Virtual Child Pornography:
Removing the Gag Reflex to Analyze Legal Implications

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Abstract:

Child pornography is a hot-button issue that has come under serious fire from the public. Technology, however, has allowed for entirely virtual child pornography, where no children need to be abused. Congress attempted to wholly ban this material, but was overturned partially by the Supreme Court. Today, however, the window is partially open to make such materials illegal. The purpose of this project is to examine the legal history of child pornography in the United States, draw conclusions for First Amendment application to virtual child pornography, and defend the legality of the material.

Type in “XXX” (a slang term for pornography) into Google’s search engine, and there are 298 million search results. “Kiddie porn” returns over 1 million results and “child pornography” returns over 3 million hits. Pornography has a strong presence on the Internet. It is widely accessible and varies across spectrums of fetishes. Child pornography has become increasingly prevalent on the Internet and, as a result, so has discussion attempting to remove it.

The First Amendment to the Constitution has been a widely discussed topic of law for centuries. Freedom of speech is not an absolute right, and can be legislated to an extent, but any attempts to curb it are subject to scrutiny by the courts (*Ashcroft v. Free Speech Coalition*, 2002 p. 1399). As such, freedom of speech has been vigorously defended by the Supreme Court, even if the speech espouses ideas contrary to mainstream values. Of the many controversial issues argued in terms of the First Amendment, a particularly divisive one is child pornography. “Child pornography raises issues about the nature of adult sexual interest in children, sexual assaults on children, and sexual fantasy about children” (Taylor and Quayle, 2003, p. 4).

Child pornography was determined to be illegal because it directly harms children (*New York v. Ferber*, 1982). It is the abuse of children “that sets child pornography apart from classes of material which could be labeled obscene or adult erotica” (Casanova, et al., 2000, p. 245). However, in the technology age, digital alterations of adults can replicate the appearance of children in pornography. Even wholly digital imitations of children are possible with the right computer software. Legislation that bans the creation or possession of this “virtual child pornography” must be subject to strict scrutiny by the judiciary (Miltner, 2005, p. 565). Can child pornography be banned on the Internet if it doesn’t directly involve any children? I contend that it cannot.

In order to address the issues involved in child pornography, this paper addresses the topics surrounding the material in addition to the legislation of the material and subsequent judicial review. First, I focus on the history of child pornography and its background in the arts. The attention is then shifted to the audience for which the pornography is intended—paedophiles[1] and child sex offenders. In order to understand the nature of child pornography, it is important to understand the consumers of such material. I will discuss the difference between paedophiles and child sex offenders, and the possible uses of virtual child pornography in psychological treatment. I then move on to the history of child pornography in the Supreme Court and the current legislation dealing with real and virtual child pornography. Since current federal law addresses child pornography in terms of obscenity, this paper then analyzes the Supreme Court's definition of obscenity, and the application of the definition to virtual child pornography. Next, I look at child pornography on the Internet, since this new media source provides for widespread dissemination of the material. Finally, I address some of the arguments against applying full First Amendment protections to virtual child pornography.

HISTORY OF CHILD PORNOGRAPHY AND ARTISTIC BACKGROUND

"[C]hild pornography has probably existed for as long as the written word" (Gillespie, 2005, p. 431). While people tend to think of child pornography as photographs or images, it can exist in written, visual, or auditory form (Gillespie, 2005, p. 431). Child sexual content has been a mainstay for the literary and artistic community for centuries. Written sexual scenes of minors, for example, are printed child pornography. Paintings of nudes from many eras of art depict individuals of youthful appearance posed in suggestive ways or even touching one another. Sexual involvement with minors has become entrenched in literature and has even become part

[1] In mainstream usage, "paedophile" is not used. The more common spelling is "pedophile." Most psychological research, however, uses the former spelling. Unless direct quotes are used from a source, this paper uses the former spelling.

of the mainstream. The term "Lolita" is a common euphemism for a sexually arousing, underage female and was coined due to the popularity of the novel Lolita by Vladimir Nabokov. Following the trend of other art forms, sexualization of children found its way into photography. Child pornography in photographic form is a more recent example, as film photography didn't exist until the 19th century. Even then, it wasn't readily available to the public. However, "[a]s early as 1847 J.T. Withe produced an album containing explicitly erotic scenes with children and naked portraits of young girls" (Townsend, 1996, p. 8).

Pictures of nude children, child pornography, and other mediums that depict sexual activity involving children clearly have a long history. It is only in recent modern times that such activity has come to be criminalized. The individual states did not put criminal codes for "child pornography" into their statutes until well into the 20th century. It was only in the late 1970s and early 1980s that states criminalized the dissemination of materials in which children appeared to be engaged in sexual activity (*New York v. Ferber*, 1982, FN2). As a result, the definition of "child pornography" has changed drastically.

Given its recent criminalization, the term "child pornography" must be defined with due precision and applied to media carefully. In 1996, the Stockholm World Congress against the Commercial Sexual Exploitation of Children defined child pornography as visual or audio material which depicted children (real or simulated) in explicit sexual conduct or showed the child's genitals in order to sexually gratify the viewer (Arnaldo, ed., 2001, p. 39). This definition comes close to the way the U.S. Congress has attempted to legislate child pornography, and it makes some distinctions that are important to future legislation and considerations.

This Stockholm World Congress definition is significant for several reasons. It clearly advocates the idea that nudity itself need not be pornographic. Through the 1950s, pictures of

nude children were common-place (Townsend, 1996). Such pictures were taken for aesthetic reasons, and often involved posing the child on hearth rugs, but not in erotic poses. Parents may take pictures of children at bath time in order to capture happy memories. These images are not sexual in nature and thus do not fit the term "pornography." Only images meant to elicit a sexual response due to posing, engaging in sexual acts, or some form of sexual suggestion, are pornography. Pornography has the "intent of being arousing" (Godwin, 2003, p. 248). "Goldstein (1999) differentiated between pornography and erotica, in that the objects that form erotica may, or may not be, sexually oriented or related to a given child or children involved in a sexual offense" (Taylor and Quayle, 2003 , p. 75). Erotica for paedophiles or child sexual offenders may thus include magazines, pictures of children, or other seemingly innocuous material (Lanning, 1987). Most child erotica is, therefore, already legal. Its creation does not require child sexual abuse. Indeed, its intent is likely wholly innocent. Only material *meant* to evoke sexualization of its characters is pornography.

The definition also draws a clear distinction between visual/audio content and written materials. Written materials are widely excluded from the definition of child pornography, despite the fact that many written articles may be equally as, or more graphic than, any visual depiction. The fact that written accounts (fictional or otherwise) are not included in the definition of child pornography has not been widely discussed. Little research discusses written child pornography. It is possible that, while repugnant to some, written accounts of child sexual activity are tolerated because writing is entirely simulated. No child need actually be harmed in order to write such accounts. Indeed, many written accounts of sexual encounters with children could be considered major works of art, and are thus excused from the stained term "child

pornography." It is possible, however, that such material could be written out of desire or collected through paedophile rings, just like visual material.

