PROTECTING THE LEAST OF THESE: A NEW APPROACH TO CHILD PORNOGRAPHY PANDERING PROVISIONS

STEPHEN T. FAIRCHILD†

ABSTRACT

The pandering of child pornography—selling, distributing, or conveying the impression that one possesses sexually graphic images of children for sale or distribution—facilitates actual harm to children, such as molestation. Yet legislative attempts to curb pandering inevitably implicate concerns about panderers' First Amendment rights. This Note argues that in balancing the vulnerability of children against the power of the First Amendment, the law must shift to focus more on the subject of this grievous harm—children. This approach will appropriately extend protection to a subset of the population that is least able to protect itself.

INTRODUCTION

The advent of the Information Age has presented new battlefields for government regulation and individual rights to confront each other. Faced with mounting evidence of growth in Internet child pornography,[1] Congress has enacted several bills

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1. *See, e.g.*, *Stopping Child Pornography: Protecting our Children and the Constitution: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 60–61 (2002) [hereinafter *Stopping Child Pornography*] (prepared statement of Ernest E. Allen, president and chief executive officer of the National Center for Missing & Exploited Children, and Daniel S. Armagh, director of the Legal Resource Division, National Center for Missing & Exploited Children) (testifying to 60,000 reports of child pornography in over four years since the establishment of an Internet "CyberTipline" site); *see also infra* Part I.A.

targeting the production, distribution, and advertising of this material.[2] As justification, Congress based these laws on voluminous findings detailing how the market for child pornography has been fueled by the addition of materials that are easily produced using emerging technologies, how the Internet engenders evasive dissemination of these materials, and how these materials are linked to other harms to children such as sexual abuse.[3] Even in the face of these compelling factual findings, however, many attempts at regulating the child pornography market have abutted an individual right that is equally compelling in American tradition—the First Amendment. In response to every law that Congress has passed to curb the further growth of child pornography, litigants have successfully raised claims that the law infringes on their fundamental right to express themselves, effectively arguing that child pornography is no less a valid mechanism of expression than provocative political blogs, advertising banners with potentially offensive messages at school-sanctioned events,[4] or flag burning.[5]

Because of the free speech interests that child pornography laws inevitably implicate, a large body of scholarship evaluates the interplay between such laws and the First Amendment.[6] In particular, the Supreme Court's 2002 decision in *Ashcroft v. Free Speech Coalition*,[7] holding virtual child pornography to be a form of protected speech, engendered a great deal of discussion in the

2. *E.g.*, Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT), Pub. L. No. 108-21, 117 Stat. 650 (codified in scattered sections of 18, 21, 28, and 42 U.S.C. (Supp. IV 2004)); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009–26 (codified in 18 U.S.C. §§ 2251–2260 (2000), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)); *see also infra* Part II.

3. *See infra* Part I.A.

4. *See* Morse v. Frederick, 127 S. Ct. 2618, 2622, 2629 (2007) (holding a student's First Amendment rights were not violated when he was suspended after unfurling a banner that read "BONG HiTS 4 JESUS").

5. *See* Texas v. Johnson, 491 U.S. 397, 420 (1989) (permitting flag burning as a means of political expression).

6. *See, e.g.*, Amy Adler, *Child Pornography Law and the Proliferation of the Sexualized Child*, *in* CENSORING CULTURE: CONTEMPORARY THREATS TO FREE EXPRESSION 228, 228 (Robert Atkins & Svetlana Mintcheva eds., 2006) (asserting that "child pornography has spawned an extraordinary and troubling body of case law" under the First Amendment). Professor Adler notes, however, that the body of articles dealing with child pornography is rather limited compared to other areas of First Amendment law, and even student notes that treat the subject have often dealt with non-First Amendment issues such as statutory interpretation. Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 924–25 & n.15 (2001).

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

academic literature.[8] In contrast, the effect of so-called "pandering provisions" has kindled little scholarship, in part because *Free Speech Coalition* touched only tangentially on them.[9] One case dealt head-on with the federal pandering statute and found it both overbroad and vague under First Amendment precedent.[10] The government's strong interests in upholding pandering legislation together with the vigorous defense mounted by those accused of pandering make this a salient topic for legal exploration, especially given the wide-ranging impacts of this litigation on American communities.

In the conflict between the power of the First Amendment and the protective intent of child pornography legislation (particularly pandering legislation), a focus on children as the object of the law's shielding power is not only normatively ideal, but also constitutionally necessary. The Constitution's guarantees of individual rights protect not just those who have the luxury to claim their succor, but also "the least of these"[11]—those vulnerable groups who may not even know they are entitled to the law's protection. Part I of this Note documents the extent to which easy access to Internet child pornography has fueled a market for such material, and has enhanced the link between child pornography and the facilitation of other crimes against children such as molestation. Part I further submits that, though the vast majority of Americans finds child pornography unacceptable, social norming influences within the small, insular community of child pornography consumers create an impression that this type of behavior is natural.[12] In Part II, the Note chronicles the

8. *See generally* Susan S. Kreston, *Defeating the Virtual Defense in Child Pornography Prosecutions*, 4 J. HIGH TECH. L. 49 (2004) (suggesting prosecutorial methods to prove that a child featured in pornographic material is real); Arnold H. Loewy, *Taking Free Speech Seriously: The United States Supreme Court and Virtual Child Pornography*, 1 FIRST AMENDMENT L. REV. 1 (2003) (praising the Supreme Court's decision protecting virtual child pornography); Sara C. Marcy, Recent Development, *Banning Virtual Child Pornography: Is There Any Way Around* Ashcroft v. Free Speech Coalition*?*, 81 N.C. L. REV. 2136 (2003) (chronicling the legislative response to the Supreme Court's rejection of the Child Pornography Prevention Act (CPPA) in *Free Speech Coalition*).

9. Pandering is "[t]he act or offense of selling or distributing textual or visual material (such as magazines or videotapes) openly advertised to appeal to the recipient's sexual interest." BLACK'S LAW DICTIONARY 1142 (8th ed. 2004). The federal pandering provision at issue in recent litigation is codified at 18 U.S.C. § 2252A(a)(3)(B) (Supp. IV 2004).

10. United States v. Williams, 444 F.3d 1286, 1305, 1307 (11th Cir. 2006), *cert. granted*, 127 S. Ct. 1874 (Mar. 26, 2007) (No. 06-694).

11. *Matthew* 25:40 (King James).

12. The passage of child pornography–protective legislation is not the imposition, by an especially vociferous interest group, of self-righteous moral norms on an unreceptive society. *Cf.*

ongoing seesaw between enactment of legislation designed to quell the demand factors that drive the market for child pornography (with an emphasis on pandering provisions), and the subsequent overturning of such legislation by the courts on First Amendment grounds. Part III offers a short critique of the reasoning in two such decisions. Part IV argues that, because children are a fundamentally different and more vulnerable subset of the population, a child-centered re-conceptualization of this area of First Amendment jurisprudence is necessary to settle the free speech conflicts that pandering legislation presents.

I. THE NATURE OF THE PROBLEM

A. Child Pornography and Sexual Abuse of Children

The majority of the American public opposes child pornography[13] because the promulgation of sexual images involving those who are legally unable to consent harms children.[14] Capturing children in sexually graphic poses recorded in a permanent medium stigmatizes the child subjects, who live with the specter of pornographic photos following them around for generations.[15] Moreover, though the definition of child pornography encompasses actions other than sexual intercourse,[16] the production of child pornography often involves adults performing sexual acts with children, which constitutes a crime under relevant statutory rape laws.[17] Thus, the use of children in sexually explicit material,

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Lawrence v. Texas, 539 U.S. 558, 582–83 (2003) (O'Connor, J., concurring in the judgment) (decrying mere disapproval by the majority as a justification for morality-based legislation). Rather, the majority of the American people has, through legislative channels, identified a problem resulting in actual harm to children and attempted to take measures to remedy it.

13. Child pornography is statutorily defined, and will be used for purposes of this Note, as a visual depiction, if "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a)(1)(A) (2000); *id.* § 2256(8)(A). A minor is "any person under the age of eighteen years." *Id.* § 2256(1).

14. *See infra* text accompanying notes 39–42.

15. 18 U.S.C. § 2251 note (2000) (Congressional Findings of the 104th Cong.) ("[W]here children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years.").

16. *See* 18 U.S.C. § 2256(2)(B)(iii) (Supp. IV 2004) (including "graphic or simulated lascivious exhibition of the genitals or pubic area of any person" in the definition of what constitutes "sexually explicit conduct").

17. *See, e.g.*, KY. REV. STAT. ANN. § 510.040(1) (LexisNexis 2006) ("A person is guilty of rape in the first degree when . . . [h]e engages in sexual intercourse with another person who is

according to Congress's findings, itself constitutes sexual abuse.[18] Demand for these types of images is high, as evidenced by the size of the market: the most reliable estimates place the financial activity generated by child pornography in the multi-million dollar range, though some figures have placed that value in the billions.[19] Congress has found a multi-million dollar interstate market for child pornography[20] that harms children's health and is detrimental to all of society.[21] The Internet's fast communications and relative anonymity make it easy to exchange this material with others who have the same interests. Although the precise volume of Internet sites dedicated to sharing child pornography is difficult to estimate due to the risks involved in revealing oneself as a consumer of this illegal product,[22] one child pornographer estimated the number of new posts to the most well-known child pornography Usenet group at between 5,000 to 7,000 per week.[23] In a year-long period between 2000 and 2001, United States law enforcement agencies arrested an estimated 2,577 people for crimes involving online sexual exploitation of minors, of

incapable of consent because he . . . [i]s less than twelve (12) years old."); WASH. REV. CODE § 9A.44.073(1) (2006) ("A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.").

