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Virtual Child Pornography: Does it Mean the End of the Child Pornography Exception to the First Amendment?

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VIRTUAL CHILD PORNOGRAPHY: DOES IT MEAN THE END OF THE CHILD PORNOGRAPHY EXCEPTION TO THE FIRST AMENDMENT?

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I. INTRODUCTION

From its inception, child pornography law has attempted to reconcile two powerful interests: the First Amendment and the prevention of sexual exploitation of children. The compelling nature of the government's interest in preventing the sexual exploitation of children through the production and distribution of sexually explicit images of children is well-accepted, if not unassailable.[1] Balanced against the government's interest in protecting children from sexual abuse are the First Amendment interests implicated in content based prohibitions of speech. For much of the history of child pornography law, courts usually resolved these competing interests in favor of the government. In the most significant case, *New York v. Ferber*,[2] the Supreme Court held that the government's interest in safeguarding children from sexual abuse was so powerful that it justified an exception to the First Amendment allowing the government to proscribe sexually explicit images of minors without having to prove that the images are obscene.[3]

Recently, the Court struck a different balance by invalidating a criminal statute that the government had termed a child pornography provision. In *Ashcroft v. Free Speech Coalition*,[4] the Court struck down provisions of the Child Pornography Prevention Act of 1996 (CPPA) that proscribed "virtual" child pornography.[5] The CPPA was the result of Congress's concern that advances in technology had enabled the creation of virtual child pornography, which is defined as computer-generated images of children engaging in sexually explicit conduct that look identical to images of actual children engaging in sexually explicit conduct.[6] In the

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[1] There have been criticisms of child pornography law. *See, e.g.*, Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) [hereinafter Adler, *Perverse Law*]. For the most part, though, those criticizing child pornography law have focused on its margins rather than the core principle that child pornography is an unprotected category of speech under the First Amendment.

[2] 458 U.S. 747 (1982).

[3] *See infra* notes 22-34 and accompanying text (describing the *Ferber* decision.)

[4] 535 U.S. 234 (2002).

[5] *See infra* notes 53-76 and accompanying text (describing the *Free Speech* decision).

[6] *See* S. REP. No. 104-358, at 2 (1996); *Free Speech*, 535 U.S. at 241 (referring to these images as "virtual child pornography"). In addition to wholly computer-generated images, Congress was concerned about the ability of computer and computer imaging technology to alter sexually explicit images in such a way as to make it impossible to determine if an actual child is depicted or to alter innocent images of a child to make it appear as though the child is engaging in sexually

CPPA, Congress defined and proscribed these images as child pornography and defended its new broader definition of child pornography on the basis that virtual child pornography threatened to undermine the prosecution of actual child pornography cases and because it viewed virtual child pornography as itself dangerous.[7] In *Free Speech*, however, the Court found the virtual child pornography provisions to be unconstitutional under the First Amendment, in part because the provisions went beyond *Ferber* in attempting to proscribe images where no actual sexual abuse of a child had occurred.[8]

In the aftermath of the *Free Speech* decision, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), which contains provisions that are similar to, but much narrower than, those struck down in *Free Speech*.[9] The legislation reveals that, paradoxically, Congress now has a much more conservative opinion about the existence of virtual child pornography than it did in 1996 when enacting the CPPA. Whereas in enacting the CPPA Congress found that virtual child pornography could be inexpensively and easily produced, in enacting the PROTECT Act, seven years later, Congress found that there is no evidence that virtual child pornography is currently being produced.[10] Congress no longer justifies regulation of virtual child pornography on the basis that it is harmful, but instead only desires to regulate virtual child pornography to the extent that doing so is necessary in order to effectively prosecute actual child pornography cases.[11]

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explicit conduct. These images are "virtual" in the sense that they are either of children who do not exist or depict a scene of sexual abuse that never occurred. *See infra* notes 44-51 and accompanying text. Although the term "virtual child pornography" can include images that have been altered to make it appear either that an identifiable minor is depicted, or, conversely, that an identifiable minor is not depicted, as well as wholly computer-generated images, this Article will use the term to refer only to wholly computer-generated images unless otherwise indicated in the text. The author also intends, unless otherwise indicated, for the term "virtual child pornography" to be understood as referring to computer-generated sexually explicit images of children which are facially indistinguishable from sexually explicit images produced using actual children, rather than computer-generated images that can be readily distinguished from those produced using actual children.

[7] *See infra* notes 45-47 and accompanying text.

[8] *See infra* notes 57-58 and accompanying text.

[9] *See infra* Part III.

[10] *See infra* notes 97-98 and accompanying text.

[11] *See infra* notes 96-99 and accompanying text.

In enacting another prohibition of virtual child pornography, the PROTECT Act attempts to do what the Court in *Free Speech* said was unconstitutional. No court has yet examined the PROTECT Act and found it to be unconstitutional, but if courts follow the rationale of the Supreme Court's decision in *Free Speech* and the virtual child pornography provisions of the PROTECT Act are struck down, prosecutions of actual child pornography cases could be adversely affected. If, as the government fears, virtual child pornography eventually becomes widely available, the result may be that the government will have difficulty in many cases establishing that any given image depicts an actual child. Consequently, the government will be unable to prosecute those cases under child pornography provisions. While the government may be able to prove that some images are obscene, and thus be able to prosecute certain cases under obscenity provisions, it will no longer be able to take advantage of the child pornography exception to the First Amendment created by *Ferber* in those cases in which it is unable to establish that the images in question depict actual children. Such a development would be particularly serious considering that technological innovation, particularly the invention of computers and the Internet, has already enabled the proliferation of child pornography beyond anything imagined in *Ferber*.[12]

This Article attempts to demonstrate that the Court's *Free Speech* decision will result in the PROTECT Act being struck down as unconstitutional and, consequently, may result in the child pornography exception to the First Amendment being valid in principle but unhelpful to the government in prosecuting many cases involving sexually explicit images of minors. Part II of this

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[12] *See* Joseph J. Beard, *Virtual Kiddie Porn: A Real Crime? An Analysis of the PROTECT Act*, 21 ENT. & SPORTS LAW 3 (Summer 2003) (stating that "[t]he Internet has made possible the global distribution of child pornography on a scale unimaginable in the analog world of photographs transmitted by mail or other conventional means"); Dina I. Oddis, *Combating Child Pornography on the Internet: The Council of Europe's Convention on Cybercrime*, 16 TEMP. INT'L & COMP. L.J. 477, 478 (2002) (stating that the growth of child pornography has "paralleled" the growth of the Internet). The tremendous growth in child pornography has caused a corresponding increase in child pornography cases for the FBI. *See id.* at 478. In "2000, the FBI investigated 2,856 cases of online child pornography and child sex exploitation," but "[i]n 1996, it investigated only 113" such cases. *See id.*; *see also* Daniel S. Armagh, *Virtual Child Pornography: Criminal Conduct or Protected Speech?*, 23 CARDOZO L. REV. 1993, 1994 (2002) (stating that "[f]ederal prosecutions of Internet child pornographers have increased by 10 percent every year since 1995").

Article describes the creation of the child pornography exception to the First Amendment and the Court's *Free Speech* decision which limited the permissible definition of child pornography. Part III describes the PROTECT Act, Congress's response to the *Free Speech* decision. Part IV analyzes the PROTECT Act and explains why the Court will likely strike it down as unconstitutional. This Part argues that the Court's decision in *Free Speech* means that prohibitions of virtual child pornography are unconstitutional, and because proving that an image depicts an actual child is a constitutionally required element of a child pornography offense, the government cannot require a defendant to prove that an image does not depict an actual child, or even to produce such evidence. The PROTECT Act's provision proscribing virtual child pornography is therefore impermissible, and its affirmative defense requiring the defendant to prove that an image does not depict an actual child, or at least to produce such evidence, unconstitutionally shifts the government's burden of proof to the defendant. Thus, the affirmative defense cannot save the virtual child pornography provision from being struck down.

In light of the likelihood that the virtual child pornography provisions of the PROTECT Act will be invalidated, Part V proposes that a presumption instructing the jury that it *may* find that an image depicts an actual child if it looks like it depicts an actual child, or instructing them *to make* such a finding, is currently a viable alternative to the PROTECT Act's regulation of virtual child pornography. This Part explains that such a presumption may not be a long-term solution to the virtual child pornography problem, however, because the future production and distribution of virtual child pornography will undermine the basis for any type of presumption that an image depicts an actual child if it looks like it depicts an actual child. Finally, Part VI discusses the implications of the PROTECT Act being struck down. The government has been very successful in prosecuting child pornography cases after the *Free Speech* decision.[13] If, however, the government is eventually unable to meet its burden of proving that images depict actual children because of the existence of virtual child pornography, and is forced to prosecute child pornography cases under obscenity statutes instead, it will undoubtedly have to

[13] *See infra* notes 117-125 and accompanying text (explaining the government's success).

expend more resources prosecuting cases and will obtain fewer convictions.

II. CHILD PORNOGRAPHY LAW BEFORE THE PROTECT ACT

A. *Creation of the Child Pornography Exception to the First Amendment*

Pornographic material that is obscene has long been held by the Supreme Court to be a category of speech that is not protected under the First Amendment.[14] While general federal restrictions on obscenity are not new, federal legislative efforts to directly prohibit child pornography are of fairly recent origin.[15] The short history of child pornography law reveals a growing societal concern about the existence of child pornography and, especially on the federal level, corresponding governmental efforts to combat child pornography by enacting new child pornography laws that are increasingly harsh and aggressive.[16] Until recently, the govern-

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[14] *See* Ashcroft v. ACLU, 535 U.S. 564, 574 (2002) (indicating that "[o]bscene speech . . . has long been held to fall outside the purview of the First Amendment"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (stating that "certain well-defined and narrowly limited classes of speech," such as obscenity, "have never been thought to raise any Constitutional problem"); *cf.* Virgina v. Black, 538 U.S. 343, 358 (2003) (explaining that "[t]he protections afforded by the First Amendment . . . are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution"). The first state obscenity statute was passed by Vermont in 1821, and the first federal obscenity statute was enacted in 1842. *See* P. Heath Brockwell, Comment, *Grappling with* Miller v. California*: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 131 n.9 (1993-1994); *see also* Roth v. United States, 354 U.S. 476, 484-85 (1957) (describing the history of obscenity laws); Gary D. Marts, Jr., *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), 25 U. ARK. LITTLE ROCK L. REV. 717, 731-38 (2003) (describing development of obscenity law in the United States).

[15] Press Release, News from the Hall of Congress, Hall Sponsors Constitutional Amendment to Prohibit Child Pornography on Internet (July 17, 2002) (Congressman Ralph M. Hall), *at* http://www.house.gov/apps/list/press/tx04_hall/antiporn.html (last visited Mar. 26, 2004).

[16] *See* MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 1-20 (2003) (documenting the growing societal concern about the harm caused by child pornography and the role of the Internet in increasing the visibility of child pornography); Adler, *Perverse Law*, *supra* note 1, at 209 (suggesting that society's obsession with child sexual abuse may in fact create and perpetuate that abuse). Congress's desire to treat child pornography offenders harshly is illustrated by the PROTECT Act. The PROTECT Act deleted many of the grounds for reducing sentences below the applicable sentencing range in the federal sentencing guidelines (removing much of the

ment's efforts to define and criminalize child pornography have been almost uniformly upheld by courts, including the Supreme Court.[17]

Before the Court created the child pornography exception to the First Amendment, the government prosecuted all sexually explicit material under obscenity statutes. In 1973, after struggling for decades to agree on a definition of obscenity, the Court, in *Miller v. California*,[18] created a three-part definition of obscenity. The Court held that material can constitutionally be suppressed as obscenity if: "(a) . . . 'the average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . [the average person applying contemporary community standards would find that] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[19] Following *Miller*, Congress, alarmed by the growing availability of child pornography, first attempted to proscribe child pornography in the Protection of Children Against Sexual Exploitation Act of 1977.[20] Using an obscenity standard, the 1977 act created a new statute, 18 U.S.C. § 2252, which criminalized the knowing transportation, shipment, or sale of obscene visual or print depictions of minors engaging in sexually explicit conduct.[21]

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discretion exercised by sentencing judges) and created or increased mandatory minimum sentences for child pornography offenses, including a new five year mandatory minimum sentence for receipt of child pornography. *See* PROTECT Act, Pub. L. No. 108-21, §§ 103, 401, 117 Stat. 650, 652-53, 667-76 (2003).

[17] *See generally* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001) (arguing that courts have not applied the same stringent First Amendment protections to child pornography that they have to other forms of speech).

[18] 413 U.S. 15 (1973).

[19] *Id.* at 24.

[20] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, § 2252, 92 Stat. 7 (1978). The intent of Congress was not to create a legal definition of child pornography without a requirement that the government prove that the material at issue was obscene, but rather to strengthen existing obscenity laws by providing more severe penalties for the distribution and sale of obscene materials that depicted children. *See* S. REP. No. 95-438, at 3 (1977). While experts testified before Congress that "virtually all of the child pornography currently on the market could be prosecuted under the existing federal obscenity statutes," Congress believed that it needed to encourage federal authorities to crack down on child pornography. *Id.* at 47-48.

[21] *See* 18 U.S.C. § 2252 (2002). In addition to § 2252, Congress added another section, now 18 U.S.C. § 2251, which prohibited the use of minors in "sexually

In *Ferber*,[22] the Court made child pornography a new and distinct category of speech unprotected under the First Amendment, upholding a New York state statute banning visual representations of sexual performances by children under 16 years of age even though the statute did not require that the images be obscene.[23] The Court offered several reasons for its creation of a new category of unprotected speech that would give the government "greater leeway in the regulation of pornographic depictions of children."[24] First, the Court acknowledged that the government's "interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[25] Second, the distribution of child pornography is intrinsically related to the sexual abuse of children because the "materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[26] In addition, "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation."[27] In the Court's view, the most expeditious method of law enforcement is to close the distribution network for child pornography in order to control the production of child pornography.[28]

The Court further found that the *Miller* standard "does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children."[29] The Court considered the value of images of children engaged in sexually explicit conduct to be "exceedingly modest, if not *de minimis*," and stated that they would not be likely to constitute a necessary part of a literary performance or scientific or educational work.[30] The *Miller* standard, which focuses on a commu-

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explicit" productions, and prohibited parents and guardians from allowing their children to be so used. *Id.* § 2251. A third section, now 18 U.S.C. § 2256, as amended, contained definitions. 18 U.S.C § 2253(2)(A)-(E)(1978) (amended by 18 U.S.C § 2256 (1986)).

[22] 458 U.S. 747 (1982).

[23] *Id.* at 764 n.17.

[24] *Id.* at 756.

[25] *Id.* at 756-57 (citation omitted). Indeed, the Court found that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757.

[26] *Id.* at 759.

[27] *Ferber*, 458 U.S. at 761.

[28] *Id.* at 759.

[29] *Id.* at 761.

[30] *See id.* at 762-63. The Court stated that there was no question of censoring a particular literary theme or portrayal of sexual activity, because the "First

nity's toleration for sexually oriented material, "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."[31] Thus, "[t]he test for child pornography is separate from the obscenity standard enunciated in *Miller*."[32] The Court reasoned that creating a child pornography exception to the First Amendment would not be inconsistent with its earlier decisions, which allowed content based prohibitions of speech when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[33]

The Court's holding in *Ferber* that child pornography is an unprotected category of speech under the First Amendment, and can be prohibited regardless of whether it is also obscene, led to Congress passing the Child Protection Act in 1984.[34] Among other changes, the Act amended 18 U.S.C. § 2252 to no longer require the government to prove that child pornography is obscene.[35] In the years following the 1984 legislation, despite the reduction in the government's burden of proof enabled by the *Ferber* decision, Congress remained convinced that child pornography was a serious national problem. In 1988, Congress, on the recom-

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Amendment interest is limited to that of rendering the portrayal somewhat more 'realistic' by utilizing or photographing children," and there were alternatives, such as "simulation" or a "person over the statutory age who perhaps looked younger . . . ." *Id.* at 763.

[31] *Id.* at 761.

[32] *Ferber*, 458 U.S. at 764.

[33] *Id.* at 763-64 (stating that whether speech is protected by the First Amendment frequently depends on the content of the speech (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 66 (1976)). The Court stated that although child pornography is "without the protection of the First Amendment," the conduct to be prohibited must be adequately limited and defined, only visual depictions could be proscribed under the child pornography standard and "some element of scienter on the part of the defendant" would be required. *See id.* at 64-65.

[34] Child Protection Act of 1984, ch. 110, § 2251, 98 Stat. 204 (1984) (current version at 18 U.S.C. § 2251 (2000)).