Finally, the definition is notable because it includes both *real and simulated* depictions of children. Although written materials have escaped the labeling factor, wholly digital representations of children are still considered as dangerous, immoral, or repulsive as images of real children. This disconnect must be addressed. Fictional written accounts of sex with children is no different from fictional visual accounts, but the latter has been criminalized while the former has escaped legislative probibitions.

DEFINING PAEDOPHILIA AND CHILD SEX OFFENDERS

The immediate reaction from the general public regarding child pornography is disgust. Consumers of such material "are regarded as among the most (if not the most) heinous criminals of all" (Sheldon and Howitt, 2007, p. 41). Child pornographers and paedophiles are generally reviled by even self-professed "tolerant" individuals. Indeed, when children are harmed, strict penalties must be applied to the offenders. The public may also become incensed, however, by those who create child pornography through wholly digital means and the consumers of such media. In such material, no child is directly harmed, and yet the idea of digital child pornography remains offensive to most.

Child pornography only exists in large underground rings because there is a market for the produced material. In order to understand the fear and loathing of such media, one must examine the consumers of the material. Thus, one must look at those who purchase and support child pornography. The most obvious group is paedophiles. Paedophilia has always existed, although a common definition and model to regulate paedophilia has not (Dunaigre in Arnaldo,

ed., 2001, p. 43). In more recent years, psychologists have attempted to classify paedophilia. As a mental disorder, "paedophilia" has been defined by the DSM-IV TR[2] by three criteria:

A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger);
B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty;

C. The person is at least age 16 years and at least 5 years older than the child or children in Criterion A.

A distinction must be made between "paedophiles" and "child sexual offenders." A paedophile is any individual who fits the DSM-IV TR criteria listed above. A child sexual offender, however, is an individual who has engaged in sexual activities with a minor against the law. Since laws vary widely from state to state regarding sexual consent, a child sexual offender is defined as having broken the law in the locality where the offense occurred. In general, these individuals are situational offenders—individuals who sexually assault children out of impulse (Dunaigre, in Arnaldo, ed., 2001, p. 45). Thus, although a "child" is legally defined as a person under the age of 18, there is a large difference between engaging in sexual acts with a child and being a paedophile. "Not all child molesters are pedophiles, and some pedophiles may not have molested children" (Laws and O'Donahue, 1997, p. 176). Clearly, being a paedophile according to DSM qualifications does not mean that an individual has ever sought sexual relations with a child. "There are heterosexual people, after all, who never have sexual relationships with another person. Why should that not be the case with paedophiles?" (Sheldon and Howitt, 2007, p. 43).

[2] The DSM-IV TR stands for Diagnostic Statistical Manual IV Text Revision. It is the text released by the American Psychiatric Association used widely by psychiatrists and psychologists to diagnose patients with clinical disorders.

There is some argument by child protection advocates that a less stringent definition of paedophile should be used. Some argue that it should simply be stated as an attraction to children. If this definition is used, paedophilia is far more widespread than previously believed. In fact, in a sample of "normal" individuals who were asked hypothetical questions about whether they would commit certain illegal sexual acts, it was reported that "21% of US college male students admitted to having some sexual attraction to children" (Sheldon and Howitt, 2007, p. 43). The relative normalcy of such an attraction means that more stringent qualifications should be used to determine who is labeled a paedophile. Such definitions also lack the clarity of the DSM qualifications and involve a much larger area of interpretation. It is tempting to assign harsh, morality-laden labels to individuals who have sexual attractions to children, but for the purposes of this paper the above definitions will be used. Further, individuals classified as "child sex offenders" due to statutory rape offenses are excluded.

TREATING PAEDOPHILIA

There is contention over whether paedophiles can be treated for their paraphilia. Some argue that paedophilia is a psychological condition and can be treated with medication or therapy. Others claim that paedophilia is not curable or even treatable because the impulse for paedophiles to have contact with children is too high. The latter claim appears to be somewhat shortsighted. Stating that any mental disorder or addiction is untreatable is irresponsible and places stigmas on the disorder. In treating paedophilia, it is even possible that virtual child pornography could control the desire that patients have for children. Arnaldo (2001) states that there are psychological and drug-based therapies for paedophiles (p. 47). It is possible that these treatments individually, or in conjunction, could keep paedophiles from engaging in child sexual

abuse. As stated earlier, simply because someone is sexually attracted to children does not mean that he or she ever will seek sexual contact with a minor.

Paedophilia can be examined according to a disease model, but is best viewed in terms of a mental disorder or addiction. The use of these models, however, "does not justify the assumption that paedophilia is a psychotic disorder which prevents the sufferer from functioning in society" (Sheldon and Howitt, 2007, p. 51). In examining treatment for paedophilia, one must be concerned with keeping the individual from sexually abusing children. This may require some form of mental outlet in order to control urges. However, paedophiles cannot simply be removed from society because of their disorder. They have the same constitutional rights as other individuals. The aim, then, is to focus on reducing the risk of offending. Many owners of child pornography who have not abused children express concern over their strong desire to do so (Quayle and Taylor, 2002, p. 349 – 350).

There are four main uses of the Internet in connection to paedophilia: "trafficking child pornography; locating children to molest; sexual communication with children; and communication with other paedophiles" (Wilcockson, 2006, p. 34). In order to address treatment, one must separate each individual component from the others. Not all paedophiles who use the Internet will employ all four factors. The four components carry different levels of risk. Some of the components lend themselves to a higher chance of contact offending. Trafficking child pornography and communicating with other paedophiles suggest a considerably lower risk of contact offending than actively seeking children in one's area to molest or chatting sexually with minors via the Internet.

Some paedophiles will restrict their Internet usages to collecting child pornography and/or talking to other paedophiles. There is some evidence that suggests "pornography for

some offenders may also have a positive function in that it may prevent the commission of a contact offense" (Taylor and Quayle, 2003, p. 76). Taylor and Quayle described interviews with men convicted of possessing illegal images of children. The interviews involved viewing sexual images of children. Some of the respondents engaged in masturbation, and those who did turned their discussion afterwards to non-sexual topics and stopped looking at the pictures. The offenders stated that such images reduced the urge to engage in sexual acts with actual children (Quayle and Taylor, 2002, p. 339). Although the images used contained children, this sort of anecdotal evidence gives hope to the idea that paedophilia may be controlled through the use of virtual material. When virtual material is produced, it could replace the need for actual child pornography in which minors are abused, but still provide an outlet for paedophiles' fantasies. In fact, most of the interviewees expressed no connection to the initial act of abuse. One interviewee stated that he was aware that the files were digital, and since they were photographs that only represented real people, they weren't really connected to the original act (Taylor and Quayle, 2003, p. 85). This recognition of digital files could serve as a positive means for treatment. Photographs that are digital imitations of people do not have to be any less sexually satisfying than ones that represent actual people. Further, the separation from the initial abuse suggests that the paedophiles do not want to be associated with it. Many of the respondents attempted to justify their use of child pornography by claiming that they did not want to view anything in which the child appeared to be harmed (Taylor and Quayle, 2003). In dissociating the child pornography from the act of child abuse, two important psychological distinctions are made: 1.) The images themselves are somehow fulfilling, separate from the acts done to create them, and 2.) *I* am not a child abuser. Clearly, for these individuals, the acts done to create the material and simply collecting the product are distinct. Allowing virtual child pornography can

capitalize on the distinction made by providing material that allows the individuals to fulfill sexual needs without any child being abused.

