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COMMENTS

CRIMINALIZING "VIRTUAL" CHILD PORNOGRAPHY UNDER THE CHILD PORNOGRAPHY PREVENTION ACT: IS IT REALLY WHAT IT "APPEARS TO BE?"

David is 11 years old.
He weighs 60 pounds.
He is 4 feet, 6 inches tall.
He has brown hair.
His love is real.
But he is not.

—Advertisement for Steven Spielberg's June 2001 film, *Artificial Intelligence.*[1]

Years after his death, John Wayne sells beer in television commercials.[2] Eons after their extinction, lifelike dinosaurs continue to terrorize actors and thrill moviegoers.[3] The highest-grossing film of all time[4] employs "virtual" passengers aboard the

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1. *A.I. Artificial Intelligence, at* http://aimovie.warnerbros.com (last visited Apr. 3, 2001).

2. Robert Lemos, *Virtual Actors: Cheaper, Better, Faster Than Humans?*, ZDNET NEWS, June 15, *available at* 1998, 1998 WL 28812578 ("John Wayne and Fred Astaire, or at least the computer-enhanced images of the deceased stars, are starring in commercials.").

3. Mick LaSalle, *It's Been a Monster Movie Season This Summer: High-Quality Action Thrillers Helped Bring in the Crowds*, S.F. CHRON., Aug. 30, 1993, at E1 ("Computer graphics continue to become an increasingly integral part of the movie-making process, and nowhere was this more apparent or impressive than in the summer's biggest hit, 'Jurassic Park.'"). The third installment in the "Jurassic Park" series, *Jurassic Park III*, is scheduled for release in the summer of 2001. *The Mummy, the Apes and More Magic*, USA TODAY, Feb. 23, 2001, at 1E.

4. Claudia Eller, *Meet the King of the World at Fox*, L.A. TIMES, Aug. 22, 2000, at C1.

Titanic, worrying some members of the Screen Actors Guild.[5] All of these feats have been accomplished using sophisticated computer graphics software that blurs the distinction between imagination and reality.[6] This manipulative digital power has raised concerns about such things as "digital kidnapping," the unauthorized misuse of digital images.[7] For example, such digital misuse could include, as intellectual property professor Joseph Beard notes, "'a star showing up in a porn flick that they hadn't intended to make.'"[8] In this digital age, however, such photographic manipulation is no longer reserved for the major Hollywood studios. Practically any home-computer user can create photorealistic images that are virtually indistinguishable from actual photographs.[9] The potential for misuse of this technology is obvious.

Pornography often acts as a catalyst for the widespread acceptance of a new technology.[10] Just as it encouraged the widespread adoption of the VCR in the 1980s,[11] so too have many millions of people found their way onto the Internet.[12] As computers became faster, more powerful, and cheaper, pedophiles also quickly discovered cyberspace (and the benefit of its anonymity) to be a thriving marketplace for child pornography.[13] Furthermore, "[n]ot

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Titanic grossed $1.8 billion worldwide. *Top Grossing Movies of All Time, at* http://us.imdb.com/Charts/worldtopmovies (last visited Feb. 27, 2001).

5. Lemos, *supra* note 2 ("The industry is worried over the use, and misuse, of digital representations of actors, everything from photos on the Internet to 3-D full-body models that, in the computer world at least, allow the actor to be cloned.").

6. *Id.*

7. Bruce Haring, *Digitally Created Actors: Death Becomes Them*, USA TODAY, June 24, 1998, at 8D.

8. *Id.* (quoting Joseph Beard, an intellectual-property professor at St. John's University).

9. S. REP. NO. 104-358, at 15 (1996) ("[A]ll that is required to produce child pornography is an IBM-compatible personal computer with Windows 3.1 or Windows 95, or an Apple MacIntosh computer.").

10. Eric Schlosser, *The Business of Pornography*, U.S. NEWS & WORLD REP., Feb. 10, 1997, at 42, 49 ("In much the same way that hard-core films on videocassette were largely responsible for the rapid introduction of the VCR, porn on CD-ROM and on the Internet has hastened acceptance of the new technologies.").

11. Rentals of hard-core pornography on video rose from 75 million in 1985 to 490 million in 1992 and to 665 million in 1996. *Id.* at 43–44.

12. Kelly M. Doherty, Comment, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 262 (1999). In the late 1960s, the Department of Defense created the Internet to provide a decentralized communications network for use during nuclear attack. By the 1980s, it had blossomed into a giant network of networks spanning the globe. *Id.* at 260.

