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THE CHILD PORNOGRAPHY PREVENTION ACT OF 1996 AND THE FIRST AMENDMENT: VIRTUAL ANTITHESES

*Sarah Sternberg**

INTRODUCTION

Soon it will not be necessary to actually molest children to produce child pornography. . . . All that will be necessary will be an inexpensive computer, readily available software, and a photograph of a neighbor's child shot while the child walked to school or waited for the bus.¹

This prediction, made to the Senate in 1996, has become reality. It is possible today to take a photo of an unsuspecting child waiting for a bus and “morph” it into an explicit depiction of sexual activity.² But if the child pictured in the resulting pornography was not physically abused in the image's creation, has the Peeping Tom neighbor done any harm?

Believing the answer to be yes, Congress enacted the Child Pornography Prevention Act of 1996 (“CPPA” or “the Act”),³ and broadened the definition of federally proscribed child pornography to include such virtual creations.⁴ In the words of one court, “[t]he regulation . . . shifted from defining child pornography in terms of the harm inflicted upon real children to a determination that child pornography was evil in and of itself, whether it involved real children or not.”⁵ This shift raises serious First Amendment concerns.

* J.D. Candidate, 2002, Fordham University School of Law. I would like to thank Professor Andrew Sims for his invaluable assistance with this Note. I would also like to thank Mom, Dad, and Daniel for their love and faith, and for giving me a good kick in the pants when I needed it.

1. *The Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (prepared testimony of Kevin V. DiGregory, Deputy Assistant Attorney Gen., Criminal Division, Dept. of Justice), available at <http://web.lexis-nexis.com/congcomp>.

2. See *infra* notes 38-46 and accompanying text (discussing recent technological advancements such as morphing and their effects on the child pornography industry).

3. 18 U.S.C. § 2252A (Supp. V 1999).

4. *Id.* § 2256(8); see also *infra* Part I.C (discussing the legislative history of the CPPA).

5. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1089 (9th Cir. 1999), cert. granted *sub nom.* *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

The Supreme Court has determined that First Amendment protection does not extend to child pornography,⁶ recognizing the vital government interest in “prevent[ing] the abuse of children who are made to engage in sexual conduct for commercial purposes.”⁷ The CPPA presents the issue of whether child pornography produced without engaging actual children in sexual conduct falls within the Supreme Court’s definition of unprotected speech. Four appellate courts have ruled on this question, with the First, Eleventh, and Fourth Circuits upholding the constitutionality of the Act’s expanded definition of child pornography, and the Ninth Circuit finding it violative of the First Amendment.⁸ The Supreme Court has recently granted certiorari on the Ninth Circuit’s decision.⁹

This Note examines the legal controversy currently before the Supreme Court in *Holder v. Free Speech Coalition*,¹⁰ namely whether a criminal statute that prohibits possession of and trafficking in sexually explicit visual depictions of what appear to be minors impinges on the First Amendment guarantees of free speech and expression. Part I places this question in context by examining the problem of child pornography, including the effects of new technologies on the industry. Part I also analyzes the First Amendment issues surrounding regulation of child pornography, and discusses Congress’ latest attempt at dealing with this problem, the Child Pornography Prevention Act of 1996. Part II analyzes the divergent treatment of this issue in the appellate courts, including a discussion of the Ninth Circuit opinion to be reviewed by the Supreme Court. Part III argues that the CPPA, as written, abridges defendants’ First Amendment rights, and it offers a suggestion for keeping the Act within the limits mandated by the Constitution and the Supreme Court.

I. SETTING THE STAGE FOR CONFLICT: CHILD PORNOGRAPHY, THE CPPA, AND THE FIRST AMENDMENT

This part provides a backdrop for the conflict among the circuits. Specifically, it discusses the harms associated with child pornography, as well as the effects of computers and the Internet on the child pornography industry, relevant First Amendment case law, and the CPPA, Congress’ latest response to the ever-evolving social ill of child pornography.

6. *New York v. Ferber*, 458 U.S. 747, 774 (1982); see also *infra* Part I.B (discussing the relevant Supreme Court decisions in detail).

7. *Ferber*, 458 U.S. at 753.

8. See *infra* Part II (discussing the split among the circuits on this issue).

9. *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

10. *Id.*

A. The “Pernicious Evil”¹¹ of Child Pornography

Child pornography “abuses, degrades and exploits the weakest and most vulnerable members of our society, our children. It poisons the minds and spirits of our youth, robbing them of their innocence”¹²

The harms associated with child pornography are as varied as they are egregious. Most directly, child pornography sexually exploits the children used in its production, which can cause both emotional and psychological problems.¹³ Child pornography also provides a record of this sexual exploitation,¹⁴ and the enduring nature of this record makes child pornography “an even greater threat to the child victim than . . . sexual abuse or prostitution A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.”¹⁵ Furthermore, “[t]he victim’s knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.”¹⁶ Pedophiles may use visual depictions of their child victims to blackmail the youngsters into secrecy,¹⁷ or to coerce the children into recruiting more young victims for the abuser.¹⁸ Child pornography plays a crucial role in lowering a child’s sexual inhibitions,¹⁹ and “[w]ith proper reinforcement, the victim can be conditioned into a state of acceptance of his or her exploitive [sic] situation.”²⁰

11. S. Rep. No. 104-358, at 12 (1996).

12. *Id.*

13. By “sexual exploitation,” this Note refers to the physical harm suffered by victims of sexual abuse. One study describes the damaging effects sexual exploitation has on children as follows:

First, the child is prematurely introduced into adult sexuality and may have difficulty synchronizing the physical, emotional, and psychological dimensions of this experience. As a result the child might perform physiologically but not respond emotionally. In such a case the sexual activity either becomes the only mode of emotional expression or becomes separated and isolated from emotion. Second, the child may be programmed to use sex to acquire recognition, attention, and validation as well as to satisfy nonsexual needs. Third, the child may learn that sex is something basically improper that needs to be cloaked in secrecy.

Ann W. Burgess et al., *Impact of Child Pornography and Sex Rings on Child Victims and Their Families*, in *Child Pornography and Sex Rings* 111, 111 (Ann Wolbert Burgess ed., 1984). The authors’ study drew on the experiences of “sixty-six children and their families involved in sex rings.”

14. See, e.g., Daniel S. Campagna & Donald L. Poffenberger, *The Sexual Trafficking in Children* 118 (1988) (noting that photographs or films may serve as a tangible record of the abuse).

15. *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) (quoting Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)).

16. *Id.* (quoting Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. Mich. J.L. Reform 295, 301 (1979)).

17. Campagna & Poffenberger, *supra* note 14, at 118.

18. S. Rep. No. 104-358, at 14 (1996).

19. Campagna & Poffenberger, *supra* note 14, at 118.

20. *Id.*

In addition to the abuse and exploitation of children who are used as subjects of child pornography, child pornography works more indirect or "secondary"²¹ harms on children who are not used as models. Child molesters may use child pornography as "instructional aids," teaching children about the behavior that is expected of them and demonstrating to them that engaging in such acts is normal.²² "Peer pressure" in the form of visual depictions plays a crucial role in "the 'cycle' of child pornography."²³ That cycle consists of seven stages, namely (1) showing child pornography to a child for "educational purposes," (2) attempting to persuade the child that sexual activity is permitted and even pleasurable, (3) convincing the child that because his peers engage in sexual activity such activity is acceptable, (4) "desensitiz[ing] the child, [and] lowering the child's inhibitions[.]" (5) engaging the child in sexual activity, (6) photographing such sexual activity, and (7) using the resulting child pornography to "attract and seduce yet more child victims."²⁴

Other harms associated with child pornography stem from the effects such materials have on their viewers. Pedophiles and child sex abusers use child pornography for "self-gratification,"²⁵ or as Congress recognized in enacting the CPPA, as a way "to stimulate and whet their own sexual appetites."²⁶ Criminal investigations have shown that almost all pedophiles collect child pornography.²⁷ Some use their collections solely to facilitate sexual fantasies that are never played out.²⁸ Others, however, act upon the fantasies that their collections arouse.²⁹ One expert characterized child pornography as

an addiction that escalates, requiring more graphic or violent material for arousal, [that] then leads to the persons in the materials

21. Samantha L. Friel, Note, *Porn By Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 Val. U. L. Rev. 207, 246 (1997).

22. Campagna & Poffenberger, *supra* note 14, at 118; *see also* S. Rep. No. 104-358, at 13 ("A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity.").

23. S. Rep. No. 104-358, at 14 (quoting Shirley O'Brien, Child Pornography).

24. *Id.* (quoting Shirley O'Brien, Child Pornography).

25. Campagna & Poffenberger, *supra* note 14, at 118; *see also* S. Rep. No. 104-358, at 12 ("Child pornography stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies.").

26. S. Rep. No. 104-358, at 8.

27. *Id.* at 12-13; *see also* Campagna & Poffenberger, *supra* note 14, at 118 (listing "Collections" as one of the nine uses of child pornography, and noting that "[m]ost hard-core pedophiles possess an extensive collection of adult and child pornography").

28. S. Rep. No. 104-358, at 13; *see also* Campagna & Poffenberger, *supra* note 14, at 118 ("Child pornography either sparks or contributes to a heightened state of arousal preparatory to masturbation.").

29. S. Rep. No. 104-358, at 13.

being seen as objects, without personality, rights, dignity or feelings. The final stage is "acting out," doing what has been viewed in the pornography. This leads to crimes of sexual exploitation and violence.³⁰

Another expert considers pedophilia "learned behavior[]," emphasizing the role child pornography plays in the learning process: "[T]he use of child pornography in time desensitizes the viewer to its pathology no matter how aberrant or disturbing. It becomes acceptable and preferred. The man always escalates to more deviant material, and the acting out continues and escalates . . ." ³¹

This industry of exploitation has historically been a lucrative undertaking, with recent profitability estimates ranging from the multi-millions³² to the billions.³³ "[B]ecause of the high ratio of income to expense," individual pornographers fare quite well from their trade.³⁴ As one pornographer explained,

[t]he nicest thing about the [child pornography] business is that the prices never go down; if anything, they will go up if the heat is on. I've been at it about five, six years and can set my own prices most of the time. Give me a pretty, cooperative 14-, 15-year-old girl and I'll be sitting pretty with the money I make off her for a long time. Longer than you can imagine. Unless the kid's a screw-up and tries to run to the law, my chances of getting busted are pretty low And the nicest thing of all is I always got lots of customers.³⁵

Computers and the Internet have further increased the profitability of child pornography for pornographers such as 39-year-old Charlie,³⁶ by decreasing costs, facilitating distribution, and increasing demand.³⁷

30. *The Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) [hereinafter *Hearing on S. 1237*] (prepared testimony of Dee Jepsen, President, "Enough is Enough!"), available at <http://web.lexis-nexis.com/congcomp>.

31. *Id.* (prepared testimony of Dr. Victor Cline).

32. Vítit Muntarhorn, *Sexual Exploitation of Children* ¶ 130 (United Nations Ctr. for Human Rights, Human Rights Study Series No. 8, 1996) (noting that one "typical" organization "made millions of dollars kept in German banks by producing and distributing child pornography" (quoting Reply of Defence for Children International (United States) to the questionnaire circulated by the Special Rapporteur on the sale of children, child prostitution, and child pornography in 1991)).

33. See S. Rep. No. 104-358, at 12 ("It has been estimated that pornography, including child pornography, is an \$8 to \$10 billion a year business, and is said to be organized crime's third biggest money maker, after drugs and gambling.")

34. Campagna & Poffenberger, *supra* note 14, at 133.

35. *Id.* at 116.

36. *Id.*

37. See Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. Cal. Interdisc. L.J. 639, 644 (1999) (citing the anonymity ensured by encryption technologies as a leading factor in the recent proliferation of child pornography).

Recent technology has also made it possible to create child pornography without the use of actual live children.³⁸ Today, anyone with a computer and inexpensive morphing software³⁹ can join Charlie and create "all too real"⁴⁰-looking child pornography at low cost.⁴¹ The morphing software allows innocent photos of children to be combined with pornographic images of adults to create realistic pornographic images of children.⁴² These computer images, unlike their print, film, or video counterparts, can be continuously duplicated without jeopardizing their quality.⁴³ The Internet has also made it possible for people to feed their pedophilic desires in virtual anonymity, thus lowering the inhibitions of many would-be child pornography viewers.⁴⁴ Consequently, the Internet, "likely the most thoroughly sweeping exchange medium of child pornography in history,"⁴⁵ has created "a new 'red light district' [wherein] an

38. See, e.g., S. Rep. No. 104-358, at 7 ("[T]echnology has made possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.").

