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Regulating What's Not Real: Federal Regulation in the Aftermath of Ashcroft v. Free Speech Coalition

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REGULATING WHAT'S NOT REAL: FEDERAL REGULATION IN THE AFTERMATH OF *ASHCROFT v. FREE SPEECH COALITION*

No calamity so touches the common heart of humanity as does the straying of a little child.[1]

I. INTRODUCTION

Pornographic images created using real children raise serious concerns about the sexual exploitation of children. Tragically, pedophiles and child molesters prey on young children by using them to create images that "feed their sexual obsessions, . . . stimulate their sex drive and validate their desire to actually assault children."[2] Philip Jenkins, author of *Beyond Tolerance*, recounts the following painful and disturbing story of a young female victim:

> [A] British girl . . . , tragically, may be one of the best-known sex stars on the Web. In the late 1980s, as a little girl of seven or eight, [she] became the subject of a photo series that depicted her not only in all the familiar nude poses of hard-core pornography but also showed her in numerous sex acts with [a young boy] of about the same age. Both are shown having sex with an adult man, presumably [the young girl's] father. . . . [These images] are cherished by thousands of collectors worldwide. They seem to be the standard starter kit for child porn novices.[3]

It should be no surprise that a child's participation in the production of such images severely impacts that child's psychological well-being.[4] There is ample evidence to suggest that children used in the production of such images struggle to develop healthy relationships as adults, endure sexual dysfunction, have a tendency to become sexual abusers themselves, and engage in drug and alcohol abuse, prostitution, or other self-destructive behavior later in life.[5] The premature introduction of sexuality to a child might result in a lasting unhealthy emotional reaction to normal sexual experiences.[6] In addition, "the

1. William Sydney Porter.

2. National Center for Missing and Exploited Children, advertisement, *In the Case of Child Pornography, the More Underdeveloped the Better the Picture* (2003), *available at* www.missingkids.com/en_US/documents/Ad_Underdeveloped_8.5x11.pdf.

3. PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 2 (2001).

4. S. REP. NO. 95-438, pt. IV(C), at 9 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 46.

5. New York v. Ferber, 458 U.S. 747, 758 n.9 (1982).

6. ANN WOLBERT BURGESS, CHILD PORNOGRAPHY AND SEX RINGS 111 (1984) ("[T]he child might perform physiologically but not respond emotionally. In such a case the sexual

child may be programmed to use sex to acquire recognition, attention, and validation . . . [and] the child may learn that sex is something basically improper that needs to be cloaked in secrecy."[7] Further, the impact of the abuse is not limited to the actual experience; a child victim who bravely discloses the experience to family or authorities finds him or herself reliving the stress and anxiety of the experience before and during disclosure.[8]

To add further pain to the inevitable psychological injury resulting from a child victim's participation in the creation of child pornography, these victims are left with "a permanent record of [their] participation and the harm to the child is exacerbated by [the materials'] circulation."[9]

Before society's relatively recent technology boom and the resulting widespread use of the Internet, child pornographers were limited to using real children to create their material. Today, unfortunately, technological advances have given child pornographers a new set of tools for the development of pornographic images that depict children in sexually explicit ways. Some say that computers have "emancipated pedophiles from having to exploit and abuse real children."[10] Further, the computer and the Internet have become the nearly-exclusive means by which child pornography is viewed and exchanged by other child pornographers and child molesters.[11] As one commentator noted:

> [C]hild porn is extremely difficult to obtain through non-electronic means and has been so for twenty years . . . . It is a substantial presence, and much of the material [on the Internet] is worse than most of us can imagine, in terms of the types of activity depicted and the ages of the children portrayed.[12]

One unfortunate result of society's technology boom and widespread use of the Internet is the introduction of virtual child pornography to the child pornographer's production capabilities. Virtual child pornography involves methods by which computer-savvy child pornographers use technology to create computer-generated images of children that look real and, even more frighteningly, to disguise images of real children so that they appear computer-

activity either becomes the only mode of emotional expression or becomes separated and isolated from emotion.").

7. *Id*.

8. *See generally id*. at 112-20.

9. *Ferber*, 458 U.S. at 759.

10. Adam J. Wasserman, *Virtual Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 246 (1998).

11. *See* JENKINS, *supra* note 3, at 9.

12. *Id*.

generated.[13] For example, child pornographers and pedophiles can use 3-D modeling programs to create images of children that are indistinguishable from real children.[14] In addition, innocent pictures of actual children can be altered by inexpensive graphics programs to create a sexually explicit image of the same child.[15]

These technological advances and the resulting introduction of virtual child pornography have muddled the already murky landscape of child pornography regulation and have challenged courts and Congress to more precisely define what images fall outside the boundaries of protected speech under the First Amendment. On April 16, 2002, the Supreme Court rejected Congress's first attempt to regulate virtual child pornography in *Ashcroft v. Free Speech Coalition*.[16] In this case, the Court faced a challenge to sections of the Child Pornography Prevention Act of 1996 (CPPA) and held that it was "overbroad and unconstitutional,"[17] stressing that the CPPA prohibited speech that might have "serious literary, artistic, political, or scientific value."[18] The Court emphasized that the "CPPA prohibit[ed] speech that records no crime and creates no victims by its production."[19] Further, the Court held that otherwise-protected speech cannot be suppressed simply because it might be used for criminal acts in the future.[20]

The *Free Speech Coalition* decision has been interpreted as marking the Court's rejection of a complete ban on virtual child pornography.[21] Further, the decision appears to protect the production of non-obscene, computer-

13. H.R. 4623, 107th Cong. § 2(5) (2002). This practice has contributed to allegedly impossible prosecutorial proof hurdles. *See infra* notes 206-12 and accompanying text.

14. *See* H.R. 4623 § 2(5).

15. *See id.*

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

17. *Id.* at 258.

18. *Id*. at 246 ("The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value.").

19. *Id.* at 250.

20. *Id*.; *see also Freedom of Speech and Expression*, 116 HARV. L. REV. 262, 266 (2002).

21. *Child Obscenity and Pornography Prevention Act of 2002 and the Sex Tourism Prohibition Improvement Act of 2002: Hearing on H.R. 4623 and H.R. 4477 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 107th Cong. 4 (2002) [hereinafter *Hearing on H.R. 4623*] (statement of Daniel P. Collins, Associate Deputy Attorney General, Office of the Deputy Attorney General, U.S. Department of Justice) ("[T]he Court concluded . . . that *New York v. Ferber*, the leading Supreme Court case that allows the criminalization of child pornography, could not be extended to support a complete ban on virtual child pornography . . . ."); *see also Freedom of Speech and Expression*, *supra* note 20, at 269 ("The Court's construction of the CPPA is yet another indication of its increasing distrust of categorical, value-based exclusions from First Amendment protection.").

generated images of children engaging in sexually explicit conduct so long as no actual child was used in the production of the image.[22]

This result is understandably unsettling to those who cannot fathom a scenario in which an image (virtual or not) of a child engaging in sexually explicit conduct has social, literary, artistic, or scientific value.[23] On the other hand, those who support the *Free Speech Coalition* decision applaud the Court for rejecting what was perceived to be an unconstitutional, overly broad regulation of speech.[24] While supporters of the decision concede that certain categories of expression, including child pornography, are beyond the protection of the First Amendment because of their "slight social value,"[25] they argue that, if Congress must regulate virtual child pornography, it must do so in a manner that does not inadvertently silence speech that would otherwise be protected by the First Amendment.[26]

Congress has struggled to draft legislation that both captures the truly objectionable virtual child pornography and stays within the boundaries of the Court's First Amendment jurisprudence. For example, in *Free Speech Coalition*, the Court held that one of the major flaws in the CPPA was Congress's failure to define precisely what harm results from virtual child pornography when no actual child is used to create the sexually explicit image.[27] The Government argued that virtual child pornography fuels the

22. *Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision*, Ashcroft v. Free Speech Coalition*: Hearing Before the House Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary*, 107th Cong. 3 (2002) [hereinafter *Enhancing Child Protection Laws*] (statement of Va. Robert C. Scott, Member, House Subcomm. on Crime, Terrorism, and Homeland Security).

23. *See* Rikki Solowey, Comment, *A Question of Equivalence: Expanding the Definition of Child Pornography to Encompass "Virtual" Computer-Generated Images*, 4 TUL. J. TECH. & INTELL. PROP. 161, 200 (2002) ("Failing to prohibit virtual pornographic images of children would be sending the wrong message to society . . . . Permitting such images to be legally available gives molesters the false idea that this can be done to children.").

24. *See* Aimee G. Hamoy, Comment, *The Constitutionality of Virtual Child Pornography: Why Reality and Fantasy Are Still Different Under the First Amendment*, 12 SETON HALL CONST. L.J. 471, 517 (2002) (concluding that "prohibiting Congress from criminalizing virtual fantasies and the imaginations of sophisticated computer users remains consistent with both the Court's jurisprudence in the area of child pornography and the First Amendment").

25. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem"); *see generally Freedom of Speech and Expression*, *supra* note 20, at 268 (explaining that these other categories include obscenity, profanity, libel, fighting words, and commercial speech).

26. As the Free Speech Coalition argued against the CPPA, "the government's interest in protecting children does not justify reducing the entire adult population to reading and viewing only what is *fit* for children." Respondent's Brief at 15, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795).

27. *Free Speech Coalition*, 535 U.S. at 250.

proliferation of the child pornography market and emphasized the negative secondary effects that virtual child pornography might have on subsequent viewers of the material.[28] This argument was flatly rejected by the majority in *Free Speech Coalition*, which held that "[v]irtual child pornography is not 'intrinsically related' to the sexual abuse of children . . . . [T]he causal link [between virtual child pornography images and actual instances of child abuse] is contingent and indirect."[29] Without such a causal link between speech and its resulting harm, the Court said, the Government may not suppress speech simply because it may "encourage" pedophiles and molesters to abuse children.[30]

In the wake of the *Free Speech Coalition* decision, both the House and Senate have made new attempts to draft legislation that targets the evils associated with virtual child pornography.[31] Determined to ensure the effective enforcement of established child pornography laws, Congress has enacted legislation in response to—and, as this Note will consider, potentially consistent with—the *Free Speech Coalition* decision. On April 30, 2003, President George W. Bush signed into law the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act 2003).[32] Whatever the fate might be for the PROTECT Act 2003, Congress has made notable progress in crafting legislation that respects the free speech guarantees embodied in the First Amendment, while targeting the specific evils associated with virtual child pornography.