There can be multiple reasons for individuals to collect such materials. To some extent, they were likened to trading baseball cards, and the emphasis was on collecting a series of images so as to have a whole "collection" that was taken at one period of time (Quayle and Taylor, 2002, p. 342). This complicates the ability to insert virtual child pornography in the place of live child pornography. As a result, such collectors of illegal materials may not constitute a wide enough audience to further live child pornography. It is possible that wholly digital child porn would substitute for the main underground rings of such material, and might satisfy a majority of its collectors.

Digital child pornography opens many doors to satisfying the sexual urges of individuals who collect such material. The main positive point, however, is that it does so without actively harming children. Such material can be created to fulfill even strongly deviant desires that include violent sexual depictions without requiring live participants. If this material can actually be used to curb the sexual desire for children, than it is possible that contact offenses will actually decrease.

Another ramification of online child pornography is the normalization and acceptance of the behavior. When clear distinctions can be drawn between virtual images and contact offenses, it is possible that the behavior can be contained. Granting individuals who are sexually attracted to minors an outlet for their sexual proclivities creates a community of support.

Quayle and Taylor (2002) found studies with contradictory results regarding the function of pornographic material involving children. Some studies suggest that the material could be used to seduce children into believing the activity is normal or desirable, while others suggest

that the pornography may prevent the commission of contact offenses (p. 333). Unfortunately, there appears to be no conclusive evidence in either direction. Due to ethical constraints, it is difficult to create truly scientific experiments with clear and convincing evidence in one direction or the other. Since virtual child pornography shows possible promise for treatment of paedophilia, it must be examined further. The use of virtual and real child pornography must be examined in relation to contact offenses as well. In this case, it is impossible to create truly scientific results because ethical and legal constraints prohibit random assignment. As a result, it must be noted that even if a large number of contact offenses involve the use of child pornography (real or virtual), it does not necessarily mean that child pornography motivated or advanced the abuse.

LEGISLATING VIRTUAL CHILD PORNOGRAPHY

The First Amendment is a fundamental right, protected from most infringement by Congress and other legislative bodies (*Lovell v. City of Griffin*, 1938, p. 450). Freedom of speech is a right that the Supreme Court has widely defended. While it is difficult to legislate, however, it is not impossible (Russomanno, 2005). "The Government may […] regulate the content of constitutionally protected speech […] to promote a compelling interest" but it must also narrowly tailor the legislation so that it minimally interferes with the First Amendment (*Sable Communications of California, Inc. v. FCC*, 1989, p. 126).

The Supreme Court ruled the criminalization of child pornography constitutional due to one such compelling government interest. By the time *New York v. Ferber* was decided in 1982, "virtually all" of the United States had criminalized the creation of images with children engaging in sexual acts, and many states did not require that this material be legally obscene to fall under the statute (*New York v. Ferber*, 1982). The New York statute at issue in *Ferber* only

listed *visual* depictions of such material—plays, motion pictures, photographs, etc. Literature, paintings, sculptures, or auditory depictions of child sexual material were not included in the statute. The creation and dissemination of such visual material was deemed illegal because the State has a vested interest in protecting minors. In the case at hand in *Ferber*, the "speech" was the product of conduct. Conduct does not fall under First Amendment protections, and can be regulated or even banned. As a result, traditional pornography was criminalized because the images were the result of abuse.

Mere possession of real child pornography is also a criminal activity. In *Osborne v. Ohio* (1990), the Supreme Court upheld the ban on possession of child pornography by reasoning, yet again, that the state had a compelling interest in the protection of children (Kornegay, 2006, p. 2138). Since the materials were a direct result of abuse, the mere possession of such materials continued the abuse (Kornegay, 2006, 2139).

Until 1996, child pornography was narrowly defined and "excluded paintings, computer images, verbal descriptions, computer-generated morphings, and simulations by immature-looking adults" (Casanova, et al., 2000, p. 248). The criminality of real child pornography was based solely on the abuse needed for its creation. Since *Ferber* was decided in 1982, however, major technological advances in digital imaging have occurred, now allowing for manipulation of pictures and videos. As a result, Congress extended the definition of child pornography further with the Child Pornography Prevention Act of 1996 (CPPA) (Kornegay, 2006, p. 2139). Among their concerns, Congress noted that new technology could create "visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable" from real children (CPPA, Subsection 1: Findings). In more of the "Findings," Congress stated that virtual child pornography could be used to seduce children into

sexual activity. The resulting legislation banned real *and simulated* images of children engaging in sexual activity. The CPPA allowed for the prosecution of individuals who possessed any pornographic image that contained someone who *appeared to be* a minor. It also banned any image that was promoted, presented, described, advertised, or distributed in a way that conveyed the impression that it contained child pornography. In the pandering provision, the actual content did not matter, only the description (Kornegay, 2006, p. 2145). If a description of the images suggested that it was child pornography, possession of the images was illegal under the CPPA, *regardless of what the images actually contained*.

Not surprisingly, certain provisions of the CPPA were challenged in court in the case of *Ashcroft v. Free Speech Coalition* (2002). The U.S. Supreme Court granted certiorari and heard arguments in October 2001. The Supreme Court stated that the CPPA went beyond *New York v. Ferber* in including pornography that did not depict actual children, since *Ferber* was decided based on the State's interest in protecting minors. Free Speech Coalition contended that since no minors were involved, and the speech was not necessarily obscene by legal standards, that the CPPA was overbroad, and chilled protected speech (*Ashcroft v. Free Speech Coalition*, 2002, p. 1398). The Supreme Court affirmed this assertion, relying partly on *Ferber* for its explanation, since *Ferber* asserted that child pornography is not necessarily without value and that alternatives such as virtual child pornography might be useful as an unconventional substitute for child pornography that involves minors (*Ashcroft v. Free Speech Coalition*, 2002, pps. 1402, 1405).