13. *Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 15 (1996) (statement of Kevin V. Di Gregory, Deputy

only have computers facilitated the distribution of child pornography, they have also revolutionized its creation."[14] Through the use of widely available digital-imaging technology, "real" children are no longer needed to create child pornography.[15] For this reason, Congress passed the Child Pornography Prevention Act of 1996 ("CPPA")[16] to combat the evils of virtual child pornography.

The CPPA, like any legislation, has its critics and proponents.[17] This comment examines how the federal appellate courts have resolved challenges to Congress's authority to ban virtual child

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Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice); Prepared Testimony of Mary H. Murguia, Director of Executive Office for U.S. Att'ys, Dep't of Justice Before the House Appropriations Comm., Subcomm. on the Dep'ts of Commerce, Justice, State and Judiciary, Fed. News Service, Mar. 23, 2000, http://web.lexis-nexis.com/congcomp/form/cong/s_testimony.html. According to Murguia's testimony:

> Child pornographers, who were once limited largely to illicit books, magazines, and mailings, have emerged as a significant problem on the Internet. This medium has enabled pedophiles to contact each other and strike up anonymous electronic conversations with or about potential victims. Also, the Internet provides pedophiles with a means to store, distribute, and exchange electronic images of child pornography. . . .
>
> . . . The FBI dedicated 177 agents in FY 1999 to child pornography and Internet exploitation.

Id.

Consequently, in 1995, more child pornography cases were presented by federal investigative agencies than in any previous year. *Id.*

14. Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440 (1997).

15. Child Pornography Prevention Act of 1996 § 121(1)(5), 18 U.S.C. §§ 2252, 2252A (Supp. IV 1998). The subsection states:

> [N]ew photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.

Id.

16. 18 U.S.C. §§ 2252, 2252A.

17. *Compare* Burke, *supra* note 14, at 470 (arguing that the state's interests in banning child pornography that is entirely computer-generated are not compelling enough or narrowly tailored enough to survive constitutional scrutiny), *with* Adam J. Wasserman, Note, *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, 247 (1998) (defending the CPPA "against Burke and other critics"), Foster Robberson, *'Virtual' Child Porn on Net No Less Evil Than Real Thing*, ARIZ. REPUBLIC, Apr. 28, 2000, at B11, *and* John Schwartz, *New Law Expanding Legal Definition of Child Pornography Draws Fire*, WASH. POST, Oct. 4, 1996, at A10. At least fifteen constitutional scholars wrote to the Senate Judiciary Committee while it was considering the CPPA to express concern about its ban on what "appears to be" child pornography. S. REP. NO. 104-358, at 29 (1996) (additional views of Sen. Biden).

pornography under the CPPA. Part I reviews the evolution and escalation of congressional attempts to regulate child pornography since the 1970s as well as the key United States Supreme Court decisions involving those efforts. Part II discusses the technological aspects of virtual child pornography and the provisions of the CPPA. Part III surveys, in chronological order, the four federal appellate court cases challenging the constitutionality of the CPPA. Part IV discusses the appropriate standard of review for examining the CPPA and argues that the federal appellate courts should have applied a "balancing of the interests" test instead of strict scrutiny. In addition, Part IV argues that child pornography has little or no value as speech.

I. CHILD PORNOGRAPHY PREVENTION SINCE THE 1970S

A. *Congressional Efforts to Proscribe Child Pornography*

Congress's first step toward protecting children from child pornography occurred with the passage of the Protection of Children Against Sexual Exploitation Act of 1977.[18] This legislation prohibited the use of children under the age of sixteen in making sexually explicit material to be distributed in interstate commerce.[19] Congress also intended to prohibit the transfer of boys across state lines for the purposes of prostitution (transporting girls across state lines was already prohibited).[20] However, this bill only regulated the commercial sale of child pornography, not the trading of such material, even through the mail.[21]

In 1984, Congress passed the Child Protection Act,[22] which went a step further, eliminating the need for a commercial transaction and raising the statutory age of a minor to eighteen.[23] This legislation also responded to the Supreme Court's decision in *New*

18. Pub. L. No. 95-225, 92 Stat. 7 (codified as amended at 18 U.S.C. §§ 2423, 2251–53 (1994 & Supp. IV 1998)).

19. *Id.*

20. S. REP. NO. 95-438, at 3 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 41.

21. Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252 (1994); Amy E. Wells, Comment, *Criminal Procedure: The Fourth Amendment Collides with the Problem of Child Pornography and the Internet*, 53 OKLA. L. REV. 99, 102 (2000).

22. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–2253 (1994 & Supp. IV 1998)).

23. *Id.* §§ 4–5; Wells, *supra* note 21, at 102.

York v. Ferber[24] by eliminating the requirement that child pornography be obscene to be criminal.[25]

Instigated by Attorney General Edwin Meese III's Commission on Pornography Report,[26] which called for tough federal enforcement of obscenity and child pornography laws,[27] Congress continued to pass legislation to fight child pornography.[28] The next piece of child pornography legislation, the Child Sexual Abuse and Pornography Act of 1986,[29] banned child pornography advertising.[30] In the same session, Congress also provided legislation subjecting those who use children to produce pornography to personal injury liability.[31]

Finally, the first law concerned with the nexus between computers and child pornography came in 1988, with passage of the Child Protection and Obscenity Enforcement Act,[32] which prohibited the use of computers to distribute child pornography.[33] The CPPA is the next significant step in addressing the power of computers to supply the child-porn market.

24. 458 U.S. 747 (1982) (granting states greater leeway in regulating child pornography than they had under strict adherence to the test established for obscenity in *Miller v. California*, 413 U.S. 15 (1973)); *see infra* Part I.B.1.

25. Child Protection Act of 1984 § 4; Michael J. Eng, Note, Free Speech Coalition v. Reno*: Has the Ninth Circuit Given Child Pornographers a New Tool to Exploit Children?*, 35 U.S.F. L. REV. 109, 111 n.14 (2000); Wells, *supra* note 21, at 102–03.

26. FINAL REPORT OF THE ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY (1986).

27. *Id.* at 77–79.

28. Schlosser, *supra* note 10, at 43. The ensuing crackdown on pornography continued through the presidency of George H.W. Bush and resulted in the conviction of hundreds of retailers, producers, and distributors. *Id.*

29. Pub. L. No. 99-628, 100 Stat. 3510 (codified as amended in scattered sections of 18 U.S.C.).

30. *Id.* § 2; Eng, *supra* note 25, at 111 n.14; Wells, *supra* note 21, at 103.

31. Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783 (codified as amended at 18 U.S.C. § 2255 (1994 & Supp. IV 1998)).

32. Pub. L. No. 100-690, 102 Stat. 4485 (codified as amended at 18 U.S.C. §§ 2251A–2252 (1994 & Supp. IV 1998)).

33. *Id.* § 7511; Eng, *supra* note 25, at 111 n.14.

B. *Child Pornography and the Judiciary*

1. *New York v. Ferber*

The first child pornography case, *New York v. Ferber*,[34] came before the Supreme Court in 1982. In *Ferber*, a bookstore owner was convicted, under state law, of promoting the sexual performance of a child under the age of sixteen after he sold two films of boys masturbating to an undercover police officer.[35] The New York Court of Appeals, in reversing the conviction, held that the state statute violated the First Amendment.[36] Because adult sexual material could only be regulated if it was deemed obscene under *Miller v. California*,[37] the Supreme Court granted certiorari in order to determine whether the New York legislature could properly prohibit the dissemination of child pornography even if the material was not obscene under the *Miller* test.[38]

The Supreme Court, in unanimously upholding the New York statute, recognized that "[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children."[39] The Court gave five reasons for justifying this greater leeway.[40] First, the Court recognized that a state has a compelling interest in "'safeguarding the physical and psychological well-being of a minor,'"[41] and that preventing the sexual exploitation of children is of "surpassing importance."[42] Second, children sexually exploited in this manner are abused by the production of a permanent record that

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34. 458 U.S. 747 (1982).

35. *Id.* at 751–52.

36. *Id.* at 752.

37. 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment."). Under the *Miller* test, in order to determine whether material is obscene, and thus without First Amendment protection, the trier of fact must determine:

> (a) whether the "average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)) (internal citations omitted).

38. *Ferber*, 458 U.S. at 753 (1982).

39. *Id.* at 756.

40. *Id.* at 756–64.