As background to the PROTECT Act 2003, this Note will provide a brief survey of the Supreme Court's obscenity and child pornography jurisprudence, including *Miller v. California* and *New York v. Ferber* and will briefly outline the unchallenged federal criminalization of child pornography that is created by using real children.

28. Petitioner's Brief at 14, *Free Speech Coalition*, 535 U.S 234 (No. 00-795). *See* Solowey, *supra* note 23, at 181 (explaining that child pornography, both real and virtual, is often used by pedophiles as a means to instruct their child victims on how to engage in sexual behavior, as a way to break children down and trick them into feeling more comfortable about engaging in the sexual behavior, and also as a pseudo-currency with which to exchange child pornography with fellow pedophiles, leading to the intolerable result of a thriving child pornography market). The secondary effects and market proliferation theories were relied upon greatly by the Government in *Free Speech Coalition* to support upholding the CPPA. *See Free Speech Coalition*, 535 U.S. at 251-54.

29. *Id.* at 250.

30. *Id.* at 253-54.

31. *See* H.R. 4623, 107th Cong. (2002); S. 2520, 107th Cong. (2002); H.R. 1161, 108th Cong. (2003); S. 151, 108th Cong. (2003) (enacted). *See generally Enhancing Child Protection Laws*, *supra* note 22, at 3 (statement of Tx. Lamar Smith, Chairman, House Subcomm. on Crime, Terrorism, and Homeland Security) ("The elimination of child pornography in all forms and the protection of children from sexual exploitation should be one of Congress's highest priorities.").

32. Pub. L. No. 108-21, 117 Stat. 650.

Next, this Note will trace Congress's past attempts to regulate child pornography, including the CPPA, and will explore the reasons behind the Court's rejection of the CPPA's virtual child pornography provisions in *Ashcroft v. Free Speech Coalition*.

Finally, this Note will highlight key provisions of the PROTECT Act 2003 and will analyze how the Act conforms to or deviates from the guidelines set forth in the *Free Speech Coalition* decision with respect to the following categories: (1) the definition of virtual child pornography; (2) the criminalization of pandering and solicitation of virtual child pornography, and (3) the affirmative defense.

II. OBSCENITY AND CHILD PORNOGRAPHY—LEADING CASES

A. Miller v. California

In *Miller v. California*, the Court tightened up the then unworkably-loose definition of obscenity.[33] In *Miller*, the Supreme Court reaffirmed its longstanding view that obscene material is not protected by the First Amendment.[34] Precisely defining obscenity, however, proved to be more difficult for the Court. In this landmark decision, the Court provided the following three-prong test for determining whether something is obscene:

> (a) [W]hether "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 . . . law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[35]

33. Miller v. California, 413 U.S. 15, 22 (1973) (5-4 decision) (noting that "no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material"). Before *Miller*, Justice Burger noted, the Court had assumed "the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Id.* at 22 n.3.

34. *Id.* at 23; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene . . . ."). In *Miller*, the appellant was convicted of violating a California statute that prohibited "knowingly distributing obscene matter." *Miller*, 413 U.S. at 16. The appellant, in a mass-mailing, advertised books containing sexually explicit material. The advertisements contained "very explicit[]" depictions of men and women engaging in sexual activity. *Id.* at 17-18.

35. *Id*. at 24 (citation omitted) (quoting Roth v. United States, 354 U.S. 476, 489 (1957)). This decision flatly rejected the Court's earlier obscenity test articulated in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Massachusetts*, 383 U.S. 413 (1966). The standard in *Memoirs* required the Court to find "that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it

Whether something appeals to the "prurient interest" or is "patently offensive" is a question of fact and must be determined based on the standards of the particular community.[36] The Court rejected the implementation of national standards, noting that such standards would ultimately prove "hypothetical and unascertainable."[37] The majority in *Miller* emphasized that "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent."[38]

B. New York v. Ferber

Nine years after the Court decided *Miller*, the Court decided *New York v. Ferber*, the leading case on the regulation of child pornography involving the use of real children in its production.[39] At issue in *Ferber* was the constitutionality of a New York statute that prohibited the promotion and distribution of material that depicted a child younger than sixteen engaging in a sexual performance.[40] Holding that "[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children,"[41] the Court found that: (1) there is a compelling governmental interest in "'safeguarding the physical and psychological well-being of a minor;'"[42] (2) "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children . . . . [because] the materials produced

affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.* at 418.

36. *Miller*, 413 U.S. at 30 ("These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation . . . .").

37. *Id*. at 31.

38. *Id*. at 34.

39. New York v. Ferber, 458 U.S. 747 (1982). In *Free Speech Coalition*, there was substantial debate regarding the reach of *Ferber*. The Government read the case as extending beyond the protection of real children and suggested that the same considerations that persuaded the Court in *Ferber* to limit First Amendment protection of child pornography involving real children should apply to the "virtual" material covered by the CPPA. Petitioner's Brief at 15, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (No. 00-795). In fact, the Government plainly stated in its Supreme Court brief that "Ferber did not hold that the government's sole compelling interest is in regulating depictions involving real children." *Id.* Alternatively, others read the *Ferber* holding as limited to protecting only real children who suffer harm because of their participation in the production of child pornography. For example, the Free Speech Coalition argued that "Congress can ban child pornography only to the extent that the proscribed material portrays sexually explicit conduct by actual children." Respondent's Brief at 2, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (No. 00-795).

40. *Ferber*, 458 U.S. at 750-51.

41. *Id.* at 756.

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

are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation,"[43] (3) "advertising and selling of child pornography provide an economic motive for . . . the production of such materials,"[44] and (4) "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[45]

The *Ferber* Court explicitly rejected the respondent's argument that the *Miller* obscenity standard should apply to child pornography.[46] The Court maintained that the *Miller* standard did not adequately support the State's "more compelling" interest in protecting children from sexual exploitation.[47] In reviewing pornography that involves the use of an actual child, a court should not consider the work as a whole and need not determine that the material appeals to the prurient interest or that the sexual conduct portrayed is patently offensive.[48] Note, however, that the "serious literary, artistic, political, or scientific value" prong of *Miller*[49] remains intact for the purposes of child pornography after *Ferber*.[50]

In sum, *Ferber* makes clear that child pornography involving the use of real children "bears so heavily and pervasively on the welfare of children engaged in its production [and therefore,] . . . it is permissible to consider these materials as without the protection of the First Amendment."[51] Therefore, under *Ferber*, if a child was involved in the production of a sexually explicit image, that image receives no First Amendment protection even if the image would not be deemed obscene under the *Miller* three-prong test.[52]

The *Ferber* Court, however, did provide the following guidance to legislators of future child pornography statutes: "Here the nature of the harm to be combated requires that the . . . offense be limited to works that *visually* depict sexual conduct by *children* below a specified age."[53] Further, the Court emphasized that "depictions of sexual conduct, not otherwise obscene, which

43. *Id.* at 759 (footnote omitted).

44. *Id.* at 761.

45. *Ferber*, 458 U.S. at 762.

46. *Id*. at 761. The Court plainly stated, "We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem." *Id.*

47. *Id*.

48. *Id*. at 764-65.

49. *See* Miller v. California, 413 U.S. 15, 24 (1973).

50. *Ferber*, 458 U.S. at 764-65; *id*. at 774 (O'Connor, J. concurring) (writing separately "to stress that the Court does not hold that New York must except 'material with serious literary, scientific, or educational value,' from its statute." (citation omitted) (quoting majority opinion at 766)).

51. *Id*. at 764.

52. *See supra* notes 33-38 and accompanying text.

53. *Ferber*, 458 U.S. at 764 (second emphasis added).

do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[54]

C. Post-*Ferber* Regulation of "Real" Child Pornography

After *Ferber*, there is virtually no debate regarding the constitutionality of legislation that targets the use of real children engaged in sexually explicit conduct in the production of pornographic materials.[55]

As a result, neither the Free Speech Coalition nor the other parties who challenged the constitutionality of the CPPA challenged the categories of speech prohibited by 18 U.S.C. § 2256(8)(A) and (C).[56] Section 2256(8)(A) prohibits any visual depiction of sexually explicit conduct where "the production of such visual depiction *involves the use of a minor* engaging in sexually explicit conduct."[57] In addition, § 2256(8)(C) prohibits "visual depiction[s] [that] ha[ve] been created, adapted, or modified to appear that *an identifiable minor* is engaging in sexually explicit conduct."[58] This provision prohibits the computerized "morphing" of innocent images of actual children into sexually explicit depictions of the same children.[59]

As previously noted, while the *Ferber* holding is clear regarding child pornography created using real children, there was significant debate in *Free Speech Coalition* about the *Ferber* holding as it applied to sexually explicit images that *appear to* depict children engaged in sexually explicit conduct.[60]

III. PAST FEDERAL CHILD PORNOGRAPHY REGULATION

Primarily concerned with the growth of multimillion-dollar child pornography and prostitution industries nationwide, Congress first addressed the issue of child pornography with the passage of the Protection of Children Against Sexual Exploitation Act of 1977.[61] The Act's Senate Report noted that at the time, current law addressed only the sale, distribution, and importation of

54. *Id.* at 765.

55. United States v. Acheson, 195 F.3d 645, 651 (11th Cir. 1999) ("To the extent it defines 'child pornography' as images of actual minors, the CPPA passes constitutional muster with room to spare.").

56. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241-42 (2002).

57. 18 U.S.C. § 2256(8)(A) (2000) (emphasis added).