18. 18 U.S.C. § 2251 note (2000) (Congressional Findings of the 104th Cong.) ("[T]he use of children in the production of sexually explicit material . . . is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved.").

19. PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 34 (2001).

20. As Part I.B makes clear, a large swath of America disapproves of child pornography and presumably does not engage in it. If this is true, why does child pornography generate such a large market? One explanation is that even if relatively few people traffic in child pornography, they do so on a massive scale involving thousands of pictures for sale. *But see id.* at 91 (arguing that estimating the value of the child pornography "industry" is misleading because most people who trade child pornography, even if in large volumes, do so out of non-economic motivations).

21. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(1)(A), 120 Stat. 587, 623 (to be codified at 18 U.S.C. § 2251 note) ("The illegal production, transportation, distribution, receipt, advertising and possession of child pornography . . . is harmful to the physiological, emotional, and mental health of the children depicted in child pornography and has a substantial and detrimental effect on society as a whole."); *see also id.* § 501(1)(B) ("A substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals openly advertising their desire to exploit children and to traffic in child pornography.").

22. JENKINS, *supra* note 19, at 56.

23. *Id.* at 55.

which 36 percent were for child pornography.[24] Of those arrested, two-thirds had child pornography in their possession.[25] One sting operation alone netted 125 subscribers to child pornography websites.[26]

Even more troublesome is the clear causal link between the viewing of child pornography and child molestation. Though viewing child pornography does not, of course, inexorably lead to sex crimes against children, statistics suggest that the connection between viewing child pornography and committing subsequent sexual abuse against children is significant. One study cited in congressional testimony found that at least 80 percent of purchasers of child pornography actively abuse children,[27] and "a 1984 study by the Chicago Police Department confirmed that in almost 100% of their annual child pornography arrests, detectives found photos, films, and videos of the arrested individual engaging in sex with other children."[28] A 2000 study by the Bureau of Prisons revealed that, of sixty-two offenders convicted of either child pornography or traveling to engage in sex with a minor, 76 percent admitted to prior unprosecuted sex crimes against children.[29] A chief from the FBI's Crimes Against Children Unit testified that "[t]here is a clear correlation between sexual abuse of children and the collection of child pornography," and cited an FBI sting operation that netted ninety-two collectors of child pornography, thirteen of whom admitted having sexually molested forty-eight children total.[30] He testified that images of child pornography "whet [child predators'] appetites for real world sexual encounters with children."[31] Thus, child pornography is causally linked to actual child molestation:

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24. MONIQUE MATTEI FERRARO & EOGHAN CASEY, INVESTIGATING CHILD EXPLOITATION AND PORNOGRAPHY: THE INTERNET, THE LAW, AND FORENSIC SCIENCE 9 (2005).

25. *Id.*

26. *Scout Leader, Counselor Arrested in Child-Porn Case*, ORLANDO SENTINEL, Oct. 19, 2006, at A7.

27. *Stopping Child Pornography*, *supra* note 1, at 65.

28. *Id.*

29. *Enhancing Child Protection Laws after the April 16, 2002 Supreme Court Decision,* Ashcroft v. Free Speech Coalition: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. 6 (2002) [hereinafter *Heimbach Statement*] (statement of Michael J. Heimbach, unit chief, Crimes Against Children Unit, Federal Bureau of Investigation).

30. *Id.*

31. *Id.*

"[Researchers] believe that child pornography is central to pedophiliac psychology, social orientation, and behavior. . . . The trading of pornography with other pedophiles may lead to exchanging victims for their sexual services."[32]

Thus, to say that child pornography is just another form of speech, worthy of protection under the First Amendment no matter how repugnant its message, is not accurate. Rather, child pornography is better described as a tool used to incite some cases of child molestation. This incitement facilitates more abuse by reinforcing the idea that it is acceptable for adults to have sexual relations with children—an illegal act recorded by much child pornography.[33] Such imminently illegal incitement is never entitled to First Amendment protection.[34] Furthermore, child molesters can use images of child pornography to become aroused, to persuade children to acquiesce in sexual activity, or to coerce the child into participating in sex through blackmail.[35] Virtual child pornography,[36] which constitutes protected speech under the Supreme Court's *Free Speech*

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32. DIANE SCHETKY & ARTHUR GREEN, CHILD SEXUAL ABUSE: A HANDBOOK FOR HEALTH CARE AND LEGAL PROFESSIONALS 154 (1988); *see also* KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR LAW-ENFORCEMENT OFFICERS INVESTIGATING CASES OF CHILD SEXUAL EXPLOITATION 31 (3d ed. 1992), *available at* http://www.skeptictank.org/nc70.pdf ("The pedophile can also use the computer to troll for and communicate with potential victims with minimal risk of being identified. . . . The child can be indirectly 'victimized' through the transfer of sexually explicit information and material or the child can be evaluated for future face-to-face contact and direct victimization."); *id.* at 28 ("[I]n most cases the arousal and fantasy fueled by [child] pornography is only a prelude to actual sexual activity with children.").

33. *Enhancing Child Protection Laws after the April 16, 2002 Supreme Court Decision,* Ashcroft v. Free Speech Coalition: *Hearing of the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Judiciary Comm.*, 107th Cong. 14 (2002) [hereinafter *Allen Statement*] (statement of Ernest E. Allen, president and chief executive officer, National Center for Missing & Exploited Children) ("[C]hild pornography is not like other speech. It is a molestation tool. It is a tool used by predators and pedophiles to seduce and manipulate, to break down inhibitions, to make sex between adults and children appear normal.").

34. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

35. *Heimbach Statement*, *supra* note 29, at 33; *Allen Statement*, *supra* note 33, at 29.

36. Virtual child pornography can include visual depictions of sexually explicit conduct when "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," 18 U.S.C. § 2256(8)(B) (Supp. IV 2004), or "such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," *id.* § 2256(8)(C) (2000).

Coalition decision, can be used to lower children's inhibitions in preparing them for sexual activity with adults.[37]

Importantly, the criminal abuse of children is directly linked with the pandering of child pornography as well as the possession, production, and distribution of such material. Pandering is "[t]he act or offense of selling or distributing textual or visual material (such as magazines or videotapes) openly advertised to appeal to the recipient's sexual interest."[38] Such advertising, even when there is no underlying material, can lead to the intent to commit sex crimes against children:

> [W]e are operating an undercover investigation after we took down a child pornography website. We actually, *without putting any images up, gave the impression* that we could provide that content. We had people sending us e-mail telling us that they wanted bestiality involving children. They wanted torture of pre-teen girls. We had people who were willing to pay to have sex with children. . . . [W]e arrested a 55-year-old man who owned a horse ranch in Detroit. He traveled to Dallas thinking he was going to have sex with an 8-year-old girl. He sent us child pornography electronically over the Internet before he arrived . . . to show to the children. He showed them pictures of himself exposed . . . .[39]

Here, the man to whom the child pornography was pandered not only had imminent intent to have sex with an underage girl, but also actually committed a sex-related crime (indecent exposure). The advertising of child pornography materials, in this case, brought a pedophile to the brink of committing a sexual crime involving a minor, with only the intervention of law enforcement standing in his way.

B. Social Norming

Whether because of the links between child pornography and molestation, or because of shared moral concerns, a large majority of the American public opposes child pornography. When asked in a

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37. *Heimbach Statement*, *supra* note 29, at 33.

38. BLACK'S LAW DICTIONARY, *supra* note 9, at 1142.

39. *Enhancing Child Protection Laws after the April 16, 2002 Supreme Court Decision,* Ashcroft v. Free Speech Coalition: *Hearing of the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Judiciary Comm.*, 107th Cong. 14 (2002) (statement of William C. Walsh, lieutenant of police, Youth and Family Support Division, Dallas Police Dep't (emphasis added)).

survey, "[s]ome 92% of Americans say they are concerned about child pornography on the Internet," and 50 percent of Americans described child pornography as the most "heinous" online crime.[40] In the psychological literature, pedophilia is a recognized disorder, and interest in child pornography is one manifestation of this disorder.[41] An American majority, recognizing the harms visited on children through this form of pornography, expressed itself through its legislators and enacted several rounds of legislation designed to condemn child pornography and to combat the problem.[42] The government has a "compelling" interest in protecting children,[43] and this legislation effectuates this protection. Typically, rational actors comport with this legislation because the costs of engaging in child pornography (be they morally or punitively based) far outweigh the benefits. The isolated nature of Internet communities, however, permits the development of communities whose members believe that the benefits of child pornography outweigh its costs.

The influence of a large, diverse community in establishing social norms, and in determining sanctions for their transgression, is an important one. Sanctions are pervasive enforcement mechanisms for social norms, and the deterrent factor against breaking a norm is the potential shame or embarrassment that a transgressor might feel when exposed to society at large.[44] Indeed, the law can act either to encourage the development of new norms[45] or, more powerfully, to

40. Press Release, Pew Internet & American Life Project, Fear of Online Crime (Apr. 2, 2001), *available at* http://www.pewinternet.org/press_release.asp?r=19.

41. *Pedophilia*, *in* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 571 (4th ed. 2000). Individuals with pedophilia often do not feel negatively about their actions because it is an ego-indulging behavior. *Id.*

42. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT), Pub. L. No. 108-21, § 501(13), 117 Stat. 650, 678 ("In the absence of Congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse."); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1)(1), 110 Stat. 3009–26 ("[T]he use of children in the production of sexually explicit material . . . is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved"); Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, § 702(2), 100 Stat. 1783–74 ("Congress has recognized the physiological, psychological, and emotional harm caused by the production, distribution, and display of child pornography by strengthening laws prescribing [sic] such activity . . . .").