The government asserted that virtual child pornography would encourage paedophiles to engage in child abuse (CPPA, Subsection 1, Findings). They could not show more than a remote connection between virtual child pornography and child abuse, however. As a result, the

Supreme Court rejected this argument, stating that the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it" (*Ashcroft v. Free Speech Coalition*, 2002, p. 1403). In 1919, the Supreme Court ruled that if certain speech or press presented a "clear and present danger" of bringing activity which Congress may rightfully prevent, that material is not protected by the First Amendment (*Schenck v. United States*, 1919). The Supreme Court may examine speech-restricting legislation to analyze if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (*Schenck v. United States*, 1919, p. 52). In *Schenck* (1919), the printed material was not protected by the First Amendment because it strongly espoused obstructing a legal draft during wartime. In the same manner, an individual cannot shout "Fire!" in a crowded theater if he or she knows there is no fire (Epstein and Walker, 2004, p. 214). The example is different, but the principle is the same: the harm that will most likely result from the speech is great enough that it precludes the speech from being protected by the First Amendment. In the latter example, the panic and resulting bodily harm caused to the other theater patrons imbues the utterance with clear and present danger. In *Ashcroft v. Free Speech Coalition* (2002), however, the government did not assert that there was a clear and present danger presented by virtual child pornography, merely the possibility that such material could be used by paedophiles in child sexual abuse. If the danger is not "clear and present," the government cannot criminalize speech simply to present crimes that *may* occur in the future. "The prospect of crime […] by itself does not justify laws suppressing protected speech" (*Ashcroft v. Free Speech Coalition*, 2002, p. 1399). The government's argument was therefore insufficient to support legislating that form of speech.

The government also asserted that allowing virtual child pornography would make it almost impossible to prosecute real child pornography crimes. According to the Supreme Court, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech" (*Ashcroft v. Free Speech Coalition*, 2002, p. 1404). Therefore, any future legislation cannot attempt to ban speech protected by the First Amendment solely because it interferes with prosecuting crimes.

The Supreme Court also addressed the pandering provision of the statute. Under the CPPA, any sexually explicit material that was promoted as containing sexual images of minors was banned. "Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie" (*Ashcroft v. Free Speech Coalition,* 2002, p. 1405). The section of the statute made the film illegal for anyone to possess, whether or not they were responsible for how the material was marketed. According to the Supreme Court, the First Amendment requires a more precise writing of such a section so that it only punishes pandering. The CPPA failed to narrowly tailor that section because possession of such material is illegal even if the possessor knows the movie contains no sexual content involving minors (*Ashcroft v. Free Speech Coalition,* 2002, p. 1406). The resulting statute thus prohibited speech entitled to First Amendment protections, simply because they were *advertised* as containing minors engaging in sexual activity.

The decision in *Ashcroft v. Free Speech Coalition* (2002) overturned two sections to the CPPA—the section that prohibited the use of a visual depiction that "appears to be" a minor, and the section that prohibited describing, advertising, and promoting a visual depiction in a way that conveys the impression that the visual depiction involves a minor engaged in sexual conduct

(Mota, 2002, p. 91). As a result, virtual child pornography was legal after the decision was released.

One important provision of the statute was not overturned. In subsection 2 of the CPPA, Congress amended the U.S. Code and banned the use of images that had been morphed so that it appeared that an identifiable minor was engaging in sexual activity (CPPA, Subsection 2. Definitions, 8(c)). Although technically this can be called "virtual child pornography," it contains morphed images of actual children and is thus not the same as material that does not contain identifiable minors. The legislation of this material by the Supreme Court makes sense in light of *Ferber* (1919). The children were not used in creating the pornography, and thus the abuse is not inherent in its production. However, although such pornography can be produced by using adult actors and morphing the images later, using a picture of an identifiable minor for the resulting pornography targets a real child. The state has a compelling interest in banning any pornography in which an image of a real child is used, whether or not the child was abused in the creation of the material.

Only one year after *Ashcroft v. Free Speech Coalition* (2002) was decided, Congress passed the PROTECT (Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today) Act of 2003. The PROTECT Act was clearly a Congressional response to the Court's decision in *Ashcroft* (2002). It bans any material that "is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct" (PROTECT Act, 2003, Sec. 502, 1(B)). As a result, virtual child pornography that is sufficiently realistic falls within the grasp of the Act. The material need not be indistinguishable to an expert, only to the ordinary individual (Kornegay, 2006, p. 2150). While the PROTECT Act uses "indistinguishable" as opposed to the more vague "appears to be" phrase found in the CPPA, it still includes a large amount of virtual

child pornography. Any images of adults engaged in sexual activity that were morphed in a realistic fashion could be included under the Act's provisions, whether or not the depiction was of an identifiable minor. It is certainly narrower than the CPPA's provision, but bans what may still be protected speech under the First Amendment. Kornegay (2006) contends that this greatly reduces the chilling effect, but such an effect still exists.

Real child pornography was banned due to the abuse necessary for its creation. Possession of such materials created a demand and economic stimulus for its production, and thus possession was criminalized since it furthered the abuse. Banning pornography "indistinguishable from" real child pornography does not further the state's interest in protecting children and criminalizes material subject to First Amendment protections. Such legislation attempts to ban legal material from being viewed by adults. In *Stanley v. Georgia* (1969), the Supreme Court ruled that Congress cannot "premise legislation on the desirability of controlling a person's private thoughts" (p. 566). The phrase "indistinguishable from" should be stricken from the statute. While it is not necessarily vague, it is certainly overbroad, and includes a large quantity of material that is protected by the First Amendment.

The PROTECT Act provides an affirmative defense for individuals charged under with trafficking, possessing with intent to sell, and mere possession of child pornography (Kornegay, 2006, p. 2151). Persons charged with such offenses may assert that the pornography was produced using real persons who were all adults or that the material was not produced using minors (Kornegay, 2006, p. 2151). The defense appears to be silent on the issue of the creation of the pornography. However, if individuals charged with the aforementioned crimes can prove that the material they possess does not actually contain real children, they are free from prosecution. Unfortunately, it is unlikely that all possessors of such media have documentation

that no real children were used. Although in criminal cases, the state is required to prove the allegations beyond a reasonable doubt, the statute includes images that are "indistinguishable from" actual minors. As a result, the burden actually falls upon the defendant, who must provide some evidence that, although the images *appear* to be real, they are in fact digitally altered. Such provisions turn the arena of criminal law upside-down and could result in many convictions for possessing what is lawful material.

No defendant should have to prove their innocence, which is what the affirmative defense in the statute essentially requires. Kornegay (2006) argues that the affirmative defense in the statute should be read so that the defendant need only provide enough credible evidence so that the fact finder in the case had reasonable doubt that the child depicted was real (p. 2156). The trouble with this assertion is: what is "credible evidence" regarding downloaded material? Kornegay notes that distributors are required to affix a notice to any sexually explicit imagery distributed. If adult pornography has been altered on home software by an individual who is *not* a distributor, however, such a notice is not required. With programs such as Adobe Photoshop, such home morphings of pornography are feasible. That individual may have no evidence that the pornography doesn't contain children.