58. *Id.* § 2256(8)(C) (emphasis added). Section 2256(1) defines a minor as any person younger than eighteen.

59. *Free Speech Coalition*, 535 U.S. at 242 ("Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*."); *see also* Respondent's Brief at 9, *Free Speech Coalition*, 535 U.S. 234 (No. 00-795).

60. *See supra* note 39.

61. Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2253); *see* S. REP. NO. 95-438, pt. II, at 3 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 40-41.

obscene materials and emphasized the importance of creating federal laws to deal directly with the abuse of children that results from their involvement in the production of pornographic materials.[62] As a result, the Act prohibited the use of children younger than sixteen years old in the production of pornographic materials and made it a crime to knowingly distribute such images for commercial purposes.[63]

Following the *Ferber* decision, Congress next responded by enacting the Child Protection Act of 1984,[64] which eliminated the commercial purposes requirement of the Protection of Children Against Sexual Exploitation Act of 1977, raised the age of a minor from sixteen to eighteen, and removed the requirement that the material be obscene within the meaning set forth in *Miller*.[65] The impetus for the passage of this Act was Congress's concern that child pornographers who distributed materials without any commercial motive were still ultimately causing harm to the children they used in the production of the pornographic material and were escaping liability under the statute by claiming that they had no commercial motivation. Congress noted that "the harm to the child exists whether or not those who initiate or carry out the schemes are motivated by profit."[66]

In 1986, Congress passed the Child Sexual Abuse and Pornography Act of 1986,[67] which made illegal any advertisement created by anyone who sought or offered to receive, exchange, produce, display, distribute, or reproduce any visual depiction of a minor engaging in sexually explicit conduct.[68] The Act also prohibited those seeking to buy child pornography or participate in the production of child pornography from publishing any notice or advertisement of their illegal intentions.[69]

In the Child Protection and Obscenity Enforcement Act of 1988,[70] Congress further refined its laws regulating child pornography by requiring "[w]hoever produces any book, magazine, periodical, film, videotape, or other

62. S. REP. NO. 95-438, at 5, 15 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 43, 53.

63. *Id.* at 15.

64. Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251-2254).

65. H.R. REP. NO. 98-536, at 7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 492, 493-94.

66. H.R. REP. NO. 98-536, at 2-3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 492, 493-94. Note Congress's focus on the harm to the actual child. The House Report stated that the Act "would limit coverage under the Act to visual depiction of children engaged in explicit sex acts, rather than . . . written depictions . . . [because there is] an obscenity requirement in the case of written depictions." *Id.* at 5. This demonstrates Congress's focus on preventing the harm to the child who engages in the production of the material rather than on outside effects of the production and distribution of child pornography that did not involve the use of a child in its production.

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

68. H.R. REP. NO. 99-910, at 5-6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952, 5955.

69. *Id.* at 6.

70. Pub. L. No. 100-690, § 7511, 102 Stat. 4485 (codified as amended at 18 U.S.C. §§ 2251(c), 2252(a), 2256, 2257).

matter which . . . contains one or more visual depictions . . . of actual sexually explicit conduct . . . shipped in interstate or foreign commerce . . . [to] create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction."[71] The Act also made illegal the use of a computer to transport, distribute, or receive child pornography.[72]

The Child Protection Restoration and Penalties Enhancement Act of 1990 prohibited the knowing sale of images of children engaged in sexually explicit conduct and prohibited the possession of such images with the intent to sell them.[73] The Act also prohibited the knowing possession of three or more depictions of children engaged in sexually explicit conduct.[74] This provision was Congress's reaction to the Supreme Court's decision in *Osborne v. Ohio*,[75] where the Court found that the child pornography market was largely underground and noted that legislation aimed only at the production and distribution of child pornography did little to curb the developing underground market for child pornography.[76] Additionally, the Court found that "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."[77] The Court encouraged the passage of laws that would fuel the destruction of materials created using actual children.[78]

The Child Pornography Prevention Act of 1996 was one of Congress's earliest forays into the regulation of virtual child pornography.[79] Concerned with the growing use of then-advanced computer and photographic technologies to produce real and virtual child pornography, Congress passed the CPPA to criminalize the production, distribution, possession, sale, or

71. *Id.* § 7513, 102 Stat. at 4487.

72. *Id.* § 7511, 102 Stat. at 4485; *see also* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 451 (1997) (explaining that Congress criminalized the use of a computer "to transport, distribute, or receive child pornography" to combat the growing use of computer networks in the child pornography market).

73. Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818 (codified as amended at 18 U.S.C. § 2252).

74. *Id.*

75. *See* Burke, *supra* note 72, at 451.

76. Osborne v. Ohio, 495 U.S. 103, 110 (1990).

77. *Id*. at 111.

78. *Id*. ("[E]ncouraging the destruction of these materials is . . . desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.").

79. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26; *see* Wade T. Anderson, *Criminalizing "Virtual" Child Pornography Under the Child Pornography Prevention Act: Is it Really What it "Appears to Be?,"* 35 U. RICH. L. REV. 393, 397 (2001) (explaining that after the Child Protection and Obscenity Enforcement Act of 1988, the CPPA was Congress's "next significant step in addressing the power of computers to supply the child-porn market").

viewing of both real and virtual child pornography.[80] Specifically, the Congressional findings accompanying the CPPA noted that new technologies "make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct."[81] Further, the Senate's findings emphasized the danger of child pornographers' computer alteration of sexually explicit images so that it becomes impossible to detect if the images were created using actual children.[82]

The Congressional findings also focused on the negative secondary effects of both real and virtual child pornography and maintained that harm occurs to a child viewing a sexually explicit image whether or not the child depicted in the image is real or "virtually indistinguishable" from a real child.[83] In sum, this component of the CPPA's rationale is based primarily on the idea that child abusers who use a computer-generated image of a child engaging in sexual conduct to seduce a real child into engaging in sexual conduct should not go unpunished.[84] In this context, any distinction between images that portray actual children and images of computer-generated children involves a "mere technicality"[85] as the damaging influence on the real child is the same no matter how the image was created.

To target these evils, Congress expanded the definition of child pornography to include two new categories of prohibited speech in 18 U.S.C. § 2256. First, § 2256(8)(B) prohibited visual depictions of sexually explicit conduct where "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct."[86] Second, § 2256(8)(D) prohibited anyone from advertising, promoting, presenting, describing, or distributing visual depictions

80. Child Pornography Prevention Act of 1996 § 121(1)(13). The CPPA "addresses the problem of 'high-tech kiddie porn' by creating a comprehensive statutory definition of the term 'child pornography' to include material produced using children engaging in sexually explicit conduct [and] computer-generated depictions which are, or appear to be, of minors engaging in sexually explicit conduct." S. REP. NO. 104-358, pt. I, at 7 (1996).

81. Child Pornography Prevention Act of 1996 § 121(1)(5).

82. *Id.* § 121(1)(6).

83. *Id.* § 121(1)(9); *see also* S. REP. NO. 104-358, pt. III, at 8 (1996) ("The effect of such child pornography . . . on a child shown such material as a means of seducing the child into sexual activity, is the same whether the material is photographic or computer-generated depictions of child sexual activity.").

84. S. REP. NO. 104-358, pt. I, at 7 (1996) ("[T]he development of computer technology capable of producing child pornographic depictions virtually indistinguishable from photographic depictions of actual children threatens the Federal Government's ability to protect children from sexual exploitation . . . .").

85. Solowey, *supra* note 23, at 178.

86. 18 U.S.C. § 2256(8)(B) (2000).

of minors engaging in sexually explicit conduct in a manner that "conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[87]

The effect of Congress's expansion of the definition of child pornography in the CPPA was to create new categories of forbidden speech under the Court's broad prohibition of child pornography articulated in *Ferber*.[88] It was these two provisions that were specifically challenged in *Ashcroft v. Free Speech Coalition*.[89]

IV. THE CIRCUIT SPLIT AND THE *ASHCROFT V. FREE SPEECH COALITION* DECISION

A. The Circuit Split

Before the Supreme Court heard *Ashcroft v. Free Speech Coalition*, five circuits passed on the issue of the constitutionality of 18 U.S.C. § 2256(B) and (D). Of the five circuits, four upheld the provisions as constitutional and one did not.

One of the first circuit cases was *United States v. Hilton*, where the First Circuit reversed the District Court for the District of Maine and held the CPPA to be constitutional.[90] At issue in *Hilton* was the constitutionality of § 2256(8)(B)'s prohibition of sexually explicit images that "appear to be a minor" engaging in sexually explicit conduct.[91] Hilton was indicted by a grand jury for the criminal possession of computer disks that contained three or more images of child pornography in violation of § 2252A(5)(b).[92] In *Hilton*, the First Circuit Court of Appeals boiled down the issue of the provision's constitutionality into four main "lessons."[93] First, the court held that material that appears to depict a minor engaging in sexually explicit conduct must be

87. *Id.* § 2256(8)(D), *repealed by* PROTECT Act 2003, Pub. L. No. 108-21, § 502(a)(3), 117 Stat. 650, 678.

88. John P. Feldmeier, *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. KY. L. REV. 205, 210-11 (2003).

89. 535 U.S. 234, 241-42 (2002).

90. U.S. v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999).

91. *Id.* at 65, 75.