[35] Congress believed that eliminating the obscenity standard would "have the effect of making proof of these offenses easier." H.R. REP. 98-536, at 7 (1983). The Department of Justice noted that while it believed "that few if any prosecutions have not been brought or not been successful in the past because of the obscenity requirement," eliminating the requirement would "enhance the enforcement of [the] statute," and streamline prosecutions by eliminating the need for the government to produce evidence of obscenity. *Id.* at 11. In addition, the 1984 Act redefined "minor" to mean anyone under the age of eighteen, replaced the word "lewd" with the word "lascivious" in the definition of sexually explicit conduct, and struck the condition making child pornography a criminal offense only when engaged in "for pecuniary profit." *Id.* at 2-4.

mendation of the Attorney General's Commission on Pornography, passed the Child Protection and Obscenity Enforcement Act which, among other things, created a recordkeeping requirement for producers of sexually explicit images.[36] The Commission found that producers, catering to the child pornography market, often used very young looking performers, which made it difficult for authorities to determine whether the performers were minors and allowed producers to claim ignorance about the ages of the performers.[37]

In 1990, a second child pornography decision by the Court, *Osborne v. Ohio*,[38] opened the door to a federal prohibition of possession of child pornography by upholding a state ban on possession of child pornography.[39] In so holding, the Court distinguished its decision in *Stanley v. Georgia*, in which it had held that the government could not punish the mere possession of obscenity in the privacy of one's own home.[40] The Court found that even assuming that there are First Amendment interests in the viewing and possession of child pornography, the interests underlying child pornography prohibitions far exceed the interests justifying the regulation of obscenity, and it could not "fault Ohio for attempting to stamp out this vice at all levels in the distribution chain."[41] In addition to the governmental interests already identified in *Ferber*, the Court took into account the harm to non-depicted children who are seduced or coerced by child pornogra-

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[36] Child Protection and Obscenity Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4485-89 (codified as amended at 18 U.S.C. § 2257). *See also* 1986 ATT'Y GEN. ANN. REP. 595, 619.

[37] *See* 1986 ATT'Y GEN. ANN. REP., at 618.

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

[39] The Court found that, "[g]iven the importance of the State's interest in protecting the victims of child pornography," the State was justified in "attempting to stamp out this vice at all levels in the distribution chain." *Id.* at 110. The Court noted Ohio's argument that since *Ferber* much of the market for child pornography had gone underground, making it nearly impossible to stop the harm done to children by only attacking the distribution and production of child pornography. *Id.* Following the decision, Congress passed the Child Protection Restoration and Penalties Enhancement Act of 1990, which, among other things, prohibited the possession of three or more pieces of child pornography. Pub. L. No. 101-647, § 322, 104 Stat. 4816, 4818 (1990).

[40] 394 U.S. 557, 565 (1969).

[41] *Osborne*, 495 U.S. at 110. In contrast to *Stanley*, where Georgia sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers, Ohio sought to prohibit the possession of child pornography in order to protect the victims of child pornography and destroy the child pornography market. *See id.* at 109.

phy.[42] The Court thus suggested that protecting children who are not actually pictured in photographic images is a legitimate and compelling state interest.[43]

In the mid-1990s, Congress became concerned about improvements in technology which it believed made it possible to manipulate existing sexually explicit images to make them appear as though minors are depicted, to alter sexually explicit images to make it impossible to determine if an actual child is depicted, and also to produce realistic computer-generated virtual images that appear to, but do not, depict actual minors engaging in sexually explicit conduct.[44] Congress believed that the creation of this type of virtual child pornography, unknown at the time of the *Ferber* decision, would both harm children and render ineffective the existing child pornography laws.[45] Thus, Congress passed the CPPA, which made three fundamental changes to the definition of child pornography.[46]

The first change was the creation of a new provision, 18 U.S.C. § 2256(8)(B), which defined child pornography to include any vis-

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[42] *Id.* at 111.

[43] *Id.* The third child pornography case decided by the Court was United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). In *X-Citement Video*, the Court reversed a Ninth Circuit decision which held that 18 U.S.C. § 2252 was unconstitutional because it did not contain a scienter element requiring the government to prove that the defendant knew that one of the performers in the visual depiction was a minor. *Id.* at 66. The Court read the statute to contain a scienter requirement and also rejected the defendant's arguments that the statute was unconstitutional "because it ma[de] the age of majority 18, rather than 16 . . . [and] because Congress replaced the term 'lewd' with the term 'lascivious' in defining illegal exhibition of the genitals of children." *Id.* at 78; *see also id.* at 83, 85-86 (Scalia, J., dissenting) (arguing that the Court's statutory reading was unconvincing and that the Constitution only required that the prosecution prove the defendant knew that the material was sexually explicit but not that one of the performers was a minor).

[44] *See Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 11 (1996); S. REP. No. 104-358, at 16 (1996) (statement of Deputy Assistant Attorney General Kevin U. DiGregory).

New photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, 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. S. REP. No. 104-358, at 2; *see also* Armagh, *supra* note 12, at 1993-94.

[45] *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (1996) (establishing congressional findings explaining the need to proscribe virtual child pornography).

[46] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208 (1997).

ual depiction that "appear[ed] to be [ ] of a minor engaging in sexually explicit conduct."[47] The definition covered both computer-generated images of minors and images of adults who appeared to be minors.[48] A second new provision, 18 U.S.C. § 2256(8)(C), defined child pornography to include visual depictions that have been "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."[49] The third new provision, 18 U.S.C. § 2256(8)(D), defined child pornography to include a visual depiction that was pandered "in such a manner that convey[ed] the impression that the material" was child pornography.[50] The CPPA also included an affirmative defense which allowed a defendant to escape conviction by establishing that the images at issue did not depict an actual child and were not advertised or promoted in such a manner as to suggest that an actual child was depicted.[51] Thus, after passage of the CPPA, the definition of child pornography included images that "appear[ed] to be," but were not, of minors engaging in sexually explicit conduct, images that were manipulated to make them appear as though they depicted identifiable minors engaging in sexually

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[47] Specifically, the CPPA defined child pornography as:

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

CPPA, Pub. L. No. 104-208, 110 Stat. 3009-26, 28 (codified as amended at 18 U.S.C. § 2256(8)).

Along with the new definitions of child pornography in § 2256(8), the CPPA created a new provision, § 2252A, which provided criminal penalties for the knowing reproduction, sale, distribution, receipt, or possession of child pornography. *See id.* at 3009-28, 29. Section 2252A was largely duplicative of the existing criminal penalties in § 2252. *See* United States v. Reedy, 304 F.3d 358, 364 n.3 (5th Cir. 2002) (stating that § 2252 and § 2252A are "indistinguishable").

[48] *See infra* note 111.

[49] *See supra* note 47.

[50] *See supra* note 47.

[51] Child Pornography Prevention Act § 2252A. The affirmative defense was not available in possession of child pornography cases. *See id.*

explicit conduct, and images that were pandered as child pornography regardless of whether the images were in fact child pornography.[52]

B. A Limitation on the Definition of Child Pornography: Ashcroft v. Free Speech Coalition

The government's success before the Court in child pornography cases came to an end in *Ashcroft v. Free Speech Coalition*.[53] In *Free Speech*, the Court addressed the constitutionality of two of the definitions of child pornography, 18 U.S.C. §§ 2256(8)(B), (D), that had been enacted as part of the CPPA.[54] Although four federal appeals courts rejected constitutional challenges to the CPPA, the Supreme Court found these two definitional provisions to be unconstitutionally overbroad.[55] With respect to the pandering provision in 18 U.S.C. § 2256(8)(D), the Court stated that "the Government [did] not offer a serious defense" of it and summarily held that the provision was overbroad because it criminalized speech based on how the speech is presented rather than on what is depicted.[56]

In striking down § 2256(8)(B), the Court rejected the notion that virtual child pornography could fit within either the child pornography exception to the First Amendment created in *Ferber*, or the obscenity exception to the First Amendment as described in *Miller*.[57] The Court held that virtual child pornography cannot be considered to be child pornography under *Ferber* because no children are harmed in the production of virtual child pornography.[58] The Court further found that § 2256(8)(B) could not be justified as

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[52] *Id.* § 2256(8).

[53] 535 U.S. 234 (2002).

[54] The Court was reviewing the Ninth Circuit's decision striking down the CPPA as unconstitutional. *See id. See generally* Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999), *rev'd* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002). Section 2256(8)(C), defining child pornography to include visual depictions that have been "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," was not challenged. *Id.* at 1089 n.3. The Court suggested that the provision is constitutional, stating that although these "morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Free Speech*, 535 U.S. at 242.

[55] *See* United States v. Fox, 248 F.3d 394, 404 (5th Cir. 2001); United States v. Mento, 231 F.3d 912, 923 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645, 652 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61, 76 (1st Cir. 1999).

[56] *Free Speech*, 535 U.S. at 257-58.

[57] *See id.* at 240-42, 246-51.

[58] *Id.* at 240-41, 249-51.

a proscription of obscenity because its provisions made no attempt to conform to the *Miller* standard.[59]

In addition to rejecting the characterization of § 2256(8)(B) as either a child pornography or obscenity provision, the Court rejected the government's arguments that a prohibition of virtual child pornography was otherwise justified under the First Amendment.[60] The Court considered the government's argument that child pornography, whether actual or virtual, whets the appetites of pedophiles to engage in molestation and is used by them to seduce children to be an insufficient basis for upholding § 2256(8)(B).[61] The Court reasoned that the government had shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse.[62] The Court held that "[w]ithout a significantly stronger, more direct connection, the government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[63] Similarly, the Court rejected the argument that the use of virtual child pornography to seduce children could justify its ban, reasoning that many innocent things may be used for

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[59] *See id.* at 240-42. The Court noted that, in contrast to the *Miller* standard, § 2256(8)(B) did not require that the images "appeal to the prurient interest" or be patently offensive and prohibited the images regardless of whether they had serious literary, artistic, political, or scientific value. *See id.* at 246.

[60] *See id.* at 251-56.

[61] *Free Speech*, 535 U.S. at 251, 253. In enacting the CPPA, Congress presented findings stating that any depiction of children involved in sex creates a "clear and present danger to all children" because child pornography, whether real or virtual, whets the appetites of child molesters and is used by pornographers and child molesters to seduce children into sexual activity.' *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 402, 110 Stat. at 3009-26, 3027; *see also* S. REP. NO. 104-358, at 12-13 (1996) (explaining that child pornography both stimulates the activities of child molesters and is used by child molesters as a device to break down the resistance and inhibitions of their targets).

[62] *Free Speech*, 535 U.S. at 253-54.

[63] *Id.* One author has argued that the Court's view "that the causal link [between such images and actual instances of child abuse] is contingent and indirect" is incorrect. *See* Oddis, *supra* note 12, at 515-16 (pointing to the testimony by experts before the Senate Judiciary Committee). The Court's opinion on the lack of a link between virtual child pornography and harm to children is not shared by the international community. *See* Mike Keyser, *The Council of Europe Convention on Cybercrime*, 12 J. TRANSNAT'L L. & POL'Y 287, 306 (2003) (stating that the Council of Europe in its Convention on Cybercrime has a provision which contains language nearly identical to that ruled unconstitutional by the Court).

immoral purposes and lawful speech may not be prohibited "in an attempt to shield children from it."[64]

The Court also rejected the government's argument that the existence of virtual child pornography threatened to render the laws against child pornography unenforceable and that a ban on virtual child pornography, coupled with an affirmative defense allowing some defendants to prove that the material was made using only adults, struck a proper constitutional balance.[65] The Court reasoned that "protected speech does not become unprotected [speech] merely because it resembles the latter," and "[t]he Government may not suppress lawful speech as [a] means to suppress unlawful speech."[66] While questioning, but ultimately not deciding, whether any sort of affirmative defense could be constitutional, the Court held that the affirmative defense in the CPPA was "incomplete and insufficient."[67] In particular, the Court noted that the affirmative defense only included materials produced with youthful looking adults and did not extend to possession offenses or virtual child pornography.[68]

In a concurring opinion, Justice Thomas agreed with the Court's analysis of §§ 2256(8)(B), (D) and interpreted the Court's opinion as "leav[ing] open the possibility that a more complete affirmative defense could save a [virtual child pornography] statute's constitu-

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[64] *Free Speech*, 535 U.S. at 251-52. In *Osborne v. Ohio*, the Court took into account the fact "that pedophiles use child pornography to seduce . . . children into sexual activity" as one of several bases for upholding a ban on possession of child pornography. 495 U.S. 103, 111 (1990); *see also supra* notes 42-43 and accompanying text. In *Free Speech*, however, the Court stated that the government can punish adults who provide unsuitable materials to children and thus a complete ban on virtual child pornography for such a reason would not be narrowly drawn. *See* 535 U.S. at 252.

[65] *Free Speech*, 535 U.S. at 255-56.

[66] *Id.* at 255.

[67] *Id.* at 255-56. The Court stated that "[t]he Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful," and that "[i]n cases under the CPPA, the evidentiary burden is not trivial." *Id.* at 255.

[68] *Id.* at 256. The government also argued that eliminating the market for actual child pornography was a sufficient reason for upholding the provisions. The Court rejected the government's argument, speculating that if virtual images were identical to child pornography produced using actual children, "the illegal images would be driven from the market by the indistinguishable [ones because] [f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice." *Id.* at 254. In the PROTECT Act, Congress rejected this reasoning. *See infra* note 235 (criticizing the Court's reasoning).

tionality."[69] Justice Thomas argued that if technological advances make "it [ ] impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children," a "narrowly drawn restriction" on virtual child pornography might be constitutional.[70] Justice Thomas noted, however, that while the government had claimed that defendants had raised the defense that child pornographic images may have been computer-generated, it could not point to any cases where the defense had been successful.[71]

Justice O'Connor wrote an opinion, concurring in the judgment in part and dissenting in part, in which she dissented with respect to the Court's treatment of § 2256(8)(B) but agreed with the majority's judgment that § 2256(8)(D) was unconstitutional.[72] Justice O'Connor agreed with the majority that § 2556(8)(B) was unconstitutional as applied to youthful looking adults but argued that it was constitutional as applied to virtual child pornography.[73] In Justice O'Connor's view, "given the rapid [ ] advances in computer-graphics technology," even if no defendants had yet created reasonable doubt through a virtual child pornography defense, "the Government's concern was reasonable," and Congress should not be required to "wait for harm to occur before it can legislate against it."[74] Chief Justice Rehnquist, joined by Justice Scalia, wrote a dissenting opinion which agreed with Justice O'Connor that the ban on virtual child pornography was constitutional but argued that § 2256(8)(B) should be interpreted as not proscribing "youthful looking adult" pornography.[75] In addition, Chief Justice Rehnquist argued that § 2256(8)(D) was constitu-

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[69] *Free Speech,* 535 U.S. at 259-60 (Thomas, J., concurring).

[70] *Id.* at 259.

[71] *Id.*

[72] *See id.* at 261 (O'Connor, J., concurring in part and dissenting in part).

[73] *See id.* at 262-67.

[74] *Id.* at 264 (citing Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 212 (1997)). While Justice O'Connor argued that the ban on virtual child pornography should survive strict scrutiny, she agreed with the majority that it did not fit within the child pornography exception to the First Amendment. *Free Speech*, 535 U.S. at 262-63. In addition to the possibility that defendants could raise a virtual pornography defense, Justice O'Connor argued that "the ban on virtual child pornography" was justified because virtual child pornography "whet[s] the appetites of child molesters . . . who may use the images to seduce young children." *Id.* at 263.

[75] *Free Speech*, 535 U.S. at 269-70 (Rehnquist, C.J., dissenting).

tional because it only proscribed "pandering" of child pornography, which is not protected by the First Amendment.[76]

III. CONGRESS ENACTS THE PROTECT ACT IN RESPONSE TO *ASHCROFT V. FREE SPEECH COALITION*

The Court's controversial decision in *Free Speech* has received a great deal of attention from writers, some arguing that the decision protects free speech and artistic expression, and others arguing that the Court erred in failing to define child pornography as encompassing virtual child pornography.[77] The Department of Justice, supported by Congress, has been one of the Court's biggest critics. The Department of Justice "believes [that the Court's decision] warrant[ed] a prompt legislative response" because it made "[e]nforcement of the child pornography laws substantially more difficult [and] threaten[ed] to reinvigorate" the trafficking of child pornography.[78] Congress considered several different avenues of response in the aftermath of the *Free Speech* decision,

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[76] *See id.* at 271-72. Chief Justice Rehnquist reasoned that § 2256(8)(D) should have been interpreted narrowly as only applying to the actual panderer of child pornography and that only the "knowing possession of materials actually containing" actual or virtual child pornography should be prohibited. *Id.* at 271-73.

[77] *Compare* Paul Finkelman, *Picture Perfect: The First Amendment Trumps Congress in* Ashcroft v. Free Speech Coalition, 38 TULSA L. REV. 243, 261 (2002) (arguing that the Court's decision "supported free speech and artistic expression"); Dannielle Cisneros, *Virtual Child Pornography on the Internet: A 'Virtual Victim'?*, 2002 DUKE L. & TECH. REV. 19, *1 (2002) (taking the position that "the [G]overnment's argument that 'virtual child' pornography encourages pedophiles to abuse children . . . is the intellectual equivalent of a claim that *Romeo and Juliet* encourages teenagers to kill themselves and should be banned from high school reading lists"); David L. Hudson, Jr., *Reflecting on the Virtual Child Porn Decision*, 36 J. MARSHALL L. REV. 211, 221 (2002) (stating that the decision "protected freedom of thought, freedom of speech, and the First Amendment"), *with* Vincent McCarthy, *Child Pornography in a Virtual World: The Continued Battle to Preserve the Child Pornography Prevention Act of 1996*, 23 CARDOZO L. REV. 2019, 2020 (2002) (arguing that the Court should have upheld the CPPA); Maria Markova, Ashcroft v. Free Speech Coalition: *The Constitutionality of Congressional Efforts to Ban Computer-Generated Pornography*, 24 WHITTIER L. REV. 985 (2003) (adopting "the position that the Supreme Court should have upheld" the CPPA). *See also* Leading Cases, *Freedom of Speech and Expression*, 116 HARV. L. REV. 262, 269-70 (2002) (stating that the Court focused on the CPPA's "marginal applications rather than the hard-core pornography that the CPPA squarely implicate[d]" and that the decision was "yet another indication of [the Court's] increasing distrust of categorical, value-based exclusions from First Amendment protection").