39. "'Morphing' is short for 'metamorphosing,' a technique that allows a computer to fill in the blanks between dissimilar objects in order to produce a combined image." Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 Harv. J. on Legis. 439, 440 n.5 (1997). Morphing software can be purchased for less than \$150. *Id.* at 440 n.7; Lee, *supra* note 37, at 645 n.23.

40. *Hearing on S. 1237, supra* note 30 (prepared testimony of Kevin V. DiGregory, Deputy Assistant Attorney Gen., Criminal Division, Dept. of Justice).

41. See S. Rep. No. 104-358, at 15 ("A child pornographer in Canada was convicted of copying innocuous pictures of children from books and catalogs onto a computer, then using the computer to alter the images to remove the childrens' [sic] clothing and arrange the children into sexual positions involving children, adults and even animals." (citing *Washington Times*, July 23, 1995)); Lee, *supra* note 37, at 645 ("Technical maneuvers that modify adult pornography into virtual child pornography through scanning and animation are possible through relatively inexpensive computer software and can be performed without extensive expertise.").

42. See, e.g., *Hearing on S. 1237, supra* note 30 (prepared testimony of Bruce A. Taylor, President and Chief Counsel, Nat'l Law Ctr. for Children and Families) ("The . . . software . . . allows the operator to remove pubic hair, shrink the size of the genitals, breasts, and/or other body parts, adjust skin tones, and otherwise manipulate the images to create a very convincing piece of child pornography.").

43. See Lee, *supra* note 37, at 645.

44. Joseph N. Campolo, Note, *Childporn.GIF: Establishing Liability for On-Line Service Providers*, 6 Fordham Intell. Prop. Media & Ent. L.J. 721, 722 n.6 (1996).

Until the late 1970's, pornography was primarily available in magazines and 8mm film loops. It was distributed through the mail, street stalls and pornographic bookstores in the "bad part of town." The distasteful locations limited the market. In the 1980's the advent of the VCR was exploited by pornographers. Consumers could purchase videos and watch pornography right in their own homes. . . . Then came the advent of personal computers . . . , and a whole new world of pornography access rushed in through its floodgate.

Id. at 721-22 n.5 (internal citation omitted).

45. Lee, *supra* note 37, at 644.

unimaginable amount of pornography [is] available for any on-line spectator."⁴⁶

But while the process used to create child pornography is transforming, many of the attendant harms remain unchanged. The effect such materials have on "sexual predators... is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by computer."⁴⁷ Children are in as great danger of being coerced or violated as a result of virtual child pornography as with the real thing.⁴⁸ And the child whose picture was taken surreptitiously while she waited for the bus will suffer harm to her privacy, reputation, and psyche when that photograph is morphed into a sexually explicit depiction.⁴⁹

Some argue that computer-enhanced or computer-generated images may pose an even greater harm to children than "traditional" child pornography.⁵⁰ Because technology allows pornography to be "designed to satisfy the preferences of individual sexual predators," the effect it has on pedophiles, and thus the threat it poses to children, may be magnified.⁵¹ It is also possible, however, that the harms associated with child pornography will be lessened by these technological advances, as no children are sexually exploited during the production of the materials.⁵² At least one thing is certain: the ability to create pornographic images without using live child models necessitated a change in existing child pornography laws.⁵³

The harms of child pornography—from the gross exploitation of children used as models for child pornography, to the abuse suffered at the hands of pedophiles whose sexual appetites were whetted by viewing child pornography, to the invasion of privacy of those unknowing children whose images are captured by a creator of virtual child pornography—have compelled the Supreme Court to uphold various legislative efforts to thwart the child pornography industry. The next section surveys this line of cases.

46. Madeleine Mercedes Plasencia, *Internet Sexual Predators: Protecting Children in the Global Community*, 4 J. Gender Race & Just. 15, 16 (2000).

47. S. Rep. No. 104-358, at 17 (1996).

48. *Id.* at 18.

49. See 18 U.S.C. § 2251 note (Supp. V 1999) (Congressional Findings) (finding that the privacy interests of children depicted in child pornography are harmed by the creation and dissemination of such materials).

50. See S. Rep. No. 104-358, at 16.

51. *Id.*

52. See *infra* text accompanying notes 229.

53. See *infra* notes 118-19, 123-26 and accompanying text (discussing the factors leading to the enactment of the Child Pornography Prevention Act of 1996).

B. *The First Amendment and Child Pornography*

Government efforts to combat the evils of child pornography through criminal statutes aimed at the creators, distributors, and possessors of such materials have been challenged on First Amendment grounds.⁵⁴ The Supreme Court has upheld statutes of this nature, however, on the basis that the creation, distribution, and possession of child pornography are forms of expression wholly outside the protection of the First Amendment.⁵⁵

While the Constitution ensures that "Congress shall make no law . . . abridging the freedom of speech,"⁵⁶ the Supreme Court has long recognized that the First Amendment is not an absolute guarantee.⁵⁷ Speech may be regulated on a content-neutral basis—that is, via "reasonable time, place, and manner regulations"⁵⁸ not aimed at suppressing specific ideas—as long as such regulations pass intermediate judicial scrutiny.⁵⁹ Accordingly, such a "regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."⁶⁰ Even content-based regulations on speech⁶¹

54. *See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990) (Ohio statute prohibiting the possession of child pornography challenged on grounds that the First Amendment protects private possession of otherwise unprotected materials); *New York v. Ferber*, 458 U.S. 747 (1982) (New York statute prohibiting the distribution of materials depicting sexual performances by minors challenged by defendant bookseller on grounds that, under the First Amendment, such distribution may be proscribed only when the materials are obscene).

55. *See Osborne*, 495 U.S. at 103 (upholding an Ohio statute prohibiting the possession of child pornography); *Ferber*, 458 U.S. at 747 (upholding a New York statute prohibiting the distribution of child pornography).

56. U.S. Const. amend. I.

57. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances."); *Whitney v. California*, 274 U.S. 357, 371 (1927) ("That the freedom of speech which is secured by the Constitution does not confer an absolute right . . . is not open to question.")

58. *United States v. Grace*, 461 U.S. 171, 177 (1983) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

59. *See Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)); *United States v. Hilton*, 167 F.3d 61, 68 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999) ("A distinct line of cases upholds reasonably-crafted regulations where the state acts not to suppress certain speech but to direct, in a content-neutral way, how or when that speech may be expressed in the public sphere." (citing *United States v. Kokinda*, 497 U.S. 720 (1990))).

60. *Turner*, 520 U.S. at 189 (citing *O'Brien*, 391 U.S. at 377).

61. The Supreme Court has defined a content-based regulation as "any restriction on speech, the application of which turns on the content of the speech." *Boos v. Barry*, 485 U.S. 312, 335-36 (1988) (Brennan, J., concurring). The difficulty in differentiating between regulations that are content-neutral and those that are content-based is acute. For example, "a tax that appears to draw a content-neutral line between large and small newspapers may in fact be content-based if it turns out that the large papers all favor one political party and most of the small ones support

will pass constitutional muster if they are narrowly tailored to serve a compelling state interest—a strict scrutiny test.⁶² Furthermore, the Supreme Court has carved out certain categories of expression as wholly outside the protective grasp of the First Amendment.⁶³ Regulations of these forms of expression need only pass the Due Process challenges of overbreadth and vagueness, to which all statutes are subject.⁶⁴ A statute is constitutionally infirm where its overbreadth is “not only . . . real, but substantial as well, judged in relation to [its] plainly legitimate sweep.”⁶⁵ An impermissibly vague law fails to “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁶⁶

The Supreme Court has consistently held obscene speech to be outside the protection of the First Amendment.⁶⁷ Attempts at

another.” Marc A. Franklin et al., *Mass Media Law* 124 (6th ed. 2000).

62. See *Hilton*, 167 F.3d at 68 (noting that a content-based regulation “must be (1) animated by one or more compelling state interests; and (2) narrowly tailored toward fulfilling those concerns”). The dissent in *Free Speech Coalition v. Reno* read the Supreme Court’s decisions on child pornography statutes as balancing “the state’s interest in regulating child pornography against the material’s limited social value,” rather than as applying strict scrutiny. 198 F.3d 1083, 1101 (9th Cir. 1999) (Ferguson, J., dissenting), *cert. granted sub nom. Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

63. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942):

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

64. The Due Process clause of the Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

65. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The Court in *Broadrick* expounded on this idea, noting that while regulations impinging on speech,

if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Id.

66. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The Court in *Kolender* further noted that the interest in preventing arbitrary law enforcement is the “more important aspect of the vagueness doctrine.” *Id.* at 358.

67. See, e.g., *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”); *Chaplinsky*, 315 U.S. at 571-72 (noting that obscene speech does not warrant First Amendment protection); see also *supra* note 63.

defining obscenity have been varied,⁶⁸ but in *Miller v. California*, the Supreme Court announced what remains the constitutional standard by which to judge materials for obscenity:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁶⁹

Accordingly, child pornography found to be obscene under the *Miller* standard is considered unprotected speech.⁷⁰ Moreover, after the Supreme Court’s opinion in *New York v. Ferber*, child pornography need not be deemed obscene for its creation or sale to be permissibly proscribed.⁷¹ In *Ferber*, the Court enumerated five reasons why government is “entitled to greater leeway in the regulation of pornographic depictions of children.”⁷² First, the Court found manifest the compelling nature of a state’s interest in protecting the “physical and psychological well-being”⁷³ of children by preventing “the use of children as subjects of pornographic materials.”⁷⁴ Second, noting that the promotion of child pornography is directly linked to the sexual abuse of children,⁷⁵ the Court found that the constitutional standard by which to regulate obscenity set forth in *Miller* “bears no connection” to the harm suffered by children in the production of such works.⁷⁶ Third, the Court found that the promotion of child

68. See *Miller v. California*, 413 U.S. 15, 22-23 (1973) (noting the historical trouble the Supreme Court has had in enunciating a standard for determining whether material is obscene, and deeming obscene speech “an area in which there are few eternal verities”).

69. *Id.* at 24 (citations omitted); see also Franklin, *supra* note 61, at 78 (“In [*Miller v. California*], after more than two decades of trying to define obscenity, the Court . . . articulated the definition that remains in effect today.”).

70. See *Miller*, 413 U.S. at 23 (“This much has been categorically settled by the Court. that obscene material is unprotected by the First Amendment.”); Vincent Lodato, Note, *Computer-Generated Child Pornography—Exposing Prejudice in Our First Amendment Jurisprudence?*, 28 Seton Hall L. Rev. 1328, 1343-44 (1998) (“Obviously, if [child pornography] is obscene under the *Miller* standard, Congress may prohibit its dissemination and receipt regardless of whether the material depicts [actual] children.”).

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

72. *Id.* at 756.

73. *Id.* at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

74. *Id.* at 758.

75. *Id.* at 759. The Court found at least two ways in which the two are related: pornographic works serve as a permanent record of the sexual abuse suffered by children, and the sexual abuse of children for the purposes of creating pornography depends on a successful distribution network for such materials. *Id.* See also *supra* Part I.A. (discussing the harms associated with child pornography in detail).

76. *Ferber*, 458 U.S. at 761.

pornography is essential to the economic viability of the illicit child pornography industry.⁷⁷ Fourth, the Court noted the “exceedingly modest, if not *de minimis*” value of child pornography and live sexual performances by children.⁷⁸ Finally, the Court determined that placing child pornography outside the realm of First Amendment protection did not conflict with precedent.⁷⁹ The *Ferber* decision was not without its limits, however. As with all regulations impinging on speech, prohibitions on child pornography must be “adequately defined.”⁸⁰ Similarly, any statute must contain a requirement of scienter.⁸¹ The Court further noted that First Amendment protection remains for the distribution of non-obscene depictions of sexual activity not involving live performances.⁸²

In response to *Ferber*, legislatures passed laws prohibiting the production or sale of child pornography.⁸³ Child pornographers, in turn, took their business underground.⁸⁴ Ohio’s answer to this law-dodging move by child pornographers was a criminal statute that prohibited the possession of child pornography.⁸⁵ The Supreme Court in *Osborne v. Ohio* upheld the constitutionality of this state law,⁸⁶ rejecting the defendant’s argument that the Ohio statute implicated the right of privacy enunciated in *Stanley v. Georgia*.⁸⁷ In *Stanley*, the Court had held a Georgia statute that proscribed possession of obscene material to be unconstitutional, finding “[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”⁸⁸ The Court found the statute at issue in *Osborne* to be of a different nature, however; rather than reflecting “a paternalistic interest in regulating

77. *Id.*

78. *Id.* at 762. The Court commented on two ways around the statutory prohibitions for artistic or educational works, noting that adults who looked like children could be used, as could “[s]imulation outside of the prohibition of the statute.” *Id.* at 763.