92. *Id.* at 67. Section 2252A(5)(b) prohibits:

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

18 U.S.C. § 2252A(5)(b) (2000).

93. *Hilton*, 167 F.3d at 70.

afforded some level of constitutional protection.[94] Second, the court held that acceptable governmental objectives regarding child pornography included more than the protection of actual children.[95] Efforts aimed at stamping out the child pornography market, preventing the possession and viewing of pornographic materials involving children, and ending the use of child pornography to seduce children into the production of pornographic materials were all held to be legitimate Congressional objectives.[96] Third, the court emphasized the importance of carefully describing "the type of condemned sexual depiction."[97] Finally, the court held that, because these regulations were aimed at protecting children, greater discretion and leeway ought to be given to state legislatures and Congress "to set out the parameters of anti-pornography restrictions."[98]

The *Hilton* court focused on what the proper interpretation of the "appears to be" standard should be and, relying on the legislative record before the passage of the Act, held that the phrase "appears to be" was synonymous with visual depictions that were "'virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.'"[99]

Further, the *Hilton* court held that the CPPA included a built-in objective standard by which a jury would be required to make its ultimate determination of guilt under the statute.[100] "A jury must decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity."[101]

In sum, the *Hilton* court refused to second-guess Congress's findings regarding the dangers associated with virtual child pornography and held that

94. *Id*. The court argued that sexually explicit material falls along "a constitutional continuum" that entitles sexually explicit speech to "varying degrees of protection." *Id.* For example, non-obscene images of actual adults engaging in sexual activity receive full constitutional protection while images of real children involved in sexual activity receive no constitutional protection. *Id*. Images that "appear[] to depict an actual minor . . . arguably fall[] somewhere in between." *Id.*

95. *Id.*

96. *Id*. The court stated that "concerns about how adults may use child pornography vis-à-vis children and how children might behave after viewing it legitimately inform legislators' collective decision to ban this material." *Id*.

97. *Id*.

98. *Hilton*, 167 F.3d at 70.

99. *Id*. at 72 (quoting S. REP. NO. 104-358, pt. IV(B), at 15 (1996)). Unfortunately, the Court muddled the rearticulated standard by stating that the "appears to be" language really applies to "a specific subset of visual images—those which are *easily mistaken for* that of real children." *Id*. (emphasis added).

100. *Id*. at 75.

101. *Id*.

the government's interest in regulating virtual child pornography was just as compelling as the government's interest in regulating child pornography created using actual children.[102]

The next circuit to consider the constitutionality of the CPPA was the Eleventh Circuit in *United States v. Acheson*, which involved a defendant who was found to have downloaded more than five hundred images of child pornography from the Internet.[103] Once again, the defendant in this case challenged the "appears to be" language of the CPPA and maintained that the statute was unconstitutionally overbroad, unconstitutionally vague, and in violation of the First Amendment.[104]

Noting the CPPA's minimal overbreadth,[105] the *Acheson* court held that the CPPA worked to eliminate child pornography and protected children from sexual exploitation.[106] The court relied on the legislative record of the CPPA and took into account the nature of surrounding provisions of the statute to find that the "CPPA rests on solid footing" regardless of whether or not the material contains a depiction of an actual child or of a computer-generated image of a child.[107]

To support its view that the statute was constitutionally sound, the court pointed to the affirmative defense provided in § 2252A(c), which allowed the defendant to assert that he or she used actual adults who were adults at the time of the production in the sexually explicit material.[108] The court was also comforted by the burden imposed on the Government to prove that the defendant "knowingly" possessed the child pornography.[109]

In the end, the court held that, despite the "legitimate sweep of the CPPA[,] . . . the demand driving the child pornography market is primarily for images falling far from any constitutional protection [and concluded that] the legitimate scope of the statute dwarfs the risk of impermissible applications."[110]

In *United States v. Mento*,[111] the Fourth Circuit Court of Appeals heard a new variation on the constitutionality challenges advanced in *Hilton* and *Acheson*. In *Mento*, the defendant was convicted of downloading from the

102. *Id*. at 73.

103. U.S. v. Acheson, 195 F.3d 645, 648 (11th Cir. 1999). In this case, the defendant did not deny that the downloaded images involved real children. *Id*. at 648 n.1.

104. *Id*. at 649.

105. *Id.* at 650-51 (stating that "[t]he CPPA's overbreadth is minimal when viewed in light of its plainly legitimate sweep").

106. *Id.* at 649.

107. *Id*. at 651.

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

109. *Id*.

110. *Id.* at 652.

111. 231 F.3d 912 (4th Cir. 2000).

Internet more than one hundred images of children engaging in sexually explicit conduct.[112] The defendant maintained that the real goal of the CPPA was to eliminate certain ideas that Congress felt were particularly evil rather than preventing harm that occurs to children as a result of their participation in or exposure to child pornography.[113]

The court in *Mento* interpreted the *Ferber* decision to include within Congress's legitimate legislative reach the secondary effects of child pornography and stated that "[t]he government instead aspires to shield *all* children from sexual exploitation resulting from child pornography, and that interest is indeed compelling."[114]

Noting that the CPPA prohibited material that could be predominately the product of a person's imagination, the Court nonetheless held that virtual depictions of child pornography had little, if any, redeeming social value and therefore did not deserve the protections of the First Amendment.[115] Further, the Court held that the "appears to be" language implied an objective standard by which the fact finder was to make its determination of guilt or innocence under the statute.[116] "[I]t would be the jury's responsibility to ensure that a reasonable person would understand the specific impression sought to be conveyed."[117]

Finally, in May 2001, in *United States v. Fox*, the Fifth Circuit also addressed the constitutionality of the "appears to be" language in the CPPA.[118] In *Fox*, the defendant was convicted of knowingly receiving child pornography via his computer.[119] The *Fox* court first addressed the issue of whether or not Congress had articulated a compelling interest in regulating images that appear to be of children engaging in sexual activity.[120] Pointing to the familiar secondary effects rationale,[121] the court concluded that the *Ferber* and *Osborne* decisions, taken together, demonstrated that the Government's interests extended beyond protecting only the children who engage in the production of

112. *Id*. at 915.

113. *Id*. at 919.

114. *Id.* at 920.

115. *Id.* at 921. ("[T]he Act prohibits material that is predominantly the product of the creator's imagination . . . . Nevertheless, artificial depictions of child pornography that cannot be easily distinguished from the real thing do not deserve the protections of the First Amendment . . . .").

116. *Mento*, 231 F.3d at 922.

117. *Id*.

118. U.S. v. Fox, 248 F.3d 394, 399-400 (5th Cir. 2001).

119. *Id*. at 398.

120. *Id*. at 400.

121. *See supra* note 28 and accompanying text for an explanation of the secondary effects theory.

the pornography.[122] "It makes little difference to the children coerced by such materials, or to the adult who employs them to lure children into sexual activity, whether the subjects depicted are actual children or computer simulations of children."[123] The *Fox* court stayed in line with the holdings of the First, Fourth and Eleventh Circuits, and held that the "appears to be" language appropriately regulated the dangers associated with virtual child pornography.[124]

Further, the *Fox* court emphasized the availability of the statute's affirmative defense for improperly charged defendants and noted the difficulties of proving that an image contains a real child.[125] In addition, the court held that the "appears to be" language was not overbroad and would not capture a substantial amount of otherwise-protected speech because it was clear from the statute that "Congress intended the 'appears to be' language of the statute to target only those images that are '*virtually indistinguishable* to unsuspecting viewers from *unretouched photographs* of actual children.'"[126] Ultimately, the *Fox* court was unconcerned about those images that fell on the fringes of the statute and held that the answer was not "invalidating the statute but rather [engaging in] 'case-by-case analysis of the fact situations.'"[127]

B. The Ninth Circuit Court of Appeals Decision

Sandwiched between the Eleventh Circuit's *Acheson* opinion and the Fourth Circuit's *Mento* decision, the Court of Appeals for the Ninth Circuit sharply diverged from the views of its fellow circuits in *Free Speech Coalition v. Reno* and held that the contested provisions of the CPPA were unconstitutionally vague, overbroad, and not in line with established First Amendment jurisprudence.[128] The categories of speech at issue in the case were the same as those addressed in the First, Fourth, Fifth, and Eleventh

122. *Fox*, 248 F.3d at 401. ("We respectfully disagree . . . that preventing harm to children actually depicted in pornography is the *only* legitimate justification for Congress's criminalizing the possession of child pornography.").

123. *Id*. at 402.

124. *Id.* at 407.

125. *Id.* at 403.

126. *Id*. at 405 (quoting U.S. v. Hilton, 167 F.3d 61, 72 (1st Cir. 1999) (quoting S. REP. NO. 104-358, at 7 (1996))) (emphasis added by *Fox* court).

127. *Fox*, 248 F.3d at 406 (second set of internal quotation marks omitted) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973)). The court created its own example of art that might fall on the margin of the statute by referring to photorealism, an artistic method that involves a painted replication of a printed photograph. *Id.*

128. Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999). The Ninth Circuit was the only circuit to hold that the CPPA was unconstitutional. *See Fox*, 248 F.3d 394; United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999). *See supra* Part IV.A for a discussion of these cases.

Circuit opinions—the "appears to be" language of § 2256(8)(B)[129] and the "conveys the impression that" language of § 2256(8)(D).[130]

The court acknowledged the compelling interests of curbing child pornography using real children, but refused to hold that *Ferber* extended beyond the protection of real children.[131] As a result, the court summarily rejected Congress's secondary effects rationale and held that "Congress has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children."[132]

In two telling footnotes, the court defended its position by stating that "the critical fault in the secondary effects analysis . . . [is that it] shifts the argument focus from whether the questioned speech or images are constitutionally protected to a focus on how the speech or image affects those who hear it or see it."[133] The court further explained its position as follows: "Many 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."[134]

In addition, the court relied on *American Booksellers Association v. Hudnut* as supporting precedent for its decision.[135] At issue in *Hudnut* was a city ordinance that prohibited pornography that portrayed women as subordinates or showed women in submissive and degrading ways.[136] The *Hudnut* court invalidated the ordinance and held that while "[d]epictions of subordination tend to perpetuate subordination . . . [i]f the fact that speech plays a role in a process of [mind] conditioning were enough to permit governmental regulation, that would be the end of freedom of speech."[137]

Obviously concerned about criminalizing images created entirely by the imagination, the *Reno* court concluded that "[b]ecause the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts[,] . . . censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment."[138]

129. 18 U.S.C. § 2256(8)(B) (2000).

130. *Id.* § 2256(8)(D), *repealed by* PROTECT Act 2003, Pub. L. No. 108-21, § 502(a)(3), 117 Stat. 650, 678.