43. *See infra* Part II.A.

44. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 915 (1996); *see also id.* at 944 ("Feelings of moral culpability are tightly connected with prevailing social norms.").

45. *See id.* at 958 ("[R]egulation might even consist of direct coercion, designed to generate good norms or to pick up the slack in their absence.").

shape preexisting norms in such a way that people will consistently obey them because of the law's powerful coercive effect.[46] Yet some members of society gain utility through deviating from the norm.[47]

More specifically, a law might express a general consensus against treating people as objects—such as prohibiting the sale of children—because society desires to deter, with official penalties for violations, this type of thinking that violates deontological norms.[48] Congress, recognizing the established norms of the American public, enacted laws relating to child pornography to give meaningful enforcement to morally and empirically based attitudes against the viewing and dissemination of such material and in favor of protecting the children involved in its production.

Child pornographers do not often participate in the larger norms community that disapproves of their stock-in-trade.[49] In fact, the potential anonymity offered by the Internet provides child pornographers with a means to opt out of established social norms; instead, their interactions are limited to the comparatively smaller realm of other child pornographers, who provide a supportive environment that reinforces their actions.[50] They are able to isolate

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46. *See id.* at 958–59 ("[Laws] have an effect in shaping social norms and social meanings. They do this in large part because there is a general norm in favor of obeying the law.").

47. *Id.* at 918–19. The reasons behind this increased utility vary, but may include disparagement of the norm's worth based upon one's own valuation of it, expression of defiance, and/or communication of individual preferences. *Id.*

48. *Id.* at 964.

49. Presumably, if child pornographers regularly participated in extra-legislative institutions of civil society (churches, town hall meetings, community recreational activities, and the like), they would encounter numerous others who would express revulsion at the pornographers' activities. It would take an especially obstreperous objector to an established norm to say, "99 out of 100 people, whom I respect well enough to spend a great deal of time with, think that my activities cause unacceptable amounts of harm to children—yet I will not allow this attitude to change my behavior in the slightest." For commentary on an increasing trend of isolation and detachment from civic commitments in American society, see generally ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

50. Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 549 (2006) ("An Internet-based community, because it permits people to isolate themselves into self-reinforcing groups defined by a single shared interest, can create an atmosphere in which members perceive that there is greater lawlessness than actually exists."). Furthermore, not only can producers of child pornography themselves hide behind the Internet's anonymous façade, but the pandering of child pornography can also minimize the transaction costs to criminals of gaining new information on the availability of their desired materials: "The tools of globalization—mainly the Internet, which offers anonymous, asynchronous communication—also offer offenders a way to obtain expertise at almost no cost." *Id.* at 542.

themselves from other members of society whose opprobrium could deter their conduct. Thus, they lose the benefit of other influences which could shape their perceptions of the inappropriateness of their behavior, and they also begin to believe that their narrow interest is reflective of society as a whole.[51] Their existence in small Internet communities contributes to a renorming process whereby a behavior traditionally condemned as unacceptable (viewing, producing, or disseminating child pornography) becomes acceptable by virtue of the limited community in which it is practiced.

One competing view of Internet communities regards them as facilitative, creating opportunities for interaction with wide varieties of people online without regard to race or gender, and dismisses as "dystopian" those who lament the loss of face-to-face interaction with human beings.[52] But any such heightened online interaction, as well as the development of "broadly supportive communities of intimacy,"[53] depends on an affirmative choice by the population subset at issue—in this case, child pornographers—to engage with individuals holding vastly different views than them. To the extent that child pornographers choose to remain in meaningful contact only with other child pornographers, they lack connections with other "social milieus" and give in to the dominance of their particular online realm.[54] The mere fact of a community's existence does not qualify the community as good; one conception of a good community might balance protection of individual autonomy with formation of bonds to other people and view dimly the arbitrary exclusion of potential

51. As Keenan explains,

> Largely because of the Internet, new communities abound. Traditional communities, because they were defined mostly by geography, included people with a variety of interests. On the Internet, new communities include people who may share only one interest. . . . Such narrow communities are not necessarily bad—one can imagine communities devoted to backgammon or quilting—but they can also be havens for individuals whose preferences put them at odds with the geographic community in which they live or the larger society.

Id. at 548.

52. Barry Wellman & Keith Hampton, *Living Networked On and Offline*, 28 CONTEMP. SOCIOLOGY 648, 649 (1999). Notably, the authors also acknowledge that the lack of any direct feedback in online communications condones the creation of messages that individuals would not normally say to others in person. *Id.* at 650.

53. *Id.* at 651.

54. *But cf. id.* at 652 ("[Living in computer-supported social networks] enhances the ability to connect with a large number of social milieus, while decreasing involvement in any one milieu.").

members from its ranks.[55] Thus, as long as the insular community of child pornographers disregards the disapprobation of a broader swath of society, it functions only as a self-interested and isolated minority.

The establishment of law-backed norms against child pornography in its various forms thus stems not from a "feel good" impulse on society's part, but from an empirically-based awareness that child pornography actually harms children. Furthermore, it is child pornographers who isolate themselves from the broad norms community that condemns their work. Yet these individuals have convinced themselves that their behavior is normal, in part by participating solely in smaller, self-reinforcing norms communities. Child pornography legislation, discussed in Part II, gives force to the large-scale societal consensus against child pornography. Often, however, child pornographers succeed in challenging these efforts on First Amendment grounds.

II. CHILD PORNOGRAPHY AND THE LAW

A. The Evolution of Child Pornography Law

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[56] This promise of protected expression exists, among many other reasons, to protect the right to speak one's conscience freely and to encourage public dialogue concerning a wide variety of views, even if those views are considered vile and repugnant at the time of their airing.[57] Although the First Amendment operates by extending immunity from government regulation to certain forms of speech, obscene speech is an area unprotected by the First Amendment. In *Miller v. California*,[58] the Supreme Court reaffirmed an earlier case, *Roth v. United States*,[59] in determining that states could permissibly regulate obscene matter.[60] The *Miller* Court set forth a three-part test for determining whether given matter was obscene: whether the average person, applying contemporary community standards, would find that the whole work

55. Amitai Etzioni, *Creating Good Communities and Good Societies*, 29 CONTEMP. SOCIOLOGY 188, 189–90 (2000).

56. U.S. CONST. amend. I.

57. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

58. Miller v. California, 413 U.S. 15 (1973).

59. Roth v. United States, 354 U.S. 476 (1957).

60. *Miller*, 413 U.S. at 23.

appeals to the prurient interest; whether the work describes sexual conduct in a patently offensive way; and whether the whole work lacks serious literary, artistic, political, or scientific value.[61] Under this definition, certain materials, even though they depicted sexual conduct, could be protected speech as long as they had the types of value that the Court mentioned; thus, a medical textbook focusing on anatomy and depicting a sex act could be immune from regulation.[62] The Court left open the question of whether depictions of sexual acts involving minors, even if they had artistic or literary merit, could nonetheless be prohibited by the government.[63]

Child pornography first gained widespread attention as a social issue in the mid-1970s.[64] Legislatures at the state and federal levels began to enact laws designed to curb the emerging problem.[65] In 1982, the Supreme Court heard the first challenge to a child pornography law in *New York v. Ferber*.[66] A Manhattan bookseller, Paul Ferber, was convicted under New York's child pornography law[67] for selling to an undercover agent two films of young boys engaging in sexual acts.[68] The New York Court of Appeals reversed the lower court and overturned Ferber's conviction on two grounds.[69] First, the court found the New York statute underinclusive because it did not prohibit the distribution of films of other dangerous activity not involving minors.[70] Additionally, because the statute's language could include materials produced outside New York State, as well as materials containing adolescent sex in a non-obscene manner, the court found the statute overbroad.[71]

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61. *Id.* at 24.

62. *Id.* at 26.

63. Although the dissent considered the question of whether state regulation of the *distribution* of sexually oriented material to minors would be permissible, *id.* at 47 (Brennan, J., dissenting), it did not address the issue of whether the *content* of the material included sexually explicit acts involving minors.

64. JENKINS, *supra* note 19, at 4.

65. *See, e.g.*, S. REP. NO. 95-438, at 5 (1977) ("[Child] pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.").

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

67. N.Y. PENAL LAW § 263.15 (Consol. 2006).

68. *Ferber*, 458 U.S. at 751–52.

69. *Id.* at 752–53.

70. *Id.* at 752.

71. *Id.* at 752–53.

Even though "[t]he Court of Appeals' assumption was not unreasonable in light of [the Supreme Court's] decisions,"[72] the U.S. Supreme Court framed the issue differently from the court of appeals, and treated child pornography as a category distinct from regular obscenity, which was governed by the *Miller* test.[73] Writing for the majority, Justice White enumerated several reasons why "[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children," even at the risk of suppressing some protected expression.[74] First, the Court noted that states have a compelling interest in "safeguarding the physical and psychological well-being of a minor."[75] That very compelling interest justified protecting children, even to the detriment of other constitutionally protected rights.[76] The Court held that preventing children from being sexually exploited and abused fell within the state's compelling interest.[77] The Court deferred to the New York legislature's findings that involvement in child pornography was harmful to a child's health,[78] and cited several studies documenting the harmful effects of sexual exploitation on children later in life and linking children's sexual performances in pornographic materials to molestation by adults.[79]

Second, the Court held that a state could regulate child pornography's dissemination in the interest of closing the distribution network for material involving sexual exploitation of children.[80] Given that the state could identify children as compelling objects of the law's protection, the Court reasoned that the only way to effectively enforce the protection of children would be to eliminate the market for such material by heavily penalizing its distribution or promotion.[81] The Court's third justification recognized that the advertising of

72. *Id.* at 753.