[78] *See The Child Abduction Prevention Act and - The Child Obscenity and Pornography Prevention Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 108th

including a constitutional amendment which would have provided that virtual child pornography is unprotected speech.[79] Finally, Congress replaced the provisions of the CPPA that were struck down in *Free Speech* with the PROTECT Act, signed by the President on April 30, 2003.[80]

The PROTECT Act narrows the reach of the virtual child pornography definition in § 2256(8)(B) in several ways.[81] Perhaps the centerpiece of the amendments is the substitution in § 2256(8)(B) of the phrase "indistinguishable from [ ] that of a minor" for the "appears to be [ ] of a minor" phrase struck down by the Court in *Free Speech*.[82] Similar to the CPPA definition struck down in *Free Speech,* under new § 2256(8)(B), "the Government is

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Cong. 1, (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General), *available at* 2003 WL 1079511 [hereinafter Collins].

[79] On July 17, 2002, a Joint Resolution was proposed to add a constitutional amendment providing that virtual child pornography is not constitutionally protected. H.R.J. Res. 106, 107th Cong. (2002). Other proposed legislation included the Child Obscenity and Pornography Prevention Act of 2002 (COPPA), H.R. 4623, 107th Cong. (2002); the Child Obscenity and Pornography Prevention Act of 2003 (COPPA), H.R. 1161, 108th Cong. (2003); and the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2002, S. 2520, 107th Cong. (2002).

[80] PROTECT Act, Pub. L. No. 108-21, §§ 102-601, 117 Stat. 650 (2003).

[81] The PROTECT Act struck § 2256(8)(D), which had also been ruled unconstitutional in *Free Speech*. *See id.* In addition, the PROTECT Act enacted many new provisions, some of which are related to the government's interest in combating child pornography. One of the new provisions, intended to replace § 2256(8)(D), is in § 2252A(a)(3)(B) and prohibits acts, relating to the distribution of any materials, that are "intended to cause another to believe that the material is, or contains an obscene visual depiction of a minor engaging in sexually explicit conduct," or "a visual depiction of an actual minor engaging in sexually explicit conduct." *Id.* § 503. Another new provision, § 2252A(a)(6)(c), prohibits providing a minor with either actual or virtual child pornography "for the purpose of inducing or persuading [the] minor to participate in any activity that is illegal." *Id.* Congress also enacted a new obscenity provision, § 1466A, which covers images of minors, either real or virtual, "engaging in sexually explicit conduct." *Id.* § 504. *See infra* notes 238-44 and accompanying text (discussing the new obscenity provision).

[82] PROTECT Act § 502(a), 117 Stat. at 678 (2003) (codified as amended at 18 U.S.C. § 2256(8)(B)(2003)). Section 2256 now provides: "(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct[.]" *See* 18 U.S.C. § 2256. The term "virtually indistinguishable" first appeared in the Congressional Findings in support of the CPPA. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, §§ 121(5), 121(8), 121(13), 110 Stat. 3009, 3026-27 (1996). Justice O'Connor argued in the dissenting part of her opinion in *Free Speech* that the Court should have narrowly construed the "appears to be" phrase in the version of 18 U.S.C. § 2256(8)(B) struck down by the Court as being equivalent to "virtually indistinguishable." *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 264-65 (2002) (O'Connor, J., concurring in

not required to prove in its case-in-chief that the computer-generated [visual depiction] is that of a[n] [actual] minor," only that the image is "indistinguishable from [ ] that of an actual minor."[83] The PROTECT Act also created a new section, § 2256(11), which explains that in order for a virtual image to be "indistinguishable" from an actual image, "an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct."[84] Section 2256(11) thus attempts to clarify that only convincing virtual child pornography falls within the child pornography definition in § 2256(8)(B).[85]

The definition of virtual child pornography in § 2256(8)(B) is limited to "digital image[s],"[86] "computer image[s],"[87] and "computer-generated image[s],"[88] and "drawings, cartoons, sculptures, or paintings" are explicitly excluded from its scope.[89] These limitations reflect that Congress is solely concerned about the danger to the prosecution of actual child pornography cases posed by virtual child pornography, and that it is Congress's intent that § 2256(8)(B) not be applied to valuable art and literature.[90] Along with a narrowing of the definition of virtual child pornography, the PROTECT Act limits the scope of much of the sexual conduct

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part and dissenting in part). The majority opinion in *Free Speech*, however, did not mention the term "virtually indistinguishable."

[83] S. REP. NO. 108-2, at 6 (2003).

[84] PROTECT Act § 502(c) (codified as amended at 18 U.S.C. § 2256(11)).

[85] Congress also indicated that the government should not have to prove "that the defendant knew or subjectively believed that the visual depiction was that of a real minor." S. REP. NO. 108-2, at 8.

[86] PROTECT Act § 502(a). *See* H.R. REP. NO. 108-66, at 60 (2003) (giving "picture[s] or video taken with a digital camera" as examples).

[87] PROTECT Act § 502(a). *See* H.R. REP. NO. 108-66, at 60 (giving "pictures scanned into a computer" as an example).

[88] PROTECT Act § 502(a). *See* H.R. REP. NO. 108-66, at 60 (giving "images created or altered with the use of a computer" as an example).

[89] PROTECT Act § 502(c) (stating that § 2256(8)(B) "does not apply to depictions that are drawings, cartoons, sculptures or paintings depicting minors or adults").

[90] *See* PROTECT Act § 501(6); H.R. REP. NO. 108-66, at 60 (stating that "[l]imiting the definition to digital, computer, or computer-generated images will help to exclude ordinary motion pictures from the coverage of 'virtual child pornography'"). The Court in *Free Speech* had specifically cited Renaissance paintings, a film adaptation of Romeo and Juliet, and Hollywood movies produced using adult actors as endangered under the CPPA. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 246-247 (2002) (stating that "[t]he statute proscribes 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 literature throughout the ages").

that is actionable under § 2256(8)(B) to that which is "graphic."[91] A new section, § 2256(10), defines "graphic" as "mean[ing] that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted."[92]

In addition to a narrowing of the scope of the virtual child pornography definition in § 2256(8)(B), the affirmative defense in § 2252A(c) has been significantly expanded in response to the Court's view in *Free Speech* that the affirmative defense created in the CPPA was "incomplete and insufficient" because it was not available in possession cases or in cases involving virtual child pornography.[93] While prior law only granted an affirmative defense for productions involving youthful looking adults and only allowed the defense if the defendant did not pander the material as child pornography, a defendant can now prevail simply by showing that no children were used in the production of the

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[91] A new section, 2256(2)(B), which contains a definition of sexually explicit conduct specific to § 2256(8)(B), has been added. This new definition does not affect prosecutions under either § 2256(8)(A) or § 2256(8)(C). Section 2256(2)(B) provides that

> 'sexually explicit conduct' means—
>
> (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;
>
> (ii) graphic or lascivious simulated;
>
> (I) bestiality;
>
> (II) masturbation; or
>
> (III) sadistic or masochistic abuse; or
>
> (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

PROTECT Act § 502(b) (codified as amended at 18 U.S.C. § 2256(2)(B) (2003)).

[92] *Id.* § 502(c) (codified as amended at 18 U.S.C. § 2256(10)). For sexual conduct that is "simulated," the new provision requires that it be "lascivious." *Id.* Thus, "sexually explicit conduct" must be "graphic" or if "simulated," also "lascivious." *Id.* The new definition of "sexually explicit conduct" enacted by the PROTECT Act is an attempt to further narrow the range of materials to which new § 2256(8)(B) might apply in response to the Court's concern in *Free Speech* that the former § 2256(8)(B) would proscribe, or at least threaten, movies with simulated sexual conduct involving adults who play the role of children. *Free Speech*, 535 U.S. at 246-48. Because the PROTECT Act should be interpreted as applying only to virtual child pornography, rather than also applying to images of adults who appear to be minors as in the CPPA, the Court's concerns about movies involving adults are not applicable. *See infra* notes 110-13 and accompanying text (explaining that § 2256(8)(B) should be interpreted as not including images of adults who appear to be minors).

[93] *See* 535 U.S. at 255-56.

materials.[94] Additionally, the affirmative defense is now available in possession of child pornography cases.[95]

In contrast to its intentions in enacting the CPPA, the government is now interested in proscribing virtual child pornography only to the extent necessary to protect its ability to effectively combat the trade of actual child pornography.[96] Significantly, Congress now concedes that "[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children."[97] Indeed, Congress cited to "leading experts" who believe "that to the extent that the technology exists to computer-generate realistic images of child pornography, the cost in terms of time, money, and expertise is—and for the foreseeable future will remain—prohibitively expensive."[98] In spite of this evidence, the Department argues that narrowly tailored regulations of virtual child pornography are necessary in order to protect the government's compelling interest in ensuring that the criminal prohibitions against actual child pornography remain enforceable and effective.[99]

Similar to its arguments in support of the CPPA, the government believes that developments in technology have made it difficult to effectively prosecute child pornography cases.[100] In

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[94] PROTECT Act § 502(d) (codified as amended at 18 U.S.C. § 2252A(c)). In other words, a defendant can now prevail if the images depict adults or if the images are virtual child pornography. The defendant must, however, provide notice to the government of an intention to assert the affirmative defense. *See* 18 U.S.C. § 2252A(c).

[95] *See* PROTECT Act § 502(d).

[96] Both Congress's statements of findings and the Department of Justice's testimony in support of the PROTECT Act focus solely on the need for "criminal prohibitions against child pornography to remain enforceable and effective." *See* PROTECT Act § 501(7)–(15); Collins, *supra* note 78. This intent is further revealed by the expansion of the affirmative defense in § 2252A(c) to include virtual child pornography. *See supra* notes 93-95 and accompanying text.

[97] PROTECT Act § 501(7).

[98] *Id.* § 501(11). This finding stands in stark contrast to the testimony in support of the CPPA, where the government argued that computers and software capable of creating "virtually indistinguishable" computer-generated child pornography were inexpensive and readily available. *See* S. REP. No. 104-358, at 15-16 (1996).

[99] *See supra* note 96; *see also* PROTECT Act § 501(14) (stating that to avoid the "grave threat to the Government's unquestioned compelling interest in effective enforcement of child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images").

[100] *Id.* § 501 (expressing concerns that developments in technology will make it impossible for the government to meet its burden of proof in child pornography cases).

addition to the future probability that virtual child pornography will be produced, the government is concerned about the ability of defendants to contend that there is "reasonable doubt" as to whether a given computer image depicts an actual child.[101] The government fears that defendants will be aided in their claims by already existing technology that is able to "disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated."[102] Because most prosecutions involve materials stored and exchanged on computers, the government believes that without some restrictions on virtual child pornography it may be able to successfully prosecute only in very limited cases, such as those in which it is able to match the depictions to pictures in pornographic magazines produced before the development of computer imaging software or in which it can establish the identity of the victim.[103]

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[101] *Id.* § 501(10) (stating that since *Free Speech* "defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual" and "some of the defense efforts have been successful"); *id.* § 501(13) (asserting that "[t]he mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused"). Congress also expressed this concern when enacting the CPPA. S. REP. No. 104-358, at 16-17 (stating that the existence of virtual child pornography gives defendants a "built-in reasonable doubt argument" in every child pornography case).

[102] PROTECT Act §§ 501(5), 501(11). The government fears that "experts . . . [will be] willing to testify" on behalf of defendants and "trials will increasingly devolve into jury-confusing battles of experts arguing over the method of generating an image that, to all appearances, looks like it is the real thing." *See* Collins, *supra* note 78.

[103] *See* PROTECT Act § 501(8) (stating that because "an image seized from a collector of child pornography is rarely a first-generation product and the retransmission of images [over the Internet] can alter the image, [it is] difficult for experts to [conclusively] opine that a particular image depicts a real child"); *see also* Collins, *supra* note 78 (discussing the possible ways for prosecutors to prove that an image depicts an actual child). In addition, the Department of Justice is concerned about the chilling effect the *Free Speech* decision has had on federal prosecutors. *See* Collins, *supra* note 78. Throughout the country, and especially in the Ninth Circuit, many prosecutors have been reluctant to bring cases where they are unable to produce direct evidence that actual children are depicted, and this hesitation has caused many otherwise viable cases to remain unprosecuted. *See* Collins, *supra* note 78; *see also* PROTECT Act § 501(9) (stating that after *Free Speech* "prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image," and that "[t]his is a fraction of meritorious child pornography cases").

IV. ANALYSIS OF THE PROTECT ACT

The PROTECT Act responds to many of the concerns expressed in *Free Speech* about the former definition in § 2256(8)(B) and focuses federal child pornography law more narrowly on the government's compelling interest in preserving its ability to enforce laws concerning child pornography produced using actual children.[104] Despite the changes made by the PROTECT Act, the most controversial aspect of the CPPA is still present in § 2256(8)(B) because the provision still encompasses virtual child pornography images.[105] In order to determine whether the PROTECT Act's virtual child pornography provisions are constitutional, it is necessary to examine the virtual child pornography definition in § 2256(8)(B) separately from the affirmative defense

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[104] Unlike the provision struck down in *Free Speech*, the new definition in § 2256(8)(B) is limited to "digital," "computer," or "computer-generated image[s]," the images must be "indistinguishable from" images depicting actual children, and the sexual content must be particularly "explicit." *See supra* notes 78-92 and accompanying text.

[105] Similar to the CPPA litigation, there will likely be challenges to the language in § 2256(8)(B) based on vagueness and ambiguity. *See, e.g.*, Eric M. Freedman, *Digitized Pornography Meets the First Amendment*, 23 CARDOZO L. REV. 2011, 2017 (2002) (citing to the Ninth Circuit's decision in *Free Speech* claiming that the term "virtually indistinguishable" would be "hopelessly vague"). Unlike the CPPA, the PROTECT Act provides guidance regarding the term "indistinguishable" and provides that a virtual child pornography image is "indistinguishable" from an actual child pornography image if "an ordinary person viewing the depiction would conclude that the depiction is of an actual child pornography image." *See supra* note 82 and accompanying text. The terminology in § 2256(8)(B) is not vaguer than the language used in many other criminal statutes, such as the federal obscenity statutes, 18 U.S.C. §§ 1460-70, and would seem amenable to limiting constructions if needed. One argument made in *Free Speech*, and likely to be repeated in a challenge to the PROTECT Act, is that a virtual child pornography provision is unworkable because it is impossible to determine the age of a virtual minor. *See* Brief for Respondent at 45-49, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (9th Cir. 2001) (No. 00-795), *available at* 2001 WL 747841. That argument should not succeed, however. In many, if not most, child pornography cases involving actual children, the government does not know the identity of the children and must prove the age of the children through methods such as allowing the jury itself to determine the age of the children or calling a pediatrician to give an expert opinion that, based solely on the images, minors are depicted. *See, e.g.*, United States v. Bender, 290 F.3d 1279, 1282 (11th Cir. 2002) (describing a pediatrician testifying as an expert witness and estimating the age of the children depicted based solely on the depictions themselves). In any case, examining whether the language in the PROTECT Act is unconstitutionally vague is beyond the scope of this Article. It is likely that any unconstitutional vagueness in the PROTECT Act could be remedied in a future statute, and thus this Article focuses on whether the PROTECT Act, or any other virtual child pornography statute, is unconstitutional for other reasons.

in § 2252A(c). If the virtual child pornography definition is constitutional, it is unnecessary to examine the affirmative defense in § 2252A(c) to determine whether it can save § 2256(8)(B) from being struck down. On the other hand, if it is unconstitutional to proscribe virtual child pornography, the focus should shift to whether an affirmative defense, exonerating the defendant if the images do not depict actual children, is sufficient to render the statutory scheme constitutional. Thus, section A of this Part examines whether it is constitutional to proscribe virtual child pornography and, concluding that it is not constitutional, section B examines, and rejects, the argument that the affirmative defense in § 2252A(C) can save § 2256(8)(B) from being struck down as unconstitutional.

A. The PROTECT Act's Provision Proscribing Virtual Child Pornography is Unconstitutional

It is well-established that the government has a "compelling interest" in proscribing actual child pornography.[106] Despite this compelling interest, the government will not be able to defend § 2256(8)(B) on the basis that virtual child pornography is within the child pornography exception to the First Amendment.[107] The Court in *Free Speech* held that computer-generated images are not child pornography because they do not involve actual children in their production, and a narrower prohibition of virtual child pornography than was present in the CPPA's provisions would still not comply with that standard.[108] Thus, the child pornography exception to the First Amendment is inapplicable in determining whether § 2256(8)(B) is constitutional.[109]

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[106] *See* New York v. Ferber, 458 U.S. 747, 756-57 (1982).

[107] *See supra* notes 22-33 and accompanying text (describing the creation of the child pornography exception to the First Amendment).

[108] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249-51 (2002) (explaining that *Ferber* does not "support a statute which eliminates the distinction" "between actual and virtual child pornography" and attempts to fit both within the First Amendment exception).

[109] Similar to the CPPA, the obscenity exception to the First Amendment is also not applicable in defending new § 2256(8)(B). *See id.* at 249 (stating that the "CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity"). In contrast to § 2256(8)(B), the PROTECT Act created a new provision, 18 U.S.C. § 1466A, prohibiting "sexually explicit" images of children - whether real or virtual - which it attempts to defend as an obscenity provision. *See infra* notes 238-44 and accompanying text.