131. *Reno*, 198 F.3d at 1092 ("Nothing in *Ferber* can be said to justify the regulation of such materials other than the protection of the actual children used in the production of child pornography.").

132. *Id*.

133. *Id*. at 1092 n.6.

134. *Id*. at 1094 n.7.

135. *Id.* at 1093 (citing Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985)).

136. *Hudnut*, 771 F.2d at 328.

137. *Id*. at 329-30.

138. *Reno*, 198 F.3d at 1094.

Ultimately, the Court held that the phrases "appear to be" and "conveys the impression that" were unconstitutionally vague because they provided no clear standard by which to determine if something "appears to be" or "conveys the impression" of a child engaged in sexually explicit conduct.[139]

C. The *Ashcroft v. Free Speech Coalition* Decision

In *Ashcroft v. Free Speech Coalition*, the Supreme Court granted certiorari to the Ninth Circuit Court of Appeals' *Free Speech Coalition v. Reno* decision to determine the constitutionality of the CPPA.[140]

Justice Kennedy delivered the opinion for the Supreme Court and held that: (1) "[T]he CPPA prohibits speech . . . [that may have] serious literary, artistic, political, or scientific value;"[141] (2) "the CPPA prohibits speech that records no crime and creates no victims by its production;"[142] (3) the affirmative defense provided in the CPPA is "incomplete and insufficient,"[143] and (4) § 2256(8)(D) is overbroad because the provision does not consider the content of the material being pandered and therefore "the CPPA does more than prohibit pandering. It prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain."[144]

1. CPPA Prohibits Speech that May Have Serious Value

At the core of the Supreme Court's concern with the CPPA was its effect of chilling speech that may have "serious literary, artistic, political, or scientific value."[145] The Court focused on the valuable role that literary themes such as teenage sexuality and the sexual abuse of children have played in our society for ages.[146] In fact, the Court warned that:

> Art and literature express the vital interest we all have in the formative years . . . . If these films . . . explore those subjects [or] contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's

139. *Id*. at 1095 ("The phrases provide no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution.").

140. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240 (2002) ("The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that it neither obscene under *Miller* nor child pornography under *Ferber*.").

141. *Id.* at 246.

142. *Id*. at 250.

143. *Id.* at 256.

144. *Id.* at 258.

145. *Free Speech Coalition*, 535 U.S. at 246.

146. *Id.* at 247-48.

> redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene.[147]

To further demonstrate its concern with the limitations imposed by the CPPA, the Court mentioned such movies as "Traffic" and "American Beauty," and speculated that these films would probably be in violation of the CPPA because they contain images that arguably "appear to be" minors engaging in sexually explicit conduct.[148]

2. The CPPA Prohibits Speech that Records No Crime and Creates No Victims

In *Free Speech Coalition*, the Government argued that Congress could legitimately regulate virtual child pornography because child pornographers and child molesters might use the images to seduce future victims,[149] that virtual child pornography "whets the appetites of pedophiles and encourages them to engage in illegal conduct,"[150] and the Government has an interest in curbing virtual child pornography because it has become a near-substitute for real child pornography and thereby fuels the child pornography market.[151]

The Court rejected the Government's secondary effects and market proliferation arguments and held that the causal link between virtual child pornography and subsequent instances of child abuse was "contingent and indirect" and "depend[ed] on some unquantified potential for subsequent criminal acts."[152] This holding is anchored in the Court's critical finding that *Ferber*'s focus was to prohibit child pornography made using *actual children* in its production.[153] Further, regarding the argument that virtual child pornography "whets the appetites" of child abusers to engage in criminal activity, the Court held that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."[154]

The Court also held that *Ferber* did not hold that all child pornography is inherently without value.[155] In fact, the Court held that *Ferber* explicitly relied

147. *Id.* at 248.

148. *Id*. at 247-48.

149. *Id*. at 251.

150. *Free Speech Coalition*, 535 U.S. at 253.

151. *Id.* at 254.

152. *Id.* at 250.

153. *Id.* at 250-51 ("*Ferber*'s judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

154. *Id*. at 253.

155. *Free Speech Coalition*, 535 U.S. at 251.

on the distinction between pornographic images produced using real children and those that did not to support its holding.[156]

In response to the Government's argument that virtual child pornography had become a near-substitute in the "real" child pornography market, the Court flatly disagreed and held that if the Government's contention were true, then potentially "legal" virtual images would have taken over the market long ago and would have driven out the illegal images of real children.[157] Any sensible child pornographer, the Court hypothesized, would have forgone the risk of creating illegal images using real children and simply created computer-generated images.[158]

3. The Affirmative Defense is Incomplete and Insufficient

The Government argued that prosecuting child pornographers who use real children in their material had become increasingly difficult because of the possibility that an image might have been computer-generated.[159] The Government warned that even experts might not be able to discern whether or not a real child has been used in an image.[160] Therefore, the Government reasoned that the best solution to this prosecutorial problem was to prevent both virtual and real images of child pornography and provide defendants with an affirmative defense that allowed them to show that the material was created using only adults.[161] The Court disagreed with the Government's solution and held that "[p]rotected speech does not become unprotected merely because it resembles [unprotected speech]."[162]

The Court held that the CPPA's affirmative defense was "incomplete and insufficient"[163] for two reasons. First, the affirmative defense did not apply when the defendant faced a possession charge,[164] and second, the affirmative defense did not provide protection to defendants who "us[ed] computer imaging, or through other means that [did] not involve the use of adult actors who appear to be minors."[165]

While the Court confirmed that the particular affirmative defense in the CPPA was incomplete and insufficient, the Court left open the possibility that

156. *Id.* ("'[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized.'") (quoting U.S. v. Ferber, 458 U.S. 747, 763 (1982)).

157. *Id.* at 254.

158. *Id.*

159. *Id*.

160. *Free Speech Coalition*, 535 U.S. at 254.

161. *Id*. at 254-55.

162. *Id.* at 255.

163. *Id*. at 256.

164. *Id*.

165. *Free Speech Coalition*, 535 U.S. at 256.

the CPPA could have been saved by a more complete and sufficient affirmative defense.[166]

4. Section 2256(8)(D) is Overbroad

The Court's primary concern with the pandering provision of the CPPA was that it did not require an inquiry into the actual content of the image that the defendant was accused of pandering; rather, a person violated § 2256(8)(D) merely by conveying the impression that a particular image was of a child engaging in sexually explicit conduct.[167] At bottom, the Court held that the First Amendment required a "more precise" restriction than that which was provided in § 2256(8)(D).[168] Further, the Court stated that § 2256(8)(D) "prohibit[ed] possession of material described, or pandered, as child pornography by someone earlier in the distribution chain."[169]

D. The Concurring and Dissenting Opinions

Justice Thomas's concurrence in the Court's holding reflects his concern that at some point in the near future, technology might exist to make it difficult, if not impossible, to prove that child pornography was created using a real child.[170] Justice Thomas was therefore concerned that the enforcement of existing child pornography laws might become practically impossible.[171] He suggested that:

> The Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children . . . . [A] more complete affirmative defense could save a statute's constitutionality . . . [and thus] some regulation of virtual child pornography might be constitutional.[172]

Justice O'Connor concurred in part and dissented in part with the holding. She found that the "appears to be" language covered two types of images: (1) those that appear to be children because they are created using youthful-looking adults, and (2) those that appear to be children because they are created using a computer.[173] With this dichotomy in place, Justice O'Connor agreed that the statute's ban on pornography created using youthful-looking

166. *Id*. ("Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms.").

167. *Id.* at 257 ("The determination turns on how the speech is presented, not on what is depicted.").

168. *Id*. at 258.

169. *Id.*

170. *Free Speech Coalition*, 535 U.S. at 259.

171. *Id.*

172. *Id.* at 259-60 (Thomas, J., concurring).

173. *Id*. at 261 (O'Connor, J., concurring in part and dissenting in part).

adults was unconstitutionally overbroad.[174] However, she, along with Chief Justice Rehnquist and Justice Scalia, did not agree with the majority that the statute's ban on child pornography created using a computer (virtual child pornography) was overbroad.[175]

Citing the overwhelming governmental interest in halting the activities of sexual offenders, the three Justices were persuaded by the Government's arguments that virtual child pornography is used to "whet the appetites of child molesters" and to seduce children into engaging in sexually explicit conduct.[176] These Justices were also troubled that a child pornographer who uses real children to create sexually explicit images might successfully avoid prosecution by asserting a false but unverifiable claim that the images were computer-generated when they, in fact, were not.[177]

These Justices also found that the language "appears to be"—as applied to virtual child pornography by Justice O'Connor and as applied across the board by Justices Rehnquist and Scalia—was best interpreted as meaning "'virtually indistinguishable from' . . . . [because] the narrowing interpretation avoids constitutional problems such as overbreadth and lack of narrow tailoring."[178] Central to this argument was the Justices' assessment that the possible conflicts involved in deciding from whose perspective "virtually indistinguishable from" should be based would be minimal.[179] Justice O'Connor stated, "This Court has never required 'mathematical certainty' or 'meticulous specificity' from the language of a statute."[180]

In a separate dissenting opinion, Chief Justice Rehnquist and Justice Scalia noted that they would have upheld the statute in its entirety and said that a fair reading of the statute shows that its language does not unnecessarily prohibit the youthful-looking adult pornography that Justice O'Connor would have protected.[181] The dissenting Justices were unconvinced by the Free Speech Coalition's doomsday view of the CPPA's effect on free speech: "[W]e should be loath to construe a statute as banning film portrayals of Shakespearian tragedies . . . . [T]he CPPA has been on the books, and has been enforced,

174. *Id.* at 262 ("The Court correctly concludes that the causal connection between pornographic images that 'appear' to include minors and actual child abuse is not strong enough to justify withdrawing First Amendment protection for such speech.").

175. *Free Speech Coalition*, 535 U.S. at 260, 265.

176. *Id*. at 263.

177. *Id.* at 263.

178. *Id.* at 264-65.

179. *Id*. at 265.