79. *Id.* at 763-64 (“[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”).

80. *Id.* at 764.

81. *Id.* at 765. Black’s Law Dictionary defines scienter as “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.” Black’s Law Dictionary 1347 (7th ed. 1999).

82. *Ferber*, 458 U.S. at 764-65.

83. S. Rep. No. 104-358, at 26 (1996) (Additional Views of Senator Grassley).

84. *Id.*; see also *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (“[S]ince the time of our decision in *Ferber*, much of the child pornography market has been driven underground. . . .”)

85. *Osborne*, 495 U.S. at 106.

86. *Id.* at 108 (finding the issue in *Osborne* “distinct” from that in *Stanley*).

87. 394 U.S. 557 (1969).

88. *Id.* at 566.

[people's] mind[s]," the Ohio law was an attempt "to destroy a market for the exploitative use of children."⁸⁹ *Ferber*, therefore, provided the relevant precedent.⁹⁰

The *Osborne* Court broadened the holding in *Ferber* to allow the government "to solve the child pornography problem by [doing more than] attacking production and distribution."⁹¹ In so doing, the Court recognized several compelling state interests furthered by the Ohio law. First, the Court noted the importance of protecting children from the sexual exploitation attendant to the creation of child pornography.⁹² Next, the Court recognized that child pornography stands as a permanent record of abuse, thus causing "continuing harm" to child victims.⁹³ The Court also pointed to pedophiles' use of child pornography to coax their young victims into sexual behavior.⁹⁴ Finally, the Court recognized the need to "stamp out this vice at all levels in the distribution chain."⁹⁵

In an attempt to further the Court-sanctioned government interest in eradicating child pornography, Congress, faced with new technologies that facilitate the creation, distribution, and possession of such materials,⁹⁶ enacted the CPPA. The following section discusses the CPPA as a response to Supreme Court precedent and developments in technology.

C. *The Child Pornography Prevention Act of 1996*⁹⁷

Congress has passed ever-evolving legislation in attempts to keep pace with the "particularly pernicious"⁹⁸ and highly lucrative⁹⁹ child pornography industry.¹⁰⁰ Various Supreme Court rulings and changes

89. *Osborne*, 495 U.S. at 109.

90. *Id.* at 109-10. The *Osborne* dissent found the Court's reliance on *Ferber* to be "misplaced," as it was *Stanley*, not *Ferber* which "extend[ed] to private possession." *Id.* at 139 (Brennan, J., dissenting). The dissent continued:

The authority of a State to regulate the production and distribution of [child pornography] is not dispositive of its power to penalize possession. . . . *Ferber* did nothing more than place child pornography on the same level of First Amendment protection as *obscene* adult pornography, meaning that its production and distribution could be proscribed. The distinction established in *Stanley* between *what* materials may be regulated and *how* they may be regulated still stands.

Id. at 139-40.

91. *Id.* at 110.

92. *Id.*

93. *Id.* at 111.

94. *Id.*

95. *Id.* at 110.

96. See *supra* notes 38-46 and accompanying text (discussing the ways in which technological advancements have changed the child pornography industry).

97. 18 U.S.C. § 2252A (Supp. V 1999).

98. S. Rep. No. 104-358, at 12 (1996).

99. *Id.*; see also *supra* text accompanying notes 33-35.

100. See *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1087-89 (9th Cir. 1999), *cert.*

in the industry have guided these efforts.¹⁰¹ Unfortunately, new ways for child pornographers to evade prosecution continually emerge.¹⁰²

The Protection of Children Against Sexual Exploitation Act of 1977¹⁰³ criminalized engaging a minor in sexual behavior in order to create visual depictions to be distributed in interstate or international commerce.¹⁰⁴ As only one person was convicted under the 1977 Act,¹⁰⁵ Congress passed the Child Protection Act of 1984.¹⁰⁶ In the 1984 Act, Congress followed the Supreme Court's precedent in *New York v. Ferber*,¹⁰⁷ and proscribed the production, distribution or possession of child pornography, regardless of whether it was obscene.¹⁰⁸ The language of the 1984 Act reflected the Supreme Court's warning in *Ferber* that the "nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct."¹⁰⁹ Because of the magnitude of not-for-profit trafficking in child pornography, the 1984 Act did not require that the materials in question be created or distributed for the purpose of completing a sale.¹¹⁰

In 1986 Congress sought new angles in its war on child pornography with two pieces of major legislation. The Child Sexual Abuse and Pornography Act of 1986 prohibited advertisements for child pornography,¹¹¹ while the Child Abuse Victims' Rights Act of 1986 subjected pornographers to liability for injuries suffered by child models.¹¹² Congress responded to the proliferation of a new technology with The Child Protection and Obscenity Enforcement

granted sub nom. Holder v. Free Speech Coalition, 121 S. Ct. 876 (2001), for a history of Congress' attempts to eradicate the child pornography industry.

101. *Id.*

102. *See id.* at 1087 ("Child pornography is a social concern that has evaded repeated attempts to stamp it out."); Muntarbhorn, *supra* note 32, ¶ 120 ("The problem [of child pornography] has become more intractable due to the advent of new technology. . . . In this regard, the law may be too slow to keep track of technological developments.")

103. Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-2253).

104. *Free Speech Coalition*, 198 F.3d at 1087.

105. *Id.* (citing Att'y Gen. Comm'n On Pornography, *Final Report* 604 (1986)).

106. Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2255).

107. 458 U.S. 747 (1982).

108. *Free Speech Coalition*, 198 F.3d at 1088. *See supra* notes 71-79 and accompanying text (discussing *Ferber*'s elimination of the requirement of obscenity for child pornography).

109. *Ferber*, 458 U.S. at 764; *see also Free Speech Coalition*, 198 F.3d at 1088 (noting that Congress changed the former statute's term "visual or print medium" to "visual depiction" (citing Pub. L. No. 98-292, §§ 3, 4, 98 Stat. 204 (1984))).

110. *Free Speech Coalition*, 198 F.3d at 1088.

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

112. Pub. L. No. 99-500, 100 Stat. 1783-74-75 (1986) (codified as amended at 18 U.S.C. § 2255).

Act of 1988,¹¹³ which outlawed the use of computers to traffic in child pornography.¹¹⁴ After the Supreme Court upheld the criminalization of the mere possession of child pornography in *Osborne v. Ohio*,¹¹⁵ Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990, which prohibited possession of three or more child pornography items.¹¹⁶

The Child Pornography Prevention Act of 1996¹¹⁷ is Congress' latest move in this game of legislative cat and mouse. The CPPA is a response to "high-tech kiddie porn," pornographic images of children created, altered, recorded, reproduced, or distributed using new technologies, especially computers.¹¹⁸ Recognizing the technological capability of producing, without the use of actual children, sexually explicit images which are "virtually indistinguishable" from those created using actual children, Congress re-defined child pornography.¹¹⁹ The CPPA prohibits the "production, distribution and possession"¹²⁰ of child pornography, with child pornography defined in section 2256(8) of the Act as:

Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct¹²¹

113. Pub. L. No. 100-690, § 7501, 102 Stat. 4485 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252).

114. *Free Speech Coalition*, 198 F.3d at 1088.

115. 495 U.S. 103 (1990); *see also supra* notes 84-95 and accompanying text (discussing the Supreme Court's decision in *Osborne*).

116. Pub. L. No. 101-647, §§ 301, 323, 104 Stat. 4816 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4)(B)).

117. 18 U.S.C. § 2252A (Supp. V 1999).

118. S. Rep. No. 104-358, at 7 (1996).

119. *Id.*; *see also* 18 U.S.C. § 2256(8) (Supp. V 1999) (providing amended statutory definition for child pornography).

120. S. Rep. No. 104-358, at 7.

121. 18 U.S.C. § 2256(8) (emphasis added).

Subsection 8's "appears to be" and "conveys the impression" language¹²² was added "to close [a] loophole[] in our Federal child pornography laws caused by advances in computer technology."¹²³ Prior laws required the prosecution to show that each piece of child pornography in question was created using an actual child.¹²⁴ The ability to create convincing child pornography using computers rather than children made it "virtually impossible" for the government to meet this burden,¹²⁵ thus creating "a reasonable doubt that a picture is really . . . of a real child being molested and exploited."¹²⁶

With the CPPA, Congress intended to enact a "prohibition [which] applies to the same type of photographic images *already* prohibited, but which [do] not require the use of an actual minor in [their] production."¹²⁷ In this way, Congress felt the CPPA would not criminalize more constitutionally protected speech than necessary, and would not be deemed impermissibly overbroad.¹²⁸ To this same end of avoiding problems of unconstitutional overbreadth, Congress also included an affirmative defense for traffickers in sexually explicit material who can show that the materials were produced using adults and not "pandered as child pornography."¹²⁹

In enacting the CPPA, Congress reasoned that computer-generated child pornography inflicts many of the same harms on children as pornography created using live children.¹³⁰ While no children are necessarily harmed in the process of creating computer-generated

122. *Id.*

123. S. Rep. No. 104-358, at 28 (Additional Views of Senator Biden); *see also supra* notes 38-46 and accompanying text (discussing these technological advances).

124. S. Rep. No. 104-358, at 15.

125. *Id.* at 16.

126. *Hearing on S. 1237, supra* note 30 (prepared testimony of Bruce A. Taylor, President and Chief Counsel, Nat'l Law Ctr. for Children and Families). The CPPA also closed another loophole in federal child pornography legislation caused by the proliferation of computers. "Since a single computer disk is capable of storing hundreds of child pornographic images," the CPPA changed the federal proscription from a ban on "the possession of three or more books, magazines, periodicals, films, video tapes or other material" containing child pornography, to a ban on the possession of "three or more *images* of child pornography." S. Rep. No. 104-358, at 10 (emphasis added).

127. S. Rep. No. 104-358, at 21.

128. *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103 (1990)).

129. S. Rep. No. 104-358, at 10. Section 2252A(c) of the CPPA absolves defendants charged with the trafficking of child pornography who can prove adults were used in the production of the pornographic materials. 18 U.S.C. § 2252A(c) (Supp. V 1999). Notably, no comparable affirmative defense exists for those arrested for mere possession of child pornography. At least one court has concluded that such an affirmative defense is unnecessary and would even be counter-productive to the goals of the CPPA. *See infra* note 202 and accompanying text. Section 2252A(d) does exculpate those charged with possession of child pornography who can show possession of less than three images and a prompt and good faith attempt to destroy the images or report their existence to law enforcement agents, however. 18 U.S.C. § 2252A(d) (Supp. V 1999).

130. S. Rep. No. 104-358, at 15.

pornography, the effects such materials have, both on pedophilic viewers and victim children, are comparable to those of "traditional" pornography.¹³¹ Child molesters and pedophiles use child pornography for self-arousal, and whether or not the materials were created using live children "is irrelevant because they are *perceived* as minors by the [pedophilic viewer's] psyche."¹³² Similarly, how the materials were created is immaterial to the child victims who are enticed into sexual activity, blackmailed into silence, or persuaded to recruit more young victims.¹³³ In short, Congress found, regardless of how the sexually explicit materials are created, they are "used to incite pedophiles to molest *real* children, to seduce *real* children into being molested, and to convince *real* children into making more child pornography."¹³⁴ Congress also found that child pornography which depicts a recognizable child invades the child's privacy and injures his reputation.¹³⁵

Thus, the CPPA's broadened definition of federally proscribed child pornography targets harms particular to computer-generated and computer-enhanced images of child pornography, as well as those long acknowledged to result from "traditional" child pornography. Arguing that this expanded definition of child pornography impinges on their First Amendment rights, several defendants convicted under the CPPA have challenged the constitutionality of the Act. Part II surveys the resulting case law.

131. See *supra* text accompanying notes 47-49.

132. S. Rep. No. 104-358, at 17 (citing written testimony of Dr. Victor Cline, June 4, 1996).

133. *Id.* at 19; see also *supra* text accompanying notes 47-49.

134. S. Rep. No. 104-358, at 19-20. *But see* Free Speech Coalition v. Reno, 198 F.3d 1083, 1093 (9th Cir. 1999), *cert. granted sub nom.* Holder v. Free Speech Coalition, 121 S. Ct. 876 (2001) ("Factual studies that establish the link between computer-generated child pornography and the subsequent sexual abuse of children apparently do not yet exist. The legislative justification for the proposition was based upon the Final Report of the Attorney General's Commission on Pornography, a report that predates the existing technology." (citations omitted)).