With the child pornography exception not available, the government will have to survive strict scrutiny of § 2256(8)(B) by establishing that it has a "narrowly drawn," compelling justification for the prohibition of protected speech.[110] One initial problem with the new definition in § 2256(8)(B) is that the phrase "indistinguishable from [ ] that of a minor" could be interpreted, similar to the phrase "appears to be [ ] of a minor" in former § 2256(8)(B), as encompassing images depicting adults who look as though they are minors.[111] The legislative history of the PROTECT Act, though, indicates that Congress was solely concerned with virtual child pornography.[112] Undoubtedly, Congress believes that images of young looking adults do not threaten the effective prosecution of actual child pornography cases in the same way as do computer-generated images of minors. Section 2256(8)(B) was not intended to include images of "adults who look like" children within its definition, and the statute should be narrowly construed to require that the government prove that images depict minors, whether real or virtual.[113]

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[110] *See Free Speech*, 535 U.S. at 262-63 (O'Connor, J., concurring in part and dissenting in part) (explicitly analyzing the CPPA under the strict scrutiny standard); Free Speech Coalition v. Reno, 198 F.3d 1083, 1091 (9th Cir. 1999) (applying strict scrutiny analysis to the CPPA); *see also* Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002) (stating that "under the strict scrutiny test, [the government] has the burden of proving that the [provision] is (1) narrowly tailored, to serve (2) a compelling state interest").

[111] In *Free Speech,* the Court stated that the CPPA "prohibits, in specific circumstances, possessing or distributing . . . images, which may be created by using adults who look like minors or by using computer imaging." 535 U.S. at 239-40. In order for an image to be "indistinguishable from [ ] that of a minor" under new § 2256(8)(B), all that is required is that "an ordinary person viewing the depiction [must] conclude that the depiction is of an actual minor engaged in sexually explicit conduct." *See supra* note 84 and accompanying text. In the absence of specific evidence about the individual depicted, it seems likely that in some cases an "ordinary person" would conclude that an image of an actual adult was instead an image of an actual minor.

[112] *See supra* notes 96-103 and accompanying text (explaining that in passing the PROTECT Act Congress was concerned only with virtual child pornography and not images of young looking adults).

[113] This interpretation would certainly not be a stretch. Section 2256(1) states that the term "'minor' means any person under the age of eighteen years[ ]." Thus, the term "indistinguishable from [ ] that of a minor" can be interpreted as meaning that the government has to prove that the person depicted is a minor, whether actual or virtual. *Cf. supra* note 105 (explaining how the government can prove that a virtual person is a minor). In *Free Speech*, Chief Justice Rehnquist argued that former § 2256(8)(B) should not be interpreted as including young adult pornography. 535 U.S. at 270 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist is correct that Congress indicated that the CPPA was not intended to apply to depictions produced using adults. *See* S. REP.

Even if § 2256(8)(B) is construed as applying only to minors, the government will likely have to convince the Court that, contrary to the Court's statements in *Free Speech*, "[t]he Government may. . .suppress lawful speech as a means to suppress unlawful speech."[114] An unusual aspect of § 2256(8)(B), though, is that it is an attempt by Congress to proscribe speech that, in its view at least, does not exist.[115] Unlike the case with a prohibition of images of adults who appear to be minors, it is difficult to argue that a proscription of speech that does not (yet) exist chills the protected speech rights of anyone.[116] Nevertheless, even if the Court reconsiders its view that virtual child pornography cannot be banned in order to enable the government to effectively prosecute actual child pornography, the government will likely find it difficult to establish that it cannot effectively prosecute actual child pornography cases.

No. 104-358, at 21. Congress did explicitly state, however, that such images were proscribed if the defendant pandered the material as child pornography. *See id.* at 16-17 (pointing to the affirmative defense in former § 2252A(c) which allowed a defendant to escape conviction if the material in question was produced using adults and was not pandered as child pornography). Unlike former § 2252A(c), new § 2252A(c) provides an affirmative defense if the material was produced using adults, regardless of whether it is pandered as child pornography. *Id.* at 41. The use of the term "affirmative defense" in § 2252A(c) does imply that young adult pornography falls within § 2256(8)(B) if it is "indistinguishable from" child pornography. *See infra* note 137 (explaining that "an 'affirmative defense' assumes that the elements of the crime have been satisfied and raises other facts which . . . would establish a justification to engage in the conduct in question"). Such an interpretation, however, would be contrary to congressional intent and is not required.

[114] Recall that in *Free Speech* the Court rejected the government's arguments that a ban on virtual child pornography was constitutional because without such a ban it could not effectively prosecute actual child pornography cases, stating that "[t]he Government may not suppress lawful speech as a means to suppress unlawful speech." *See supra* note 66 and accompanying text.

[115] *See supra* notes 97-98 and accompanying text (explaining that Congress believes that the production of computer-generated images of minors is not yet possible). Undoubtedly, in addition to virtual child pornography cases, § 2256(8)(B) could also be used to prosecute cases involving images that have been manipulated to make the actual children appear computer-generated, to disguise the identity of the actual children, or to turn innocent images of children into ones that are sexually explicit. *See supra* notes 100-103 and accompanying text. These types of images, however, are already unlawful under §§ 2556(8)(A),(C). Thus, the only otherwise protected speech proscribed under § 2256(8)(B) is virtual child pornography.

[116] *Cf. Free Speech*, 535 U.S. at 244 (stating that because of the "severe" penalties enacted by the CPPA, "few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law").

The government argues that it has suffered "adverse judgments" as a result of the assertion of "virtual child [pornography] defense[s]," but the reality is that the government has been quite successful since the *Free Speech* decision in meeting its burden of establishing that images depict actual children.[117] For example, courts have held that there was "sufficient evidence" that the images depicted actual children in cases where a pediatric expert testified as to the age of the child depicted and "that the photographs appeared to portray real children;"[118] where an FBI agent testified at trial that "based on his training and [ ] experience . . . the images depicted actual children," and the judges' own viewing of the images left "no doubt" in their minds that the images depicted real children;[119] where the government introduced expert testimony that the images of child pornography did not appear to be altered and that completely realistic, computer-generated images of humans were not yet possible;[120] and where the government established that the images were published "before computer 'morphing' technology was available."[121]

Even more significantly, although the First Circuit has held that such evidence by itself is insufficient to meet the government's burden of proof, every other circuit that has considered the issue has held that the government can meet its burden of proof by merely introducing the images into evidence and allowing the factfinder to conclude that the images depict actual children.[122]

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[117] *See* John P. Feldmeier, *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. KY. L. REV. 205, 220-23 (2003) (showing "that the 'virtual child' defense has not been [ ] successful" in any cases either before or after the *Free Speech* decision).

[118] *See* United States v. Bender, 290 F.3d 1279, 1282 n.2 (11th Cir. 2002) (denying defendant's *Free Speech* claim and noting that "there [was] sufficient evidence that the images portray[ed] real children"). *But see* United States v. Hilton, 363 F.3d 58, 64-66 (1st Cir. 2004) (holding that a doctor's testimony that an image looks as though it depicts an actual child based on the physical characteristics of the child in the image is not sufficient evidence that the image depicts an actual child).

[119] *See* United States v. Richardson, 304 F.3d 1061, 1065 (11th Cir. 2002).

[120] *See* United States v. Rearden, 349 F.3d 608, 613-14 (9th Cir. 2003).

[121] *See* United States v. Guagliardo, 278 F.3d 868, 871-72 (9th Cir. 2002).

[122] *Compare Hilton*, 363 F.3d at 64 (holding that the government "must introduce relevant evidence *in addition to* the images *to prove the children are real*"); United States v. Sims, 220 F. Supp. 2d 1222, 1227 (D.N.M. 2002) (reversing conviction under § 2252(a) where the government put forth no evidence that the images depicted actual minors and objected to the notion that it was required to do so even though such evidence was available), *with* United States v. Slanina, 359 F.3d. 356, 357 (5th Cir. 2004) (stating that "the

For example, in *United States v. Kimler*, the Tenth Circuit rejected the argument that the government is "require[d] to either produce direct evidence of the identity of [the] children in the [ ] images or expert testimony that the images depicted are those of real children rather than computer-generated 'virtual' children."[123] The court held that because imaging technology has not advanced to the point where "indistinguishable" images are possible, "[j]uries are still capable of distinguishing between real and virtual images . . . ."[124]

Government was not required to present expert testimony, or any other evidence in addition to the images themselves in order to meet its burden of proof"); United States v. Fuller, 77 Fed. Appx. 371, 380 (6th Cir. 2003); United States v. Kimler, 335 F.3d 1132, 1142 (10th Cir. 2003); United States v. Deaton, 328 F.3d 454, 455 (8th Cir. 2003) (stating that the government is not required to put forth affirmative evidence that children were not computer-generated and indicated that the images themselves were sufficient evidence at both trial and sentencing to prove actual minors); United States v. Hall, 312 F.3d 1250, 1260 (11th Cir. 2002) (holding, based on an examination of the images by the court, that the children depicted in the images were real and no reasonable jury could have found that the images were of virtual children); United States v. Vig, 167 F.3d 443, 449 (8th Cir. 1999) (holding that "[t]he images were viewed by the jury which was in a position to draw its own independent conclusion as to whether real children were depicted"); United States v. Oakes, 224 F. Supp. 2d 296, 301-302 (D. Me. 2002) (holding, based on an examination of the images by the court, that the defendant did not meet the standard of establishing "actual innocence").

[123] *See Kimler*, 335 F.3d at 1140.

[124] *Id.* at 1142. The issue of whether virtual child pornography exists is, of course, dispositive of whether the government should be required to introduce evidence other than the images at issue in order to obtain a conviction. The First Circuit in *Hilton* "recognize[d] that the vast technological revolution underway since 1987 . . . has made undeniable the fact that sexually explicit images portraying children can be produced by artificial means . . . ." 363 F.3d at 64-65. The court thus held that because virtual child pornography exists, juries are not able to identify actual child pornography based on the images themselves, and the government must therefore produce additional evidence that the images depict actual minors. *See id.* at 64. In contrast, because the Tenth Circuit found that virtual child pornography is not yet available, it held that juries are still able to identify actual child pornography based solely on the images, and the government can meet its burden of proof by introducing the images into evidence and allowing the jury to conclude that they depict actual children. *See Kimler*, 335 F.3d at 1140-42. The First Circuit's "undeniable" fact that virtual child pornography is currently capable of being produced is not so undeniable, as Congress found when enacting the PROTECT Act. *See supra* note 98 (finding that it is not yet feasible to produce virtual child pornography). Nonetheless, although it may be debatable whether virtual child pornography exists, the First Circuit's decision does not necessarily mean that the government will start losing child pornography cases in the First Circuit. The First Circuit merely held that the government has to produce evidence other than the images at issue in order to meet its burden of proof and indicated that the government has various options to choose from in meeting its burden, including the introduction of evidence establishing the identity of a depicted child or testimony of a computer

Currently, the government is quite successful in prosecuting child pornography cases,[125] and the PROTECT Act, similar to the CPPA, can be viewed as an attempt by Congress to address a problem that has not yet materialized. Congress, however, also defends the PROTECT Act as a reasonable response to predicted future harm because child pornography prosecutions will not be possible once technology advances so that "virtually indistinguishable" computer-generated images are available.[126] The problem with this argument is that the government is essentially asking the Court to uphold a statute unnecessarily proscribing protected speech on the basis that in the future the statute may be necessary.[127] Even Justice Thomas, who argued that if technological advances made it impossible to prosecute actual child pornography the government may have a "compelling interest in barring or otherwise regulating" virtual child pornography, indicated in *Free Speech* that the government would not have a compelling interest until technological advances actually made it difficult to prosecute actual child pornography.[128] Thus, even if the Court reconsiders its belief that the government may not suppress lawful speech as a means to suppress unlawful speech, given the government's

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graphics expert. 363 F.3d at 65, 65 n.6. Thus, it is premature to conclude that the First Circuit's decision will result in the government no longer being able to meet its burden of proving that images depict actual minors. *See infra* Part VI. (discussing the government's alternatives in the event that it becomes unable to meet its burden of proving that images depict actual children).

[125] *See supra* notes 118-25 and accompanying text.

[126] *See* S. REP. NO. 108-2, at 4-5 (2003).

[127] Even if technology advances to the point where virtual child pornography can be produced, at this point it is hard to predict whether such technology will render experts incapable of identifying computer-generated images or whether, in the future, the government will have developed effective ways of identifying actual children. *See infra* note 202 and accompanying text (suggesting that the government has the ability to keep a data base of known victims of child pornography that it can use to establish that a particular image depicts an actual child).

[128] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 259-60 (2002) (Thomas, J., concurring). Justice Thomas noted that "the Government asserts only that defendants *raise* such defenses, not that they have done so successfully." *Id.* at 259. Justice Thomas reasoned that

> [w]hile this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

Id.

inability to show that it can no longer prosecute child pornography cases effectively, it seems unlikely that the Court would uphold a provision that criminalized virtual child pornography.

B. The Affirmative Defense Created by the PROTECT Act Cannot Save the Virtual Child Pornography Provision From Being Struck Down

Having established in Part IV.A. that § 2256(8)(B) cannot withstand strict scrutiny on its own, this section explores whether the affirmative defense in § 2252A(c), exonerating a defendant if the image in question does not depict an actual minor, can save § 2256(8)(B) from being struck down yet again.[129] Notwithstanding Justice Thomas' concurring opinion in *Free Speech* suggesting that a complete affirmative defense could save the constitutionality of a virtual child pornography provision, the Court correctly recognized that placing the burden on the defendant to prove that an image does not depict an actual child raises serious constitutional issues.[130] This section first describes the Court's burden of proof decisions, which hold that the government is required to bear the burden of proof for all elements of an offense. In light of these decisions, this section goes on to explain why the government must bear the burden of proof of establishing that an image depicts a minor and cannot require the defendant to prove that an image does not depict a minor or even to produce evidence that an image does not depict a minor.

1. The Supreme Court's Burden of Proof Jurisprudence

The principle that the government must prove all of the elements of a crime is well-established. In *In re Winship*,[131] reflecting what had been the general consensus on the constitutional requirements of due process, the Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged."[132] The Court followed its decision in *Winship* by holding, in *Mullaney v. Wilbur*,[133] that the government

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[129] *See supra* notes 105-28 and accompanying text.

[130] *See supra* notes 65-68 and accompanying text.

[131] 397 U.S. 358 (1970).

[132] *Id.* at 364. The Court reasoned that the reasonable doubt standard ensures that "the moral force of the criminal law [will] not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*

[133] 421 U.S. 684 (1975).

may not shift the burden of proof on an element of the offense to the defendant.[134] In *Mullaney*, the Court declared Maine's murder statute unconstitutional because it presumed an essential element of the murder offense, malice, and shifted to the defendant the burden of rebutting the presumed element.[135] The Court reasoned that Maine violated *Winship* by distinguishing between murder and manslaughter on the basis of heat of passion but not requiring the prosecution to prove that element beyond a reasonable doubt.[136]

The *Mullaney* decision created great controversy because of the possibility that its implications would render all affirmative defenses unconstitutional.[137] In *Patterson v. New York*,[138] how-

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[134] *See id.* at 703-04.

[135] *See id.* at 685-87. At issue in *Mullaney* was a Maine homicide statute which provided that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought [an essential element of the offense of murder] would be conclusively implied . . . ." *See id.* If, however, "the defendant proved by a fair preponderance of the evidence that he acted . . . in the heat of passion, on sudden provocation, without express or implied malice aforethought," the crime would be "reduce[d] from murder to manslaughter." *See id.* at 686 n.3.

[136] *See id.* at 698. The Court also stated that if *Winship* were limited to those facts that constitute a crime as defined by state law, a state could evade the decision by either redefining the elements that constitute different crimes and recharacterize them as sentencing factors or could, in the case of assaults for example, define all assaults as a single offense and then require the defendant to disprove the elements of aggravation. *See id.* at 699 n.24.

[137] *See The Supreme Court, 2001 Term—Leading Cases,* 116 HARV. L. REV. 200, 239-40 (2002) [hereinafter *Leading Cases*]; Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 34 (1977) (stating that *Mullaney* "had clearly appeared to herald the end of affirmative defenses in the criminal law"); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L. J. 457, 469 (1989) (stating that "[b]y evincing a willingness to look beyond the state's designation of who bore the burden of persuasion, the Court had raised a '*Mullaney* question' regarding any factor significantly affecting the defendant's conviction and punishment"). An "affirmative defense assumes" that the elements of the crime have been satisfied and "raises other facts that, if true, would establish [ ] a justification . . . to engage in the conduct in question," while a non-affirmative defense negates an element of the offense. Leslie Yalof Garfield, *Back to the Future: Does* Apprendi *Bar a Legislature's Power to Shift the Burden of Proof Away From the Prosecution by Labeling an Element of a Traditional Crime as an Affirmative Defense?*, 35 CONN. L. REV. 1351, 1357 n.33 (2003). While the *Mullaney* decision clearly held that a defendant cannot be required to bear the burden of proof for a defense that negates an element of the offense, it was less clear whether the decision also meant that a defendant cannot be required to bear the burden of proof for a defense that does not negate an element of the offense.

[138] 432 U.S. 197 (1977).

ever, the Court held that it is constitutional to place the burden of proof for an affirmative defense on a defendant and interpreted the *Mullaney* decision as only establishing that a criminal statute may not be applied in such a way that an essential element of a charged crime is presumed, leaving a defendant with the burden of proof in demonstrating the absence of the element in order to qualify for a less serious offense.[139] The Court reasoned that "[t]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required . . . ."[140]

In upholding the New York statute, the Court reasoned that unlike the statute at issue in *Mullaney*, malice was not an element of the New York statute, and the statute thus did not presume any essential element of the crime charged and did not require the defendant to prove the nonexistence of an essential element of the crime.[141] In the Court's view, the distinction was crucial because the government is not required to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the

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[139] *Id.* at 214-15.