180. *Free Speech Coalition*, 535 U.S. at 265 (O'Connor, J., concurring) (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

181. *Id*. at 269, 273.

since 1996. The chill felt by the Court has apparently never been felt by those who actually make movies."[182]

Regarding the "conveys the impression" language found in § 2256(8)(D), Chief Justice Rehnquist and Justice Scalia maintained that a fair reading of the CPPA would reveal that § 2256(8)(D) only reaches the "'sordid business of pandering.'"[183]

V. CONGRESS' RESPONSE: THE PROTECT ACT 2003

On April 30, 2002, the House introduced the Child Obscenity and Pornography Prevention Act of 2002 (COPPA 2002) in response to the *Free Speech Coalition* decision and later passed the COPPA 2002 on June 25, 2002.[184] A companion bill, Senate Bill 2511, was introduced in the Senate on May 14, 2002.[185]

Fearing the COPPA 2002 might "be more concerned with making a public point than with making successful cases,"[186] on May 15, 2002, the Senate introduced the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2002 (PROTECT Act 2002) and later passed this version of the PROTECT Act on November 14, 2002.[187]

However earnest its efforts might have been at responding to the *Free Speech Coalition* decision, the 107th Congress faced the reality of a November election and the resulting "lame duck" session of an outgoing Congress.[188] Because the COPPA 2002 and the PROTECT Act 2002 were not identical, neither bill could be approved before Congress adjourned.[189] As such, "[t]hese bills died with the demise of the 107th Congress."[190]

182. *Id.* at 270-71 (citation omitted). To bolster this point, the Justices noted that the films "Traffic" and "American Beauty" won their Academy Awards in 2001 and 2000, long after the enactment of the CPPA. *Id.* at 271.

183. *Id.* at 271 (Rehnquist, C.J. & Scalia, J., dissenting) (quoting Ginzburg v. United States, 383 U.S. 463, 467 (1966)).

184. H.R. 4623, 107th Cong. (2002). The COPPA 2002 was drafted by the Department of Justice and introduced to the House by Representative Lamar Smith. 148 Cong. Rec. H3880-81 (daily ed. June 25, 2002) (statement of Rep. Pomeroy).

185. S. 2511, 107th Cong. (2002).

186. *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing on S. 2520 Before the Senate Comm. on the Judiciary*, 107th Cong. 145 (2002) [hereinafter *Stopping Child Pornography*] (statement of Vt. Patrick Leahy, Chairman, Comm. on the Judiciary).

187. S. 2520, 107th Cong. (2002). This 2002 version of the PROTECT Act was introduced to the Senate by Senators Leahy and Orrin Hatch. 148 Cong. Rec. S11199 (daily ed. Nov. 15, 2002) (statement of Sen. Leahy).

188. S. REP. NO. 108-2, pt. II, at 2 (2003).

189. *Id.* at 3.

190. Joseph J. Beard, *Virtual Kiddie Porn: A Real Crime? An Analysis of the PROTECT Act*, 21 ENT. & SPORTS L. 3, 4 (2003).

Almost immediately after convening, the 108th Congress began an effort to craft responsive legislation to the *Free Speech Coalition* decision. On January 13, 2003, the Senate introduced the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act 2003),[191] and on March 6, 2003, the House introduced the Child Obscenity and Pornography Prevention Act of 2003 (COPPA 2003).[192] The COPPA 2003's articulated purpose was to "prevent trafficking in child pornography and obscenity, to proscribe pandering and solicitation relating to visual depictions of minors engaging in sexually explicit conduct, [and] to prevent the use of child pornography and obscenity to facilitate crimes against children."[193] Alternatively, the PROTECT Act 2003's stated purpose is "to restore the government's ability to prosecute child pornography offenses successfully."[194]

It should be noted that there was significant debate about key provisions in the COPPA 2003 and the PROTECT Act 2003. To illustrate, after the House reviewed the Senate's version, it offered an "amendment" to the Senate bill on March 27, 2003, which, in reality, was a recommendation that the Senate's language be replaced in its entirety with the House's version found in the COPPA 2003.[195]

Despite ongoing disagreement, and presumably in the interest of the prompt passage of meaningful legislation, both houses compromised and passed the PROTECT Act 2003 on April 10, 2003.[196] President George W. Bush signed the PROTECT Act 2003 on April 30, 2003, and stated that "[t]his important legislation gives law enforcement authorities valuable new tools to deter, detect, investigate, prosecute, and punish crimes against America's children."[197]

But does it? While it is hard to imagine anyone opposing Congress's good intentions, the question regarding whether the PROTECT Act 2003 is meaningful *and* constitutionally viable remains. In other words, what has Congress done differently this time to ensure that America's children will not suffer another successful constitutional challenge to well-meaning but ineffective legislation?

191. S. 151, 108th Cong. (2003).

192. H.R. 1161, 108th Cong. (2003).

193. *Id.* at pmbl.

194. S. REP. NO. 108-2, pt. I, at 1 (2003).

195. *Compare* House Amendment to S. 151, Title V, §§ 501-512 (March 27, 2003) *with* H.R. 1161, 108 Cong. at §§ 1-14 (2003) (identical language). *See also* Beard, *supra* note 190, at 4.

196. *See* H.R. REP. NO. 108-66, title V, at 59 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 694.

197. Statement on Signing the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 39 WKLY. COMP. PRES. DOC. 504 (April 30, 2003), *reprinted in* 2003 U.S.C.C.A.N. 705, *available at* http://usinfo.state.gov/usa/s043003bh.htm.

From the time immediately following *Free Speech Coalition* until the present, both the House and Senate have made clear that their desire is to respond to, not rehash, the problems identified by the Court in the *Free Speech Coalition* decision with regard to virtual child pornography regulation. In fact, Senator Leahy made the following statement regarding the objectives for the PROTECT Act 2002: "The harder task is finding those kinds of legislative solutions that are not merely designed to be tough on child pornography in the short term, but can withstand the test of time and the scrutiny of the courts. . . . [T]he PROTECT Act . . . is a response to the [*Free Speech Coalition*] decision, not a challenge to it."[198] Supporters of the Protect Act 2003 argued that "[t]he last thing we want to do is to create years of legal limbo for our nation's children . . . . Our children deserve more than a press conference on this issue. They deserve a law that will last rather than be stricken from the law books."[199]

While it remains to be seen how courts will handle future constitutional challenges to the PROTECT Act 2003, what follows is a look at this purported "response to the [*Free Speech Coalition*] decision."[200] This section presents an overview of Congress's findings that accompanied the PROTECT Act 2003 and highlights key provisions,[201] including how the Act: (1) changes the definition of virtual child pornography; (2) changes the offense of pandering and solicitation of virtual child pornography, and (3) changes the affirmative defense. Finally, this section will briefly analyze the PROTECT Act 2003's constitutional viability in light of the Court's decision in *Free Speech Coalition*.

A. Congressional Findings Accompanying the PROTECT Act 2003

As expected, the PROTECT Act 2003 cites a rapidly growing need to protect children from child molesters and child pornographers.[202] It states that "technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not already, to computer [-]generate realistic images of children."[203]

198. *Stopping Child Pornography*, *supra* note 186, at 1-2 (statement of Vt. Patrick Leahy, Chairman, Senate Comm. on the Judiciary).

199. S. REP. NO. 108-2, pt. VIII, at 16 (2003).

200. *Stopping Child Pornography*, *supra* note 186, at 2.

201. The PROTECT Act 2003 also adds two new crimes to the prosecutor's toolbox in the fight against the exploitation of children. *See* PROTECT Act 2003, Pub. L. No. 108-21, § 503(1)(D), 117 Stat. 650, 680; *id.* § 504, 117 Stat. at 681-82. This Note will not analyze these sections.

202. *Id.* § 501(2), 117 Stat. at 676.

203. *Id.* § 501(5).

Notably, the PROTECT Act 2003 abandons the secondary effects and market proliferation rationales[204] that accompanied the CPPA and instead emphasizes the perceived need to strengthen the Government's ability to prosecute child pornography offenders.[205]

Specifically, Congress warns that there is nothing to indicate that child pornography bought, sold, and possessed in today's child pornography market is produced in any way other than through the use of an actual child.[206] Congress insists that many criminal defendants claim that the image in question is computer-generated, and therefore require that the Government prove beyond a reasonable doubt that the image is of a real child.[207] Apparently, some prosecutors feel this to be an insurmountable burden in some cases. In fact, "prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions."[208]

For example, Congress highlights the fact that much of the child pornographic material circulating on the Internet involves retransmitted images that can be altered so as to make it impossible to determine if the depiction involves a real child.[209] Congress warns that:

> [This technology creates] difficulties in enforcing the child pornography laws [that] will continue to grow increasingly worse. The mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to

204. Although the secondary effects and market proliferation justifications are not explicitly identified by the PROTECT Act 2003, one provision of the PROTECT Act 2003 is squarely aimed at criminalizing the use of visual depictions of minors engaging in sexually explicit conduct to seduce children into engaging in sexually explicit conduct. *Id.* § 503(1)(D). Interestingly, this provision prohibits the use of such images to persuade minors to engage in *any* illegal purpose. *Id.* For this reason, some speculate that this provision might be overbroad. *See* Beard, *supra* note 190, at 6.

205. PROTECT Act 2003 § 501(9); *see also Stopping Child Pornography*, *supra* note 186, at 62 (statement of Mr. Ernest E. Allen, Director, The National Center for Missing and Exploited Children) ("[G]raphics software packages and computer animation are being used to manipulate or 'morph' images and to create 'virtual' images indistinguishable from photographic depictions of actual human beings. . . . [This] severely impairs the ability of law enforcement and prosecutors to protect children by enforcing existing laws prohibiting such crimes.").

206. PROTECT Act 2003 § 501(7).

207. *Id.* § 501(7), (9).