73. *Id.*

74. *Id.* at 756.

75. *Id.* at 756–57.

76. *Id.* at 757. The Court noted the prevalence of child-protecting legislation in other First Amendment conflicts such as statutes prohibiting children's distribution of literature on the street, Prince v. Massachusetts, 321 U.S. 158 (1944), and protecting children from being exposed to non-obscene literature, Ginsberg v. New York, 390 U.S. 629 (1968).

77. *Ferber*, 458 U.S. at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

78. *Id.* at 757–58.

79. *Id.* at 758 n.9.

80. *Id.* at 759.

81. *Id.* at 760.

materials containing child pornography was inherent in the production of these already illegal materials.[82] Thus, advertising child pornography was a type of conduct inevitably incident to and facilitative of its illegal production.[83] Finally, irrespective of whether the visual material in child pornography was legally obscene,[84] the Court held that its value was "exceedingly modest, if not *de minimis*,"[85] and that recognition of child pornography as a category of speech outside the First Amendment's protection was consistent with stare decisis.[86] The Court ultimately held that the New York statute was not impermissibly overbroad, as only a "tiny fraction" of the materials prohibited by the statute would actually be legitimate depictions of child sexual performances (such as in medical textbooks).[87]

Though *Ferber* stood for a wide-ranging state ability to ban the dissemination of child pornography, the New York statute at issue did not deal with private possession of materials depicting sexual acts involving minors. Possession of obscenity involving exclusively adult actors was legal even before the Supreme Court's decision in *Miller*.[88] The Court considered the possession of child pornography for the first time in *Osborne v. Ohio*,[89] and held that states could permissibly ban possession of these materials.[90] Drawing on many of the same rationales the Court used in *Ferber*, Justice White wrote for the majority that because there remained a compelling state interest in protecting minors, the state could decrease demand for child pornography by proscribing its possession.[91] This compelling interest could justify a state's attempt to eliminate child pornography at all levels of distribution, not just dissemination or sale.[92] The Court

82. *Id.* at 761–62.

83. *Id.*

84. *Id.* at 762 n.15. In fact, the Court held that "[t]he test for child pornography is separate from the obscenity standard enunciated in *Miller*." *Id.* at 764.

85. *Id.* at 762.

86. *Id.* at 763 (noting that "[t]he question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech" and citing libel as an unprotected category of speech).

87. *Id.* at 773–74.

88. Stanley v. Georgia, 394 U.S. 557, 559 (1969) ("[T]he mere private possession of obscene matter cannot constitutionally be made a crime.").

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

90. *Id.* at 111.

91. *Id.* at 109–10.

92. *Id.* at 110.

reiterated the justifications it had found persuasive in *Ferber*: because child pornography leaves a permanent record of child abuse, and because there is a link between these materials and sexual abuse, banning possession of this pornography appropriately discouraged its production.[93]

B. Child Pornography Law in the Digital Age: The Child Pornography Prevention Act and Ashcroft v. Free Speech Coalition

As a result of the *Ferber* and *Osborne* decisions, child pornography remained a mostly limited, underground phenomenon throughout the 1980s and early 1990s.[94] Enhanced law enforcement efforts increased the transaction costs to child pornography consumers of dealing in these materials,[95] while Congress, particularly emboldened by *Ferber*, strengthened the prohibition against disseminating child pornography by increasing its minimum punishment from two to five years.[96] For a while, it appeared that the market for child pornography had shriveled nearly to the point of extinction.[97]

The Internet explosion of the mid-1990s caught legislators and law enforcement by surprise. The number of host computers on the Internet exploded from 300 in 1981 to 9,400,000 in 1996.[98] In a ten-year period, the number of host computers increased by a factor of 150.[99] Additionally, new technologies emerged that made it possible for child pornographers to produce images that appeared to be

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93. *Id.* at 111.

94. JENKINS, *supra* note 19, at 39–40.

95. FERRARO & CASEY, *supra* note 24, at 11.

96. Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, § 704(b), 100 Stat. 1783–75. The minimum sentence for distribution, transportation, sale, intent to sell, or knowing receipt, 18 U.S.C. § 2252(a)(1)–(3) (2000), was increased to fifteen years for repeat offenders of crimes against children by the PROTECT Act. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT), Pub. L. No. 108-21, § 103(b)(1)(C)(iii), 117 Stat. 650, 653.

97. JENKINS, *supra* note 19, at 40. In what was perhaps a harbinger of the technological explosion to come, however, electronic bulletin boards (a precursor of sorts to the World Wide Web) kept communications alive between those interested in swapping child pornography. The limited technological capabilities of computing at that time, though, rendered the digital transfer of pornographic images between users infeasible. *Id.* at 41–45.

98. Reno v. ACLU, 521 U.S. 844, 850 (1997).

99. *See* Krista Ostertag, *The Net's Come a Long Way, Baby*, VARBUSINESS, Nov. 1, 1997, at 115.

children engaging in sexual acts, but were created entirely by computer and did not involve any actual children—so-called "virtual" child pornography.[100] Child pornographers could mount an affirmative defense to a charge under 18 U.S.C. § 2252A(a)(5)(b)[101] by proving that the images of children used in pornographic material were not real.[102] This tactic presented an overwhelming challenge to law enforcement, as even skilled online agents could not distinguish between a virtual "child" and a real child victim of sexual exploitation.[103]

Accordingly, Congress passed the Child Pornography Prevention Act of 1996 (CPPA) to respond to these emerging technologies.[104] It amended the definitions of child pornography in 18 U.S.C. § 2256(8) to include "any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[105] Congress intended the "appears to be" language to include computer-generated images that were indistinguishable from real children. Additionally, Congress added statutory language that banned the pandering of such visual depictions by including within the definition of child pornography any visual depictions that were "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."[106]

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100. S. REP. NO. 104-358, at 7 (1996).

101. This statute provides punishment for anyone who

> knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer . . . .

18 U.S.C. § 2252A(a)(5)(B) (2000).

102. *See Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the S. Comm. on the Judiciary*, 104th Cong. 72 (1996) (statement of Bruce A. Taylor, president and chief counsel, National Law Center for Children and Families) ("Under present law, the Government must prove that every piece of child pornography . . . is of a real minor being sexually exploited.").

103. *See id.* at 70 ("If a computer generated counterfeit picture of a child engaged in sex is so good a fake that you cannot tell by looking at it, then police, courts, and indeed pedophiles and seduced children would also be unable to know the difference.").

104. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009–26.

105. *Id.* § 121(2)(4), 110 Stat. at 3009–28 (codified at 18 U.S.C. § 2256(8)(B) (2000)).

106. *Id.* (codified at 18 U.S.C. § 2256(8)(D) (2000)).

The sweep of the CPPA's language potentially included images in which no child was harmed. Indeed, Congress identified a probable First Amendment conflict in this area, as the statute could have reached some images to which the Supreme Court had extended First Amendment protection.[107] In the case that would become *Ashcroft v. Free Speech Coalition*, a group of artists and film producers, fearing the statute's language would prohibit their legitimate work,[108] filed suit against the government shortly after the CPPA's passage. They alleged that the "appears to be" language of 18 U.S.C. § 2256(8)(B), as well as the "conveys the impression" pandering provision in § 2256(8)(D), were overbroad and chilled their valid expression of works protected by the First Amendment.[109] After the Ninth Circuit reversed a lower court decision and found the CPPA facially invalid,[110] the government appealed to the Supreme Court.

The *Free Speech Coalition* holding that engendered the most controversy was the Supreme Court's affirmation that § 2256(8)(B) was overbroad.[111] The Court held, first, that the CPPA provided no protection to images that were non-obscene under the *Miller* test; in fact, the CPPA made no reference to the *Miller* test at all.[112] As a result, images containing teenagers engaged in sexual activity that had artistic merit—for example, a rendition of Shakespeare's *Romeo and Juliet*—could fall under the CPPA's prohibitions even though they violated no contemporary community standards of decency.[113] The Court also rejected the rationale offered by the government for prohibiting virtual child pornography: that such images "whet[] the

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107. S. REP. NO. 104-358, at 28–30 (1996). The Supreme Court held in *Ferber* that the distribution of non-obscene depictions of sexual conduct not involving live performances was still protected by the First Amendment. New York v. Ferber, 458 U.S. 747, 764–65 (1982).

108. The group, *Free Speech Coalition*'s respondents, included a painter of nudes, an erotic photographer, and the publisher of a naturist-oriented book. Ashcroft v. Free Speech Coal., 535 U.S. 234, 243 (2002). The respondents made clear that their work did not include child pornography, and that they opposed child pornography by offering a reward for information leading to the arrest of persons involved in its production. Brief for Respondents at 9–10, *Free Speech Coal.*, 535 U.S. 234 (No. 00-795).

109. *Free Speech Coal.*, 535 U.S. at 243.

110. *Id.* (citing Free Speech Coal. v. Reno, 198 F.3d 1083 (9th Cir. 1999)). Yet four other federal circuit courts sustained the CPPA in separate cases: United States v. Fox, 248 F.3d 394, 402–03 (5th Cir. 2001); United States v. Mento, 231 F.3d 912, 921 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645, 652 (11th Cir. 1999); and United States v. Hilton, 167 F.3d 61, 74 (1st Cir. 1999).

111. *Free Speech Coal.*, 535 U.S. at 256; *see also* sources cited *supra* note 8.

112. *Free Speech Coal.*, 535 U.S. at 246.