The affirmative defense of the PROTECT Act does not go far enough to protect individuals who possess legal virtual child pornography. If an individual receives child pornography that he or she knows to be virtual porn because of its description, but does not keep that description, then he or she may be subject to conviction under the statute. While such legislation can be applied to individuals who download virtual child pornography *after* its inception, it cannot be applied to those who acquired the same materials prior to the Act. It is possible that individuals who legally possessed virtual child pornography before 2003 lack proof

that such material is within legal bounds. Such evidence could have been deleted or thrown away, particularly since the time frame in between *Ashcroft v. Free Speech Coalition* and the PROTECT Act did not require individual collectors of virtual child pornography to have proof that it was minor-free. Kornegay (2006) only examines books, magazines, or videos, stating that possessors of child pornography may easily get credible evidence from the publisher (p. 2159). He does not address the problem of proof for individual pictures that could be downloaded by individual collectors (p. 2159). The statute places a heavy burden on possessors of virtual child pornography, particularly since the time period of 2002 to 2003 required no "credible evidence" that virtual child pornography did not include minors. The affirmative defense stated in the PROTECT Act does not outline a solution for these problems, and should be edited to clearly state what constitutes credible evidence.

The PROTECT Act has been challenged in court. In October 2007, the Supreme Court heard oral arguments for *United States v. Williams*. At issue in the case is the pandering provision of the PROTECT Act. The Act bans advertising or promoting material in a "manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains" an obscene depiction of sexual conduct by a minor, or a depiction of sexual conduct by an actual minor (PROTECT Act, Sec. 503, 3(b)). The main change in the statutes is that the CPPA criminalized the mere possession of materials described as child pornography or obscenity, whereas the PROTECT Act criminalizes promoting or advertising material as such. The PROTECT Act's pandering provision has been far more narrowly tailored than the CPPA. In *Ashcroft v. Free Speech Coalition*, the Supreme Court noted that pandering may be important in determining whether media was obscene (122 S.Ct. 1406). Some material, however, may be marketed, advertise, or promoted in such a way that

"reflects the belief" that the material contains a visual depiction of an actual minor engaging in sexual activity. In *Ashcroft*, the Supreme Court ruled that some Academy Award-winning movies would be included in material banned by the CPPA. The same is true of the PROTECT Act. Movies may be marketed in such a way that reflects the belief that it depicts minors engaging in sexual activity. The pandering provision of the PROTECT Act, like the CPPA, regards "how the speech is presented, not on what is depicted" (*Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1405). The decision in *United States v. Williams* has not yet been released, but the section should be ruled unconstitutional by the Supreme Court.

OBSCENITY AND THE PROTECT ACT

Section 504 of the PROTECT Act prohibits any individual from knowingly "produc[ing], distribut[ing], receiv[ing], or possess[ing] with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting," that "depicts a minor engaging in sexual activity, and is obscene," or "depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex" and lacks serious artistic, literary, scientific, or political value (PROTECT Act, 2003, p. 691). Further, the PROTECT Act bans "possess[ing] a visual depiction of any kind" that fulfills the above criteria (PROTECT Act, 2003, p. 681) This section of the PROTECT Act aims to ban virtual child pornography and even cartoon, drawn, sculpted, or painted depictions of child pornography if it lacks serious artistic, literary, scientific, or political value. Yet again, Congress attempted to ban visual depictions of fictional child pornography, in which no children are directly used.

This section of the PROTECT Act raises serious constitutional issues. In attempting to ban virtual child pornography, it uses part of the obscenity framework laid out by the Supreme Court, but not the entire three-part test. Obscene material is not protected by the First Amendment, and can be completely banned (*Roth v. United States*, 1957, p. 481). Pornography, however, is not obscene by definition. Obscenity was outlined by the Supreme Court in *Miller v. California*. The obscenity test requires that material fulfill three requirements:

> "(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" (*Miller v. California*, 1973, p. 24, internal citations omitted).

In order to be ruled "legally obscene," media must meet all three of these qualifications. Congress banned the production, distribution, receiving, and possession (with or without the intent to distribute) of any image depicting a minor engaging in sexual activity that is obscene. That part of the Act, by including the term "obscene," is bound to interpretation by the tripartite framework outlined by the Supreme Court in *Miller*. This part of the Act is constitutionally sound, as it bans material that does not have First Amendment protections. The dissemination and possession of real child pornography is banned in the Act, and such prohibition of materials involving real children is constitutionally sound. The "obscene" qualification is not necessary if real child pornography is being banned.

The Act *also* bans producing, distributing, receiving or possessing with intent to distribute "an image that is *or appears to be*, of a minor engaging in" sexual acts, provided the

image “lacks serious literary, artistic, political, or scientific value” (PROTECT Act, 2003, p. 681 emphasis added). For this part of the PROTECT Act, Congress did not adhere to the obscenity definitions set forth by the Supreme Court. They chose only the third provision of the obscenity test. While the obscenity qualification was not necessary for the prohibition of real child pornography, it is certainly necessary in this portion of the Act. Here, Congress attempted to ban virtual child pornography only if it lacks serious value in the literary, artistic, political, or scientific realms. If Congress had held to the *Miller* test in this section, and banned the production and dissemination of virtual child pornography that was obscene, this section of the PROTECT Act would pass constitutional muster. Breaking up the *Miller* test and using only one of its three provisions, however, means that a much less stringent test is created. It is not wholly clear why Congress drew this seemingly arbitrary line when involving virtual child pornography, but the prohibition of such materials simply because they lack certain significance is unconstitutional. The materials must also appeal to a prurient interest by community standards and be patently offensive. The Act can be revised to pass constitutional muster if the Congress amends it to prohibit the production and distribution of virtual child pornography that is obscene according to the *Miller* test.

Congress also attempted to ban the possession of child pornography in a similar fashion. Any individual who possesses a visual depiction of a minor that is obscene has violated the Act. This is constitutional, for the Supreme Court upheld a ban on possession of child pornography in *Osborne v. Ohio* (1990). However, it is important to note that in *Stanley v. Georgia* (1969), the Supreme Court stated that mere possession of obscene materials cannot be criminalized. The reason that this part of the Act is valid, then, is because it criminalizes real child pornography, not obscenity.