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

42. *Id.* at 757.

forces them to "go through life knowing that the recording is circulating within the mass distribution system for child pornography."[43] Third, advertising and selling child pornography encourages the market for such materials, and thus the continuation of activity that is "illegal throughout the Nation."[44] Fourth, the social value of such live performances and photographic reproductions is "exceedingly modest, if not *de minimis*."[45] Finally, the Court noted that earlier precedent did not preclude the recognition of child pornography as a category of material without First Amendment protection.[46] The Court also ruled that the statute was not substantially overbroad.[47]

Additionally, the Court clearly stated that the child pornography test is distinctly different than the *Miller* test for obscenity.[48] With respect to child pornography, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."[49] According to the Court, First Amendment protection still remained for works "not otherwise obscene" that depict sexual conduct "which do[es] not involve live performance or photographic or other visual reproduction of live performances."[50] This statement by the Court is perhaps most relevant to computer imaging,[51] and has been seized upon by those critical of banning computer-generated child pornography.[52]

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43. *Id.* at 759 n.10 (quoting David P. Shourlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

44. *Id.* at 761.

45. *Id.* at 762.

46. *Id.* at 763.

47. *Id.* at 773. The Supreme Court has recognized that the overbreadth doctrine is "strong medicine" and is employed "only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). It is not novel that a law should not be stricken for overbreadth unless it reaches a substantial number of impermissible applications. *Ferber*, 458 U.S. at 771. "'[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" *Id.* at 773–74 (quoting *Broadrick*, 413 U.S. at 615–16).

48. *Ferber*, 458 U.S. at 764.

49. *Id.*

50. *Id.* at 765.

51. *See* Vincent Lodato, Note, *Computer-Generated Child Pornography—Exposing Prejudice in Our First Amendment Jurisprudence?*, 28 SETON HALL L. REV. 1328, 1335 (1998).

52. S. REP. NO. 104-358, at 29 (1996) (additional views of Sen. Biden, citing written testimony of Frederick Schauer, Frank Stanton Professor of the First Amendment at Harvard University's Kennedy School of Government and a visiting professor of law at Har-

The *Ferber* Court applied a "balance of competing interests" test in reviewing the New York statute at issue.[53] Clearly, the Court focused its attention on the harm to minors engaged in the production of sexually explicit material.[54]

2. *Osborne v. Ohio*

The susceptibility of child pornography to state regulation became more apparent in the Supreme Court's decision in *Osborne v. Ohio*.[55] Petitioner Osborne, having been convicted of possessing four photographs of a nude male adolescent, challenged Ohio's right to proscribe his mere possession of child pornography.[56] Osborne based his argument on the Court's decision in *Stanley v. Georgia*,[57] which struck down a state statute prohibiting the private possession of obscene material.[58] The Court distinguished *Stanley* on the grounds that the "interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law."[59]

Ohio put forth three justifications for banning the possession of child pornography. First, the state wished to destroy the market for such materials, and concluded that decreasing the demand would consequently lower the production.[60] Second, as noted in *Ferber*, the victims of child pornography suffer continued harm by the indefinite existence of the sexually explicit materials at issue.[61] Finally, Ohio intended to force the destruction of child pornography and thus limit the amount of material available for pe-

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vard Law School); Wasserman, *supra* note 17, at 265.

53. *Ferber*, 458 U.S. at 764 ("When a definable class of material, such as that covered by [the statute], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.").

54. *See supra* text accompanying notes 41–43; Burke, *supra* note 14, at 446.

55. 495 U.S. 103 (1990).

56. *Id.* at 107.

57. 394 U.S. 557 (1969).

58. *Id.* at 564–68.

59. *Osborne*, 495 U.S. at 109. In *Stanley*, Georgia had asserted that the possession of obscenity would "poison the minds of its viewers." 394 U.S. at 565.

60. *Osborne*, 495 U.S. at 109–10 ("[W]e cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain.").

61. *Id.* at 111; *see supra* text accompanying note 43. Ohio hoped to encourage the destruction of such materials. *Osborne*, 495 U.S. at 111.

dophiles to use for the seduction of other children.[62] Given the weight of Ohio's interests, the Court ruled that the state could constitutionally forbid the possession of child pornography.[63]

In accepting Ohio's compelling interests, the Court executed a subtle yet important shift, particularly with regard to virtual pornography. Whereas the first two justifications continue *Ferber*'s focus on the children who are exploited as actual subjects of the material, the final justification rests on the potential for harm to *other* children who may be seduced into exploitation or abuse.[64] The Court further rejected Osborne's overbreadth objections, concluding that the Ohio statute would not apply to mere nudity because it required "a lewd exhibition or involve[d] a graphic focus on the genitals."[65]