113. *Id.* at 246–47.

appetite"[114] of child molesters and encourage them to commit illegal sexual acts with children.[115] The Court noted that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it"[116] nor could speech be banned because it had the potential to increase the chances of an unlawful act being committed at an indeterminate point in the future.[117] The majority perceived no more than a tenuous connection between child pornography and any actual molestation that might result from it.[118] Finally, the Court rejected the government's "market deterrence" rationale (that eliminating virtual child pornography would dry up the market for actual child pornography) because there was no underlying crime in virtual child pornography's production; no actual children were abused.[119]

Significantly, however, the Supreme Court also struck down the CPPA pandering provision in § 2256(8)(D).[120] The majority held that the "conveys the impression" language was overbroad because it could reach material that actually contained no sexually explicit content, but whose advertising merely gave the impression that such content was present.[121] The Court acknowledged Congress's extensive findings detailing the problems posed by materials looking like child pornography, but made no findings addressing the dangers posed by pandering materials.[122] Section 2256(8)(D) also reached beyond the rationale for regulating pandering set forth by *Ginzburg v. United States*[123] because there was no requirement that the material must

114. *Id.* at 253.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 253–54.

119. *Id.* at 254. The Court added that law enforcement difficulties in distinguishing between real and virtual children also did not justify the CPPA, as it was impermissible to ban protected speech to eradicate unprotected speech. *Id.* at 254–55.

120. *Id.* at 258.

121. *Id.* at 257. The Court gave the example of a movie containing no sexually explicit scenes involving minors, but with previews conveying the impression that such scenes were in the movie, being treated as child pornography. *Id.*

122. *Id.*

123. Ginzburg v. United States, 383 U.S. 463 (1966). In *Ginzburg*, the defendant had been convicted of sending an obscene publication through the mail; the prosecution relied on the manner in which the defendant advertised the publications to prove their obscene content. *Id.* at 464, 467–70. The Court held that, in close cases, the manner in which a publication was advertised could be probative of that publication's obscenity. *Id.* at 470.

have been pandered in a commercial context.[124] Thus, the Supreme Court held that Congress's first attempt at regulating the pandering of child pornography was overbroad and violated the First Amendment.

C. Pandering Provisions and the Law: The PROTECT Act and United States v. Williams

Congress licked its wounds from the Supreme Court's rebuke in *Ashcroft v. Free Speech Coalition* and immediately set to work drafting new legislation that would address the Supreme Court's First Amendment objections to the CPPA, yet at the same time provide robust prosecution of those who sustained the market for child pornography. The result was the PROTECT Act of 2003, signed into law by President Bush on April 30, 2003.[125] The law acknowledged the *Free Speech Coalition* decision, but recognized that its impact had made prosecutions of child pornography defendants extremely difficult by forcing the government to overcome a "virtual porn defense."[126] To comport with *Free Speech Coalition*, the PROTECT Act changed the language in 18 U.S.C. § 2256(8) to prohibit visual depictions "that [are] of, or [are] *virtually indistinguishable* from that of, *an actual minor*."[127] The Act also attempted to respond to the Supreme Court's rejection of the CPPA's pandering provision by substituting what Congress thought was more narrowly tailored language, codified as 18 U.S.C. § 2252A(a)(3)(B). The new law punished anyone who knowingly

> advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material *or purported material* in a manner that *reflects the belief, or that is intended to cause another to believe,* that the material or purported material is, or contains (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.[128]

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124. *Free Speech Coal.*, 535 U.S. at 258.

125. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT), Pub. L. No. 108-21, 117 Stat. 650.

126. S. REP. NO. 108-2, at 45 (2003).

127. *Id.* at 6–7 (emphasis added). Congress intended an objective, reasonable person standard—an ordinary observer—in determining whether a "virtually indistinguishable" depiction looked like an actual child. *Id.* at 7.

128. 18 U.S.C. § 2252A(a)(3)(B) (Supp. IV 2004) (emphasis added).

In drafting this provision to comply with the Supreme Court's decision, Congress (perhaps unwittingly) resurrected the market deterrence rationale rejected in *Free Speech Coalition*, justifying the new pandering provision on the ground that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material."[129] Congress also believed the pandering provision was crucial to help prosecutors to pursue possessors of actual child pornography whom they could not reach by other statutes.[130] Yet the new language still did not escape First Amendment concerns. A group of senators noted the objection of a leading First Amendment scholar that the "purported material" language tipped the whole Act "over the constitutional edge,"[131] and observed themselves that the lack of a nexus between the pandering of obscenity and any actual obscene material endangered the validity of the entire provision.[132] A letter written by the American Civil Liberties Union pointed out that the distribution of protected speech could be punished merely because of its marketing, and criminal liability did not require underlying obscene material.[133] Despite these objections, however, the final version of the PROTECT Act included the pandering provision.[134]

These lurking First Amendment infirmities came back to haunt Congress and the PROTECT Act in a 2006 case, *United States v. Williams*.[135] The defendant, Michael Williams, had posted a message in an Internet chat room giving the impression that he possessed child pornography.[136] An undercover agent engaged the defendant in an Internet chat, culminating in the defendant posting a hyperlink which led to images of actual minors engaged in sexually explicit conduct.[137] Williams was charged with possessing child pornography and with

129. S. REP. NO. 108-2, at 12 (2003).

130. *Id.* at 23–24.

131. *Id.* at 24 (quoting Professor Frederick Schauer).

132. *Id.*

133. *Id.* app. at 32.

134. The inclusion of these problematic provisions, despite arguments in the record against them, probably resulted from a combination of legislative compromise and a rush to get the statute codified. *See id.* at 24 ("We do not want to put child porn convictions on hold while we wait another six years to see if the law will survive constitutional scrutiny.").

135. United States v. Williams, 444 F.3d 1286 (11th Cir. 2006), *cert. granted*, 127 S. Ct. 1874 (Mar. 26, 2007) (No. 06-694).

136. The message read: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." *Id.* at 1288.

137. *Id.* at 1289.

pandering it under 18 U.S.C. § 2252A(a)(3)(B).[138] He entered a conditional guilty plea and subsequently challenged the pandering provision's constitutionality in the Eleventh Circuit on grounds of overbreadth and vagueness.[139]

The Eleventh Circuit started with Williams's overbreadth challenge. Though the court recognized that the government may prohibit commercial speech that is false or proposes an illegal transaction,[140] The court held that Williams's pander was non-commercial and could not be regulated under the "fighting words" incitement doctrine.[141] The absence of a statutory link to content was also problematic, as speech promoting alleged material could be criminalized even if the material was non-pornographic or nonexistent.[142] Moreover, the Eleventh Circuit held that courts could not criminalize subjective beliefs that materials contained child pornography based on the way in which they were communicated.[143] The court rejected the notion that pandering could be a stand-alone offense under *Ginzburg v. United States*, and reemphasized the *Free Speech Coalition* holding that *Ginzburg* only applied in a commercial context.[144]

The court also found unconvincing the market deterrence rationale advanced by the government in this case and discussed during Congress's deliberations over the PROTECT Act. The Eleventh Circuit determined that Congress's link between pandering and stamping out the market for child pornography was empirically inadequate.[145] Although Congress cited a compelling interest in

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138. *Id.*

139. *Id.*

140. *Id.* at 1297. The court pointed out that, even in a commercial pandering situation, the only person able to complain about false advertising of a desired product would be the intended purchaser of child pornography—hardly the basis for a legitimate claim. *Id.*

141. *Id.* at 1298. This doctrine prohibits government limitations on speech unless the speech can be shown to incite imminent unlawful conduct. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see also supra* text accompanying note 34. The fact that the Court found Williams's pander did not imminently incite illegal activity does not preclude the probability that some child pornography pandering, and perhaps a substantial amount, may still in fact be inciteful and therefore subject to restriction under *Brandenburg*. *See Williams*, 444 F.3d at 1298 ("The First Amendment plainly protects speech advocating, encouraging or approving of otherwise illegal activity, *so long as it does not rise to 'fighting words status.*'" (emphasis added)).

142. *Williams*, 444 F.3d at 1298.

143. *See id.* at 1299 ("In this case . . . the law does not seek to attach liability to the materials, but to the ideas and images communicated to the viewer by those materials.").

144. *Id.* at 1301.

145. *Id.* at 1303.

protecting children from sexual predators, the court failed to find a close nexus between this interest and preventing the pandering of child pornography, even given *Ferber*'s allowance of market deterrence as a justification for eliminating the profit motive for exploiting real children.[146] Any aid to prosecutors in virtual pornography cases also did not justify the establishment of pandering provisions; such aid revived the rejected market proliferation rationale and targeted lawful speech (the communication of one's thoughts about material) to prohibit unlawful speech.[147] According to the Eleventh Circuit, the government could not use the pandering provision as a crutch to prove the existence of real children in pornographic materials.[148]

Williams also prevailed on his vagueness challenge. The court focused on the lack of an underlying material requirement in the pandering statute. The "reflects the belief"[149] language could establish criminal liability based on the communication of perverse thought alone, regardless of whether that thought related to child pornography.[150] Furthermore, the obscurity of the statute's intent requirement allowed the provision to potentially criminalize a possessor of cute children's photographs who, by his promotion of the materials, merely intended to convey a naughty double-entendre.[151] Because the provision provided no affirmative defense that there were no underlying pornographic materials, people who (for admittedly base reasons) intended to give the impression that they possessed child pornography, even when they possessed nothing at all, could also have been exposed to criminal liability.[152]

Thus, each legislative attempt to combat child pornography has met with First Amendment-based setbacks in the courts. This has been consistently true of pandering provisions. Though such provisions have attempted to serve the congressional goal (and public objective)[153] of eliminating the market for child pornography, their reach has strayed into areas of speech protected by the First

146. *Id.*
147. *Id.* at 1303–04.
148. *Id.* at 1304.
149. *Id.* at 1306 (quoting 18 U.S.C. § 2252A(a)(3)(B) (Supp. IV 2004)).
150. *Id.*
151. *Id.* at 1306–07.
152. *Id.* at 1307.
153. *See supra* Part I.B.