The final part of section 504 of the PROTECT Act bans the possession of any image that is, or appears to be, of a minor engaging in sexual activity that lacks serious literary, artistic, political, or scientific value. The PROTECT Act thus attempts to ban the mere possession of virtual child pornography if it lacks serious values. This part of the Act is clearly unconstitutional. "[T]he mere private possession of obscene matter cannot constitutionally be made a crime" (*Stanley v. Georgia*, 1969, p. 559). Possession of obscene materials cannot be prohibited because Congress cannot control a person's thoughts (*Stanley v. Georgia*, 1969, p. 566). If media that fits the strict obscenity test laid out in *Miller* cannot be proscribed, certainly possession of non-obscene materials cannot be proscribed. While in the former parts of the section, Congress addresses production and distribution of materials, this part addresses mere possession. In order to suppress the possession virtual child pornography, Congress must find an avenue other than obscenity. It is not evident that any other avenues exist that are constitutionally sound, but banning possession of virtual child pornography through an obscenity framework is inherently unconstitutional since private possession of obscenity cannot be prohibited.

The possession ban in the PROTECT Act is patently unconstitutional. Congress has attempted twice to prohibit the possession of virtual child porn, but has failed on each attempt. A revised statute that attempted to criminalize possession of such materials under the legal obscenity framework would be inconsistent with the ruling in *Stanley v. Georgia* (1969), which declared that the government could not criminalize mere possession of obscenity.

When examined carefully, the possession portion of the PROTECT Act fails. The Supreme Court has clearly shown through its decisions that possessing virtual child pornography cannot be a crime, whether it is or is not obscene. The Act attempts to proscribe the possession

of materials that do not necessarily meet the obscenity test. It proscribes materials that meet a far less strict standard. If the media itself lacks serious literary, artistic, political, or scientific value, it is prohibited by the Act. While this portion of the Act has not yet come under review, any challenge to the possession prohibition must result in invalidating this particular part of the act. As it is written, it is highly unlikely that a revision of the possession ban will remedy the constitutional issues. As such, it should be overturned in its entirety.

The "attempt by Congress to proscribe virtual child pornography as obscene was on the right track," but falls short constitutionally (Kornegay, 2006, p. 2167). If Congress bans the production and dissemination of virtual child pornography based on the *Miller* obscenity test, the prohibition will likely pass constitutional muster. However, it is important to note that not all virtual child pornography will fall into this category. Obscenity is defined by community standards and in order for something to be considered legally obscene, it must appeal to prurient interest, be patently offensive, and lack serious literary, artistic, political, or scientific value (*Miller v. California,* 1973, pps. 36-37). Not all virtual child pornography will pass the obscenity test. As Justice Kennedy explained in *Ashcroft*, images that may technically be "child pornography" may not be offensive in light of community standards (*Ashcroft v. Free Speech Coalition*, 2002, p. 1400). Congress cannot attempt to override this by banning all virtual child pornography, since the Supreme Court has stated that it is subject to First Amendment protections. They must narrowly tailor any legislation so that it minimally impinges upon the freedom of speech (*Sable Communications of California, Inc. v. FCC,* 1989, p. 126). A revision of the wording in this portion of the Act can remedy the constitutional issues at hand. In order to do so, however, the Act must employ the legal obscenity definition outlined by the Supreme Court.

If Congress does attempt to revise the statute by criminalizing the distribution of "obscene" virtual child pornography, there are other issues to be considered. As stated earlier, virtual child pornography could be useful in treating and controlling paedophilic urges. Individuals who suffer from the disorder may use virtual child pornography in order to prevent contact offending. This would certainly be an important scientific value and could result in a decrease of child sexual abuse. Banning virtual child pornography, at least for certain controlled uses, is short-sighted.

Further, since obscenity is defined by community standards, what is obscene (and, as a result, illegal) in Charlotte, NC may not be obscene in Manhattan. For printed materials, the Act clearly serves its purpose, and obscenity can be defined by the community standards in which the materials were located. A great deal of virtual child pornography exists (and will exist in the future) on the Internet. The PROTECT Act includes materials that are transmitted through the use of computers, and thus it bans the material if it is used in interstate or foreign transmissions through the Internet (PROTECT Act, 2003, p. 681-682). Materials on the Internet are not transported in the same way as physical materials. This creates unique jurisdictional issues that are still unresolved.

VIRTUAL CHILD PORNOGRAPHY AND THE INTERNET

In order to understand the legal ramifications of regulating the Internet, it is important to note that material may be posted and viewed from different counties, states, or countries. Traditional jurisdictions of law enforcement involve physical locations. The Internet, however, allows any computer to access information that is on another computer anywhere in the world. As a result, jurisdictions become harder to draw.

The Internet is widely available to the American public. It was privatized in April of 1995 and, unlike radio or television, is not regulated by the Federal Communications Commission (Casanova, et al., 2000). Thus, the Internet is an extremely difficult arena in which to prosecute crimes. In addition to being new and highly controversial, the Internet has expanded quickly through American society, and become a mainstay for access to information. It connects millions, and possibly billions of sites, and has unlimited information potential. The Internet has enabled Internet-Relay Chat (IRC) and other forms of instant messaging. IRC allows individuals to communicate and share files directly with other Internet users. As such, child pornography is most easily accessed and traded through the Internet. The difficulties of monitoring such a medium combined with the informational freedom has created a dilemma for legislative bodies—how do we eliminate child pornography?

The short answer is that it is practically impossible to eliminate child pornography on the Internet. Once an image has been posted on the Internet, it is virtually indestructible (Kerrison, 2006). The massive reach of the Internet allows millions of individuals to access information at incredibly fast speeds. In order to eliminate any given image, it is necessary to find all Internet pages where it has been posted *and* all the individual computers to which it was downloaded.

Congress has so far had trouble deciding how to prohibit material on the Internet. They have attempted to proscribe information on the Internet according to traditional jurisdictions, prohibiting the transfer of material and the viewing or downloading of material by computers in the United States (PROTECT Act, 2003, p. 681-682). In terms of the PROTECT Act and the application of obscenity, however, such traditional jurisdictions do not make sense on the Internet.

The Internet connects any computer in the world to information that can be located in a different state or country. This has resulted in an online community of sorts, in which people can talk, trade information, give opinions, and transfer media. Since obscenity must be defined by community standards, as stated by the Court in *Miller*, it does not make sense to view the "community" as the location of the computer on which the material exists. Instead, a much more rational interpretation is that the Internet itself is a community and is, therefore, its own jurisdiction. The legislature has not yet accepted this view, but in light of modern technology it is the most logical way to police the Internet.

There are some technical issues that must be addressed in order to create an "Internet jurisdiction." It cannot be a traditional jurisdiction that has a separate court system, but should be analyzed in terms of national and international law. A separate court in the federal system should exist for Internet issues. Some material may be housed under traditional jurisdictions. E-mail and instant messaging systems, for example, can be regulated according to local, state, and federal laws. These forms of communication are analogous to private mailing companies and phone conversations. Information that is downloaded from or viewed on a website, however, should be handled in a separate court that can handle the specific issues raised by the Internet. The Internet is sufficiently unique to justify this separation.