135. 18 U.S.C. § 2251 note (Supp. V 1999) (Congressional Findings) (quoting Pub. L. No. 104-208, § 101(a)(7)); see also *supra* note 49. The Act was not without its detractors in the Senate, including Senator Feingold, who felt the Act failed to follow Supreme Court precedent. See S. Rep. No. 104-358, at 36-38 (1996) (Minority Views of Senator Feingold). Senator Feingold noted that "[t]he Supreme Court has repeatedly held, in a number of different areas, that expression may not be regulated solely for its effect upon others." *Id.* at 37. Senator Feingold found the CPPA to be an unconstitutional departure from *New York v. Ferber*, where only "the protection of the actual children used in the actual production of child pornography [was found] to warrant the criminalization of non-obscene material." *Id.* (quoting testimony of Frederick Schauer before the Senate Judiciary Committee Regarding Proposals to Amend the Laws on Child Pornography).

II. TAKING IT TO THE COURTS: DOES THE FIRST AMENDMENT PERMIT REGULATION OF VIRTUAL CHILD PORNOGRAPHY?

Litigation ensued not long after the CPPA was enacted. To date, four appellate courts have heard cases challenging the constitutionality of the statute. Three circuit courts have found Congress' broadened definition of child pornography constitutionally permissible, while one divided court has found the "appears to be"¹³⁶ and "conveys the impression"¹³⁷ language of the CPPA violative of the First Amendment. A discussion of these decisions follows.

A. *Guarding First Amendment Principles: The Decision in Free Speech Coalition v. Reno*¹³⁸

Under *Ferber*, child pornography is an unprotected category of speech, which the government may regulate with impunity.¹³⁹ The controversy before the circuit courts in *United States v. Hilton*,¹⁴⁰ *United States v. Acheson*,¹⁴¹ *Free Speech Coalition v. Reno*,¹⁴² and *United States v. Mento*¹⁴³ was whether the CPPA's language criminalizing the production, distribution, or possession of images that "appear[] to be"¹⁴⁴ of minors engaging in sexually explicit conduct inappropriately broadens this category of speech. The Ninth Circuit opinion in *Free Speech Coalition v. Reno* is the only appellate-level decision to hold the CPPA's broadened definition of child pornography unconstitutional.¹⁴⁵

Finding that the CPPA is a content-based restriction on speech,¹⁴⁶ the *Free Speech Coalition* court applied strict scrutiny to determine whether the Act is narrowly tailored to serve a compelling state interest.¹⁴⁷ The court looked to the Supreme Court's opinion in *Ferber*¹⁴⁸ to assess the compelling nature of the governmental interest behind the CPPA: "Nothing in *Ferber* can be said to justify the

136. 18 U.S.C. § 2256(8)(B) (Supp. V 1999); *see also supra* text accompanying notes 119-26 (discussing this statutory term and the reasons for its inclusion in the CPPA).

137. 18 U.S.C. § 2256(8)(D) (Supp. V 1999); *see also supra* text accompanying notes 119-26 (discussing this statutory term and the reasons for its inclusion in the CPPA).

138. 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom.* Holder v. Free Speech Coalition, 121 S. Ct. 876 (2001).

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

140. 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999).

141. 195 F.3d 645 (11th Cir. 1999).

142. 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom.* Holder v. Free Speech Coalition, 121 S. Ct. 876 (2001).

143. 231 F.3d 912 (4th Cir. 2000).

144. 18 U.S.C. § 2256(8)(B) (Supp. V 1999).

145. *Free Speech Coalition*, 198 F.3d at 1098 (Ferguson, J., dissenting).

146. *Id.* at 1091.

147. *Id.*; *see also supra* note 62 and accompanying text (discussing the strict scrutiny analysis that is applied to content-based regulations on speech).

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

regulation of [child pornography] other than the protection of the actual children used in [its] production”¹⁴⁹ Because the CPPA criminalizes images that do not depict an identifiable child, the *Free Speech Coalition* court found the Act to be “a significant departure from *Ferber*.”¹⁵⁰ The court read *Ferber* as implicitly finding constitutional protection for “sexually explicit acts involving non-recognizable minors and . . . pornography that does not involve minors.”¹⁵¹ Moreover, the court did not find compelling Congress’ interest in curbing the effects child pornography may have on third parties—the child victims of pedophiles who view sexually explicit images which appear to depict children. It commented, “[i]f the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.”¹⁵² The court concluded that absent “a demonstrated basis to link computer-generated images with harm to real children,” regulation of such images is unconstitutional.¹⁵³

Having concluded that the CPPA poses an undue burden on First Amendment freedoms,¹⁵⁴ the *Free Speech Coalition* court turned to analyze the statute for overbreadth and vagueness.¹⁵⁵ As the Supreme Court has found in examining a charge of overbreadth, “[w]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the duty of the courts] is to adopt the latter.”¹⁵⁶ Reiterating its view that restrictions on child pornography are justified only insofar as they seek to curb a direct harm to children, the *Free Speech Coalition* court found the CPPA to be substantially overbroad.¹⁵⁷

The Supreme Court has stated that a statute is impermissibly vague when it does not “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is

149. *Free Speech Coalition*, 198 F.3d at 1092.

150. *Id.*

151. *Id.* (citing *Ferber*, 458 U.S. at 763).

152. *Id.* at 1093 (quoting *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (striking a city ordinance which prohibited pornography portraying women as submissive)).

153. *Id.* at 1094. The court noted a complete lack of studies connecting computer-generated child pornography with child molestation, observing that Congress’ suggestion of such a link was based on the Final Report of the Attorney General’s Commission on Pornography, which predated the relevant technology. *Id.* at 1093 (citation omitted).

154. As the court failed to find Congress’ interest in using the “appears to be” and “conveys the impression” language compelling, it did not assess the narrow tailoring of the statute. *Id.* at 1095.

155. *Id.*; see *supra* notes 64-66 and accompanying text.

156. *Almendarez-Torres v. United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (quoting *United States ex rel. Attorney Gen. v. Delaware and Hudson Co.*, 213 U.S. 366, 408 (1909)).

157. *Free Speech Coalition*, 198 F.3d at 1096.

prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.”¹⁵⁸ Accordingly, the *Free Speech Coalition* court found the Act’s “appears to be” and “conveys the impression” language to be “highly subjective” and without an “explicit standard” by which ordinary people can interpret its prohibitions.¹⁵⁹ This vagueness, the court concluded, allowed for discretionary and discriminatory enforcement of the statute.¹⁶⁰

The Ninth Circuit concluded that the CPPA signals an impermissible shift in legislative intent “from defining child pornography in terms of the harm inflicted upon real children to a determination that child pornography [is] evil in and of itself.”¹⁶¹ Judge Ferguson dissented from the majority opinion in *Free Speech Coalition*, arguing in accordance with the opinions in *United States v. Hilton*, *United States v. Acheson*, and *United States v. Mento*, which upheld the constitutionality of the CPPA. A discussion of these opinions and Judge Ferguson’s dissent in *Free Speech Coalition* follows.

B. *In Support of the CPPA: Hilton*,¹⁶² *Acheson*,¹⁶³ *Mento*,¹⁶⁴ and the *Free Speech Coalition Dissent*¹⁶⁵

The First, Eleventh, and Fourth Circuits upheld the CPPA as a constitutionally permissible move by Congress to prevent a technological safe haven for child pornographers and pedophiles. Expressing a sentiment shared by each of these courts, the Fourth Circuit in *United States v. Mento* concluded that, while the CPPA is “bold and innovative in its attempt to combat the sexual exploitation of minors caused by the trade of child pornography[,] . . . [b]oldness and innovation . . . do not render an Act of Congress constitutionally infirm.”¹⁶⁶ In so holding, the courts applied strict scrutiny to the CPPA’s restriction on speech,¹⁶⁷ and analyzed the Act for overbreadth¹⁶⁸ and vagueness.¹⁶⁹

158. *Id.* at 1095 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); see also *supra* note 66 and accompanying text (discussing the Supreme Court’s definition of unconstitutional vagueness).

159. *Free Speech Coalition*, 198 F.3d at 1095.

160. See *id.*

161. *Id.* at 1089.

162. *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 115 (1999).

163. *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999).

164. *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000).

165. *Free Speech Coalition*, 198 F.3d at 1097-1104 (Ferguson, J., dissenting).

166. *Mento*, 231 F.3d at 923.

167. See *infra* Part II.B.1. In his dissent to the Ninth Circuit opinion in *Free Speech Coalition v. Reno*, Judge Ferguson argued that the constitutionality of the CPPA is better decided using a balancing approach. 198 F.3d at 1101 (Ferguson, J., dissenting) (citing *Osborne v. Ohio*, 495 U.S. 103, 108-11 (1990); *New York v. Ferber*, 458 U.S. 747, 756-64 (1982)); see also *supra* note 62 (describing constitutional tests applied by

1. First Amendment Analysis of the CPPA's Broadened Definition of Child Pornography

The *Hilton*, *Acheson*, and *Mento* courts applied strict scrutiny to the Act's broadened definition of child pornography.¹⁷⁰ The *Acheson* court found the government interest served by the CPPA to be compelling, noting the Supreme Court's declaration that "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."¹⁷¹ According to the *Hilton* court, new problems such as computer-created pornographic images of children spark the same compelling governmental interest as traditional child pornography.¹⁷² In order to further these compelling interests, the *Hilton* court concluded, government must be allowed to expand its statutory definitions to meet the demands of expanding technology.¹⁷³ Recalling the Supreme Court's grant to government of "greater leeway in the regulation of pornographic depictions of children," the *Acheson* court found the statute narrowly drawn.¹⁷⁴ Similarly, the *Hilton* court noted the Supreme Court mandate "that government be permitted a certain degree of flexibility in how it chooses to grapple with new problems presented by the evolving nature of the child pornography industry."¹⁷⁵

In a similar but more detailed analysis, the *Mento* court identified six interests driving Congress to enact the CPPA:

- (1) to prevent the use of virtual child pornography to stimulate the sexual appetites of pedophiles and child sexual abusers;
- (2) to destroy the network and market for child pornography;
- (3) to prevent the use of pornographic depictions of children in the seduction or coercion of other children into sexual activity;
- (4) to solve the problem of prosecution in those cases where the government cannot call as a witness or otherwise identify the child

the circuit courts to the CPPA).

168. *See infra* Part II.B.2.

169. *See infra* Part II.B.3.

170. *See supra* notes 62, 167.

171. *United States v. Acheson*, 195 F.3d 645, 650 (11th Cir. 1999) (quoting *Ferber*, 458 U.S. at 757).

172. *United States v. Hilton*, 167 F.3d 61, 73 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999). The court outlined several of the threats to child well-being associated with virtual child pornography:

[c]omputer-created or enhanced material can be bought, sold, or traded like any other form of child pornography, adding further fuel to the underground child pornography industry. It can be used just as effectively as pictures of actual children to entice or blackmail children into cooperating with would-be abusers. Moreover, the material may have been created through the abuse of an actual minor but altered so that it may be impossible to show that a real child was ever involved in its creation.

Id.

173. *Id.*

174. *Acheson*, 195 F.3d at 650 (quoting *Ferber*, 458 U.S. at 756).

175. *Hilton*, 167 F.3d at 72-73 (citing *Osborne*, 495 U.S. at 110).

involved to establish his/her age; (5) to prevent harm to actual children involved, where child pornography serves as a lasting record of their abuse; and (6) to prevent harm to children caused by the sexualization and eroticization of minors in child pornography.¹⁷⁶

The *Mento* court dismissed defendant Mento's argument that, with the CPPA, the government's interest had moved to censoring certain ideas, an expansion of interest that would extend beyond the limits imposed by the Supreme Court in *Ferber*.¹⁷⁷ "Viewed in the proper context, *Ferber* in no way stands for the proposition that permissible governmental interests in the realm of child pornography would be forever restricted to the harm suffered by identifiable children participating in its production."¹⁷⁸ Rather, the *Mento* court found that *Ferber*'s limitations were pertinent to "less graphic material" such as cartoons and drawings,¹⁷⁹ and the *Mento* court echoed the *Hilton* and *Acheson* opinions which emphasized the Supreme Court's call for flexibility in allowing the government to tackle new problems in the child pornography industry as they arise.¹⁸⁰

Concluding that the government's interest in protecting children from the harms associated with child pornography is compelling, the *Mento* court turned to the second prong of its strict scrutiny analysis: whether the regulation is narrowly tailored to serve that interest.¹⁸¹ Specifically, the court examined whether the CPPA's "appears to be" language is "the least restrictive means to further [its] articulated interest."¹⁸² Noting Congress' findings regarding the effects of child pornography on pedophiles and children,¹⁸³ the court maintained "[t]o the viewer, there is no difference between a picture of an actual child and what 'appears to be' a child."¹⁸⁴ Moreover, the *Mento* court agreed with the First Circuit that Congress needs the "appears to be" language to keep the child pornography industry from hiding behind technological advancements.¹⁸⁵ Thus, the *Mento* court found the CPPA to be the least restrictive means of furthering the compelling interest of protecting children from the harmful effects of child pornography.