II. ADVANCES IN DIGITAL IMAGING AND THE CPPA

A. *Computer-Generated Child Pornography*

Advances in computer technology, specifically the convergence of photo-imaging technology and home computers, have drastically improved the ease with which child pornography can be manufactured. Some photo-editing programs are available for as little as $50, though the higher-end software such as Adobe Photoshop costs around $600.[66] According to the Senate report accompanying the CPPA, these technologies allow individuals to produce "visual depictions of children engaging in sexually explicit conduct which are virtually indistinguishable to an unsuspecting viewer from unretouched photographs of actual minors engaging in such conduct."[67]

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62. *Osborne*, 495 U.S. at 111.

63. *Id.* The Court noted that a scienter element was still required for a conviction under the Ohio statute. *Id.* at 123.

64. Wasserman, *supra* note 17, at 254.

65. *Osborne*, 495 U.S. at 113.

66. Robert Benincasa, *Computer Tricks Fuel Child Pornography: Software Makes it Easy to Exploit Kids, Raises Free Speech Concerns*, DETROIT NEWS, Sept. 29, 1999, at A3. The lower cost of video equipment has also increased the supply of hard-core pornographic movies. Schlosser, *supra* note 10, at 45. Only about 100 hard-core feature films were produced in 1978, with a typical cost of about $350,000. *Id.* In 1996, about 8,000 films were produced, and some cost only a few thousand dollars to produce. *Id.*

67. S. REP. NO. 104-358, at 8 (1996).

There are two categories of computer-generated pornography—computer-altered and virtual.[68] "Virtual" child pornography does not involve the depiction of an actual, "identifiable minor."[69] Because the children depicted do not actually exist, the image is completely "virtual."[70] Computer-altered child pornography, on the other hand, incorporates an actual minor in some way.[71] In such instances, computers are used to alter innocent pictures of actual children, taken from magazines, videos, catalogs, and the like by digitally removing clothing and arranging the children into sexually-provocative positions.[72] Employing a technique known as "morphing," even pictures of adults can be transformed digitally into pictures of children.[73] All of these techniques allow producers to custom-tailor images to the proclivities of the pedophile-consumer.[74]

Prior to the enactment of the CPPA, these advances in computer-imaging technology rendered federal law impotent in several ways.[75] First, because the law only covered pornography involving actual children, it created a loophole for computer-generated pornography.[76] Second, if prosecutors were forced to prove during child pornography prosecutions that the children depicted in photos were indeed real children, reasonable doubt would be "built-in" to every "kiddie-porn" prosecution.[77]

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68. Free Speech Coalition v. Reno, 198 F.3d 1083, 1098 n.1 (9th Cir. 1999) (Ferguson, J., dissenting); Eng, *supra* note 25, at 111. Up to this point, the term "virtual" has been used to encompass both forms of computer generated child pornography. This will continue throughout this Comment unless a distinction is necessary, at which point it will either be referred to as "virtual" or "computer-altered."

69. *Free Speech Coalition*, 198 F.3d at 1098 n.1 (Ferguson, J., dissenting).

70. *Id.*

71. *Id.*

72. S. REP. NO. 104-358, at 15.

73. Burke, *supra* note 14, at 440–41 & n.5.

74. S. REP. NO. 104-358, at 16.

75. Eng, *supra* note 25, at 112.

76. S. REP. NO. 104-358, at 18 ("[The CPPA] will close this computer-generated loophole in Federal child exploitation laws . . . .").

77. *Id.* at 16. In fact, in the first federal trial involving the importation of child pornography by computer, *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), the defense attempted such a strategy. *Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. 17–18 (1996) (statement of Kevin Di Gregory, Deputy Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice); S. REP. NO. 104-358, at 16–17.

B. *The CPPA*

Congress enacted thirteen legislative findings into law with the CPPA.[78] Congress recognized that advances in computer technology made it possible to create depictions of what "appear to be" actual children engaging in sexually exploitative conduct.[79] In addition, Congress found that computer-altered pornography that contains images of recognizable children affects their reputation for years.[80] Perhaps most significant, Congress concluded that no distinction existed between using "virtual" or "real" pornography to seduce and molest children.[81] For these reasons and others, Congress enacted the CPPA "to attack the rise of computerized or 'virtual' child pornography."[82]

The CPPA accomplished this attack by amending 18 U.S.C. § 2256 to include:

> (8) "child 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—
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[83]

The "appears to be" language in subsection (8)(B) refers to child

78. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(1), 110 Stat. 3009, 3009-26 to -27 (codified at 18 U.S.C. § 2251 note (Supp. IV 1998) (Congressional Findings)).