[140] *Id.* at 210. The Court explained that "[t]here is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability' . . . . The Court did not intend *Mullaney* to have such far-reaching effect." *Id.* at 214 n.15 (citations omitted). The Court did, however, reaffirm the principle that "any shifting of the burden of persuasion" on an element of a crime is "impermissible under the Due Process Clause." *Id.* at 215.

[141] *See id.* at 215-16. Under the New York homicide statute, malice was not an element of second degree murder, but a defendant could reduce a second degree murder charge to manslaughter by proving by a preponderance of the evidence that his actions resulted from an "extreme emotional disturbance for which there was a reasonable explanation or excuse." *Patterson*, 432 U.S. 197, 198 (1977) (citing N.Y. PENAL LAW § 125.25 (McKinney 1975)). The Court noted that

> [t]he crime of murder is defined by the statute . . . as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt . . . . No further facts are either presumed or inferred in order to constitute the crime.

Id. at 205-06.

punishment."[142] The Court thus allowed legislatures great latitude in defining the elements of an offense with only the limitation that "there are obviously constitutional limits beyond which the [government] may not go" in defining those elements.[143] While the Court indicated that it must be "within [the government's] constitutional powers to sanction by substantial punishment" the conduct described in the elements of the offense, it provided little guidance as to where the constitutional line is drawn.[144]

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[142] *Id.* at 207. Expansive proceduralists disagree with the Court's decision in *Patterson* and argue that the reasonable doubt rule should attach to every fact affecting the defendant's criminal liability under the legislative scheme, including the absence of defenses. *See, e.g.*, Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665 (1987) (arguing "that due process should require the government to establish every fact that under the applicable statutes gives rise to a distinctive range of criminal punishments, regardless of whether a fact negates an element of the offense or establishes an affirmative defense"); Stephen Saltzburg, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 AM. CRIM. L. REV. 393 (1983) (arguing "that due process requires the government to bear the burden of proving any element of a crime that compounds the defendant's stigmatization and blameworthiness").

[143] *Patterson,* 432 U.S. at 210.

[144] *Id.* at 208. The Court provided one example that would be unconstitutional: a legislature may not enact a criminal statute that eliminates a defendant's presumption of innocence when charged with a particular crime. *Id.* at 210. Although the Court has identified some constitutional limits on legislatures' ability to define crimes, it has not developed a comprehensive constitutional standard for determining those limits. *See* Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998) (stating that, "within limits, the question of which facts are" essential elements of a crime and which are only sentencing factors is "normally a matter for Congress"); McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986) (noting that the Court had "never attempted to define precisely the constitutional limits noted in *Patterson*, *i.e.*, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases, and do not do so today"); *see also* Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 782 (2002) (stating,

> [t]he Court . . . has never held that the Constitution requires legislatures to define crimes in any particular way. Instead, the Court has contented itself with elaborating constitutional doctrines that limit the ability of legislatures to shift burdens of proof, create factual presumptions, convert elements to sentencing factors, or recharacterize elements of crimes as affirmative defenses);

Note, *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 HARV. L. REV. 1349, 1353 (1999) (stating that "the Court [has] provided little guidance . . . other than . . . asserting . . . that an individual may not be declared presumptively guilty of a crime and that a statute may not offend a deeply rooted principle of justice"); Note, Winship *on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093, 1096 (1993) (stating "that the Court has been quite deferential to legislative determinations of . . . the elements of an offense" and, "[c]onsequently,

Following the *Winship*, *Mullaney* and *Patterson* decisions, the essential elements of a crime, as defined by the legislature, could not be presumed to exist and had to be proven beyond a reasonable doubt by the prosecution, but the burden of proof for affirmative defenses could be placed on the defendant. In *Martin v. Ohio*,[145] the Court further extended the *Patterson* decision by upholding a provision which placed on the defendant in a murder prosecution the burden of proving that the killing was in self-defense even though one of the elements of self-defense tended to negate the offense element of prior calculation and design. The Court held that due process is not violated "simply because" proof of an affirmative defense may tend to negate an element of the crime.[146] As one scholar has observed, "[a]fter *Martin*, it was clear that virtually any legislative shifting of any item from the category of 'element of the crime' to the category of 'affirmative defense' would, at least if clearly expressed in the statute, pass constitutional muster."[147]

Reversing course from the jurisprudence that produced *Patterson* and *Martin*, the Court has recently revisited the issue of the scope of a legislature's power to define the elements of an offense.[148] In *Apprendi v. New Jersey*,[149] "for the first time, the Court [ ] rejected a legislature's carefully considered decision about whether [ ] a particular factor should be treated as an 'ele-

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legislatures can dilute the impact of *Winship* by simply removing elements from the definition of a given offense"); Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 465 (1985).

[145] 480 U.S. 228 (1987).

[146] *Id.* at 234. The Court also rejected the argument that "because self-defense renders lawful what would otherwise be a crime, unlawfulness is an element of the offense that the state must prove by disproving self-defense" by stating that Ohio courts had held that "unlawfulness" was established through proving the elements of aggravated murder. *Id.* at 235.

[147] Joseph L. Hoffmann, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 273 (2001). *See Martin,* 480 U.S. at 239 (Powell, J., dissenting) (asserting that "[t]he Court thus seem[ed] to conclude that as long as the jury is told that the State has the burden of proving all elements of the crime, the overlap between the offense and defense is immaterial"); *see also* Rhodes v. Brigano, 91 F.3d 803, 807-08 (6th Cir. 1996) (stating that "due process is not violated simply because proof of an affirmative defense. . . may tend to negate an element of the crime charged").

[148] *See* Apprendi v. New Jersey, 530 U.S. 466, 468-69 (2000) (questioning whether a New Jersey statute could allow the trial judge to make a factual determination increasing a maximum sentence imposed by another statute).

[149] *See id.*

ment of the crime.'"[150] The Court overturned a sentence where the defendant had been sentenced under a "'hate crime' law [which] provid[ed] for an 'extended term' of imprisonment if the trial judge [found], by a preponderance of the evidence, that the defendant" had violated the hate crime statute.[151] In finding that the application of the hate crime law improperly increased the defendant's sentence beyond the statutory maximum of the underlying firearm conviction, the Court stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[152] The Court reasoned that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," "[and a legislature may not] circumvent the protections of [the Due Process Clause] 'merely by redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.'"[153]

Some scholars have interpreted *Apprendi* broadly and have argued that the decision offers a basis for a return to an interpretation of *Mullaney* that the reasonable doubt rule attaches to every fact affecting the defendant's criminal liability, and thus a legislature can no longer shift the burden of proving an affirma-

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[150] Hoffmann, *supra* note 147, at 264.

[151] *Apprendi*, 530 U.S. at 468-69 (referencing N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1995)).

[152] *Id.* at 490. The Court's decision in *Apprendi* followed several related decisions. In *McMillan v. Pennsylvania,* the Court held that the preponderance of evidence standard may be used when considering a sentencing factor. 477 U.S. 79, 91 (1986). The Court noted that "*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive." *Id.* at 85. Similarly, in *Almendarez-Torres v. United States*, the Court held that the existence of the defendant's prior conviction did not have to be determined by the jury because "Congress intended to [designate that fact as] a sentencing factor" rather than an element of a crime. 523 U.S. 224, 235 (1998). However, in *Jones v. United States*, the Court held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment and proved beyond a reasonable doubt" by a jury. 526 U.S. 227, 243 n.6 (1999). The Court reasoned that a legislature cannot relieve the government of proving beyond a reasonable doubt an "essential ingredient of the offense." *Id.* at 241.

[153] *Apprendi*, 530 U.S. at 485 (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)). The Court noted that "*Patterson* made clear that the state law still required the State to prove every element of that State's offense of murder and its accompanying punishment." *Id.* at 485 n.12.

tive defense to the defendant.[154] Nothing in the Court's opinion in *Apprendi*, however, indicated that affirmative defenses are unconstitutional.[155] In addition, lower courts have interpreted *Apprendi* as not intending to alter the ability of legislatures to place the burden of proving affirmative defenses on the defendant.[156] Nevertheless, the Court has not limited the reach of *Apprendi* with regard to Sixth Amendment rights in sentencing.[157] Thus, the *Apprendi* decision does represent a retreat by the Court from its view that the legislature should be given con-

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[154] *See* Garfield, *supra* note 137, at 1354-56. In her dissent in *Apprendi*, Justice O'Connor insisted that the Court's decision would require it "to overrule, at a minimum, [a] decision[ ] like *Patterson*." *Apprendi*, 530 U.S. at 544 (O'Connor, J., dissenting); *see also* Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 251 (stating that the fact "[t]hat Patterson may have committed his homicide under the influence of extreme emotional distress, subjecting him to a manslaughter rather than a murder penalty, clearly changed the 'range of punishments to which the prosecution is by law entitled'").

[155] The Court made clear that the "case . . . [did] not raise any questions concerning the State's power to . . . plac[e] the affirmative defense label on 'at least some elements' of traditional crimes." *Apprendi*, 530 U.S. at 475; *see also id.* at 485 n.12 (discussing *Patterson* but not indicating disagreement with the decision); *id.* at 501 (Thomas, J., concurring) (stating "that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)").

[156] *See, e.g.*, United States v. Williams, 308 F.3d 833 (8th Cir. 2002); United States v. Tinoco, 304 F.3d 1088, 1106 (11th Cir. 2002); United States v. Bradshaw, 281 F.3d 278, 296 (1st Cir. 2002); United States v. Brown, 276 F.3d 930, 932 (7th Cir. 2002) (claiming that "*Apprendi* leaves undisturbed the principle that while the prosecution must indeed prove all the elements of the offense charged beyond a reasonable doubt, . . . the legislation creating the offense can place the burden of proving affirmative defenses on the defendant").

[157] Soon after *Apprendi* it appeared as though the Court preferred a narrow interpretation of the decision, holding that the Constitution does not require that facts that "trigger [ ] mandatory minimum" sentences be "submitted to the jury or proved beyond a reasonable doubt." Harris v. United States, 536 U.S. 545, 571-72 (2002); *see also Leading Cases*, *supra* note 137, at 238 (indicating that the Justices are "keen on limiting the reach of *Apprendi*"); Andrew M. Levine, *The Confounding Boundaries of "*Apprendi*-Land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 382 (2002) (stating that *Harris* makes the extension of *Apprendi* far less likely in the immediate future). The Court has certainly not retreated from its holding in *Apprendi*, however, and, it could be argued, has extended the reach of the decision. *See* Blakely v. Washington, 124 S. Ct. 2531 (2004) (holding that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts); Ring v. Arizona, 536 U.S. 584, 589 (2002) (holding that "capital sentencing schemes" in which a judge decides whether any "aggravating factors" are present, and without which a death sentence may not be imposed, are inconsistent with *Apprendi*).

siderable leeway in deciding what statutory language requires proof beyond a reasonable doubt.[158] Despite recently addressing issues such as whether certain facts must be treated as elements of the crime and proven beyond a reasonable doubt, though, the Court has not offered additional insight into the point at which burden-shifting becomes unconstitutional.[159]

2. The PROTECT Act's Affirmative Defense Unconstitutionally Shifts the Burden of Proof to Defendants

Although the Court has consistently held that the burden of proof of an element of a crime, as defined by the legislature, may not be shifted to the defendant, it has not chosen to develop substantive constitutional criminal law that would create constitutionally required elements of crimes.[160] Issues regarding the burden of proof for child pornography crimes are different than for other crimes, however, due to First Amendment constraints.[161] If

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[158] *See* Garfield, *supra* note 137, at 1379-80 (stating that "[t]he Court's renewed commitment to evaluate for itself whether a legislature's definition of a crime is appropriate [signals a] return to the pre-*Patterson* days of *Winship* and *Mullaney*").

[159] *See supra* note 144 and accompanying text. The Court has not, for example, followed the lead of those writers who have proposed tests for determining the constitutionality of criminal statutes. *See, e.g.*, Garfield, *supra* note 137, at 1383 (proposing a "'two-prong' test for [courts to consider when] evaluating whether the legislature may" permissibly shift the burden of proof in a criminal prosecution); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 427-28 (2002) (arguing that "the prosecution must disprove 'justification defenses' because the prosecution always must prove wrongdoing in order to justify punishment," but "on eligibility defenses . . . such as insanity and minority . . . the defendant [must] carr[y] the burden of persuasion"); Nancy J. King & Susan R. Klien, *Essential Elements*, 54 VAND. L. REV. 1467, 1535 (2001) (proposing a "multi-factor test" for determining the constitutionality of criminal statutes).

[160] *See* Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335 (2000) (stating that the Court "has articulated few Constitutional doctrines of [ ] substantial criminal law"); Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1270 (1998) (noting that no "substantive constitutional criminal law has sprung from the courts' interpretations of [ ] presume[ed] . . . innocence and reasonable doubt"). While some scholars have argued that courts should create substantive constitutional criminal law, such a process would likely be difficult. *See* Standen, *supra* note 144, at 782 (arguing that "[f]or courts to identify the 'essential' or 'core' elements of the gamut of crimes would require constant attention and reconsideration and [would] thus seem [ ] incompatible with the sporadic interventions characteristic of judicial oversight").

[161] Of course, in addition to child pornography offenses, the First Amendment also constrains the definitions of other offenses involving categories of speech unprotected under the First Amendment. *See, e.g.*, Virginia v. Black, 538 U.S.

the First Amendment did not restrict the definition of child pornography, in defending the PROTECT Act the government could argue that the involvement of an actual minor in a depiction is not an element of the definition of child pornography under § 2256(8)(B), and the affirmative defense in § 2252A(c), exonerating the defendant if it is shown that the image does not depict an actual minor, does not shift the burden of proof of an element of the offense in § 2256(8)(B) to the defendant.[162] The statute would not be unconstitutional because the government would be required to prove all of the elements of the offense beyond a reasonable doubt.[163]

The flaw in this argument is that even if § 2256(8)(B) does not require that actual minors be depicted, the First Amendment does.[164] It is true that the Court has allowed certain facts, such as self-defense, to be labeled affirmative defenses, and the burden of persuasion placed on the defendant, even though such defenses are probably constitutionally required.[165] The Court has indicated, however, that it must be within the government's constitutional powers to criminalize the conduct described in the elements of the offense without regard to any affirmative defense.[166] Some

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343 (2003) (dealing with First Amendment issues involving a statute criminalizing cross-burning with the intent to intimidate).

[162] *See supra* notes 81-93 and accompanying text (describing the PROTECT Act's virtual child pornography provisions).

[163] *See supra* Part.IV.B.1. (describing the Court's burden of proof jurisprudence).

[164] *See supra* Part.IV.A. (illustrating that a constitutionally required element of a child pornography offense is that the image in question depict an actual child).

[165] *See* Dripps, *supra* note 142, at 1676, 1677 (stating that the Court in Martin v. Ohio, 480 U.S. 228 (1987), "rejected the possibility that the reasonable doubt rule . . . appl[ies] to constitutionally required defenses without regard to legislative classification," but noting that "if due process . . . requires . . . [the] recognit[ion] [of] any exculpatory doctrine at all, self-defense would. . . rank among those required"); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.8(c), at 88 (2d ed. 2003) (noting that there are constitutional objections to the notion that the State can punish a defendant for an act committed in self defense).

[166] *See supra* note 144 and accompanying text (discussing the latitude legislatures possess in defining crimes); *see also* Martin v. Ohio, 480 U.S. 228, 232 (1987) (emphasizing that the "New York [legislature in *Patterson*] had the authority to define murder as the intentional killing of another person"). If such a rule were not the law, it would be unconstitutional to presume a statutorily, but not constitutionally, required element of an offense and shift the burden of disproving the element to the defendant, *see supra* Part IV.B.1., but not to shift the burden of disproving a constitutionally, but not statutorily, required element to the defendant. Such a result would be flatly inconsistent with the Court's burden of proof jurisprudence.

courts have violated this requirement by allowing the burden of proof of constitutionally required elements to be shifted to defendants through affirmative defenses.[167] The Ninth Circuit, for example, has held, in a production of child pornography prosecution under 18 U.S.C. § 2251, that although "the [F]irst [A]mendment does not permit the imposition of criminal sanctions on the basis of strict liability" in child pornography cases, knowledge of the age of the minor, which was "not an element of the offense" under the statute, was required by the First Amendment as an affirmative defense but "not as an element of the offense."[168] The Ninth Circuit's decision confuses constitutionally required affirmative defenses and constitutionally required offense elements and violates *Mullaney* by shifting the burden of proof of a constitutionally required element of the offense to the defendant.[169]

The government cannot shift its burden of proof and require a defendant to prove that images do not depict actual children in order to avoid a criminal conviction. Nevertheless, the government may be able to defend the PROTECT Act on the basis that

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[167] *See supra* Part IV.B.1.

[168] *See* United States v. United States D.C.D. Cal., 858 F.2d 534, 538-44, 543 n.6 (9th Cir. 1988). In rejecting the claim that the government was required "to prove scienter as part of its case," the Ninth Circuit distinguished "Supreme Court cases holding that the government must carry such a burden, in cases involving booksellers and other downstream distributors," on the basis that "producers are in a position to know or learn the ages of their employees." *Id.* at 543 n.6. Although the Ninth Circuit believed that the First Amendment did not permit the imposition of criminal sanctions on the basis of strict liability, the Supreme Court has indicated that scienter is not constitutionally required for producers of child pornography. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 76 n.5 (1994); *see also* Outmezguine v. State, 641 A.2d 870, 877 (Md. 1994) (holding that a strict liability statute did not violate the First Amendment in a production of child pornography case).