208. *Id.* § 501(9). *But see* Feldmeier, *supra* note 88, at 220. Noting that the prosecutor's perceived struggle might be exaggerated, Feldmeier states that, "of the 2091 child pornography cases initiated by the government between 1992 and 2000, only 10 defendants, regardless of the defense strategy they employed, were acquitted. . . . Even more telling is that none of these acquittals are reported as being based on the so-called 'virtual child' defense." *Id.*

209. PROTECT Act 2003 § 501(8).

> create a reasonable doubt in every case of computer images even when a real child was abused.[210]

In a hearing before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, Associate Deputy Attorney General Daniel P. Collins testified that many experts are willing to testify to the uncertainty of whether an image was created using an actual child on behalf of defendants.[211] He forecasts that, without a change in the law, "[t]rials will increasingly devolve into jury-confusing battles of experts arguing over the method of generating an image that, to all appearances, looks like it is the real thing."[212]

What follows are key provisions from Congress's effort to combat these perceived obstacles and to protect the nation's children from sexual exploitation.

B. How the Act Changes the Definition of Virtual Child Pornography

The PROTECT Act 2003 heeds the Court's warning in *Free Speech Coalition* regarding the unconstitutionality of the CPPA's "appears to be" language found at § 2256(8)(B),[213] and amends this section to read:

> "[C]hild pornography" means 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 . . .
>
> > (B) such visual depiction is a digital image, computer image, or computer-generated image *that is, or is indistinguishable from, that of a minor* engaging in sexually explicit conduct . . . ."[214]

In addition, the PROTECT Act 2003 creates a special definition for "sexually explicit conduct" applicable to the newly amended § 2256(8)(B) by dividing § 2256(2) into subsection (A), which includes the previous definition of sexually explicit conduct,[215] and subsection (B), which houses the following definition applicable only to § 2256(8)(B):

"[S]exually explicit conduct" means—

> (i) *graphic* sexual intercourse . . . whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

210. *Id.* § 501(13).

211. *Hearing on H.R. 4623*, *supra* note 21, at 4 (statement of Daniel P. Collins, Associate Deputy Attorney General, Office of the Deputy Attorney General, U.S. Department of Justice).

212. *Id.*

213. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002).

214. 18 U.S.C.A. § 2256(8)(B) (Supp. I 2003) (to be codified at 18 U.S.C. § 2256(8)(B)) (emphasis added).

215. *See* PROTECT Act 2003, Pub. L. No. 108-21, § 502(b), 117 Stat. 650, 676; 18 U.S.C. § 2256(2) (2000).

> (ii) graphic or lascivious simulated;
>
> (I) bestiality;
>
> (II) masturbation; or
>
> (III) sadistic or masochistic abuse; or
>
> (iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person[.][216]

The PROTECT Act 2003 adds to § 2256 to define "graphic" (as used in the new § 2256(2)(B)) and "indistinguishable" (as used in the amended § 2256(8)(B)) as follows:

> (10) "[G]raphic," when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; . . .
>
> (11) '"[I]ndistinguishable" . . . means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.[217]

First, regarding the changes to § 2256(8)(B), it would seem at first glance that the PROTECT Act 2003 follows the Court's criticisms of the "appears to be" language in *Free Speech Coalition*. Most notably, the definition now limits the images that fall within its purview to "digital image[s], computer image[s], or computer-generated image[s]."[218] Further, the sexually explicit conduct depicted must be either graphic or lascivious,[219] and the depiction must be "virtually indistinguishable" from an actual minor engaging in graphic or lascivious actual or simulated sexual conduct.[220]

However, recall that the Court specifically stated that *Ferber* "reaffirmed that where the [child pornography] is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment."[221] Further, the Court stated, "*Ferber* did not hold that child pornography is by

216. 18 U.S.C.A. § 2256(2)(B) (Supp. I 2003) (to be codified at 18 U.S.C. § 2256(2)(B)) (emphasis added). In addition, "lascivious" is defined as "tending to excite lust; lewd; indecent; obscene." BLACK'S LAW DICTIONARY 794 (5th ed. 1979).

217. 18 U.S.C.A. § 2256(10)-(11) (Supp. I 2003) (to be codified at 18 U.S.C. § 2256(10)-(11)).

218. *Id.* § 2256(8)(B).

219. *Id.* § 2256(B)(i).

220. *Id.* § 2256(11).

221. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 251 (2002).

definition without value."[222] While the PROTECT Act 2003 unquestionably narrows the definition of virtual child pornography, it is unclear whether these amendments sufficiently foreclose constitutional challenge.[223]

To be sure, the *Free Speech Coalition* Court rejected the "virtually indistinguishable" rationale.[224] As Professor Schauer noted in a statement about the PROTECT Act 2002 to the Senate Committee on the Judiciary, "no degree of indistinguishability in he [sic] image can create a real child where none existed before."[225] While § 2256(8)(B) explicitly protects drawings, cartoons, sculptures, and paintings,[226] this provision might still prohibit speech that "records no crime and creates no victims by its production."[227] By allowing no consideration of whether the work contains serious literary, artistic, political, or scientific value, the PROTECT Act 2003 could penalize the makers or possessors of films such as "Romeo and Juliet," "American Beauty," and "Traffic,"[228] which all portray minors engaged in arguably sexually explicit conduct under the new § 2256(2)(B) definition of sexually explicit conduct.[229]

While this provision of the PROTECT Act 2003 would capture what most communities would regard as objectionable virtual child pornography, it seems that an obscenity requirement would more safely narrow § 2256(8)(B).[230] In

222. *Id*. The Court was worried about the CPPA's application to "a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. . . . Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards." *Id*. at 246.

223. Beard, *supra* note 190, at 5.

224. *See Free Speech Coalition*, 535 U.S. at 249-50; *Stopping Child Pornography*, *supra* note 186, at 117 (statement of Professor Anne M. Coughlin, University of Virginia School of Law) ("Justice Kennedy noticed that the government sought to remedy [the "appears to be" language] in the CPPA by arguing that the prohibited speech was 'virtually indistinguishable' from the child porn that the government is free to regulate, and he disapproved this proposed understanding of the statute.").

225. *Stopping Child Pornography*, *supra* note 186, at 154 (statement of Professor Frederick Schauer, John F. Kennedy School of Government, Harvard University).

226. 18 U.S.C.A. § 2256(11) (Supp. I 2003) (to be codified at 18 U.S.C. § 2256(11)).

227. *Free Speech Coalition*, 535 U.S. at 250.

228. Recall that the Court expressed that these films might have fallen "within the wide sweep of the [CPPA's] prohibitions." *Id.* at 248.

229. Congress attempts to minimize this concern by stating that "[l]imiting the definition to digital, computer, or computer-generated images *will help* to exclude ordinary motion pictures from the coverage of 'virtual child pornography.'" H.R. REP. NO. 108-66, title V, at 60 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 695 (emphasis added). Note, however, that many movies are viewed on DVD, and the term DVD stands for *digital* video disc. In any event, it is difficult to understand why the medium used, whether it be digital, computer, film, or something else, would ultimately determine whether a work is protected by the First Amendment.

230. *See supra* notes 33-38 and accompanying text for a discussion of the *Miller* obscenity standard.

fact, the National Center for Missing and Exploited Children advocates this view:

> [T]he vast majority (99-100%) of all child pornography would be found to be obscene by most judges and juries . . . [I]t is highly unlikely that any community would not find child pornography obscene.
>
> . . .
>
> In the post-*Free Speech* decision legal climate the prosecution of child pornography cases under an obscenity approach is a reasonable strategy and sound policy.[231]

It appears that Senators Leahy, Biden, and Feingold would agree with this approach as well: "The Supreme Court made it clear that we can only outlaw child pornography in two situations: one where it is obscene, or two, where it involves real kids. That is the law . . . whether or not we agree with it."[232]

C. How the PROTECT Act 2003 Changes the Criminalization of Pandering and Solicitation

The PROTECT Act 2003 completely eliminates 18 U.S.C. § 2256(8)(D), the CPPA provision that defined child pornography as the advertisement, promotion, presentation, description, or distribution of any visual depiction in such a way that "conveys the impression that" the material contains a visual depiction of a minor engaging in sexually explicit conduct.[233] In *Free Speech Coalition*, the Court held that this provision was substantially overbroad and in violation of the First Amendment.[234]

The new pandering and solicitation provision in the PROTECT Act 2003 amends 18 U.S.C. § 2252A by breaking up § 2252A(3) into two subsections. The original provision remains at § 2252A(a)(3)(A), while the PROTECT Act 2003 adds the following new pandering provision at § 2252A(a)(3)(B):

> (3) [Any person who] knowingly . . .
>
> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, *any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe*, that the material or purported material is, or contains—

231. S. REP. NO. 108-2, pt. VIII, at 28 (2003).

232. *Id.* at 27. *See also* Feldmeier, *supra* note 88, at 220 ("[B]ecause a non-obscene image that is 'indistinguishable' from that of a minor . . . does not depict an actual child, it does not fall outside the protection of the First Amendment.").

233. 18 U.S.C. § 2256(8)(D) (2000), *repealed by* PROTECT Act 2003, Pub. L. No. 108-21, § 502(a)(3), 117 Stat. 650, 678.

234. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).

> (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.[235]

In the PROTECT Act 2003's Conference Report, Congress explains that "this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. . . . [and] prohibits an individual from soliciting what he believes to be actual or obscene child pornography."[236]

This section is troublesome for two reasons. First, the "'purported material' [language] criminalizes speech even when there is no underlying material at all—whether obscene or non-obscene, virtual or real, child or adult."[237] This seems to be in direct contravention of the Court's holding in *Free Speech Coalition* where it disapproved of the CPPA's pandering provision because, under it:

> [C]ontent is irrelevant. 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. The determination turns on how the speech is presented, not on what is depicted.[238]

Recall that the *Free Speech Coalition* Court made it clear that visual depictions of children engaging in sexually explicit conduct might still be legal if the depiction has literary or other significant value.[239]

Second, § 2252A(a)(3)(B)(ii) potentially criminalizes the promotion of materials that are not obscene and do not involve the use of an actual child.[240] Arguably, this provision of the PROTECT Act 2003 would mean that "[a]ny person or movie theatre that presented films like Traffic, Romeo and Juliet, and American Beauty would be guilty of a felony. . . . The whole aim of dramatic presentation is to convince the viewer that what is, in fact, fiction is fact."[241]

235. 18 U.S.C.A. § 2252A(a)(3)(B) (Supp. I 2003) (to be codified at 18 U.S.C. § 2252A(a)(3)(B)) (emphasis added).