Amendment. Part III focuses on pandering provisions specifically, highlighting some elements of *Free Speech Coalition* and *Williams* in which the courts' reasoning was unconvincing.

III. EVALUATING THE *FREE SPEECH COALITION* AND *WILLIAMS* DECISIONS

Nine Supreme Court justices in *Free Speech Coalition*, and a three-judge appellate panel in *Williams*, faced the delicate task of balancing the cherished freedoms of the First Amendment against the real harms to children caused by child pornography. Both cases came down on the side of the First Amendment, and as a result, lessened the protection of children against forces that enhanced the market for child pornography—particularly pandering. Although these jurists most likely had benign motives and reached their decisions after careful deliberation and weighing of the competing interests of both cases, elements of both opinions disregard salient equities that favor the government's defense of anti-child pornography laws.

In *Free Speech Coalition*, the government presented all the evidence it could possibly muster before the Supreme Court, offering congressional records,[154] legislative findings,[155] amicus briefs,[156] and quantitative evidence[157] to defend the CPPA's constitutionality—and still lost. According to the Court, "[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse."[158] The majority demanded a "significantly stronger, more direct connection" to accept a market deterrence rationale of prohibiting virtual child

154. Ashcroft v. Free Speech Coal., 535 U.S. 234, 270 (2002) (Rehnquist, C.J., dissenting) (recognizing that the legislative history makes clear that Congress did not intend the CPPA to apply to works of art, as the majority feared).

155. *See id.* at 244–45 (majority opinion) ("In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses.").

156. *See, e.g.*, Brief of the States of New Jersey et al. as Amici Curiae Supporting Petitioner, *Free Speech Coal.*, 535 U.S. 234 (2002) (No. 00-795) (advocating deference to the "extensive testimony and written materials" that Congress used in considering the CPPA). The amicus brief further recognized that children "are the 'most vulnerable and defenseless' members of our society." *Id.* (quoting Doe v. Poritz, 662 A.2d 367, 376 (N.J. 1995)).

157. *See Free Speech Coal.*, 535 U.S. at 245 (citing WALTER R. MCDONALD & ASSOCS., INC. & AM. HUMANE SOC'Y, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. OF CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT REPORT 1999 (documenting that 93,000 children were victims of sexual abuse in one year alone)).

158. *Id.* at 253.

pornography on the ground that it encourages pedophiles to commit abuse.[159]

This rhetoric begs the question of exactly how much convincing evidence it will take for the government to mount a successful defense of any legislation targeted at the child pornography market. In congressional hearings leading up to the CPPA, one national expert on child abuse testified to a faux-pander that attracted one man who made clear his imminent intent to have sex with children.[160] Data closely linked the possession and purchase of child pornography—that is, the creation of a market for it—with abuse of children.[161] The Supreme Court refused to defer to Congress's extensive findings in this case despite sufficient evidence for the Court to find in favor of the government. This pattern has repeated in other significant cases.[162] Is the Court looking for a specific form of test that shows—through, say, multivariable regressions and standard deviations—an unassailable link between pandering and increased demand for child pornography? If it is impossible to even glean such evidence, it is disingenuous for the Court to keep insisting that the government cannot prove that link.[163] And because of the clandestine nature of the child pornography market, it may indeed be nearly impossible to gather such evidence to the Court's satisfaction.[164]

If the Supreme Court in *Free Speech Coalition* was ignorant, willfully or not, of Congress's findings, the Eleventh Circuit in *Williams* ignored a crucial fact of the case that should have made its

159. *Id.*

160. *See supra* text accompanying note 39.

161. *See supra* notes 27–32 and accompanying text.

162. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 628–36 (2000) (Souter, J., dissenting) (criticizing the majority for ignoring Congress's "mountain of data" demonstrating the national extent of rape and domestic violence); United States v. Lopez, 514 U.S. 549, 616–17 (1995) (Breyer, J., dissenting) ("[T]he determination [of an activity's effect on interstate commerce] requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy."). Justice Breyer noted in *Lopez* that "reports, hearings and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious," *id.* at 619, and provided a lengthy appendix, containing over one hundred of these sources, of which the majority could have availed itself, *id.* at 631–44.

163. Admittedly, the rationale of *Morrison* indicates that increasing an already sizeable legislative record may accomplish precisely nothing. *Morrison*, 529 U.S. at 614 (majority opinion) ("In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings . . . . But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

164. Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 661 (1999).

disposition facile. Williams was not just making an empty pander; he actually possessed real child pornography.[165] The Eleventh Circuit made much of its objection that the paucity of a statutory link to actual content rendered the PROTECT Act invalid for vagueness.[166] But with Williams, actual content was present, rendering irrelevant one of the court's overbreadth concerns.[167] If the Eleventh Circuit wanted to attack the PROTECT Act for First Amendment unconstitutionality *ab initio*, it could have at least chosen a more sympathetic defendant—one not in possession of actual child pornography.[168] That the court found compelling Williams's argument that he was "victimized" by an overbroad pandering statute, even when he was pandering material that he possessed, smacks of a certain cynicism about Congress's motives in passing the PROTECT Act to curtail the market for child pornography.

IV. A NEW VISION FOR CHILDREN, PANDERING, AND THE FIRST AMENDMENT

A. Reconceptualizing the Doctrine

The *Williams* decision is not authoritative in all jurisdictions; the Supreme Court could either accept or reject its reasoning. Yet even if the Supreme Court overturns *Williams* and upholds the PROTECT Act's pandering provision as constitutional, a new approach to evaluating pandering-versus-free speech conflicts, based upon a child-centered approach to this area of First Amendment law, would obviate the need for the back-and-forth between legislatures and courts in trying to decide the constitutionality of future pandering provisions.

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165. United States v. Williams, 444 F.3d 1286, 1289 (11th Cir. 2006), *cert. granted*, 127 S. Ct. 1874 (Mar. 26, 2007) (No. 06-694) ("[Williams's] computer hyperlink contained, among other things, seven images of actual minors engaging in sexually explicit conduct.").

166. *Id.* at 1306 ("[T]he law does not require the pandered material to contain any particular content nor, in fact, that any 'purported' material need actually exist.").

167. *Id.* at 1298–99 ("Because no regard is given to the actual nature or even the existence of the underlying material, liability can be established based purely on promotional speech reflecting the deluded belief that real children are depicted in legal child erotica . . . ."). Williams had more than a belief—he *knew* that his material was illegal child pornography. *See id.* at 1288–89 (describing Williams's online comments and actions).

168. Even though Williams challenged the statute facially, rather than as applied, *id.* at 1296, a more compelling case would have been made by a defendant who possessed no child pornography whatsoever but gave the impression that he had such materials merely to create a titillating impression in the reader's mind, *id.* at 1307.

The prevailing approach to pandering is panderer-oriented, based on the rights that the panderer draws from the First Amendment. Thus, panderers—including actual child pornographers—can mount a successful claim that anti-pandering statutes violate their inherent rights to self-expression, even if the manner of that expression happens to offend a majority of people.[169] The right to express one's thoughts, regardless of the merit of their contents, is not trivial; self-expression is at the heart of freedom of conscience and democratic participation.[170] Indeed, a democratic society demands a dialectic between prevailing attitudes and unpopular views, encouraging frank discussion toward the aim of synthesizing consensus on a norm.[171] The First Amendment is a powerful and necessary guarantor of this potential for self-expression.

Yet it is precisely the First Amendment's power that makes it dangerous in the hands of those who wield it to do harm, and for exactly that reason, the First Amendment has not proved an absolute bulwark against every form of expression in every circumstance.[172] National security has trumped individual First Amendment rights when a clear and present danger threatened the nation.[173] The right to engage freely in commercial speech does not extend to false advertising or proposed illegal transactions,[174] and as demonstrated in

169. *See id.* at 1298 ("The First Amendment plainly protects speech advocating or encouraging or approving of otherwise illegal activity . . . . Thus, the non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech under the First Amendment.").

170. *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile . . . ."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

171. *See id.* ("[D]iscussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . .").

172. *See id.* at 373 (noting that fundamental rights such as free speech are not necessarily absolute rights).

173. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (noting that the government may restrict free speech in cases of clear and imminent danger to the country); United States v. Progressive, Inc., 467 F. Supp. 990, 997 (W.D. Wis. 1979) (threatening to issue a preliminary injunction to prevent the publication of an article containing secrets of hydrogen bomb production if the parties did not settle by a certain date). *But see* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (establishing an extremely high, though not undefeatable, presumption against prior restraints on expression).

174. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980).

Part II, the Supreme Court does not extend protection to speech that is either obscene or contains child pornography.[175]

Permitting pandering in the name of First Amendment rights unleashes a very powerful force onto a very vulnerable population. Even though no objectionable *material* may be at the root of a pander, the pandering *itself* constitutes the tools for a crime, as it heightens interest in child pornography and makes it more likely that actual child molestation will take place.[176] Pandering gives child pornographers unfettered freedom to hawk their wares, secure in the knowledge that as long as they possess only the type of material from which they could mount a successful affirmative defense (for example, virtual child pornography), their pandering will go unpunished.