[169] *See, e.g.*, State v. Ryan, 543 N.W.2d 128, 142 (Neb. 1996) (stating that the State may not constitutionally rely upon the affirmative defense of insanity as a means of addressing the material element of malice in a trial for second degree murder because it relieves the State from proving beyond a reasonable doubt the defendant's guilt of each and every essential element of the crime, particularly malice), *overruled on the finding of necessity of malice by* State v. Burlinson, 583 N.W.2d 31 (Neb. 1998). Even if the Ninth Circuit was correct that a fact such as scienter can be constitutionally required as an affirmative defense but not an offense element, the justification for such a holding would be that producers are in a better position than the government to produce evidence on the issue of scienter. *Cf. X-Citement*, 513 U.S. at 76 n.5 (stating that "producers are more conveniently able to ascertain the age of performers" than are other child pornography defendants). In contrast, defendants subject to the affirmative defense in § 2252A(c) are not in a better position than the government to establish the origins of images. *See infra* notes 198-203 and accompanying text.

the affirmative defense in § 2252A(c) shifts only a burden of production, and not a burden of persuasion, to defendants. Section 502(c) of the PROTECT Act, which created § 2252A(c), provides for an "affirmative defense" in certain circumstances, but the term "affirmative defense" is ambiguous because it can place very different burdens on the defendant.[170] The term can refer to "the burden of persuasion," which is "the burden of convinc[ing] the tribunal" that the elements of the defense have been met, but the term can also refer to the less onerous "burden of production," which is the burden of presenting "sufficient evidence to . . . support the presence of a defense."[171] If the affirmative defense in § 2252A(c) is interpreted as shifting only a burden of production to the defendant on the constitutionally required element that the images depict actual children, the government would still retain its burden of persuasion.[172] If the defendant satisfies his production burden by introducing evidence that the images in question do not depict actual children, the government must persuade the jury beyond a reasonable doubt that the images depict actual children.[173]

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[170] *See* PROTECT Act, Pub. L. No. 108-21, § 502(c), 117 Stat. 650, 679 (2003) (codified as amended at 18 U.S.C. § 2252A(c) (2003)).

[171] *See* United States v. Prentiss, 256 F.3d 971, 975 n.2 (10th Cir. 2001); *see also* Smart v. Leeke, 873 F.2d 1558, 1569 n.10 (4th Cir. 1989) (Murnaghan, J., dissenting) (arguing that "most, if not all, of the confusion in this area of the law could be eliminated if the term 'burden of proof' were stricken from our legal vocabularies and replaced by two more precise terms, such as 'burden of persuasion' and 'burden of producing evidence'"); Commonwealth v. Sojourner, 408 A.2d 1108, 1112 (Pa. Super. Ct. 1979) (stating that "'burden of proof' is an ambiguous term" and can mean either a burden of production or the burden of persuasion); Huigens, *supra* note 159, at 427.

[172] *See infra* notes 182-185 and accompanying text (describing the *State v. Myrland* decision).

[173] In order to establish that an image is child pornography under § 2256(8)(B) of PROTECT Act, the government must prove that: (1) the "visual depiction is a digital image, computer image, or computer-generated image;" (2) the visual depiction is of a person (whether real or virtual) under the age of eighteen; (3) the visual depiction either is that of an actual minor or an ordinary person viewing the depiction would conclude that the depiction is of an actual minor; and (4) the minor depicted is engaged in sexually explicit conduct. PROTECT Act § 502. If the affirmative defense in § 2252A(c) is interpreted as placing only a burden of production on the defendant, one complication is the overlap between element (3) and the affirmative defense in § 2252A(c). Element (3) can be interpreted as giving the government the option of proving either that an actual minor is depicted or that a virtual minor is depicted. If the government elects under element (3) to establish that the depiction is of a virtual minor, § 2252A and § 2256(8)(B) could be interpreted together as requiring, if the defendant meets his burden of production under § 2252A(c), that the government prove both that the depiction is of an actual minor and that the depiction is "indistinguishable"

The government can plausibly argue that the affirmative defense in § 2252A(c) should be interpreted as placing only a burden of production on defendants. Some courts have held that statutes must explicitly allocate to the defendant the burden of persuasion for an affirmative defense, and in contrast to other provisions of the PROTECT Act, section 502(c) does not explicitly allocate such a burden.[174] The government can also argue that the Court should invoke the canon of constitutional avoidance and interpret § 2252(A)(c) as shifting only a burden of production in order to avoid the serious constitutional issue of the government's ability to shift the burden of persuasion to a defendant on an essential element of a child pornography crime.[175] Section 2252A(c) can thus be interpreted as shifting only a burden of production to defendants while still assigning to the government the burden of persuasion.

It is generally understood that the prosecution has both the burden of production and the burden of persuasion for all the facts necessary to constitute the crime with which the defendant is charged.[176] The Court, however, has never directly held that shifting a burden of production to the defendant on an element of a crime is unconstitutional.[177] To the contrary, the Court has suggested that shifting a burden of production to the defendant on an element of an offense may be constitutional.[178] In *Mullaney*, the Court noted that "[m]any States do require the defendant to show

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from that of an actual minor. PROTECT Act §502. Obviously, proof that the depiction is of an actual minor would also likely establish that an ordinary person would conclude that the depiction is of an actual minor. In light of the awkwardness of the second option under element (3), the government would undoubtedly elect the first option of establishing that the image is that of a minor, and, presumably, would not have to prove the element until the defendant had satisfied his production burden.

[174] *See* PROTECT Act § 502(c). *See, e.g.*, United States v. Talbott, 78 F.3d 1183, 1186 (7th Cir. 1996) (holding that a statute must explicitly allocate to the defendant the burden of persuasion as to an affirmative defense). Unlike the affirmative defense in § 2252A(c), section 105 of the PROTECT Act provides for a mistake of age defense in "sex tourism" cases but requires the defendant to prove the defense by a "preponderance of the evidence." PROTECT Act § 105.

[175] *See* United States v. X-Citement Video, 513 U.S. 64, 78 (1994) (stating that "[i]t is . . . incumbent upon us to read the statute to eliminate those [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress").

[176] *See* LAFAVE, *supra* note 165, § 1.8(a), at 77-78. If the prosecution does not meet its production burden, the defendant is entitled to a directed verdict. *See id.* at 77 n.8, 78-79.

[177] *See* 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES, § 4(b)(3), at 33 (2001).

[178] *See id.*

that there is 'some evidence' indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt," and indicated that "[n]othing in this opinion is intended to affect that requirement."[179] Further, in *Patterson*, Justice Powell, who dissented, stated that "even as to those factors upon which the prosecution must bear the burden of persuasion, . . . [t]he State normally may shift to the defendant the burden of production, that is, the burden of going forward with sufficient evidence 'to justify (a reasonable) doubt upon the issue.'"[180]

Some scholars and lower courts have interpreted the Court's opinions as indicating that there is a constitutional distinction between placing the burden of production on an accused and placing the burden of persuasion on an accused. They reason that shifting a production burden does not involve the same concerns that were addressed by the Court in *Mullaney* or *Winship* because the defendant does not have to meet any persuasion burden at all.[181] In *State v. Myrland*,[182] for example, a Minnesota state court held that the Minnesota child pornography statute, which provided for an affirmative defense to a possession of child pornog-

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[179] 421 U.S. 684, 701 n.28; *see supra* notes 133-36 and accompanying text (describing *Mullaney*).

[180] 432 U.S. 197, 230-31 (1977). Justice Powell did indicate that "there are outer limits on shifting the burden of production to a defendant" such as the "rational connection" and "comparative convenience" requirements. *See id.* at 230 n.16; *see also infra* notes 198-203 and accompanying text (applying the comparative convenience test to the affirmative defense in § 2252A(c)); *cf.* Barton D. Day, Note, *The Withdrawal Defense to Criminal Conspiracy: An Unconstitutional Allocation of the Burden of Proof*, 51 GEO. WASH. L. REV. 420, 434 n.108 (1983) (explaining that Justice Powell may not have actually meant that the burden of production can be shifted to the defendant on an element of the offense).

[181] *See, e.g.*, Commonwealth v. Sojourner, 408 A.2d 1108 (Pa. Super. Ct. 1979) (finding in an unauthorized possession of a controlled substance case that the burden of production of coming forward with some evidence of authorization to possess a controlled substance could be placed on the defendant even though unauthorized possession was an essential element of the crime); State v. Ryan, 543 N.W.2d 128, 150 (Neb. 1996) (Gerrard, J., dissenting) (arguing that "[t]here is a clear constitutional distinction between casting the burden of *production* on an accused and casting the burden of *persuasion* on an accused"), *overruled by* State v. Burlinson, 583 N.W.2d 31 (Neb. 1998). In one of the more well-known articles on the topic, John Calvin Jeffries, Jr. & Paul B. Stephan, III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979), it was argued that placement of a burden of production on the defendant is a "permissible housekeeping device" that does not raise any threat to the reasonable doubt standard. *See id.* at 1334.

[182] 644 N.W.2d 847 (Minn. 2002), *cert. denied*, 537 U.S. 1019 (2002).

raphy charge if the person in the pornographic work was eighteen years of age or older, did not unconstitutionally shift the burden of proof because it imposed on defendants only a burden of production and not of persuasion.[183] The Court, stating that it would construe the statute to avoid an unconstitutional result, recognized that the burden of persuasion could not be shifted to the defendant on an element of the offense but agreed with the prosecution that the burden of production could be shifted to the defendant without violating due process.[184] In the Court's view, the Supreme Court's concern in *Free Speech* about an affirmative defense "'seeking to impose on the defendant the burden of proving his speech is not unlawful'" was not applicable because the statute before it only imposed a burden of production on the defendant.[185]

Despite the Court's statements and lower court decisions, shifting a burden of production to the defendant on an element of a crime is difficult to reconcile with the Due Process Clause of the Fifth Amendment and the right to a jury trial guaranteed by the Sixth Amendment.[186] The distinction between a burden of pro-

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[183] *See id.* at 851. The affirmative defense provided: "It shall be an affirmative defense to a charge of violating this section that the pornographic work was produced using only persons who were 18 years or older." *See id.* at 850 (quoting MINN. STAT. § 617.247, subd. 8 (2000)).

[184] *See id.* at 851 n.2. The court accepted the state's argument that the statute only required defendants "to make a prima facie showing that the age of the person depicted was a disputed issue," at which point the burden would shift back to the state to disprove the defense. *See id.* at 851.

[185] *See id.* at 851 n.2 (quoting Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002)). The court stated that "due process is violated [only] if (1) the proffered defense disproves or negates an element of the charged crime, and (2) the defendant has the burden of persuasion with respect to the defense." State v. Myrland, 644 N.W.2d 847, 850 (Minn. 2002). The court's decision is consistent with earlier decisions of the Minnesota Supreme Court. *See, e.g.*, State v. Hage, 595 N.W.2d 200 (Minn. 1999) (holding that "if the mitigating circumstances or issue disproves or negates an element of the crime charged, the greatest burden the state may impose upon a defendant is that of shouldering the burden of production").

[186] Several authors have argued that placing a burden of production on the defendant for an element of an offense is unconstitutional. *See* Day, *supra* note 180, at 434-35; Shari L. Jacobson, *Mandatory and Permissive Presumptions in Criminal Cases: The Morass Created by* Allen, 42 U. MIAMI L. REV. 1009, 1032 (1988) (stating that "because courts cannot direct a verdict against the defendant in a criminal case," shifting the burden of production is "probably unconstitutional"); Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 340-41 (1986) (arguing that the Court's decisions "preclude shifting the burden of production").

duction and the burden of persuasion is a matter of degree rather than kind, and the difference between the two burdens should not be overstated. In order to determine whether a burden of production is satisfied, one must evaluate the persuasive force of the evidence that has been adduced on the relevant issue, and a litigant has met his burden of production only if the evidence introduced is sufficiently persuasive to create a reasonable doubt, or to meet some lower standard.[187] Apart from the similarity between a burden of production and the burden of persuasion, shifting a burden of production violates the due process requirement that the government prove all elements of an offense beyond a reasonable doubt.[188] In addition, shifting a burden of production to the defendant violates the Sixth Amendment's right to a jury trial because the failure of the defendant to meet the burden will result in a directed verdict against the defendant.[189]

Placing a burden of production on the defendant on an element of an offense violates due process because the defendant can be convicted without any proof establishing the element. If the defendant has a burden of production, the prosecution has no obligation to present evidence addressing the element until the defendant's burden is met.[190] The defendant can thus be convicted even if neither side presents any evidence directly relevant to the element.[191] Such a result would be hard to reconcile with the Court's holding in *Jackson v. Virginia*,[192] that a conviction must be reversed if there is insufficient evidence to allow a rational trier of

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[187] *See* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 328-29 (1980) [hereinafter Allen, *Structuring*]; Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627, 634 (1994) [hereinafter Allen, *Burdens*]. Professor McNaughton famously made this point many years ago. *See* John T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955) (arguing that a burden of production is also a burden of persuasion).

[188] *See supra* Part IV.A. (describing the Court's burden of proof jurisprudence).

[189] *See* Jacobson, *supra* note 186, at 1032 (stating that directed verdicts against defendants at criminal trial are most likely unconstitutional).

[190] *See* Day, *supra* note 180, at 435.

[191] *See* Allen, *Structuring*, *supra* note 187, at 329 (stating that "[i]f the defendant is unable to meet the burden of production, the state is thereby relieved of the duty to present evidence and persuade the jury on an issue relevant to the defendant's culpability"); Day, *supra* note 180, at 435-36; ROBINSON, *supra* note 177, § 4(a)(2), at 24-25.

[192] 443 U.S. 307 (1979).

fact to find each of the elements of the offense beyond a reasonable doubt.[193]

Placing a burden of production on the defendant also violates the defendant's Sixth Amendment right to a jury trial because it requires the trial judge to direct a verdict against the defendant if the burden is not satisfied.[194] Placing a burden of production on the defendant requires the judge, rather than the jury, to determine whether the burden has been met, and a ruling by the judge that the defendant has not met his burden removes the element from the case without the jury deciding whether it has been proven.[195] It is true that, in a sense, verdicts on both affirmative defenses and defenses that negate elements of the offense are commonly directed against defendants. If the defendant does not produce enough evidence, the jury will not be instructed on the defense.[196] There is a fundamental difference, though, between refusing to instruct the jury on a defense and removing an essen-

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[193] *See id.* at 319. *But see* Jeffries & Stephan, *supra* note 181, at 1334 (stating that placing a burden of production on the defendant can be reconciled with the beyond a reasonable doubt requirement "if one assumes that the prosecution could prove beyond a reasonable doubt the absence of any exculpatory fact for which the defendant could produce no affirmative evidence"). Professor Robinson claims that the Court in *Jackson* "held that the constitution requires the prosecution to bear the burden of production for all essential elements of the offense." *See* ROBINSON, *supra* note 177, § 4(a)(2), at 22. While the Court's opinion did not explicitly make such a holding, allowing a burden of production to be shifted to the defendant on an element of the offense is inconsistent with *Jackson*'s requirement of proof beyond a reasonable doubt on every element of the crime.

[194] *See* United States v. Gaudin, 515 U.S. 506, 520 (1995) (noting that the trial judge cannot order the jury to convict a defendant); Rose v. Clark, 478 U.S. 570, 578 (1986) (stating that a directed verdict cannot be entered against a defendant in a criminal case); LAFAVE, *supra* note 165, § 1.8(h), at 96-97 (stating that the court cannot "direct the jury to find against the defendant on one of the several elements of the crime, even though the prosecution's evidence concerning the evidence is uncontradicted"); CHARLES A. WRIGHT & KENNETH W. GRAHAM, 21 FEDERAL PRACTICE AND PROCEDURE EVIDENCE § 5142 (1977).

[195] *See Gaudin*, 515 U.S. at 522-23 (stating that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged"); *see also* Harris, *supra* note 186, at 340-41, 341 n.153 (arguing that the Constitution requires that the jury determine whether all of the elements have been proven beyond a reasonable doubt, precluding the judge from taking an element from the jury and directing its finding, and that "if a party suffers a directed verdict for failure to satisfy a burden of production, allocation of the production burden to that party also amounts to allocation of the burden of persuasion").

[196] *See* Leach v. Kolb, 911 F.2d 1249, 1256 (7th Cir. 1990) (noting that although a refusal to instruct the jury on an affirmative defense is the same as directing a verdict against the defendant on the affirmative defense, courts have upheld the practice); Harris, *supra* note 186, at 341 (explaining the practice of

tial element of the crime from the case. The Court has seemed to agree with this analysis, stating that

> the effect of a failure to meet the production burden is significantly different for the defendant and the prosecution. When the prosecution fails to meet it, a directed verdict in favor of the defense results. Such a consequence is not possible upon a defendant's failure, however, as verdicts may not be directed against defendants in criminal cases.[197]

Even if shifting a burden of production to the defendant is not presumptively unconstitutional, certain constitutional due process tests would undoubtedly need to be satisfied before such a burden could be imposed. Likely, at a minimum, a comparative convenience standard would need to be satisfied and would require that evidence relating to the offense element be easier for the defendant to produce than the prosecution.[198] Regarding the affirma-

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directing verdicts against defendants on both affirmative defenses and defenses negating elements of the offense).