79. *Id.* § 121(1), 110 Stat. at 3009–26.

80. *Id.*

81. *Id.* § 121(1), 110 Stat. at 3009–27. "Child molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers." S. REP. NO. 104-358, at 13–14.

82. United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999).

83. 18 U.S.C. § 2256(8) (Supp. IV 1998) (emphasis added).

pornography that is entirely virtual—"portray[ing] no actual living child."[84] Subsection (8)(C) addresses computer-altered pornography.[85] Subsection (8)(D) prohibits producers or distributors from even presenting material as depicting child pornography.[86] Under the statute, an "identifiable minor" only needs to be someone who was a minor at the time the image was created or whose image as a minor was used in its creation.[87] This part of the statute covers, for instance, replacing the face of an adult engaged in sexual conduct with the face of a real child.[88]

In addition to the definitional changes in section 2256, the CPPA also inserted section 2252A.[89] This companion statute to section 2252, which criminalizes "the use of a minor engaging in sexually explicit conduct,"[90] maintains the same prohibitions, substituting the term "child pornography," in order to prohibit virtual child pornography using the new definition of that term as found in section 2256.[91] Section 2252A also includes an affirmative defense that exempts everyone, except possessors (i.e. producers and distributors), if they can show that actual adults were used to produce the material and that it was not advertised as containing minors.[92] It is also an affirmative defense to possession of child pornography that the defendant "possessed less than three images of child pornography" and took action to destroy the material or reported the matter to the police.[93]

III. JUDICIAL INTERPRETATION OF THE CPPA: THE CIRCUITS GO THREE TO ONE

A. United States v. Hilton[94]

The first challenge to the constitutionality of the CPPA in federal court began with the indictment of David Hilton for criminal

84. Wasserman, *supra* note 17, at 248.
85. *See* 18 U.S.C. § 2256(8)(C) (Supp. IV 1998).
86. *See id.* § 2256(8)(D).
87. *Id.* § 2256(8)(C).
88. Wasserman, *supra* note 17, at 249.
89. 18 U.S.C. § 2252A (Supp. IV 1998).
90. *Id.* § 2252(a)(1)(A) (1994).
91. *Id.* § 2252A (Supp. IV 1998); *see* Wasserman, *supra* note 17, at 249.
92. 18 U.S.C. § 2252A(c) (Supp. IV 1998).
93. *Id.* § 2252A(d)(1).
94. 167 F.3d 61 (1st Cir. 1999).

possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B).[95] Hilton challenged the statute on constitutional grounds, and the United States District Court for the District of Maine accepted his vagueness and overbreadth claims.[96] The court also found the CPPA to be a content-neutral regulation, only enacted to combat the secondary effects of child pornography.[97] The court made no examination of the severability clause Congress enacted with the statute.[98] Rejecting the court's analysis, however, a three-judge panel of the First Circuit unanimously reversed the district court's decision, declaring the CPPA constitutional.[99]

The First Circuit, in *Hilton*, determined that the CPPA is not content-neutral as the district court had held, finding instead that the statute "is a quintessential content-specific statute."[100] The court's analytical framework relied on the "greater leeway" accorded to the government in *Ferber*,[101] as well as *Osborne*'s recognition of government interests beyond the protection of children who appear in sexually explicit materials.[102] With these precepts in mind, the court turned to Hilton's overbreadth and vagueness challenges.[103]

Prior to reaching the overbreadth claim at issue, the court noted several reasons why the judiciary must be hesitant to strike down a statute as overbroad.[104] While describing the "appears to be" language of the statute as "troublesome,"[105] the court

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95. *Id.* at 67.

96. United States v. Hilton, 999 F. Supp. 131, 136–37 (1998).

97. *Id.* at 134.

98. *See id.*

99. *Hilton*, 167 F.3d at 65.

100. *Id.* at 69.

101. *Id.* at 70 (quoting New York v. Ferber, 458 U.S. 747, 756 (1982)).