176. *United States v. Mento*, 231 F.3d 912, 918-19 (4th Cir. 2000) (citing *Hilton*, 167 F.3d at 66-67).

177. *Mento*, 231 F.3d at 919.

178. *Id.*

179. *Id.* at 919 n.8.

180. *Id.* at 919-20.

181. *Id.* at 920; see also *supra* note 62 (outlining the strict scrutiny analysis used by the *Mento*, *Hilton*, and *Acheson* courts).

182. *Mento*, 231 F.3d at 920 (quoting *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

183. Congress found that child molesters and pedophiles use child pornography for self-arousal and to "seduc[e] or break[] down [a] child's inhibitions to sexual abuse or exploitation." *Id.* at 920 (quoting 110 Stat. 3009-26, -27).

184. *Id.*

185. *Id.* at 920-21.

In his dissent to the *Free Speech Coalition* opinion, Judge Ferguson embarked on a slightly different First Amendment analysis of the CPPA. Judge Ferguson believed that the proper inquiry under the Supreme Court's previous opinions "is to weigh the state's interest in regulating child pornography against the material's limited social value."¹⁸⁶ Ferguson's dissent listed four reasons for disagreeing with the majority's determination that "[o]nce 'actual children' are eliminated from the equation . . . Congress is impermissibly trying to regulate 'evil idea[s].'"¹⁸⁷ First, the dissent pointed to the Supreme Court's opinion in *Osborne v. Ohio* for the proposition that the government has a compelling interest in protecting children other than those who are actually depicted in pornography.¹⁸⁸ Next, the dissent noted that the Supreme Court has sanctioned some of Congress' justifications for passing the CPPA, such as preventing child molesters from seducing their victims with photos of other children engaged in sexual activity.¹⁸⁹ Third, the dissent recalled the Supreme Court's grant of flexibility to government in promoting the general well-being of children.¹⁹⁰ Fourth, the dissent stressed, "child pornography, real or virtual, has little or no social value."¹⁹¹

Having concluded that the CPPA does not violate the First Amendment, the *Hilton*, *Acheson*, and *Mento* courts, as well as the dissent in *Free Speech Coalition*, turned to the challenges of the Act as unconstitutionally overbroad and vague.

2. The Overbreadth Challenge

As the *Acheson* court recognized, the overbreadth doctrine is "strong medicine,"¹⁹² applicable only where a statute is incapable of constitutionally sound interpretation.¹⁹³ With this mandate in mind, the courts looked to the legislative record of the CPPA to define the Act's scope.¹⁹⁴ That record revealed Congress' intention to extend the federal prohibition of child pornography to images which are

186. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1101 (9th Cir. 1999) (Ferguson, J., dissenting), cert. granted sub nom. *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001) (citing *Ohio v. Osborne*, 495 U.S. 103, 108-11 (1990); *New York v. Ferber*, 458 U.S. 747, 756-64 (1982)).

187. *Id.* at 1098 (Ferguson, J., dissenting) (citations omitted).

188. *Id.* at 1098-99 (citing *Osborne*, 495 U.S. at 108, 111; *United States v. Hilton*, 167 F.3d 61, 70 (1st Cir.), cert. denied, 120 S. Ct. 115 (1999)).

189. *Id.* at 1099 (citing *Osborne*, 495 U.S. at 111; 18 U.S.C.A. § 2251 (West Supp. 1999), Historical and Statutory Notes, Congressional Findings, at 3).

190. *Id.* at 1099-1100 (citing *Osborne*, 495 U.S. at 109; *Ferber*, 458 U.S. at 756-57).

191. *Id.* at 1100 (citing *Ferber*, 458 U.S. at 762).

192. *United States v. Acheson*, 195 F.3d 645, 650 (11th Cir. 1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

193. *Id.* at 650 (citing *Ferber*, 458 U.S. at 769 n.24); see also *supra* notes 65, 156 and accompanying text (discussing the doctrine of overbreadth).

194. See *United States v. Mento*, 231 F.3d 912, 921 (4th Cir. 2000); *United States v. Hilton*, 167 F.3d 61, 72 (1st Cir.), cert. denied, 120 S. Ct. 115 (1999).

“virtually indistinguishable” from those of real children.¹⁹⁵ The *Mento* court noted Congress’ explanation that “[t]he appears to be language applies to the same type of photographic image already prohibited, but which does not require the use of an actual minor in its production.”¹⁹⁶ The *Acheson* court noted that this expansion in scope is justified by Congress’ legitimate interest in protecting those children harmed by child pornography in ways other than by use as live models.¹⁹⁷ Similarly, in his dissent to the *Free Speech Coalition* opinion, Judge Ferguson found the CPPA’s prohibition on pornographic images “easily mistaken for real photographs of real children” to be a permissibly narrow extension of judicially approved child pornography statutes.¹⁹⁸

The *Mento* court recognized that by criminalizing images not created with live child models, the CPPA “prohibits material that is predominantly the product of the creator’s imagination—an array of complex computer images whose composition requires a degree of artistic skill.”¹⁹⁹ The court was not troubled by this, however, finding minimal social value in expression of this kind.²⁰⁰

The courts did not find impermissible overbreadth in the possibility of mistaken prosecution for possession or distribution of images using young-looking adult models. The Act’s affirmative defense for traffickers in such material who can prove that the models used were of majority age weighed against a finding of overbreadth.²⁰¹ Although the *Mento* court noted that this defense is unavailable to those who merely possess such material, the court nevertheless concluded that remedying this “slight risk” of wrongful conviction would thwart Congress’ compelling interest in eradicating the market for child pornography.²⁰² The *Acheson* court likewise concluded that “the legitimate scope of the statute dwarfs the risk of impermissible applications,” and the court stressed the availability of case-specific remedies for any misapplications which might arise.²⁰³

195. *Acheson*, 195 F.3d at 651 (quoting S. Rep. No. 104-358, at pt. I, IV(B)); *Hilton*, 167 F.3d at 72 (quoting S. Rep. No. 104-358, at pt. I, IV(B)). The *Hilton* court went on to explain, “[i]t follows [from the legislative record] that drawings, cartoons, sculptures, and paintings depicting youthful persons in sexually explicit poses plainly lie beyond the reach of the Act.” *Hilton*, 167 F.3d at 72.

196. *Mento*, 231 F.3d at 921 (quoting S. Rep. No. 104-358, at pt. IV(C)).

197. *Acheson*, 195 F.3d at 651.

198. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1102 (9th Cir. 1999) (Ferguson, J., dissenting), *cert. granted sub nom. Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

199. *Mento*, 231 F.3d at 921.

200. *Id.* (citing *Hilton*, 167 F.3d at 73).

201. *See id.*; *Free Speech Coalition*, 198 F.3d at 1102; *Acheson*, 195 F.3d at 651.

202. *Mento*, 231 F.3d at 921-22. The *Mento* court reasoned that a similar defense for mere possessors of child pornography “would do nothing to prevent the sexual exploitation of teenagers and other minors, and it would permit the market for child pornography to thrive.” *Id.* at 922.

203. *Acheson*, 195 F.3d at 652; *see also Free Speech Coalition*, 198 F.3d at 1102

The *Acheson* court acknowledged that in *Ferber*, the Supreme Court suggested that “a person over the statutory age who perhaps looked younger’ could be used to make an otherwise illegal performance [legal].”²⁰⁴ But the *Acheson* court found that *Ferber*’s recognition of the “exceedingly modest, if not *de minimis*” value of sexually explicit depictions of children failed to outweigh any remote hypothetical concerns of erroneous conviction.²⁰⁵ The *Acheson* court found further relief from overbreadth in the CPPA’s scienter requirement.²⁰⁶ Because the prosecution must prove knowledge on the part of the defendant that the materials in question depict minors, the Act’s scienter requirement provides an incentive for the government to prosecute only where the images in question are “of pre-pubescent children or persons who otherwise clearly appear to be under the age of 18.”²⁰⁷

In sum, the First, Eleventh, and Fourth Circuits, along with a dissenting judge in the Ninth Circuit, determined “the CPPA does not burden substantially more material than necessary.”²⁰⁸

3. The Void for Vagueness Challenge

Mindful that “[a]n ambiguous law fails to provide the requisite notice and undermines public confidence that the laws are equally enforced,”²⁰⁹ the courts also assessed the CPPA for constitutionally impermissible vagueness.²¹⁰

In ruling on a CPPA conviction, the *Hilton* court noted, a jury is asked to look at the totality of the circumstances to determine whether a reasonable viewer would consider the sexual depiction in question to involve a minor.²¹¹ This, the court concluded, is an objective inquiry, and can be proven using objective evidence, thus lessening the likelihood of arbitrary enforcement of the CPPA.²¹² The

(noting that other possible misapplications not specifically accounted for in the statute should be dealt with “on a case-by-case[] basis,” rather than by invalidating any particular clause) (Ferguson, J., dissenting); *Hilton*, 167 F.3d at 74 (“The existence of a few possibly impermissible applications of the Act does not warrant its condemnation.”).

204. *Acheson*, 195 F.3d at 651 (quoting *New York v. Ferber*, 458 U.S. 747, 763 (1982)).

205. *Id.* (quoting *Ferber*, 458 U.S. at 774).

206. *Id.* at 651-52; see also *supra* note 81 (providing a definition of scienter).

207. *Acheson*, 195 F.3d at 651-52 (quoting *Hilton*, 167 F.3d at 73).

208. *United States v. Mento*, 231 F.3d 912, 922 (4th Cir. 2000).

209. *Hilton*, 167 F.3d at 75. When the law is aimed at expression, the court noted, this danger is magnified: “[A] poorly-worded statute, ‘may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.’” *Id.* (quoting *Reno v. ACLU*, 521 U.S. 844, 872 (1997)).

210. See *supra* text accompanying notes 66, 158 (quoting the Supreme Court’s definition of an impermissibly vague law).

211. *Hilton*, 167 F.3d at 75.

212. *Id.* The *Hilton* court listed various means by which a depicted person’s age

Acheson court suggested that the pornographic materials themselves could offer objective evidence as to the age of the children depicted, for example through the names of their image files.²¹³ Similarly, the *Mento* court found that the Act's "appears to be" language provides an objective rather than capricious standard by which to judge a particular defendant.²¹⁴

The CPPA's scienter requirement provided an additional safeguard against arbitrary enforcement.²¹⁵ The scienter requirement, the courts felt, assures convictions only where the government can show the defendant knowingly possessed what he believed to be sexually explicit material depicting a minor.²¹⁶ Because of this requirement, the *Hilton* court announced that,

a defendant who honestly believes that the individual depicted in the image appears to be 18 years old or older . . . , or who can show that he knew the image was created by having a youthful-looking adult pose for it, must be acquitted, so long as the image was not presented or marketed as if it contained a real minor.²¹⁷

The *Mento* and *Hilton* courts also considered the relevant statutory definitions to assess the clarity of the CPPA's prohibitions. The *Mento* court found the CPPA explicit in its definition of child pornography,²¹⁸ the word minor,²¹⁹ and the type of sexual conduct forbidden under the Act.²²⁰ The *Mento* court also surveyed the legislative record, and determined that the Act's "appears to be" language was meant to target only those images which are "virtually indistinguishable" from true child pornography.²²¹ Similarly, the

could be objectively proven, namely

the physical characteristics of the person; expert testimony as to the physical development of the depicted person; how the disk, file, or video was labeled or marked by the creator or the distributor of the image, or the defendant himself; and the manner in which the image was described, displayed, or advertised.

Id. (citation omitted).

213. *United States v. Acheson*, 195 F.3d 645, 652-53 (11th Cir. 1999) (citing *Hilton*, 167 F.3d at 61). The *Acheson* court listed by way of example some of the names of the image files found in the defendant's possession, including "SEXKD001.JPG," "08with15.jpg," and "11rape.jpg." *Id.* at 653 & n.2.

214. *United States v. Mento*, 231 F.3d 912, 922 (4th Cir. 2000); accord *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1103 (9th Cir. 1999) (Ferguson, J., dissenting), cert. granted sub nom. *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

215. *Mento*, 231 F.3d at 922; *Free Speech Coalition*, 198 F.3d at 1103; *Acheson*, 195 F.3d at 652-53; *Hilton*, 167 F.3d at 75.

216. See, e.g., *Hilton*, 167 F.3d at 75.

217. *Id.*; accord *Acheson*, 195 F.3d at 653.