A child-centered approach to pandering, on the other hand, would more effectively shield a vulnerable population from the tremendous power of the First Amendment. It would recognize that not only the First Amendment, but other essential constitutional rights such as justice[177] and liberty,[178] are implicit in the protection of all American constituencies[179]—perhaps even more poignantly in the case of children. The Constitution's claims to liberty and justice ring hollow if they do not extend to protect vulnerable minority populations. Indeed, this very concern was on the mind of the Constitution's Framers in crafting the federal government structure to prevent against the tyranny of majorities in state legislatures.[180] The

175. *See supra* Part II.A.

176. *See supra* text accompanying notes 27–32.

177. U.S. CONST. pmbl. A suggestive argument maintains that the words in the Preamble are not just empty rhetoric, but ought instead to play a normative role in constitutional dialogue, presumably including constitutional adjudication. *See* Sanford Levinson, *Why It's Smart to Think About Constitutional Stupidities*, 17 GA. ST. U. L. REV. 359, 376 (2000) ("If the Constitution proclaims to speak in the name of the collective People, then . . . the People should engage in a national conversation about whether the Constitution really is a fit instrument for achieving the truly inspiring goals set out in the magisterial Preamble. How, indeed, do we 'establish Justice' or 'assure Domestic tranquility' or 'secure the Blessings of Liberty'?").

178. U.S. CONST. amend. V.

179. *See* Mark S. Kende, *Filtering Out Children: The First Amendment and Internet Porn in the U.S. Supreme Court*, 2005 MICH. ST. L. REV. 843, 856 (advocating a First Amendment approach that weighs the interests of groups like parents and children, rather than purporting to use strict scrutiny analysis).

180. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 43–44 (2005) (recounting James Madison's ultimately successful efforts in *The Federalist Papers* to persuade a skeptical public that a strong national legislature was necessary to protect the liberties of citizens, especially minorities).

First Amendment's guarantee of free expression, powerful as it may be, cannot be allowed to override the protection of the laws granted to vulnerable groups like children: "Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights."[181]

Shifting paradigms toward evaluating pandering based on its harm to children will necessarily require reconsideration of a particular area of the law—yet such a shift is not without precedent. The treatment of rape in the criminal law, for example, has enhanced protections for victims by focusing less on their alleged promiscuity.[182] The enactment of "rape shield" laws, prohibiting introduction of a victim's past sexual history to show that it was more likely that the victim invited intercourse with the defendant because of a promiscuous reputation, is emblematic of a change in attitudes regarding the law's treatment of another vulnerable population segment.[183] In other words, rape trials have progressed from being about the victim to increasingly concerning themselves with the defendant's conduct.[184] Although the required paradigm shift in child pornography pandering jurisprudence operates in somewhat the opposite manner—focusing on the child victims of that pandering, instead of shifting away from them—the desired result is the same: increasing protection for the more vulnerable of two groups by reconsidering the object of that protection.

Framing the pandering issue as one fundamentally concerning children requires, at a basic level, treating children differently than panderers—and more worthy of protection—for purposes of weighing rights. Yet this attitudinal shift is not unprecedented; the

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181. Bridges v. California, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting).

182. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094 (1986) ("[C]ourts, in defining the crime [of rape], have focused almost incidentally on the defendant—and almost entirely on the victim.").

183. *See* FED. R. EVID. 412 ("The following evidence is not admissible in [almost] any civil or criminal proceeding involving alleged sexual misconduct . . . (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim's sexual predisposition.").

184. *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 949–50 (2004) (observing that only three states still retained a prompt complaint requirement, and then only in spousal sexual offense cases, whereas only three other states retained corroboration requirements); *see also* FED. R. EVID. 413(a) (permitting, in a rule enacted in 1995, introduction of evidence that a sexual assault defendant committed past sexual assault offenses).

law treats children as essentially different in several other ways. Minors, for example, lack the capacity to assent to binding contracts.[185] The law assesses different punishments for juvenile offenders than for adults who commit the same crime.[186] This area of the law, in particular, has also experienced a shift as American society has deemed it inappropriate to subject juveniles to the death penalty.[187] Some states have even authorized capital punishment for convicted child molesters.[188] At a more quotidian level, minors are not allowed to smoke, vote, or drink alcohol before they reach certain ages.

If the law treats children differently in areas that at least tangentially concern their safety, then children should also receive the benefit of preferential treatment in a small area of First Amendment law that directly protects their well-being. Ultimately, this requires society to countenance the loss of a small amount of First Amendment freedoms—the pandering of purported matter ruled illegal and directly linked with harm to children—when drawing the line at how far those freedoms may extend. Given the many citizens who strongly disapprove of child pornography,[189] it is likely that overwhelming numbers of people would be comfortable placing children far behind that line.[190] The Supreme Court has already

185. RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981). Those who enter into contracts with children may have an expectation interest that the latter will honor their contractual obligations—and still be disappointed when the law holds the contract void for lack of capacity. The law regards these upset expectations as acceptable in the name of protecting children.

186. *See, e.g.*, FLA. STAT. ANN. § 958.04 (LexisNexis 2006) (authorizing alternate sentences and prohibiting incarceration in traditional adult facilities for "youthful offenders").

187. *See* Roper v. Simmons, 543 U.S. 551, 564–68 (2005) (holding that a "national consensus" of thirty states prohibiting the death penalty for juveniles had emerged, thus requiring the total abolition of the juvenile death penalty under the Eighth Amendment).

188. *See, e.g.*, OKLA. STAT. tit. 10, § 7115(I) (2006) (authorizing the death penalty for rape of a child under fourteen years old); State v. Wilson, 685 So. 2d 1063, 1064 (La. 1996) (upholding Louisiana's death penalty law for rape of a victim under twelve years old). Admittedly, however, these state laws encounter considerable constitutional difficulties in light of *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (prohibiting imposition of the death penalty for rape), though it is debatable whether *Coker* was limited to the rape of an *adult* woman, *Wilson*, 685 So. 2d at 1066.

189. *See supra* notes 40–42 and accompanying text.

190. In *State v. Holm*, 137 P.3d 726 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part), *cert. denied*, 127 S. Ct. 1371 (2007), the chief justice of the Utah Supreme Court struggled to define exactly where that line could be drawn in protecting a child from polygamous marriage. Maintaining that the state had no business regulating the private conduct of a religious practice, Chief Justice Durham "could not uphold Holm's bigamy conviction on the basis that the religiously motivated conduct at issue is inherently harmful to children who

indicated its willingness to draw such a protective line; *New York v. Ferber* held that the government has a compelling interest in "safeguarding the physical and psychological well-being of a minor."[191] Children are vitally important in the Court's eyes: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens . . . ."[192]

B. Counterarguments and Responses

A child-based treatment of pandering provisions is not without its potential dangers. For one, it is possible to overplay the extent of the problem, and in doing so, inadvertently exacerbate the interest in the child pornography market that pandering fuels. The "moral panic" phenomenon experienced over sensational, heinous crimes such as child kidnappings, brutal murders, or online predation[193] may lead to positive results (such as enhanced penalties for sex offenders), but could also serve to obscure the actual level of threat posed by child pornography.[194] If a child-centered approach is susceptible to a

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grow up in polygamous homes." *Id.* at 775–76. That is, consenting adults possessed a freedom, based on *Lawrence v. Texas*, 539 U.S. 558 (2003), to "choose the nature of their relationships 'in the confines of their homes and their own private lives.'" *Holm*, 137 P.3d at 776 (quoting *Lawrence*, 539 U.S. at 567). But because the defendant had committed unlawful sexual conduct with the minor whom he married in a non-state-sanctioned ceremony, *id.* at 730–31, the chief justice would have held that Holm's bigamy conviction did not violate his Fourteenth Amendment claim of individual liberty, *id.* at 776 n.34.

For support of the larger point, that a broad swath of society favors the protection of children, see *supra* notes 40–42 and accompanying text.

191. New York v. Ferber, 458 U.S. 747, 756–57 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

192. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

193. In the fall 2006 television lineup, an average of 9.1 million viewers weekly enjoyed *Dateline NBC*'s "To Catch a Predator" series featuring online stalkers of children invited to a house where, rather than a submissive child, a television crew and law enforcement officials awaited them. Allen Salkin, *Web Site Hunts Pedophiles, and TV Goes Along*, N.Y. TIMES, Dec. 13, 2006, at A1. The proliferation of "To Catch a Predator," and shows like it, has made realizable the peculiarly American dream of "settl[ing] down on your couch for an evening of scaring the hell out of yourself over your kids." James Poniewozik, *Breaking America's Favorite Taboo*, TIME, Oct. 8, 2006, at 39.

The intent here is certainly not to trivialize the magnitude of the problem. There is a real issue that children do fall victim to child pornography, and are subjected to sexual abuse because of it. *See supra* Part I.A. Nevertheless, responsible treatment of the subject will caution against the hyperbolic, emotionally-charged panic that undermines otherwise persuasive arguments in favor of curtailing the market for child pornography.

194. *See* Suzanne Ost, *Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society*, 29 J.L. & SOC'Y 436, 443–47 (2002) (documenting British society's outrage resulting from media coverage of Internet child

societal construction of children as innocent, it may actually promote more child sex abuse, precisely because abusers are attracted to the (pandered) image of the innocent child.[195] First Amendment scholar Amy Adler posits that merely passing more laws about child pornography, or revising existing ones, will not solve the problem if the laws force society to regard children as sexual objects in evaluating whether certain cases meet the definitions of child pornography.[196] The treatment of children in child pornography cases is paradoxical, Professor Adler argues, because in perceiving a need to increase discussion about the prohibited conduct—child sexual abuse—society enters a Foucauldian cycle of increased desire to engage in that conduct, with some members of society perversely choosing to participate in such behavior *precisely because* it violates a norm widely accepted as taboo.[197]

Furthermore, carving out a narrow exception for pandering child pornography—taking a child-based approach that is not found in other areas of First Amendment jurisprudence—could add confusion to an already fragmented body of law.[198] For a while, courts will

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pornography—when the media, in one case, demonstrated a link between child pornography and a child's death—and arguing that such a moral panic could distort the magnitude of the actual threat from child pornography).