[197] Sandstrom v. Montana, 442 U.S. 510, 516 n.5 (1979); *see also* Engle v. Isaac, 456 U.S. 107, 120 n.20 (1982) (noting that the "[d]efinition of a crime's elements may have consequences under state law other than allocation of the burden of persuasion" because while defendants may be required "to come forward with some evidence of affirmative defenses,. . . the State must prove the elements [of a crime beyond] a reasonable doubt even when the defendant introduces no evidence"). In addition to the reasons described above, the fact that the virtual child pornography provisions raise First Amendment issues may supply an additional reason why a burden of production may not be shifted to defendants. The Court has indicated that it may have different standards for reviewing burden of proof issues in First Amendment cases, and may disfavor affirmative defenses in criminal cases that raise First Amendment issues because affirmative defenses do not protect defendants from being prosecuted. In *Free Speech*, the Court noted that the former affirmative defense in § 2252A(c) "applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002); *see also* Ashcroft v. ACLU, 124 S. Ct. 2783, 2796 (2004) (Stevens, J., concurring) (citing *Free Speech* in arguing that the Child Online Protection Act is constitutionally suspect in part because its affirmative defense does not provide Web publishers with assurances of freedom from prosecution); *see infra* note 227 (further explaining the possibility that the standards may be different for cases that involve First Amendment issues).

[198] *See* Allen, *Structuring*, *supra* note 187, at 360 (stating that if a court today were "to strike down a statute placing a burden of production on a defendant, it probably would do so on the basis of the comparative convenience and rational relationship tests"); *supra* note 180 and accompanying text (explaining that Justice Powell indicated in *Patterson* that a comparative convenience test would have to be met before a burden of production could be assigned to the defendant); *cf.* ROBINSON, *supra* note 177, § 4(b)(2), at 31 (noting that some believe that a defendant should be assigned a burden of production on an issue that is peculiarly within his knowledge); MODEL PENAL CODE § 1.12(3) (1985) (defining

tive defense in § 2552A(c), however, it is certainly not the case that defendants have a comparative advantage over the government in producing evidence that images do not depict actual children. As the Court indicated in *Free Speech*, if the government would have difficulty establishing that an image depicts an actual child, the defendant would have just as hard of a time producing evidence that no actual children were used, especially if the defendant is merely a possessor and not the producer of the images.[199]

It is difficult to imagine that defendants as a class are in a better position than the government to establish the origins of images or whether they depict actual children. As Congress itself noted in passing the PROTECT Act, "[a]n image seized from a collector of child pornography is rarely a first-generation product . . . ."[200] While the possibility exists that a defendant could retain an expert to testify that a particular image does not depict an actual child, this hardly gives defendants a comparative advantage.[201] To the contrary, the resources of the government, and particularly its ability to gather images of child pornography without fear of criminal prosecution, give it a significant advantage over defendants in establishing that an image depicts an actual child. The government, for example, could potentially create a data base of known victims of child pornography that it could use to establish that a particular image depicts an actual child.[202] In any case, regardless of whether the government believes that its resources are sufficient to enable it to effectively prosecute child pornography cases, it cannot plausibly argue that defendants as a class are

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"affirmative defenses" as those that are "peculiarly within the knowledge of the defendant").

[199] 535 U.S. at 255-56.

[200] PROTECT Act, Pub. L. No. 108-21, § 501(8), 117 Stat. 650, 677 (2003).

[201] Congress itself expressed skepticism that experts would be able to determine whether an image depicts an actual child. *See id.* § 501(8) (stating that "the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child").

[202] *See, e.g.*, United States v. Hersh, 297 F.3d 1233, 1238 n.4 (11th Cir. 2002) (describing how government agents compared a list of child pornography files on a defendant's computer with a government database of known child pornography); *Comm. on Judiciary, The Child Obscenity and Pornography Prevention Act of 2002*, H.R. Res. 107-526, 107th Cong. §§ 8-9 (2002) (seeking to create a database that would only be accessible to authorized law enforcement personnel for all child pornography known to include images of actual children).

better able to produce evidence of whether images depict actual children.[203]

The PROTECT Act addresses many of the deficiencies in the statute struck down by the Court in *Free Speech*, and the result is a statute with a much narrower focus.[204] The remaining problem with the PROTECT Act, however, is a fundamental one that will likely doom it. As a result of the Court's decision in *Free Speech*, the government must prove that an image depicts an actual child in order for that image to be unprotected speech.[205] It is likely that the government cannot, consistent with the Constitution, satisfy its burden of proof by requiring the defendant to prove that images do not depict actual children.[206] Although less clear, it also seems likely that the government cannot shift a burden of production to the defendant of introducing evidence that images do not depict actual children.[207]

V. The Presumption Alternative to the PROTECT Act

Part IV of this Article illustrated why the virtual child pornography provisions of the PROTECT Act are unconstitutional. If, similar to the CPPA, the virtual child pornography provisions are struck down, the government may attempt to yet again structure

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[203] Despite an old Supreme Court case that seems to approve of such a practice, it is also unlikely that difficulties of proof would justify shifting the burden of proof to defendants through an affirmative defense. In *Morrison v. California*, the Court stated that the burden of going forward with evidence at some stages of a criminal trial may be placed on the defendant, but only after

> the State [has] proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

291 U.S. 82, 88-89 (1934) (citation and quotations omitted). In *Mullaney*, however, the Court rejected the argument that "difficulties in negating an argument that the homicide was committed in the heat of passion" justified shifting the burden of proof to the defendant. Mullaney v. Wilbur, 421 U.S. 684, 701 (1975). The Court further stated that the burden of proof could not be shifted to the defendant even though "intent is typically considered a fact peculiarly within the knowledge of the defendant." *Id.* at 702. Later, in *Patterson*, the Court explicitly recognized that a possible understanding of *Morrison* has been overruled. *See* 432 U.S. 197, 203-04 n.9 (1977) (asserting that "if the *Morrison* cases are understood as approving shifting to the defendant the burden of disproving a fact necessary to constitute the crime, the result in the first *Morrison* case could not coexist with *In re Winship* . . . and *Mullaney*").

[204] *See supra* notes 81-95 and accompanying text.

[205] *See supra* notes Part IV.A.

[206] *See supra* notes 160-69.

[207] *See supra* notes 170-203.

the burden of proof in child pornography cases in order to ensure their effective prosecution. After two unsuccessful attempts at creating a constitutional statute proscribing virtual pornography but allowing for an affirmative defense, the government should consider alternative methods of manipulating the burden of proof. Use of a presumption is one possible alternative. Several courts have held that the government can meet its burden of proof in child pornography cases by simply introducing the alleged child pornography image at issue into evidence and allowing the factfinder to conclude that the image depicts an actual child.[208] These cases raise the possibility that the government could enact a statute that creates a presumption that an image is child pornography if the jury determines that the image looks like it is an image of an actual child.[209]

A presumption is a device which allows the jury to determine the existence of an element of the crime when other, "evidentiary" or "basic," facts are established.[210] There are two main categories of presumptions. A permissive presumption, sometimes referred to as an inference, "suggests to [the] jury a possible conclusion to be drawn if the government proves predicate facts but does not require the jury to draw that conclusion."[211] Permissive inferences are constitutional if the connection between proved and presumed fact "is rational on its face or is rational based on the facts of the given case."[212] The Court has stated that because "a per-

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[208] *See supra* notes 122-25 and accompanying text.

[209] Of course, it might be asked why the government needs to enact another statute when it can meet its burden of proof, at least in most districts, simply by introducing the images into evidence. While such an argument has persuasive force, the government has a legitimate interest in guiding and structuring jury decision-making to better ensure that juries do not acquit defendants on the basis of unfounded claims that an image does not depict an actual child.

[210] *See* Ulster County v. Allen, 442 U.S. 140, 156 (1979) (stating that "[i]t is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts"); *see also* Jacobson, *supra* note 186, at 1009.

[211] *See* Francis v. Franklin, 471 U.S. 307, 313-14 (1985); Leo H. Whinery, *Presumptions and Their Effect*, 54 OKLA. L. REV. 553, 561-62 (2001) (stating that, for a permissive presumption, the usual case is that the court instructs the jury that "it may regard the basic fact as sufficient evidence of the presumed fact *but it is not required to do so*"); Jacobson, *supra* note 186, at 1012 (stating that "[t]he purpose of [a] permissive presumption is to point out to the jury a natural inference that it might otherwise be unlikely to note").

[212] *See Allen*, 442 U.S. at 165; *see also* Kevin W. Robinson, *Proof Issues*, 90 GEO. L.J. 1740, 1748-49 (2002). The party challenging the presumption must "demonstrate its invalidity as applied to him." *See Allen*, 442 U.S. at 157. The Court in *Allen* left open the possibility that when the inference is the "sole and

missive presumption [ ] allows - but does not require - the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one," it does not "place [a] burden of any kind on the defendant" and is consistent with the Court's burden of proof jurisprudence.[213]

Unlike a permissive presumption, a mandatory presumption instructs the jury that it must infer the presumed, elemental fact if the State proves the predicate facts.[214] "A mandatory presumption may be either conclusive or rebuttable . . . . A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption."[215] In contrast, "[a] rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted."[216]

In *Ulster v. Allen*,[217] the Court suggested that mandatory presumptions may be upheld if the proved fact is sufficient to support the inference of guilt beyond a reasonable doubt.[218] In later cases,

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sufficient basis for a finding of guilt" it might have to satisfy a more stringent test. *Id.* at 167; *see also* Miller v. Norvell, 775 F.2d 1572, 1575 (11th Cir. 1985) (holding that where the basic fact of presumption was the only evidence of presumed fact, the presumption was unconstitutional where the basic fact did not prove the presumed fact beyond a reasonable doubt).

[213] *See Allen*, 442 U.S. at 157 (stating that a permissive presumption leaves the trier of fact free to reject the inference and does not shift the burden of proof).

[214] *See id.*; *see also* Robinson, *supra* note 212, at 1749 (explaining that "[u]nlike a permissive presumption, a mandatory presumption does not permit the jury to reject the inference based on an independent evaluation of other evidence in the record"). The purpose of the mandatory presumption is to weed out justifications and excuses for the crime that the prosecution does not need to overcome with evidence or address in presenting its case. *See* Jacobson, *supra* note 186, at 1025.

[215] *Franklin*, 471 U.S. at 314 n.2; *see also* Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 197 n.21 (1996) (stating that "[w]ith the conclusive presumption, the crime is now established by proving either the presumed fact or the fact that gives rise to the presumption").

[216] *See Franklin*, 471 U.S. at 314 n.2; *see also* Robinson, *supra* note 212, at 1749 n.1977 (stating that "[a] rebuttable presumption requires the jury to find the presumed element unless the defendant introduces sufficient evidence to persuade the jury that the inference is unwarranted").

[217] 442 U.S. 140 (1979).

[218] *Id.* at 157-60, 166-67 (stating that "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a [mandatory] presumption [that shifts the burden of persuasion] unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt"); *id.* at 169 n.2 (Powell, J., dissenting) (stating that the Court's opinion "suggest[ed] that presumptions that shift the burden of persuasion to the defendant" are

however, the Court has made clear that both conclusive mandatory presumptions and mandatory presumptions which shift the burden of persuasion to the defendant are unconstitutional.[219] The constitutionality of "mandatory presumption[s] that shift only a burden of production to the defendant" is less clear, and the Court has explicitly noted that it has not yet decided the issue.[220] In *Allen*, though, the Court stated that to the extent that a presumption imposes an "extremely low burden of production," such as "being satisfied by 'any' evidence, it may be that its impact is no greater than that of a permissive inference, and it may be proper to analyze [the presumption] as such" in assessing its constitutionality.[221]

Lower courts are split regarding the constitutionality of mandatory presumptions that shift only a burden of production.[222]

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constitutional if "'the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt'").

[219] *See* Sandstrom v. Montana, 442 U.S. 510, 523, 524 (1979) (stating that a presumption which shifted the burden of persuasion was found to be unconstitutional in *Mullaney*, and a conclusive presumption is similarly unconstitutional because it conflicts with the presumption of innocence and the fact-finding function of the jury); *see also* Yates v. Evatt, 500 U.S. 391 (1991) (holding that a mandatory presumption instructing the jury to presume malice from use of a deadly weapon was unconstitutional), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62 (1991); Carella v. California, 491 U.S. 263, 265-66 (1989) (holding that the statute and jury instruction, stating that theft and embezzlement of an automobile could be presumed from the defendant's failure to return the automobile within a certain period of time, "unconstitutionally imposed a conclusive [mandatory] presumption as to the core elements" of the crimes charged and "foreclosed independent jury consideration of . . . the facts").

[220] *See Franklin*, 471 U.S. at 314 n.3; *see also* LaFave, *supra* note 165, § 3.4(c), at 218 (stating that the law regarding "mandatory rebuttable presumptions is not entirely clear"); *cf. Mullaney*, 421 U.S. 684, 702-703 n.31 (suggesting that a mandatory presumption shifts a "production burden to the defendant [and] [ ] must satisfy certain due process requirements").

[221] *See* 442 U.S. at 157-58 n.16.

[222] *Compare* Davis v. Allsbrooks, 778 F.2d 168, 172 (4th Cir. 1985) (stating that a mandatory presumption involving an element of the offense is permissible where it is employed so as to merely "shift a burden of production to the defendant" and where "the presumed fact is rationally connected to a proven fact"); Graham v. State, 827 A.2d 874, 884 (Md. Ct. Spec. App. 2003) (suggesting that such a presumption may be constitutional); Virgin Islands v. Parrilla, 7 F.3d 1097, 1103 (3d Cir. 1993) (suggesting that a mandatory presumption, even one which shifts the burden of persuasion, is constitutional under certain circumstances), *with* People v. Watts, 692 N.E.2d 315, 322-23 (Ill. 1998) (holding that "mandatory [rebuttable] presumptions which shift the burden of production to the defendant are unconstitutional" because they relieve the state of its burden of proving the element in question beyond a reasonable doubt and can result in a directed verdict); State v. Leverett, 799 P.2d 119, 124 (Mont. 1990)

The arguments against the constitutionality of these presumptions are similar to those regarding the constitutionality of shifting a burden of production to the defendant on an offense element.[223] It is argued that mandatory presumptions that shift a burden of production to the defendant violate the constitutionally required burden of proof and the right to trial by jury because they require the trial judge or jury to decide the case in accordance with the presumption.[224] It is not clear that burden of production shifting mandatory presumptions are unconstitutional, however. Unlike affirmative defenses which shift the burden of production on an element of the offense to the defendant, a mandatory presumption requires the government to prove the offense element beyond a reasonable doubt before the defendant is required to produce evidence, and the Court has disagreed with the notion that an unconstitutional presumption is "equivalent to a directed verdict" against the defendant.[225]

Currently, there is a strong factual basis for the creation of a presumption that images that appear to be child pornography are in fact child pornography. As Congress found when enacting the PROTECT Act, there is no evidence that *any* virtual child pornography is currently being created.[226] Based on the absence of evidence to the contrary, it would seem that there is at least a rational connection between a finding that an image appears to depict an actual child and the conclusion that the image does in

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(stating that presumptions which are "presented to the jury in a manner which places a burden of production on the defendant" are unconstitutional).

[223] *See supra* notes 186-203 and accompanying text.

[224] Many scholars have argued that these presumptions are unconstitutional. *See, e.g.*, WRIGHT & GRAHAM, *supra* note 194, at § 5146 (1977) (stating that production shifting mandatory presumptions are unconstitutional because a directed verdict cannot be entered against a defendant); Day, *supra* note 180, at 439 n.140 (stating that a production shifting mandatory presumption may unconstitutionally compel a defendant to present evidence because failure to rebut the presumption will result in mandatory issue default); Jacobson, *supra* note 186, at 1021; Note, *Presumptive Intent Jury Instructions After* Sandstrom, 1980 WIS. L. REV. 366, 374 (1980) (arguing that "presumption[s] [that] place a production burden on the defendant raise significant constitutional questions"); Sundby, *supra* note 137, at 500-501 n.163 (discussing potential constitutional problems with presumptions shifting a burden of production and stating that "a failure to meet the burden of production could be characterized as a directed verdict").

[225] *See* Rose v. Clark, 478 U.S. 570, 581 (1986) (stating that an unconstitutional presumption is not equivalent to a directed verdict because the jury still must find "every fact necessary to establish every element of the offence beyond a reasonable doubt").

[226] *See supra* notes 96-98 and accompanying text.

fact depict an actual child. Indeed, currently the connection appears to be true beyond a reasonable doubt. A permissive presumption informing the jury that it may make such a connection would thus be constitutional, and a mandatory rebuttable presumption that shifts only a burden of production to the defendant may also be constitutional.[227]

A presumption would help the government guide jury decision-making in child pornography cases to achieve its stated goal of preventing acquittals based on flimsy defense claims that the images at issue might not depict actual children.[228] A presump-

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[227] These presumptions would not be constitutional if the Court does not allow presumptions in cases that raise First Amendment issues. In Virginia v. Black, 538 U.S. 343 (2003), the plurality opinion, joined by four Justices, criticized a "prima facie evidence" provision in a cross-burning prosecution which informed the jury that it could find that the defendant burned the cross with "intent to intimidate" from the fact of cross-burning itself. *Id.* at 363-64. The plurality noted that "[t]he prima facie [ ] provision [would] permit a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense," and that the "provision ma[de] it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." *See id.* at 365. Both Justice Scalia and Justice Thomas criticized the plurality's treatment of the prima facie provision and argued that it was constitutional. *See id.* at 369-79 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 395-400 (Thomas, J., dissenting). However, Justice Souter, joined by two other Justices in an opinion concurring in the judgment in part and dissenting in part, also criticized the prima facie provision. *See id.* at 385-87 (Souter, J., concurring). Although it would seem that a majority of the Justices believed the prima facie provision was unconstitutional, it is difficult to state conclusively that a majority of Justices believe that all presumptions are unconstitutional in criminal cases that raise First Amendment issues. The plurality opinion criticized the prima facie provision because "a burning cross is not always intended to intimidate" and stated that the provision made "no effort to distinguish among [ ] different types of cross-burnings." *Id.* at 365-66. Thus, it could be the case that the plurality simply did not think that the connection between the fact of cross-burning and cross-burning with intent to intimidate was rational. If so, the plurality simply applied the traditional test for permissive presumptions. In any case, even if a stricter test is required in cases that raise First amendment issues, such as having to prove the connection beyond a reasonable doubt, in child pornography cases the connection between the fact that images look like they depict actual minors and the conclusion that images actually depict minors may satisfy the test.