218. See *infra* note 266 (providing the CPPA's definition of child pornography).

219. The CPPA defines a minor as "any person under the age of eighteen years." 18 U.S.C. § 2256(1) (1994).

220. *Mento*, 231 F.3d at 922. See *infra* note 265 (providing the CPPA's definition of sexually explicit conduct).

221. *Mento*, 231 F.3d at 922 (quoting S. Rep. No. 104-358, at pts. I, IV(B) (1996)).

Hilton court found the statute's definitions to be clear, and its scope appropriately limited to visual images.²²²

The *Mento* and *Hilton* courts read the CPPA's affirmative defenses as further security against mistaken convictions and arbitrary enforcement of the Act.²²³ Moreover, where "there are few equally efficacious alternatives" the *Hilton* court found no grounds to overturn the statute as vague.²²⁴

The First, Eleventh, and Fourth circuits thus upheld the constitutionality of the CPPA, finding that the statute "neither impinges substantially on protected expression nor is so vague as to offend due process."²²⁵ The dissent in *Free Speech Coalition v. Reno* argued for a similar outcome.²²⁶

Part III of this Note disagrees with the appellate opinions in *Hilton*, *Acheson*, and *Mento*, and argues that the *Free Speech Coalition* court was correct in finding the CPPA to be constitutionally infirm. In criminalizing more than that child pornography which harms actual children, the CPPA extends beyond the Supreme Court-sanctioned interest of protecting children and censors expression protected by the First Amendment. This Note proposes an amendment to assure that the Act's focus remains on protecting children rather than eradicating disfavored ideas.

III. THE CONSTITUTIONAL ILLS OF THE CPPA AND A PROPOSED SOLUTION

Unquestionably, children harmed by child pornography are harmed severely.²²⁷ But not all child pornography necessarily harms children. While advancements in technology have frustrated law enforcement officials working to protect children from the pestilence of child pornography,²²⁸ these same developments have made it possible for pedophiles to gratify their desires without hurting actual children.²²⁹

222. *Hilton*, 167 F.3d at 76.

223. *Mento*, 231 F.3d at 922; *Hilton*, 167 F.3d at 75-76; see also *supra* note 129 (discussing the Act's affirmative defenses).

224. *Hilton*, 167 F.3d at 76 (rejecting defendant's suggestion that the statutory language be changed to apply to images of persons who are or appear to be "physically sexually immature," as such construction would exclude those minors who appear "physically sexually mature" from statutory protection).

225. *Id.* at 65.

226. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1098 (9th Cir. 1999) (Ferguson, J., dissenting), *cert. granted sub nom. Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

227. See *supra* Part I.A.

228. See *supra* note 102, text accompanying notes 119-126.

229. See Burke, *supra* note 39, at 464-65 ("There may be a strong correlation between the consumption of pornography and the perpetration of sexual crimes against children; however, there is not necessarily a causal relationship. In fact, viewing virtual child pornography may produce the opposite effect and alleviate the desire to pursue actual children."). But see Lee, *supra* note 37, at 668-69 (rejecting the

Consider the man who uses pornographic images of children not as a prelude to sexual activity with minors but as a tool for masturbation. If this man who looks but doesn't touch views an image that involved no actual children in its creation, arguably he has harmed no one by his choice of self-arousal.²³⁰ The law cannot, in keeping with the Constitution, refuse to acknowledge that this hypothetical man may exist.

Because the CPPA makes no allowance for this man and the type of child pornography he views, it reaches beyond the protection of children and seeks to criminalize and censor unpleasant speech. In this way, this Note argues, the Act is unconstitutional.²³¹ While this Note agrees with the Circuit Courts in *United States v. Hilton*,²³² *United States v. Acheson*,²³³ and *United States v. Mento*²³⁴ and the dissent in *Free Speech Coalition v. Reno*²³⁵ that the CPPA is not unconstitutionally vague,²³⁶ it argues that the Act's expanded definition of child pornography is overbroad²³⁷ and works as an impermissible infringement on First Amendment freedoms.²³⁸ The Act can be brought within the limits of the Constitution, however, by amending its terms to assure that its focus remains on the compelling government interest of protecting children from the harms of child pornography. One possible solution, an affirmative defense for defendants who can show that no children are harmed by the child pornography at issue, is proposed below.²³⁹

"safety-valve theory," which posits that child pornography can act as an outlet for pedophilic desires, and stating that "[l]ike real child pornography, virtual child pornography may be used by perpetrators to override their own knowledge that what they are doing is abusive. [It] can normalize abuse by suggesting that it is the children who want the sexual activity."); Plasencia, *supra* note 46, at 17 (discussing the process of "virtual validation," whereby "[s]upported and encouraged fantasy triggers action in the real world. Provocative images of child pornography, stories of sex and other community-supported chat bolster and empower a pedophile's sense of self. The pedophile, in return, is more likely to act.").

230. It can be argued that such a person is harming himself by deriving pleasure from materials most of society would find morally repugnant. But the Supreme Court has explicitly renounced government's "paternalistic," *Osborne v. Ohio*, 495 U.S. 103, 109 (1990), interest in "controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

231. See *infra* Part III.A. (discussing the constitutional infirmities of the CPPA).

232. 167 F.3d 61 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999).

233. 195 F.3d 645 (11th Cir. 1999).

234. 231 F.3d 912 (4th Cir. 2000).

235. 198 F.3d 1083, 1097-1104 (9th Cir. 1999) (Ferguson, J., dissenting), *cert. granted sub nom.* *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

236. See *infra* Part III.A.2; see also *supra* Part II.B.3 (discussing the conclusions in *Hilton*, *Acheson*, *Mento*, and the *Free Speech Coalition* dissent that the CPPA is not impermissibly vague).

237. See *infra* Part III.A.3.

238. See *infra* Part III.A.1.

239. See *infra* Part III.B (proposing an amendment to the CPPA to satisfy the demands of the First Amendment and Due Process).

A. *The CPPA As Written Is Unconstitutional*

All creators of child pornography do not create equally. Some sexually exploit children to create their product, while others use only computers. The CPPA treats all producers of child pornography the same, however. Similarly, the CPPA assumes that all possessors of child pornography will sexually abuse children, making no allowance for the viewer of child pornography whose experience ends with the image before him. In this way, the CPPA is unconstitutionally overbroad and an impermissible impingement on First Amendment rights.

1. The CPPA Impinges on the First Amendment Guarantee of Freedom of Expression

The CPPA enters into territory protected by the First Amendment by regulating speech solely because it is distasteful. The Supreme Court has explicitly negated such legislation: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."²⁴⁰ Or as famed pornographer Larry Flynt stated, "[f]reedom of [the] press is not . . . freedom for the thought you love the most. It's freedom for the thought you hate the most."²⁴¹

The Supreme Court opinions in *Ferber* and *Osborne* recognized child pornography as outside the realm of First Amendment protection.²⁴² The *Ferber* and *Osborne* Courts were not motivated by a desire to stamp out disfavored speech, however. Rather, the Supreme Court's focus appropriately remained on the harm inflicted on children by child pornography. In *Ferber*, the Court found the government interest in preventing the exploitation of children in the creation of child pornography to be an "objective of surpassing importance,"²⁴³ noting that that "interest is limited to . . . utilizing or photographing children."²⁴⁴ Courts such as the Fourth Circuit in *Mento*, which found that the limitation outlined in *Ferber* "was meant to limit regulation to those images that appear to be actual pornographic photographs,"²⁴⁵ read too much into *Ferber*.²⁴⁶ As the majority in *Free Speech Coalition* noted, "[n]othing in *Ferber* can be

240. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

241. *Burke*, *supra* note 39, at 439.

242. *See supra* notes 71-95 and accompanying text (discussing the Supreme Court opinions in *Ferber* and *Osborne*).

243. *New York v. Ferber*, 458 U.S. 747, 757 (1982).

244. *Id.* at 763.

245. *United States v. Mento*, 231 F.3d 912, 919 n.8 (4th Cir. 2000).

246. *But see id.* at 919 (concluding that defendant *Mento*'s reading of *Ferber* as "limit[ing] appropriate government interests to those designed to keep real children from being victimized by pornographers . . . interprets *Ferber* too narrowly").

said to justify the regulation of such materials other than the protection of the actual children used in the production of child pornography.²⁴⁷ While the Supreme Court in *Ferber* did recognize the need for flexibility on the part of government in regulating child pornography,²⁴⁸ the justification for such legislative leeway lay solely in protecting actual children from the harms associated with posing for child pornography.²⁴⁹

In *Osborne*, the Supreme Court recognized that child pornography does not just harm its child subjects, and held that a criminal prohibition on the mere possession of child pornography survived constitutional scrutiny.²⁵⁰ Along with the government interest in preventing the exploitation of children,²⁵¹ and the interest in destroying the market for child pornography,²⁵² the *Osborne* Court was influenced by two more indirect harms associated with child pornography. Specifically, the Court pointed to the permanent record of abuse child pornography creates, traumatizing child victims years after their abuse has ended,²⁵³ and the possible use of child pornography by pedophiles as a tool for seducing young victims.²⁵⁴ On balance, the *Osborne* Court concluded, these harms weighed in favor of allowing government to regulate private possession of child pornography.²⁵⁵ Thus, courts looking to prohibit child pornography for reasons other than the harms it directly inflicts on its child subjects must look to *Osborne*.

Where the child pornography in question is “virtual,” the scales tip in a different direction than under the facts of *Osborne*. Not all of the factors relied upon by the *Osborne* Court in upholding a prohibition on the private possession of child pornography are present for virtual child pornography, thus upsetting the delicate balance between the government interest in protecting children and the Constitution’s mandate that individual rights remain protected. No children are sexually exploited in the creation of virtual child pornography.

247. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1092 (9th Cir. 1999), cert. granted sub nom. *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

248. *Ferber*, 458 U.S. at 756.

249. See *id.* at 757 (noting that “[t]he prevention of sexual exploitation and abuse of children constitutes a governmental objective of surpassing importance”); *supra* notes 72-79 and accompanying text (discussing the five reasons the *Ferber* Court gave for finding child pornography categorically outside the protection of the First Amendment).

250. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990). See *supra* notes 85-95 and accompanying text (discussing the Supreme Court’s opinion in *Osborne* in greater detail).

251. *Osborne*, 495 U.S. at 109.

252. *Id.* at 110.

253. *Id.* at 111.

254. *Id.*

255. See *id.* (“Given the gravity of the State’s interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.”).

Similarly, where the materials in question do not depict a recognizable child, no child suffers the emotional trauma of knowing pornographic images of him are circulating among pedophiles. Finally, allowing virtual child pornography arguably discourages a market for "traditional" child pornography which exploits actual children.²⁵⁶ While computer-generated child pornography that does not require the use of actual children for its creation can still be used by pedophiles as a tool of seduction, this factor alone is not sufficient to overcome the First Amendment.

Where no actual children are abused and no identifiable children are depicted, the harms to children by virtual child pornography are entirely speculative. The majority in *Free Speech Coalition* noted a lack of a proven link between virtual child pornography and actual sexual abuse of children,²⁵⁷ stating further that the report relied on by Congress in enacting the CPPA "shows that the use of sexually explicit photos or films of actual children to lure other children played a small part in the overall problem involving harm to children."²⁵⁸ The *Free Speech Coalition* court continued, "[m]any innocent things can entice children into immoral or offensive behavior, but that reality does not create a constitutional power in the Congress to regulate otherwise innocent behavior."²⁵⁹

Accordingly, the *Osborne* factors weigh in favor of finding the CPPA as written to be an unconstitutional prohibition of First Amendment expression. An inquiry into the constitutionality of the CPPA must also determine whether or not the Act is impermissibly

256. See *infra* notes 298-300 and accompanying text (arguing that the affirmative defense proposed in this Note allows for a shift in the child pornography industry towards images which do not involve actual or identifiable children for their creation).

257. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1093-94 (9th Cir. 1999), cert. granted sub nom. *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001) ("[T]here [is no] demonstrated basis to link computer-generated images with harm to real children."); see also Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. Marshall J. Computer & Info. L. 483, 490 (1996) ("Factual studies concerning the link between computer-generated child pornography and subsequent sexual abuse of children do not yet exist."). Apparently there are still no studies demonstrating a connection between virtual child pornography and harm to actual children. In 2000, the Fourth Circuit cited no study for its conclusion that, "[t]o the viewer, there is no difference between a picture of an actual child and what 'appears to be' a child, [and that] depictions that are represented to be minors are harmful in the same way as any child pornography, except that there is no minor involved in their production." *United States v. Mento*, 231 F.3d 912, 920 (4th Cir. 2000).