195. *See id.* at 457–58 ("Our objectification of children as innocent may cause us to *reduce* them simply to objects of innocence, the one aspect of childhood that may be of the greatest attraction to the child sexual abuser.").

196. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 264–65 (2001).

197. *Id.* at 249–51; *see also supra* note 47 and accompanying text. Indeed, Professor Adler explicitly references Foucault in countering the commonly-held assumption that talking about a problem is the most effective means for its resolution; instead, according to Foucault, the communal logorrhea inherent in constantly discussing the problem merely advances a pre-existing cycle of repression. Adler, *supra* note 196, at 270–71. For the development of this aspect of Foucault's phenomenology, see generally 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., 1990) (1978).

198. *See* Adler, *supra* note 6, at 1000–01 (2001) (arguing that a significant shift in child pornography law—regarding child pornography not just as speech, but as action harmful by itself—has contributed to making this body of First Amendment law even more incoherent, and despairing of finding a coherent theory to First Amendment law). Professor Adler maintains that anti-child pornography advocates have conflated the clear semiotic distinction between the thing represented (child abuse) and the object that represents it (a pornographic image depicting such abuse). *Id.* at 985–86. But it is not immediately apparent that the distinction is so clear: images of child pornography have a pronounced link to abusive sexual conduct with a child, *see supra* text accompanying notes 27–32, a point which even Adler acknowledges. *Id.* at 987 ("Child pornography is not just the *product* of a crime of child abuse. It may sometimes serve as an *inducement* to commit it."). And although Adler focuses mainly on First Amendment overbreadth challenges in defining the *content* of child pornography, Adler, *supra*

struggle to reassure themselves that they are not merely punishing thoughts or fantasies expressing themselves as speech, but are instead targeting assertive conduct in the form of words—conduct which directly furthers a market that harms children.[199] Courts and legislatures should adopt limiting provisions to prevent this narrow approach from spilling over into other realms of protected speech. For instance, adult pornography, and the advertising of it, should not be subject to First Amendment restraints merely because children could stumble upon it or purposely choose to view it.[200] Additionally, an adequate test exists for evaluating adult pornography—the obscenity test from *Miller*—that overcomes the hurdles of the First Amendment.

The ambit of the child-centered approach is best cabined from the danger of overbroad prohibition of speech (and extension into

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note 6, at 961–69, she says nothing about whether statutes prohibiting the *pandering* of child pornography would be susceptible to her criticisms.

199. *See* Adler, *supra* note 6. at 999–1001 (criticizing the complete elimination of the speech/action distinction in child pornography law); *see also* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995) (postulating that First Amendment doctrine is incoherent because it focuses only on words, rather than on action taken in the context of the social norms the words embody).

Axiomatic to American criminal law is the refusal to punish people for their thoughts alone. *See, e.g.*, Doe v. City of Lafayette, 334 F.3d 606, 613 (7th Cir. 2003) (holding that a convicted sex offender who wandered into a park and admitted to having sexual thoughts about the children therein could not constitutionally be punished merely for holding repugnant thoughts). Criminal statutes encompass an *actus reus* requirement because people must voluntarily make an affirmative decision to manifest their thoughts through actions. After all, the First Amendment provides not only freedom of speech, but also the freedom either to express or not express one's thoughts. Wooley v. Maynard, 430 U.S. 705, 714 (1977). *Doe* was reversed, however, by an en banc Seventh Circuit, which ruled that, in going to the park and searching for children to satisfy his sexual cravings, the defendant conducted himself in a manner not worthy of protected expression, but rather as a predator. Doe v. City of Lafayette, 377 F.3d 757, 763–65 (7th Cir. 2004) (en banc). Therefore, the defendant was not being punished for thought alone but for action resulting from those thoughts which nearly came to child molestation. *Id.* at 766–67.

200. There are arguments both for and against this proposition, which are beyond the scope of this Note. C*ompare* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28–29 (1971) (arguing that a majoritarian view of pornography as morally polluting should be given wide judicial latitude in evaluating statutes banning pornography), *and* Steven E. Merlis, Note, *Preserving Internet Expression While Protecting our Children: Solutions After* Ashcroft v. ACLU, 4 NW. J. TECH. & INTELL. PROP. 117, 126–31 (2005) (proposing increased use of filtering software and "cyber zoning" to restrict pornography to certain Internet domains), *with* Svetlana Mintcheva, *Protection or Politics? The Use and Abuse of Children*, *in* CENSORING CULTURE: CONTEMPORARY THREATS TO FREE EXPRESSION, *supra* note 6, at 167 (submitting that a perceived "need" to protect children from viewing pornographic material merely amounts to further censorship).

other arenas of constitutional interpretation that do not beg for such an approach) by explicit statutory requirements that panderers possess actual pornographic content. Such a linguistic link already exists in state statutes; Ohio does not permit anyone to "[k]nowingly solicit, receive, purchase, exchange, possess, or control *any material* that shows a minor participating or engaging in sexual activity, masturbation, or bestiality . . . ."[201] whereas Kentucky requires actual knowledge that the material in question is child pornography:

> A person is guilty of advertising material portraying a sexual performance by a minor when, *having knowledge of its content and character thereof*, he or she writes or creates advertising or solicits anyone to publish such advertising or otherwise promotes the sale or distribution of matter portraying a sexual performance by a minor.[202]

This type of textual requirement of a panderer's possession or knowledge of actual child pornographic material has withstood constitutional challenges in the state courts.[203] Although a statute prohibiting even non-content-based panders would go the furthest in quelling the market for child pornography, such textual content requirements in the federal statutes would accomplish much of that goal without running afoul of overbreadth doctrine.

In operation, the philosophical change engendered by a child-centered pandering provision would address these potential objections. It would recognize that the protection of children from a means of solicitation that furthers the potential for their harm is even more compelling than the First Amendment right of self-expression. A child-centered pandering provision would provide an explicit statutory link to actual content and express recognition of the legislative purpose to protect children.[204] Such a provision would

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201. OHIO REV. CODE ANN. § 2907.322(A)(5) (LexisNexis 2006) (emphasis added).

202. KY. REV. STAT. ANN. § 531.360(1) (LexisNexis 2006) (emphasis added).

203. *See* State v. Meadows, 503 N.E.2d 697, 704–05 (Ohio 1986) (holding that, given the state's compelling interest in protecting children, § 2907.322(A)(5) does not violate the First Amendment); State v. Eichorn, No. 02 CA 953, 2003 Ohio App. LEXIS 3101, at *14 (Ohio Ct. App. June 27, 2003) (declining to find § 2907.322(A)(5) overbroad). *But see* State v. Tooley, No. 2004-P-0064, 2005 Ohio App. LEXIS 6032, *21 & n.37 (Ohio Ct. App. Dec. 16, 2005) (disagreeing with at least three other state appellate districts in holding § 2907.322(A)(5) unconstitutional), *rev'd*, State v. Tooley, Nos. 2006-0105 & 2006-0216, 2007 Ohio LEXIS 1655 (Ohio July 25, 2007).

204. For a promising model statute, see Brian G. Glass, Note, *Protecting Children and Expression: Towards Better Tailored Child Pornography Laws*, 9 VA. J. SOC. POL'Y & L. 471, 495 (2001) ("No person shall produce, promote, distribute, view or possess sexual material that

eschew the punishment of mere thoughts or fantasies that is anathema to the freedom to think as one chooses.[205] It would treat pandering as a tool, and as conduct inextricably incident to crime, rather than the mere expression of thoughts. And it would reduce the available means by which those who possess illegal child pornography, or those who encourage them, perpetuate the harm done to children.

CONCLUSION

Congress recognized a problem when it saw it. Consequently, Congress made good-faith efforts to establish that the pandering of child pornography furthered the market for illegal pornographic material. In so doing, it substantiated the nexus between those who consume child pornography and those who abuse children. Congress drafted its legislation based on extensive testimony and data from numerous experts, and on the justification that a broad social norm had coalesced against the market for exploitative child pornography. Yet each proposed solution contained the potential to hamper rights of self-expression, and given the First Amendment's powerful purchase on the ability to express oneself in the manner most reflective of one's conscience, expression won out in the balancing of rights performed by American courts.

The appropriate frame of reference in evaluating this category of competing rights claims must center on the object of the most significant harm—the child. Yet the institutions responsible for shaping the law that protects this vulnerable group have not embraced this orientation. If courts and legislatures focus on children as the beneficiaries of the law's protection, they will find that pandering of child pornography is not just speech; it is a tool used by molesters, pedophiles, and others who possess base motives vis-à-vis children to facilitate their crimes. This recognition, coupled with the corollary emphasis on protecting children, is the constitutional

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a reasonable person . . . would believe has caused and continues to cause direct harm to an individual child or to an identifiable class of children.").

205. *See* Clay Calvert, *Freedom of Thought, Offensive Fantasies, and the Fundamental Human Right to Hold Deviant Ideas: Why the Seventh Circuit Got it Wrong in* Doe v. City of Lafayette, Indiana, 3 PIERCE L. REV. 125, 135 (2005) (arguing that the First Amendment ought to protect all manner of thoughts, as long as they do not end up in criminal conduct or in absolutely unprotected expression like violence or obscenity). This Note has attempted to show that the pandering of child pornography can end up in both.

imperative of society's commitment, at its most ideal, to use the law to seek true justice.