Since the only feasible constitutional avenue Congress may take to prohibit virtual child pornography is under the obscenity framework, one must analyze Internet pornography under its provisions. In *Miller v. California* (1973), the Supreme Court stated that the test for obscenity relied upon "contemporary community standards" (p. 36). The evolution of the Internet has provided a sort of online community where Internet users are arguably more connected to each other than actual neighbors. If viewing the Internet as its own community, then the obscenity

framework must be analyzed by Internet community standards. When analyzing obscenity in terms of an Internet community, legal obscenity becomes much harder to label.

The Internet hosts a large amount of pornographic material. Some of this media contains material that could be considered highly offensive. Many websites feature content that would qualify as obscene in physical jurisdictions, but has become just a segment of the Internet—utilized by some, ignored by others, and blocked by parents and filtering systems. One example would be bestiality, which is easily accessed on the Internet. Bestiality would likely be considered "obscene" in many jurisdictions, but appears on the Internet as just another form of sexual activity. Those interested in bestiality may download such content, but the vast majority of Internet users will simply ignore the material or be complete unaware of its existence. Certainly bestiality might qualify as appealing to prurient interests, but it has become normalized on the Internet. Child pornography may even be more common than pornography involving animals. In virtual child pornography, as opposed to pornography involving animals, there aren't any victims since the media can be used by morphing images of consenting adults.

Other websites that may be patently offensive have become part of the Internet mainstream and are mocked in the media. Some examples include the Internet phenomena of Tubgirl (picture) and 2 Girls 1 Cup (video clip). Each of these depicts coprophagia, the eating of excrement. They were widely circulated links on the Internet, and are easily found through search engines and viewed for free. Given the nature of the material, it is hard to argue that virtual child pornography is more patently offensive. The Internet, as opposed to traditional jurisdictions, has allowed such material to thrive. Rotten.com is one website that has a whole subsection encouraging traditionally offensive pornography. It promises to "handle your various newly discovered fetishes" and give you a "steady stream of nasty at your fingertips"

(http://www.pornopolis.com). Material that may be legally obscene in physical locations has moved to the Internet. Perhaps this shift is even preferable, as digital material can be filtered and blocked.

Since the Internet explosion and the resulting access to media is relatively new, it is difficult to draw strong conclusions without sufficient research. However, if viewing the Internet as its own community, it is not likely that virtual child pornography would be considered obscene. Many websites contain material that would probably be outlawed in print form. However, material on the Internet is more easily avoided that a pamphlet handed to someone on the street or mailed to their home address, as was the case in *Roth v. United States*. New filters and parental controls allow individuals to protect themselves and their children from such materials if they choose.

ARGUMENTS AGAINST PROTECTING VIRTUAL CHILD PORNOGRAPHY

Anti-porn activists may argue that virtual child pornography presents a clear and present danger to children because the possessors of such material may sexually abuse children. However, the harm possibly created by virtual child pornography "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts" (*Ashcroft v. Free Speech Coalition*, 2002, p. 1402). In psychological research, no clear link has been conclusively drawn between virtual child pornography and contact offending (Williams, 2004, p. 253). Research cannot then support the idea that child abuse is harm that will most likely result from virtual child pornography. If research can show that virtual child pornography *does* incite contact offenses, legislation may be drawn that narrowly bans the production and possibly the possession of such material. It is possible that such legislation will pass constitutional muster. Without conclusive evidence that virtual child pornography increases the

risk of child sexual abuse, however, banning virtual child pornography unconstitutionally infringes on the First Amendment. "There are many things innocent in themselves […] that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused" (*Ashcroft v. Free Speech Coalition*, 122. S.Ct. 1402). Candy, video games, and other innocent items could also be used to seduce children, but those objects are not banned. While virtual child pornography may not seem innocent, it does not involve any children in its production, and is inherently blameless of child abuse.

Bower (2004) argues that social science should be more widely applied to the First Amendment. He gives many examples of movies, songs, and magazine articles that had some objectionable content. Upon viewing/hearing/reading this material, some individuals acted out violent scenes, committed suicide, or performed depicted acts and were harmed as a result. He uses these case examples as a comparison to virtual child pornography, noting that Congressional findings suggest that the material can be used to encourage children into sexual activity (Bower, 2004, p. 241). While this appears to be a noble reason to ban virtual child pornography, his argument ignores two key points: 1.) there is no hard, conclusive evidence that virtual child pornography is necessarily used to encourage child abuse, and 2.) speech and print media that depict ideas and activities do not force individuals to believe those ideas or engage in those activities. According to Quayle and Taylor (2002), the "relationship between contact offenses and pornography remains unclear" (p. 354). Psychologists studying paedophilia and child pornography have had difficulty drawing strong causal relationships between child pornography and child abuse. While certainly some child abusers possessed child pornography prior to their offenses, the number of individuals who possess child pornography without ever committing contact offenses is difficult to estimate. Further, Quayle and Taylor (2002) found that several

possessors of child pornography in their study used the material as a replacement for offending (p. 354). Bower also ignores the historical purpose of the First Amendment. In Louis Brandeis' concurrence in *Whitney v. California*, he addresses the First Amendment's duty to protect those from the mob mentality of public opinion: "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears" (*Whitney v. California*, 1927, p. 376). In virtual child pornography, no children are being harmed, and fearing such a medium appears irrational. Certainly, under Brandeis, virtual child pornography should enjoy full First Amendment protections. While virtual child pornography may be repugnant to the general public, such disfavor does not eliminate the protections of such material. Bower uses examples of individuals who committed violent acts identical to those seen in movies (Bower, 2004, p. 248). Although the movie makers were later sued, most won in court. This result is not actually surprising. Speech, after all, is not conduct. In each of the cases set forth by Bower, no individual was being forced to commit an act. They willingly observed the media and then committed actions of their own free will.

Schlafly (2008) contends that the Supreme Court is championing pornography and "rewriting [the First Amendment] to guarantee the profits of pornographers" (p. 103). Her argument runs parallel to Bower's (2004), claiming that the Supreme Court ignores social evils in the face of pornography. Her writing, however, relies heavily on moral arguments. While it may appear that the Supreme Court supports pornography, the decisions regarding pornography are carefully worded around the First Amendment.

Bower (2004) contends that the decision in *Ashcroft v. Free Speech Coalition* will result in more widespread access to virtual child pornography (p. 259). Applying First Amendment protections to virtual child pornography does mean that it will likely become more widespread.

Normalizing virtual child pornography, however, is not necessarily a bad thing. By enabling individuals to legally view virtual child pornography, paedophiles may be more willing to seek treatment. Currently, paedophilia is viewed harshly by mainstream society. By giving virtual child pornography First Amendment protections, it is possible that some societal stigma associated with the media and its consumers will be reduced. If the stigma of paedophilia is reduced, individuals who suffer from it may be more willing to admit to the disorder and seek treatment to control it.