258. *Free Speech Coalition*, 198 F.3d at 1094 (citing Attorney Gen. Comm'n on Pornography, Final Report 604, 649-50 (1986)). But see *infra* text accompanying note 298 (noting the Fourth Circuit's conclusion in *United States v. Mento* that permitting possession of pornographic materials that do not depict identifiable children would frustrate efforts to protect children).

259. *Free Speech Coalition*, 198 F.3d at 1094 n.7.

overbroad or vague.²⁶⁰ In subsections 2 and 3 below, this Note argues that while the CPPA is not impermissibly vague, its extended definition of child pornography is fatally overbroad.

2. The CPPA is Not Unconstitutionally Vague

A criminal statute such as the CPPA is impermissibly vague where it does not “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”²⁶¹ Of these two interests furthered by the void-for-vagueness doctrine, the interest in preventing arbitrary law enforcement is the most crucial.²⁶²

This Note argues in accordance with the opinions in *United States v. Hilton*, *United States v. Acheson*, and *United States v. Mento*, and the dissent in *Free Speech Coalition v. Reno* that the CPPA is not unconstitutionally vague.²⁶³ A jury or judge ruling on a CPPA conviction engages in an objective inquiry using objective evidence to determine whether a reasonable viewer would consider the pornographic materials in question to depict a minor.²⁶⁴ The statutory definitions are unambiguous, providing a detailed list of conduct considered “sexually explicit,”²⁶⁵ a clear description of when visual depictions of such conduct will be considered child pornography,²⁶⁶ and a thorough explanation of the term “identifiable minor.”²⁶⁷ Moreover, the legislative record indicates that only those images which are “virtually indistinguishable”²⁶⁸ from previously proscribed child pornography are to be targeted.²⁶⁹ The CPPA’s affirmative

260. See *supra* notes 64-66 and accompanying text.

261. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

262. See *supra* note 66.

263. See *supra* notes 209-26 and accompanying text (discussing the conclusions in *Hilton*, *Acheson*, *Mento*, and the *Free Speech Coalition* dissent that the CPPA is not impermissibly vague).

264. See *supra* notes 211-14 and accompanying text.

265. 18 U.S.C. § 2256 (1994) (defining such conduct as “actual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person”).

266. See *id.* § 2256(8) (Supp. V 1999) (defining child pornography as a visual depiction of sexually explicit conduct involving an actual minor, what “appears to be” an actual minor, or “an identifiable minor,” or sexually explicit materials marketed to “convey[] the impression that [they] contain[] a visual depiction of a minor engaging in sexually explicit conduct”).

267. *Id.* § 2256(9)(A). Section 2256(9)(A) defines a depiction of an identifiable minor as an image of a minor “who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature.” *Id.* § 2256(9)(A)(ii).

268. S. Rep. No. 104-358, at 7 (1996).

269. See *supra* text accompanying notes 195-98.

defenses and requirement of scienter further protect defendants against arbitrary arrests and convictions.²⁷⁰ Under section 2252A(c), those arrested for trafficking in child pornography can defend against the charges by demonstrating that the materials in question were produced using adults rather than children, and that they were not marketed as portraying children.²⁷¹ Defendants charged with mere possession are also protected by an affirmative defense which exculpates those who possessed fewer than three images of child pornography and acted promptly to destroy the materials or turn them over to law enforcement officials.²⁷² Thus, only true child pornographers or knowing possessors of child pornography are targeted by the Act. Similarly, the Act's requirement of scienter ensures that only those defendants who willfully violate the statute will be convicted, by making knowledge an element of any charge under the CPPA.²⁷³

While the CPPA is not unconstitutionally vague, it does impinge on more protected expression than is necessary to reach its stated interest of protecting children from harm. A discussion of the Act's overbreadth follows.

3. The CPPA is Unconstitutionally Overbroad

Because the CPPA prohibits more protected expression than necessary, it is unconstitutionally overbroad. The CPPA's overbreadth is "not only . . . real, but substantial as well, judged in relation to [its] plainly legitimate sweep."²⁷⁴

The Supreme Court has clearly delineated the legitimate scope of any anti-child pornography legislation as lying in the protection of real children from harm.²⁷⁵ But the CPPA criminalizes more than speech which harms children; it criminalizes disfavored ideas. The *Mento* court recognized this shortcoming of the CPPA when it noted that the Act "prohibits material that is predominantly the product of the creator's imagination."²⁷⁶ That court's conclusion that such concerns do not impinge on First Amendment freedoms because "there is little, if any, social value in this type of expression"²⁷⁷ underestimates the importance of freedom of expression, however. Rather, as the

270. See *supra* notes 129, 201-02, 206-07 and accompanying text.

271. 18 U.S.C. § 2252A(c) (Supp. V 1999).

272. *Id.* § 2252A(d).

273. See, e.g. *id.* § 2252A(a)(5)(B) (providing that any person who "knowingly" possesses child pornography will be punished under the CPPA).

274. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). See *supra* note 65 and accompanying text for a more detailed discussion of the overbreadth doctrine as outlined by the Supreme Court in *Broadrick*.

275. See *supra* notes 71-95 and accompanying text (discussing the Supreme Court's opinions in *Ferber* and *Osborne*).

276. *United States v. Mento*, 231 F.3d 912, 921 (4th Cir. 2000).

277. *Id.* (quoting *United States v. Hilton*, 167 F.3d 61, 73 (1st Cir. 1999)).

Free Speech Coalition court noted, “while such images are unquestionably morally repugnant, they do not involve real children nor is there a demonstrated basis to link computer-generated images with harm to real children[, and the CPPA thus] does not withstand constitutional scrutiny.”²⁷⁸

Because the CPPA could be amended to keep its proscriptions within the limits outlined by the Supreme Court and dictated by the Constitution, it is substantially and impermissibly overbroad. One such amendment is proposed below.

B. Proposed Amendment to the CPPA

The CPPA’s constitutional flaws are easily resolved. This Note argues for the addition of an affirmative defense for defendants who can prove that no actual children were harmed by the child pornography in question. The addition of such an affirmative defense would cure the Act of overbreadth, eliminate the conflict between the Act and the First Amendment, and eradicate any vestigial threats of arbitrary law enforcement.²⁷⁹ Proposed section 2252A(e) of the Child Pornography Prevention Act of 1996, would read as follows:

(e)It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), (4) or (5) of subsection (a) that –

(i) the alleged child pornography was produced wholly without the use of actual children;

(ii) the alleged child pornography was advertised, promoted, presented, described, or distributed so as to convey the impression that it was produced wholly without the use of actual children; and

(iii) no identifiable child is depicted in the alleged child pornography.

This affirmative defense would allow anyone apprehended for knowingly sending, receiving, distributing, reproducing, selling, or possessing child pornography²⁸⁰ to absolve him or herself by proving that the materials in question did not and do not harm actual children.

The affirmative defense proposed here targets all of the harms inflicted by child pornography on its child models,²⁸¹ be they live or computer-manipulated models, while respecting the protected status of expression which harms no actual children. A similar defense has been suggested by at least one other commentator, Samantha L.

278. *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1094 (9th Cir. 1999), cert. granted *sub nom.* *Holder v. Free Speech Coalition*, 121 S. Ct. 876 (2001).

279. See *supra* Part III.A (discussing the constitutional shortcomings of the CPPA).

280. 18 U.S.C. § 2252A (a) (Supp. V 1999).

281. See *supra* Part I.A.

Friel.²⁸² Friel's proposed amendment creates a rebuttable presumption that visual depictions of children engaged in sexual activity are child pornography, and provides an affirmative defense to those who can show by clear and convincing evidence that the images do not depict actual children.²⁸³ The differences between the amendment proposed by Friel and the one proposed in this Note are significant, however.

The amendment proposed here is modeled after the CPPA's existing affirmative defense for defendants who can show that the materials in question were produced using adults and were not marketed as child pornography.²⁸⁴ Accordingly, this Note's proposed amendment requires a showing that the materials were not promoted as "real" child pornography. This requirement assures that defendants do not benefit from accidentally stumbling upon virtual child pornography when searching for actual child pornography, and discourages the creation of child pornography that harms actual children.²⁸⁵

Moreover, the amendment proposed here recognizes Congress' concern for the children whose innocent photos were turned into pornography, by requiring defendants to prove that the children depicted in the materials are not identifiable. In enacting the CPPA, Congress found that "child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come."²⁸⁶

Friel's amendment, on the other hand, does not require a defendant to show that no identifiable minor is depicted in the pornographic

282. Friel, *supra* note 21, at 261. Friel's Note proposed including the following language to the CPPA:

(5) Any film, videotape, photograph or other similar visual reproduction or depiction by computer which appears on its face to depict a child engaged in any activity described in this section shall be presumed to be child pornography for purposes of this Section.

(6)(A) It shall be an affirmative defense to a charge of child pornography that each subject of the film, videotape, photograph or other similar visual reproduction or depiction by computer was not a real child under the age of eighteen (18) engaged in sexual activity, but was, rather, a computer-created image of an imaginary person, or a computer-manipulated image of a real person, or that the child was, in fact, eighteen (18) years of age or older.

(B) The defendant shall bear the burden of rebutting, by clear and convincing evidence, the presumption contained in subsection (a)(5) so as to rely on this affirmative defense.

Id.

283. *Id.*

284. *See supra* text accompanying note 129 (discussing this defense, § 2252A(c)).

285. *See infra* text accompanying notes 299, 306.

286. 18 U.S.C. § 2251 note (Supp. V 1999) (Congressional Findings) (quoting Pub. L. No. 104-208, § 101(a)).

materials in question, noting that “[p]erhaps it is better to leave issues, such as privacy and defamation, to the civil courts.”²⁸⁷ Friel finds it “unlikely that a state’s interest in preventing a potential mental harm will be enough to justify the expansion of [the definition of child pornography] to include virtual child pornography of real children.”²⁸⁸ Conversely, this Note argues that the protection of a child’s privacy and reputation is compelling, and that a criminal statute aimed at child pornography should—and under the Constitution may—address this interest. As Senator Biden noted,

there is wide agreement that expanding current law to prohibit visual depictions of sexually explicit conduct in which an identifiable minor’s likeness is recognizable meets current constitutional requirements, even where the minor was not actually engaged in sexual conduct These kinds of images cause significant harm to real children because, although the minor depicted may not have actually engaged in sexual conduct, the image creates an apparent record of sexual abuse and thus causes the same psychological harm to children (in fact, using a minor’s likeness in such a depiction could reasonably be considered a form of abuse).²⁸⁹

Recent technological developments have made it possible to create child pornography without the use of live children, thus potentially reducing the physical sexual abuse of children associated with the creation of child pornography.²⁹⁰ If an identifiable child is depicted in computer-created pornography, however, that child has still been abused. The prevention of such psychological sexual abuse is no less compelling an interest than the prevention of physical sexual abuse—a position supported by Supreme Court precedent.²⁹¹

Amending the CPPA to include a defense such as the one proposed here furthers the state interests validated by the Supreme Court in

287. Friel, *supra* note 21, at 239.

288. *Id.* at 237.

289. S. Rep. No. 104-358, at 30 (1996) (Additional Views of Senator Biden). Senator Biden proposed adding a separate provision to the CPPA to “prohibit[] *only* those visual depictions that have been created, adapted, or modified to make it appear that an *identifiable* minor was engaged in sexually explicit conduct.” *Id.* at 11. Because the Act is severable, 18 U.S.C. § 2251 note (Supp. V 1999) (Severability), this proposed provision would have remained intact in the event of judicial invalidation of the CPPA’s broadened definition of child pornography. *See* S. Rep. No. 104-358, at 28-32 (Additional Views of Senator Biden) (providing the rationale behind Senator Biden’s proposed provision).

290. *See supra* notes 38-46 and accompanying text (discussing the technological developments which led to the enactment of the CPPA).

291. *See* Adelman, *supra* note 257, at 486 (noting that the Supreme Court in *Ferber* “focused on . . . harm to the subjects [of child pornography]”). *But see* *New York v. Ferber*, 458 U.S. 747, 764-65 (1982) (“[T]he distribution of descriptions or other depictions of sexual conduct . . . which do not involve *live* performance or photographic or other visual reproduction of *live* performances, retains First Amendment protection.” (emphasis added)).

Ferber and Osborne.²⁹² In *Ferber*, the Court found it “evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”²⁹³ The Court continued, “[t]he legislative judgment . . . that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child . . . easily passes muster under the First Amendment.”²⁹⁴ In upholding a ban on the possession of child pornography, the Supreme Court in *Osborne* pointed to the harmful psychological effects of child pornography on its child subjects: “The pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come.”²⁹⁵ Accordingly, the affirmative defense proposed in this Note targets the physical and psychological harms to those children used in the creation of child pornography, whether the children are used as live models or their innocent likenesses are manipulated by computers to produce pornography.