236. H.R. REP. NO. 108-66, title V, at 61 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 695.

237. S. REP. NO. 108-2, pt. VIII, at 23 (2003). One concern about the "purported material" language is that the provision might "federally criminalize talking dirty over the Internet or the telephone when the person never possesses any material at all. That is speech, and that goes too far." *Id*. at 24.

238. *Free Speech Coalition*, 535 U.S. at 257.

239. *See id*. at 251; *see also supra* text accompanying notes 145-48 and 155-56.

240. *See* S. REP. NO. 108-2, pt. VIII, at 24.

241. *Id*.

Further, the *Free Speech Coalition* Court required that the Government explain the evils posed by pandering images that simply "look like child pornography."[242] Notably, Congress has somewhat flimsily articulated a reason why the mere pandering of otherwise legal images should be prohibited. In the PROTECT Act 2003's Conference Report, Congress mentions that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material."[243] This appears to be a resurrection of the market-deterrence theory advanced by the Government in *Free Speech Coalition*.[244] The Court summarized and disposed of this argument as follows: "[I]t is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible."[245]

Once again, Congress has failed to articulate specifically how the pandering and solicitation of *legal* images fuels the market for *illegal* images of children engaging in sexually explicit conduct. Put simply, in what way would a trailer for "Traffic," "Romeo and Juliet," or "American Beauty" fuel the market for images of actual children engaging in sexually explicit conduct or obscene images of children (actual or real) engaging in sexually explicit conduct?

Finally, it is important to note, the PROTECT Act 2003 does include an affirmative defense;[246] however, § 2252A(c) excludes from its purview § 2252A(a)(3)(B). Congress explains that the PROTECT Act 2003's affirmative defense is "comprehensive . . . for anyone charged with distributing or possessing child pornography . . . [but the PROTECT Act] ensure[s] [that] the defense does not apply to the pandering provisions."[247] As previously explained, § 2252A(a)(3)(B)(ii) potentially criminalizes the promotion of materials that are not obscene and do not involve the use of an actual child.[248] As such, the PROTECT Act 2003's affirmative defense can hardly be characterized as "comprehensive."

For these reasons, the pandering and solicitation provision of the PROTECT Act 2003 seems especially vulnerable to constitutional challenge.[249]

242. *Free Speech Coalition*, 535 U.S. at 257.

243. H.R. REP. NO. 108-66, title V, at 62 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 696.

244. *See supra* text accompanying notes 152-58.

245. *Free Speech Coalition*, 535 U.S. at 254.

246. *See infra* notes 251-66 and accompanying text.

247. H.R. REP. NO. 108-66, title V, at 61 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 696.

248. *See supra* notes 237-45 and accompanying text.

249. S. REP. NO. 108-2, pt. VIII, at 24 (2003) ("[T]he decision to obviate the need to demonstrate any relation to obscenity places the constitutionality of the provision as a whole at risk.").

D. How the PROTECT Act 2003 Changes the Affirmative Defense

The PROTECT Act 2003 provides the following amended affirmative defense to be codified at § 2252A(c):

> (c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—
>
> (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and
>
> (B) each such person was an adult at the time the material was produced; or
>
> (2) the alleged child pornography was not produced using any actual minor or minors. . . .
>
> A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless . . . the defendant provides the court and the United States with notice of the intent to assert such defense.[250]

In *Free Speech Coalition*, the Court held that the affirmative defense provided in 18 U.S.C. § 2252A of the CPPA[251] was incomplete and insufficient and that it failed to protect a significant amount of lawful speech.[252] Specifically, Justice Kennedy held that the affirmative defense provided in the CPPA was "incomplete and insufficient"[253] because the defense did not extend

250. 18 U.S.C.A. § 2252A(c) (Supp. I 2003) (to be codified at 18 U.S.C. § 2252A(c)).

251. This affirmative defense provided:

> It shall be an affirmative defense . . . that—
>
> (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;
>
> (2) each such person was an adult at the time the material was produced; and
>
> (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2252A(c) (2000).

252. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002). In a discussion about the insufficiency of the affirmative defense provided in the CPPA, the Court concluded, "Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms." *Id.*

253. *Id.*

to possession offenses,[254] nor did the defense protect defendants who could prove that the images in question were not produced using actual children.[255]

In response to the Court's concern that the affirmative defense failed to protect defendants who could prove that no child was used in the production of the material in question, the PROTECT Act 2003 now protects defendants in two situations: (1) when the alleged child pornography was produced using an actual person engaging in sexually explicit conduct and that person was an adult at the time of production,[256] or (2) when the alleged child pornography was not produced using an actual minor.[257]

Both scenarios seem to answer the majority's immediate concerns regarding the ineffectiveness of the CPPA's affirmative defense, but critics raise an important point: the PROTECT Act 2003's affirmative defense arguably presupposes that a real child was used in the production of the image.[258] Is it not the government's burden to prove beyond a reasonable doubt that the image is of an actual child?

Some say the PROTECT Act 2003's "relaxed definition of child pornography,"[259] together with its affirmative defense, unfairly requires a defendant to "prove the government's case."[260] Further, it is argued that the PROTECT Act 2003's affirmative defense "ignores the reality that most defendants lack the resources or the ability to prove that a 'fictional' character is not a real minor. If the government . . . is purportedly having trouble . . .

254. *Id*. at 255-56 ("Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor."). The PROTECT Act 2003 explicitly extends the § 2252A(c) affirmative defense to alleged violations of 18 U.S.C. § 2252A(a)(5). PROTECT Act 2003 § 502(d), 117 Stat. at 679.

255. *Free Speech Coalition*, 535 U.S. at 256. The affirmative defense "allows persons to be convicted in some instances where they can prove children were not exploited in the production." *Id*.

256. PROTECT Act 2003 § 502(d) (to be codified at 18 U.S.C. § 2252A(c)(1)(A)-(B)).

257. *Id*. (to be codified at 18 U.S.C. § 2252A(c)(2)). *See also* Beard, *supra* note 190, at 5.

258. Feldmeier, *supra* note 88, at 223. As Feldmeier noted:

> In essence, under Section 2252A(c)(1), all federal prosecutors must do in child pornography cases is prove that the charged material contains an image that is 'indistinguishable' from that of a minor engaged in sexually explicit conduct. Once this is done, the burden of proof shifts to the defendant who is then responsible for proving that the image is not of an actual child.

Id.

259. *Id.* at 224. *See also* Beard, *supra* note 190, at 5 ("[T]here remains the Supreme Court's more general criticism that a criminal law that shifts the burden to the accused 'raises serious constitutional difficulties.'") (quoting *Free Speech Coalition*, 535 U.S. at 255).

260. Feldmeier, *supra* note 88, at 224.

then how can criminal defendants, many of whom are indigent, be expected to do so?"[261]

Others argue that the affirmative defense is fair and affords (at least for a producer-defendant) the opportunity to prove that adults were used in the material or that the material was made without the use of an actual minor.[262] After all, many of these defendants are hardly indigent; they presumably had the money for a fancy computer and software. In support of a provision substantially similar to the one found in the PROTECT Act 2003, the Senate defended the affirmative defense by stating that "this provision places the burden of proof on the party that is in the best position to determine the pertinent facts."[263]

Finally, some support the PROTECT Act 2003's affirmative defense on the ground that it is unreasonable to expect some prosecutors with limited access to sophisticated investigative tools to review every pornographic image involving children for evidence that a real child was used.[264] Indeed, some feel that this task might be "overwhelming" for prosecutors.[265]

Even assuming these perceived obstacles are real, it is difficult to imagine any scenario in which the American system of justice relieves, or even minimizes, a prosecutor's burden because something is "too hard." The credibility of our American system of criminal justice relies upon the government marshalling sufficient evidence against a defendant so as to eliminate reasonable doubt in the minds of judges and juries. Any other standard "undermine[s] and insult[s] the men and women serving as federal prosecutors who are more than capable of securing child pornography convictions without the assistance of dumbed-down evidentiary standards."[266]

VII. CONCLUSION

While it remains to be seen whether the PROTECT Act 2003 will survive the scrutiny of the Supreme Court, it is clear that Congress has made progress in crafting legislation that presents a more comprehensive solution to the child pornography problem.

261. *Id*. at 225. Feldmeier further states that "it is patently unfair, unreasonable, and unconstitutional to afford the government a 'close-enough' standard in child pornography cases, while requiring defendants to demonstrate with precision the non-minor status of the person depicted." *Id*.

262. *See* S. REP. NO. 108-2, pt. III, at 8 (2003).

263. *Id*.

264. Robin Schmidt-Sandwick, *Freedom of Speech: Supreme Court Strikes Down Two Provisions of the Child Pornography Prevention Act (CPPA), Leaving Virtual Child Pornography Virtually Unregulated*, 79 N.D. L. REV. 175, 200 (2003) (proposing that prosecutors face significant challenges in mounting successful cases against child pornographers).

265. *Id*.

266. Feldmeier, *supra* note 88, at 228.

Despite the great debate that ensued while finalizing its legislative response to the *Free Speech Coalition* decision, one thing is certain: Congress is not willing to compromise in its mission to protect children from the evils of child pornography and child molestation. Crafting legislation that both targets specific Congressional objectives and respects the speech freedoms guaranteed by the First Amendment will help secure the legislative protection that child pornography and molestation victims not only deserve, but also so desperately require.[267]

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267. *See Stopping Child Pornography*, *supra* note 186, at 156 (statement of Professor Frederick Schauer, John F. Kennedy School of Government, Harvard University).

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