Congress noted in the findings of the PROTECT Act that allowing virtual child pornography will result in a chilling of government prosecutions for actual child pornography (Kornegay, 2006, p. 2148). While this is possible, the Supreme Court argued that virtual child pornography was probably not indistinguishable from real child pornography. If it was, they stated, "[f]ew pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice" (*Ashcroft v. Free Speech Coalition*, 2002, p. 254). Thus, it is currently unlikely that real child pornography is indistinguishable from virtual child pornography, so investigations are likely not compromised. If, in the future, virtual child pornography does become indistinguishable from material involving actual minors, pornographers will be considerably less likely to risk abusing children in order to make the material.

In reality, virtual child pornography is a creative enterprise. It requires no physical, sexual, or emotional abuse of any child. It is wholly the product of its creators. Virtual child pornography, in its creation, is no different from a painted depiction or a written account. Fictional written accounts of child pornography enjoy First Amendment protections. As virtual child pornography is no different in its origins, it must enjoy the same First Amendment

protections. While it is enticing to label such material "offensive" and criminalize its manufacture, sale, and possession, it is not different from other fetish pornography. Criminalizing such material based on purely moral interests is contrary to the free speech protections ensured by the First Amendment of the Constitution.

Possession of real child pornography, in which children were abused, is, and should be, punishable by imprisonment. Such pornography is the result of direct child abuse and the effects of such abuse on a child are devastating. Mere possession of such materials must still be criminal activity because it produces a market for such abusive products. However, totally virtual child pornography, in which no child is harmed, must not be criminal in its manufacture or possession. Whether produced with a youthful adult actor or digitally created, such material is no different from any other form of pornography. It may, and should, be regulated in the same manner as other forms of pornography. However, when no actual child is harmed in the making of such pornography, it should be protected by the First Amendment. Adults should have the right and ability to purchase and view such materials as they would any other pornographic materials.

The current prohibition of virtual child pornography is patently unconstitutional and should be overturned. The First Amendment does extend to virtual child pornography, even if the material is widely unpopular and reviled. Virtual child pornography is a form of speech unlike actual child pornography, and cannot be treated as if it directly harms minors. If a clear and present danger can be shown in relation to virtual child pornography, Congress may draft legislation banning it. Until then, virtual child pornography should share the same First Amendment protections as other written and visual materials.

References

American Psychiatric Association. (2000). *(DSM-IV-TR) Diagnostic and statistical manual of mental disorders, 4th edition, text revision*. Washington, DC: American Psychiatric Press, Inc. Retrieved February 18, 2008, from http://www.behavenet.com/capsules/disorders/pedophiliaTR.htm

Arnaldo, Carlos A., ed. (2001). *Child abuse on the Internet: Ending the silence.* Paris: United Nations Educational, Scientific and Cultural Organization.

Ashcroft v. Free Speech Coalition. 122 S. Ct. 1389. (2002).

Bower, Daniel W. (2004). Holding virtual child pornography creators liable by judicial redress: An alternative approach to overcoming the obstacles presented in *Ashcroft v. Free Speech Coalition*. *BYU Journal of Public Law, 19(1),* 235 – 260.

Casanova, Manuel F., Solursh, Diane, Solursh, Lionel, Roy, Emily, and Thuigpen, Lance. (2000). The history of child pornography on the Internet. *Journal of Sex Education and Therapy, 25(4),* 245 – 251.

Child Pornography Prevention Act of 1996. H.R. 3610, Section 121, 3009-26 – 3009-21. (1996).

Epstein, Lee and Walker, Thomas G. (2004). Constitutional law for a changing America: Rights, liberties, and justice. Washington: CQ Press.

Gillespie, Alisdair A. (2005). Indecent images of children: The ever-changing Law. *Child Abuse Review, 14,* 430 – 443.

Godwin, Mike. (2003). *Cyber rights: Defending free speech in the digital age*. Cambridge: MIT Press.

Kerrison, Steve. (2006). Social network users have ruined their privacy, forever. Hexus: Definitive Technology News & Reviews. Retrieved April 21, 2008 from: http://www.hexus.net/content/item.php?item=7499

Kornegay, James Nicholas. (2006). Protecting our children and the Constitution: An analysis of the "virtual" child pornography provisions of the PROTECT Act of 2003. *William & Mary Law Review, 47(6),* 2129 – 2167.

Lanning, Kenneth V. (1987). *Child molesters: A behavioral analysis for law-enforcement officers investigating cases of child sexual exploitation*. Washington: National Center for Missing & Exploited Children.

Laws, D. Richard and O'Donahue, William T. (1997). *Sexual deviance: Theory, assessment, and treatment*. Guilford Press.

Lovell v. City of Griffin, 303 U.S. 444. (1938).

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

Miltner, Katherine A. (2005). Discriminatory filtering: CIPA's effect on our nation's youth and why the Supreme Court erred in upholding the constitutionality of the Children's Internet Protection Act. *Federal Communications Law Journal, 57(3)*, 555 – 578.

Mota, Sue Ann. (2002). The U.S. Supreme Court addresses the Child Pornography Prevention Act and Child Online Protection Act in *Ashcroft v. Free Speech Coalition* and *Ashcroft v. American Civil Liberties Union*. *Federal Communications Law Journal, 55(1)*, 85 – 98.

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

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

Quayle, Ethel and Max, Taylor. (2002). Child pornography and the Internet: Perpetuating a cycle of abuse. *Deviant Behavior, 23(4)*, 331 – 361.

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

Rotten.com "Porno". Retrieved on April 11, 2008 from: http://www.pornopolis.com.

Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

Schenck v. United States, 249 U.S. 47 (1919).

Schlafly, Phyllis. (2008). The morality of First Amendment jurisprudence. *Harvard Journal of Law & Public Policy, 31(1)*, 95 – 103.

Sheldon, Kerry and Howitt, Dennis. (2007). *Sex offenders and the Internet.* West Sussex: Wiley.

Stanley v. Georgia, 394 U.S. 557. (1969).

Taylor, Max and Quayle, Ethel. (2003). *Child pornography: An Internet crime*. New York: Brunner-Routledge.

Townsend, Chris. (1996). A picture of innocence? *History Today, 46(5)*, 8 – 11.

United States v. Williams. (No. 06-694). Oral arguments. Retrieved January 28, 2008, from http://www.oyez.org/cases/2000-2009/2007/2007_06_694/

Whitney v. California, 274 U. S. 357 (1927).

Wilcockson, Matthew. (2006). Working with Internet paedophiles. *Mental Health Practice, 9(9)*, 34 – 37.

Williams, Katherine S. (2004). Child pornography law: Does it protect children? *Journal of Social Welfare and Family Law, 26(3)*, 245 – 261.