Adding the affirmative defense proposed in this Note to the CPPA would close a striking gap in congressional logic. The CPPA as written provides an affirmative defense for those who can prove the pornographic materials in question (1) depict only people of majority age and (2) were not marketed as depicting children.²⁹⁶ In including this defense, Congress recognized that not all pornographic materials which appear to depict children harm children.²⁹⁷ But Congress failed to follow this notion through by allowing a defense for those who enjoy looking at sexually explicit depictions of children, but would

292. See Lee, *supra* note 37, at 678 (arguing that an affirmative defense under which defendants must demonstrate “that [the] child pornography in their possession is neither real, nor advertised as being real, nor of an identifiable minor . . . should allow courts to regulate virtual child pornography without radically departing from *Ferber’s* definition of child pornography”); Gary Geating, *Obscenity and Other Unprotected Speech: Free Speech Coalition v. Reno*, 13 Berkeley Tech. L.J. 389, 403 (noting that “the identifiable minor . . . definition[] of child pornography only prohibit[s] unprotected child pornography”). But see Lodato, *supra* note 70, at 1331-32 (“The courts have consistently explained that the government’s only compelling and permissible justification for prohibiting child pornography is to prevent the harms associated with participating in the production of such material.”).

293. *Ferber*, 458 U.S. at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

294. *Id.* at 758.

295. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

296. 18 U.S.C. § 2252A(c) (Supp. V 1999); see also *supra* note 129.

297. See S. Rep. No. 104-358, at 21 (1996) (“[The CPPA] does not, and is not intended to, apply to a depiction produced using *adults* engaging in [sic] sexually explicit conduct, even where a depicted individual may appear to be a minor.”). It is likely that Congress added this defense to comply with the Supreme Court’s suggestion in *Ferber* that using youthful-looking adults would be a permissible way around the statutory prohibitions in that case. See *supra* note 78. The point remains, however, that to allow sexually explicit images of adults who look like children but not computer-generated images that look like children is inconsistent—and constitutionally suspect.

never sexually molest an actual child and would choose pornography which does not harm actual children if given the statutory choice. The amendment proposed here allows such people their images, however vulgar members of Congress, the Supreme Court, or society in general may find them, provided they can show that no children were harmed by the pornography.

This kind of affirmative defense could also actually lead to a decrease in the number of children harmed by child pornography, a result clearly within the Act's plainly legitimate sweep. The court in *United States v. Mento* argued that a "safe harbor" for possessors of child pornography which does not depict identifiable children "would do nothing to prevent the sexual exploitation of . . . minors, and it would permit the market for child pornography to thrive."²⁹⁸ This Note respectfully disagrees. Knowing that virtual child pornography is not illegal under the Act, child pornographers could shift their business from abusing live children to generating virtual porn.²⁹⁹ Similarly, "a curious dabbler in pedophilia [would be] allowed to vent his or her desire on a computer screen instead of ruining a child's life for a sexual experience."³⁰⁰

This Note's proposed amendment also cures the Act's First Amendment troubles.³⁰¹ This affirmative defense would keep the Act from treading in constitutionally protected waters by assuring that only child pornography that harmed actual children is proscribed.³⁰² Without an actual event of abuse, be it physical or psychological abuse, the possession or creation of virtual child pornography would remain protected expression.³⁰³ This is in keeping with the Supreme

298. *United States v. Mento*, 231 F.3d 912, 921 (4th Cir. 2000).

299. Friel, *supra* note 21, at 224-25.

300. *Id.* at 225. The advent of virtual child pornography may also pose an increased risk to children. Current technology allows pedophiles to alter innocent photos of a child's friends or siblings to depict sexual conduct. *Id.* at 229. The child then sees these familiar figures engaged in sexual conduct and is more readily convinced such behavior is okay. *Id.* Consequently, a defendant invoking the proposed affirmative defense must prove that no identifiable child is depicted in the offending materials. See also *supra* text accompanying note 51 (discussing another way in which virtual child pornography increases the risk to children).

301. See Burke, *supra* note 39, at 471 ("A reading of the statute that permits the government to prosecute based only upon the strong *appearance* of a statutory violation and then shifts the burden to the defendant to prove that the depiction is neither real, nor advertised as being real, nor of an identifiable minor, should withstand scrutiny.")

302. If the materials were deemed obscene under *Miller*, they could be freely regulated without raising First Amendment concerns. See *supra* notes 68-70 and accompanying text (discussing the Supreme Court's decision in *Miller* and the resulting definition of unprotected obscenity); Lodato, *supra* note 70, at 1343-44 ("Obviously, if the material is obscene under the *Miller* standard, Congress may prohibit its dissemination and receipt regardless of whether the material depicts children.")

303. See Friel, *supra* note 21, at 248-49 (proposing an amendment that would not criminalize possession of virtual child pornography, but would prosecute actual sexual

Court's decisions in *Ferber* and *Osborne*, where the focus remained on the harm inflicted on actual children.³⁰⁴

The terms of this proposed amendment ensure the appropriate balance between the interests outlined in *Osborne* and those guarded by the First Amendment.³⁰⁵ The CPPA as amended by this Note in no way diminishes the government's ability to prevent the sexual exploitation of children during the creation of child pornography, as no children are sexually exploited to create virtual child pornography. By requiring defendants to show that the materials in question do not depict a recognizable child, the affirmative defense proposed here assures that no child suffers the emotional trauma of knowing pornographic images of her are circulating among pedophiles. This Note's proposed amendment arguably discourages a market for "traditional" child pornography which exploits actual children, by allowing for an alternative method of creation.³⁰⁶

Under the CPPA as amended by this Note, virtual child pornography can still be used by child abusers as a tool of seduction, however. This is the only *Osborne* factor³⁰⁷ which remains in play where virtual child pornography which does not depict an identifiable minor is concerned. Accordingly, the balance shifts in favor of First Amendment protection for such materials. This shift is especially necessary where, as here, the remaining factor supporting an outright ban on virtual child pornography is based on a presumption by the legislature about what uses child pornography *may* be put to, rather than an actual instance of abuse of a child.

The proposed amendment raises evidentiary concerns, however. One of Congress' reasons for enacting the CPPA was to ensure that defendants did not use improvements in technology as a "built-in reasonable doubt argument in every child exploitation/pornography prosecution."³⁰⁸ Congress feared that as technology advanced,

abuse or attempted sexual abuse of children); Burke, *supra* note 39, at 465 ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of the law, not abridgment of the rights of free speech." (quoting *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (quoting *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., & Holmes, J., concurring))).

304. See *supra* notes 71-95 and accompanying text (discussing the Supreme Court decisions in *Ferber* and *Osborne*).

305. See *supra* text accompanying notes 91-95, 250-60 (discussing the *Osborne* factors and how they apply to virtual child pornography).

306. See *supra* text accompanying note 299.

307. See *supra* text accompanying notes 91-95 (discussing the four factors which led the *Osborne* Court to uphold the constitutionality of a prohibition on the possession of child pornography).

308. *Hearing on S. 1237, supra* note 30 (prepared testimony of Bruce A. Taylor, President and Chief Counsel, Nat'l Law Ctr. for Children and Families); see also *supra* notes 123-126 and accompanying text. This reasonable doubt defense was attempted and either rejected or overcome in at least two cases, *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995) and *United States v. Nolan*, 818 F.2d 1015 (1st

computer-generated images would become increasingly difficult to distinguish from actual photographs or films.³⁰⁹ Shifting the burden to defendants to prove that the materials in question were created using a computer rather than a child removes this threat,³¹⁰ but poses evidentiary challenges for defendants. Proving that no actual child was used in the production of a particular piece of child pornography could be difficult, especially where the defendant downloaded the images from the Internet.³¹¹ These concerns do not rise to the level of Due Process violations, however, as there are sufficient ways for defendants to show the origin of the pornographic materials.³¹²

For example, a defendant could demonstrate his or her skill in manipulating computer-generated images, and an expert, appointed by the defendant or the court, could analyze the defendant's skill Or, the defendant could testify verbally as to how he or she created the image, or watched it being created, and the fact-finder could determine whether this testimony is credible.³¹³

Further, just as pornographic computer images are named to reflect the ages of those depicted,³¹⁴ so too could virtual child pornography images be labeled to indicate that no children were used in their production.³¹⁵ The names of the files in question could be offered to the jury as evidence that the defendant did not knowingly possess pornographic images of actual children.³¹⁶ Similarly, Web sites offering virtual child pornography could provide ample documentation of the production process for the materials, to ensure that defendants caught with such pornography could meet their burden under this Note's affirmative defense. The fact that no identifiable child is depicted in the images could be demonstrated "either through factual evidence or through expert testimony . . . to show that the depiction . . . is of an actual person and not different

Cir. 1987), though the appellate decisions in both left open the possibility of placing the burden on CPPA defendants to prove that the materials in question were not created using actual children. See Lodato, *supra* note 70, at 1354 (concluding that, "[u]nder the reasoning in *Nolan* and *Kimbrough* . . . it is the defendant's burden to prove that the child pornography was produced without using an actual child").

309. S. Rep. No. 104-358, at 16 (1996).

310. See Lodato, *supra* note 70, at 1353 ("By placing the burden of proof upon the defendant to prove that the child pornography in question was made without the use of an actual child, one of Congress' reasons for prohibiting computer-generated child pornography is rendered meaningless.").

311. Lee, *supra* note 37, at 678.

312. *But see id.* at 679 (finding that these evidentiary concerns "pose[] difficult constitutional issues which may not withstand constitutional scrutiny").

313. Friel, *supra* note 21, at 259 n.348.

314. See *supra* note 213.

315. Some possible file names are "8goodasreal.jpg," "justlike9.jpg," and "virtualkidz.gif."

316. While such evidence would not conclusively prove that the images in question are not of actual children, it would serve as one element of a defense against a charge of knowing possession of child pornography.

features from different people[,] and to show that the bone structure or other facial features are indeed of a minor.”³¹⁷

Thus, the burden of showing that no actual children were used in the production of the pornography in question, the pornography was not marketed as portraying actual children, and no identifiable children are depicted in the pornography is not undue. There are adequate means for defendants to prove each element of the affirmative defense proposed in this Note, and defendants wishing to produce, collect, or distribute virtual child pornography will be sure to use only those materials which a jury will find not to harm actual children.

In sum, the amendment proposed in this Note provides a constitutionally sound balance between the compelling state interest in protecting actual children from harm, and the First Amendment protection which necessarily extends to that speech we hate the most.³¹⁸ By focusing on injury to actual children, the CPPA as amended by this Note prohibits only expression which harms, not expression which merely offends. The First Amendment demands as much, allowing legislatures to protect their citizens from actual injury, while ensuring that disfavored ideas are not criminalized.³¹⁹

CONCLUSION

The First Amendment and the Supreme Court demand that child pornography be regulated only where the well-being of children is at stake. This mandate focuses attention not on the “secondary effects”³²⁰ child pornography may have, but on the harms directly associated with its production and existence. In *Holder v. Free Speech Coalition*³²¹ the Supreme Court will determine whether the Child Pornography Prevention Act of 1996 strays from the limits imposed by the Constitution and previous Court rulings. This Note urges the Court to find that the Act as written is impermissible under the First Amendment, and that the addition of an affirmative defense such as the one proposed here would keep the Act within the boundaries of the Constitution. Without such a defense, the Act sends government down “the slippery slope”³²² of regulating speech for the thoughts it

317. S. Rep. No. 104-358, at 31 (1996) (Additional Views of Senator Biden). Senator Biden was explaining how the prosecution could meet its burden under a separate section of the CPPA proposed by Biden to prohibit the use of identifiable minors in sexually explicit depictions. See *supra* note 289.

318. See *supra* text accompanying note 241.

319. See *supra* Part III.A.1 (arguing that the CPPA as written impinges on First Amendment freedoms by prohibiting more child pornography than that which poses a direct harm to actual children).

320. Friel, *supra* note 21, at 246.

321. 121 S. Ct. 876 (2001).

322. Clay Calvert, *The “Enticing Images” Doctrine: An Emerging Principle in First Amendment Jurisprudence?*, 10 Fordham Intell. Prop., Media & Ent. L.J. 595, 607

might put in people's heads, not solely the harm directly caused by its expression.

(2000) ("If one class of speech can be said to somehow entice children into illegal conduct, then surely Congress will continue to expand the definition of child pornography, sweeping up and regulating more and more forms of previously protected speech that allegedly influence children.").

Notes & Observations