[228] *See supra* note 101 and accompanying text. A mandatory rebuttable presumption would easily fit into the current statutory scheme. The basic fact, that an image looks like it depicts an actual child, would be the same finding that the jury is required to make under § 2256(8)(B). *See supra* note 84 and accompanying text (explaining that the jury is required to find that § 2256(8)(B) is satisfied if "an ordinary person viewing the depiction" would conclude that the image depicts an actual child). If the image looks like it depicts an actual child, the defendant would be required to produce evidence that the image does not depict an actual child, a burden identical to that imposed by the affirmative

tion may not be a viable long-term solution to the government's virtual child pornography problem, however. While a presumption may be effective in the short-term because no virtual child pornography is currently being produced, if virtual child pornography becomes as prevalent as the government fears, or if more courts decide that virtual child pornography can be easily produced, the factual basis for the presumption would be undermined.[229] If, for example, virtual child pornography were to flood the child pornography market, there would be no basis for concluding that an image depicts an actual child just because it appears to depict an actual child.[230] In such a situation, even a permissible presumption might not be constitutional.

VI. The Future of Child Pornography Prosecutions

The government is currently quite successful in prosecuting child pornography cases.[231] In the future, if virtual child pornography floods the market as the government fears it may, and the government is not able to develop new methods of proving that images depict actual children, the government's ability to successfully prosecute many child pornography cases will undoubtedly be compromised.[232] The government will still be able to prosecute

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defense in § 2252A(c) if it is interpreted as placing only a burden of production on the defendant. *See supra* notes 170-75. If the defendant's production burden is met, the government would have the burden of convincing the trier of fact that the image in question depicts an actual child.

[229] *See supra* note 126 and accompanying text.

[230] In United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003), the Tenth Circuit held that because imaging technology has not advanced to the point where indistinguishable images are possible, "[j]uries are still capable of distinguishing between real and virtual images . . . ." *Id.* at 1142.

[231] *See supra* notes 117-25 and accompanying text.

[232] This could also occur if defendants become successful at disguising images of actual child pornography to make it difficult or impossible to determine whether actual minors are depicted. *See supra* notes 100-03 (discussing this potential). As described in *supra* notes 97-98 and accompanying text, in contrast to the CPPA where Congress aggressively proclaimed that virtual child pornography was being produced, in enacting the PROTECT Act Congress found that the cost of producing virtual child pornography will remain prohibitively expensive for the foreseeable future. If Congress underestimated future developments in technology, or the capabilities of current technology, virtual child pornography could flood the market sooner than Congress expected. Regardless of whether Congress's findings in enacting the PROTECT Act are accurate, it seems probable that at some point, now or in the future, virtual child pornography will be produced. Additionally, the government should not have to worry about the constitutionality of proscribing visual depictions that have been "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct" because these images are covered by § 2256(8)(C),

cases where it can specifically identify the child depicted or have an expert testify that "an image predates [morphing] technology" or otherwise give an opinion that an image likely depicts an actual child.[233] But these methods have limitations and would only be applicable in some, but not all, cases.[234] If the Court adheres to its statements in *Free Speech* that virtual child pornography cannot be proscribed as a means of enabling the government to combat actual child pornography, the government could lose the benefit of the child pornography exception to the First Amendment for at least some child pornography cases.[235]

Losing the child pornography exception would not necessarily mean that the government could no longer prosecute cases involving sexually explicit images of children. Before the Court's decision in *Ferber* announcing the child pornography exception, the government prosecuted sexually explicit images of children under the *Miller* obscenity standard, believing at the time that almost all of the child pornography on the market could be prosecuted under the federal obscenity laws.[236] Even now, over twenty years after the Court announced in *Ferber* that the government is not

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which was not challenged in *Free Speech*. Identifying such images and proving that they depict actual children, however, may become more difficult in the future. *See supra* note 54.

[233] *See* Collins, *supra* note 78 (describing these methods of establishing that images depict actual minors but arguing that each method has weaknesses). Of course, the government may be able to develop new methods of proving that an image depicts an actual child. *See, e.g.*, *supra* note 202 and accompanying text (suggesting that the government could construct a database of images of known child pornography victims).

[234] *See generally* Collins, *supra* note 78.

[235] *See supra* notes 22-33 and accompanying text (describing the child pornography exception to the First Amendment announced in *Ferber*). The Court might respond, as it did in *Free Speech*, by speculating that "[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market . . .[because] [f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 254 (2002). The argument that virtual child pornography will drive all actual child pornography from the market is suspect. *See* PROTECT Act, Pub. L. No. 108-21, § 501(12), 117 Stat. 650, 678 (2003) (stating that "the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children" and "that there is no evidence" that production of virtual child pornography would stop the production of actual child pornography). Even if the Court's statement is true for some pornographers, it is highly implausible that *all*, or even most, of those who sexually abuse children, and memorialize the abuse through photographic images, will suddenly stop doing so once virtual child pornography becomes available.

[236] *See supra* note 20. Although such statements are purely speculative, the National Center for Missing and Exploited Children recently opined "that the

constitutionally required to prove that child pornography is also obscene, the government is no stranger to using obscenity statutes to prosecute cases involving sexually explicit images of minors. In aftermath of the *Free Speech* decision, the Attorney General announced that the Department of Justice would use the federal obscenity statutes as necessary to prosecute child pornography in order to avoid the requirement of proving that images depict actual minors.[237]

In the PROTECT Act, the government further explored the idea of using obscenity statutes in cases involving sexually explicit images of minors in order to avoid having to prove that the images depict actual minors. Section 504 of the PROTECT Act created a new statute, 18 U.S.C. § 1466A, which modifies the *Miller* standard for obscenity in cases involving sexually explicit images of children.[238] Section 1466A contains four separate obscenity provisions covering sexually explicit images of children.[239] While new § 1466A(a)(1) and (b)(1) merely proscribe images of minors that are "obscene," and punish violators as though they had been convicted of a child pornography crime, § 1466A(a)(2) and (b)(2) both contain an obscenity provision which eliminates the first two prongs of the *Miller* standard.[240]

Obscenity is not defined by statute, but rather by the test provided by the Court in *Miller*, and the PROTECT Act is an attempt to modify the Court's definition of obscenity as it relates to images of children.[241] Significantly, in cases under § 1466A(a)(2) and (b)(2) there is no requirement that an average person, applying contemporary community standards, would find that an image, taken as a whole, appeals to the prurient interest or that the

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vast majority . . . of all child pornography would be found to be obscene by most" fact-finders. *See* S. REP. No. 108-002, 108th Cong. 23 (2003).

[237] *See* Attorney General, Response to Supreme Court Decision in Ashcroft v. Free Speech, DOJ Conference Center (April 16, 2002) (transcript *at* http://www.usdoj.gov/criminal/ceos/ashcroft_freespch.htm); *see also* United States v. Dodds, 347 F.3d 893, 895-902 (11th Cir. 2003) (describing how the defendant was successfully prosecuted under both child pornography and obscenity statutes).

[238] *See* PROTECT Act § 504 (codified as amended at 18 U.S.C. § 1466A); *see also supra* notes 18-19 and accompanying text (describing the *Miller* standard for obscenity).

[239] *See* PROTECT Act § 504 (codified as amended at 18 U.S.C. § 1466A).

[240] *See* PROTECT Act § 504 (codified as amended at 18 U.S.C. § 1466A).

[241] Others have proposed the elimination of some of the *Miller* elements for certain types of pornography. *See, e.g.*, Bruce A. Taylor, *Hard-Core Pornography, A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 276 (1987) (advocating "that courts [ ] treat hard-core pornography as obscenity per se [because] its commercial production necessarily involves prostitution").

image depicts sexual conduct in a patently offensive way.[242] The only prong of the *Miller* standard required is that the image must "lack serious literary, artistic, political, or scientific value."[243] While it is possible that the Court will allow a modification of the *Miller* standard as applied to sexually explicit images of children because of the government's compelling interest in safeguarding the well-being of minors, the new obscenity provisions in § 1466A(a)(2) and (b)(2) may well be struck down on the basis that they eliminate constitutionally required elements of the obscenity definition.[244]

Even if the new obscenity provisions in the PROTECT Act are upheld, the significance of the possibility that the government could lose the child pornography exception for at least some child pornography cases should not be discounted. In creating the child pornography exception, and rejecting the argument that the government should be limited to proscribing obscene images, the Court in *Ferber* recognized that an obscenity standard is not "a satisfactory solution to the child pornography problem," because an obscenity standard "does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children."[245] Indeed, there are significant

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[242] *See* PROTECT Act § 504.

[243] *See id.*

[244] In defending § 1466A, the government can point to Ginsburg v. New York, 390 U.S. 629, 640-43 (1968), where the Court held that because of the state's interest in the well-being of its children, it could proscribe the distribution of "harmful to minors" material to children even though the material would not be obscene for adults. However, eliminating the first two prongs of the *Miller* test is extremely novel, and the Court could very well hold that all three prongs are constitutionally required. In *Free Speech*, while the Court noted that the age of the subject depicted could be relevant in determining whether a depiction is obscene, the Court stated that the "CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity." Ashcroft v. Free Speech Coalition, 535 U.S. 234 240, 249 (2002); *see also* United States v. Various Articles of Obscene Merch., 709 F.2d 132, 135 (2d Cir. 1983) (stating that "[s]exually-oriented work is not obscene unless all three elements of the *Miller* test are satisfied"). In addition, § 1466A(b)(1) and (b)(2) are constitutionally suspect because they proscribe the possession of obscenity, which the Court found to be unconstitutional in Stanley v. Georgia, 394 U.S. 557 (1969). Nevertheless, a comprehensive analysis of § 1466A is beyond the scope of this Article, which focuses on the deficiencies of using any obscenity statute to prosecute cases involving sexually explicit images of children.

[245] 458 U.S. 747, 761 n.12 (1982) (stating that it is simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation"). Interestingly, Congress itself has stated that even a modified

differences between the federal child pornography statutes and the obscenity statutes, even a modified obscenity standard such as that found in § 1466A, that make obscenity statutes less desirable for the prosecution of cases involving sexually explicit images of minors.[246] Two differences in particular should be highlighted.

First, the Court has held that to avoid the risk of prior restraint on speech, the government must use "rigorous procedural safeguards" before it may seize material which it considers to be obscene, and material may not be taken out of circulation until there has been a determination of obscenity after an adversarial hearing.[247] In contrast, because child pornography is afforded less constitutional protection than obscenity and involves objective criteria by which to determine its unlawfulness, courts do not require a prior adversarial hearing before the government may seize all copies of the suspected child pornography.[248] Even though two of the provisions in § 1466A have eliminated the first two prongs of the *Miller* test, § 1466A will likely be treated as an obscenity statute and not a child pornography statute. In a case involving a state child pornography statute which contained an exception for images possessing artistic merit, the Tenth Circuit held that a pre-seizure adversarial hearing was constitutionally

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obscenity standard "will not meet the government's compelling interest in combating child pornography and preventing harm to children." S. REP. No. 108-002, 108th Cong. 10 n.7 (2003) (discussing an obscenity provision similar to § 1466A).

[246] *Ferber* itself illustrates that it is often easier to convict under a child pornography statute than an obscenity statute. The *Ferber* case involved films "devoted almost exclusively to depicting young boys masturbating," yet the jury acquitted the defendant of the obscenity charges. 458 U.S. at 752.

[247] *See* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 62-63 (1989); *see also* Quantity of Copies of Books v. Kansas, 378 U.S. 205, 213 (1964) (holding that a prior judicial determination of obscenity was required before any large-scale seizure of materials for the purpose of destruction as contraband could occur).

[248] *See* United States v. Kimbrough, 69 F.3d 723, 727-28 (5th Cir. 1995) (stating that "[i]dentification of visual depictions of minors engaging in sexually explicit conduct," in contrast to a legal determination that materials are obscene, "is a factual determination that leaves little latitude to the [police] officers"); United States v. Koelling, 992 F.2d 817, 822 (8th Cir. 1993) (noting that while there is some chance of a "mistaken seizure," "[m]ost minors look like minors and most adults look like adults, and most of the time most law enforcement officers can tell the difference"); United States v. Smith, 795 F.2d 841, 847 (9th Cir. 1986); Boggs v. Merletti, 987 F. Supp. 1, 8 (D.D.C. 1997), *aff'd on other grounds sub nom*, Boggs v. Rubin, 161 F.3d 37, 41 (D.C. Cir. 1998) (indicating that no prior adversarial hearing is required before seizure).

required because the statute had incorporated the third prong of the *Miller* test.[249]

Second, pornographic material that is not child pornography, including that under § 1466A, is not obscene if, viewed "as a whole," it contains "serious literary, artistic, political or scientific value."[250] It would be erroneous to assume that material that could be prosecuted as child pornography necessarily has no serious value. One of the reasons why the Court rejected an obscenity standard in *Ferber* for child pornography was because a work can contain "serious literary, artistic, political, or scientific value [yet] may nevertheless embody the hardest core of child pornography."[251] The Court in *Free Speech* noted that its earlier decision in "*Ferber* did not hold that child pornography is by definition without value" and indicated that "some works in this category might have significant value. . . ."[252] Unlike the first two prongs of the *Miller* standard, the serious value prong is an objective one, is not based on community standards, and requires the government to prove beyond a reasonable doubt that a "reasonable person" would find that the material lacks "serious literary, artistic, political or scientific value."[253] Because it is an objective standard, "a fact finder's determination that a work 'lacks serious literary artistic, political, or scientific value' is 'particularly amenable to appellate review.'"[254]

At this point in time, it is difficult to estimate how many cases involving sexually explicit images of minors will have to be prose-

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[249] *See* Camfield v. Okl. City, 248 F.3d 1214, 1227 (10th Cir. 2001).

[250] *Compare* Miller v. California, 413 U.S. 15, 24 (1973) (holding that material is not obscene if it contains "serious literary, artistic, political, or scientific value"), *with* United States v. Matthews, 209 F.3d 338, 345 (4th Cir. 2000) (contrasting child pornography with obscenity and holding that there is no First Amendment defense in child pornography cases for material with "serious literary, artistic, political, or scientific value").

[251] *Ferber*, 458 U.S. at 761. As the Court pointed out, "it is irrelevant to the [abused] child [ ] whether . . . the material . . . has literary, artistic, political or social value." *Id.*

[252] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 248, 251 (2002) (stating that the "artistic merit of a work does not depend on the presence of a single explicit scene" (citing Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 419 (1966) (plurality opinion))).

[253] *See* Pope v. Illinois, 481 U.S. 497, 500-01 (1987).

[254] *See* United States v. Various Articles of Merch., Schedule No. 287, 230 F.3d 649, 653 (3d Cir. 2000) (quoting Smith v. United States, 431 U.S. 291, 305 (1977)). Indeed, it is probable that some courts will have a very broad definition of "serious value." *See, e.g.*, *id.* at 658 (holding that magazines depicting nude children were not obscene as a matter of law because they "champion nudists' alternative lifestyle").

cuted under obscenity statutes if virtual child pornography becomes widely available and the Court refuses to allow any restrictions on virtual child pornography. What is clear, though, is that the government is at risk of losing the benefit of the child pornography exception to the First Amendment for at least some cases involving sexually explicit images of minors. An obscenity statute, even a modified one, is not a perfect substitute for a child pornography statute, and the government will undoubtedly lose, or choose not to pursue at all, cases prosecuted under obscenity statutes that it could have won if they had been prosecuted under child pornography statutes.[255]

VII. CONCLUSION

Perversely, at a time when the child pornography problem is growing rapidly because of advances in technology, prosecutions under child pornography statutes face an uncertain future. In passing the CPPA in 1996, Congress acted hastily, and the result was a badly drafted and overbroad virtual child pornography statute that was enacted before such a prohibition was necessary. Recently, in the PROTECT Act, Congress enacted a second statute regulating virtual child pornography that contains similar problems. If the Court adheres to the principles it espoused in *Free Speech*, it is unlikely that any statute proscribing virtual child pornography, regardless of how narrowly it is drafted, could pass constitutional muster. While in the past the Court has been deferential to the government when reviewing the constitutionality of child pornography statutes, in *Free Speech* it drew a bright line between actual child pornography and virtual child pornography. If virtual child pornography ever becomes widely available, and the government is unable to meet its burden of proving that images depict actual children in a significant number of cases, the government's options will be limited, and its efforts to destroy the child pornography market may be diminished. In such a scenario, the interesting question will be whether the Court is as committed to free speech as it indicated in *Free Speech*.

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[255] States which do not have a modified obscenity statute such as § 1466A, and thus will have to prove that an image satisfies all three of the *Miller* elements, will face a bigger challenge than the federal government and may consequently lose more cases.