102. *Id.* at 69–71. Among the secondary compelling interests the court noted from *Osborne* were the elimination of the "record of abuse of real children" and the use of such materials to seduce children into sexual activity. *Id.* at 70.

103. *Id.* at 71.

104. *Id.* at 70. Recognizing that the overbreadth doctrine is "strong medicine" that is only to be used as a last resort, the court reviewed several considerations against employing the doctrine. *Id.* at 71 (quoting *Ferber*, 458 U.S. at 769). First, facial invalidation of a statute has far-reaching effects. *Id.* Second, a few "problematic prosecutions under the law" can be outweighed by the likely number of lawful applications. *Id.* Finally, relying on hypothetical situations is less reliable than case-by-case adjudication. *Id.* (citing *Ferber*, 458 U.S. at 781 (Stevens, J., concurring)).

105. *Id.* at 71.

reiterated that, wherever possible, statutes with two interpretations should be construed to avoid constitutional problems.[106] The court reasoned that legislative history clearly indicated that Congress meant the "appears to be" language to have a narrow construction—applying only to visual images that can be mistaken for actual children.[107] Therefore, the CPPA would not apply to non-photographic materials depicting sexually explicit poses of youthful-looking persons.[108] Eventually the court rejected the overbreadth claim, even though some "tiny fraction of material . . . could conceivably . . . fall within the purview of the Act . . . ."[109]

Finally, the court turned to the defendant's vagueness claim. According to the court, a statute must "'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited'" or be voided for vagueness.[110] Reversing the district court's finding that the "appears to be" standard is completely subjective, the First Circuit held that, to the contrary, it is an objective one.[111] It is up to the jury to examine the "totality of the circumstances" and to decide "whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity."[112] The court noted that the CPPA has an element of scienter that the prosecution must satisfy in order to overcome its burden of proving that the defendant "knowingly" possessed the images at issue.[113] The court also mentioned that the affirmative

106. *Id.* at 71–72 (citing *Ferber*, 458 U.S. at 769 n.24).

107. *Id.* at 72. The court quoted the language of Senate Report 104-358, which defines the narrow class of images as those "'which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.'" *Id.* (quoting S. REP. NO. 104-358, at pt. I, IV(B) (1996).

108. *Id.* The court specifically refers to "drawings, cartoons, sculptures, and paintings." *Id.* In fact, the government conceded this point by arguing that these types of materials would not be a depiction of a "person." *Id.* at 72 n.7.

109. *Id.* at 74. The specific exception the court had in mind was youthful adults portraying children in "sexually provocative images with redeeming social value." *Id.*

110. *Id.* at 75 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

111. *Id.*

112. *Id.* (citing S. REP. NO. 104-358, at pt. IV(C)). Some of the considerations that the jury may take into account include: (1) the physical appearance of the person depicted; (2) how the image was marked or identified; (3) the file name in the case of a computer file; and (4) how the image was advertised or displayed. *Id.*

113. *Id.* (citing 18 U.S.C. § 2252A(a)(5)(B) (Supp. IV. 1998)).

defense[114] would require the acquittal of someone

> who honestly believes that the individual depicted in the image appears to be 18 years old or older (and is believed by a jury), or . . . knew the image was created by having a youthful-looking adult pose for it . . . so long as the image was not presented or marketed as if it contained a real minor.[115]

Considering all these factors, the court upheld the statute against the defendant's vagueness challenge.[116]

B. United States v. Acheson[117]

A constitutional challenge almost identical to that found in *Hilton* made its way to the Eleventh Circuit in November 1999. Acheson, the defendant, downloaded child pornography off the Internet using the screen name "Firehawk96."[118] Acting on information from German authorities in September 1996, the United States Customs Department found out about Firehawk96's activities.[119] A little over a year later, the FBI received information that the defendant was downloading child pornography using America Online ("AOL").[120] After linking Firehawk96 to Acheson, the FBI seized and searched his computer.[121] Authorities discovered over 500 sexually explicit images involving minors.[122] Acheson pled guilty but reserved the right to appeal the constitutionality of the CPPA.[123]

Citing *Hilton*, the court found the CPPA to be a content-based restriction.[124] The court then announced that Acheson's facial

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114. *See supra* text accompanying notes 92–93.

115. *Hilton*, 167 F.3d at 75–76.

116. *Id.* at 76. The court also considered another element—the lack of alternatives. *Id.* ("We reject the suggestion that Congress must be confined to addressing pornographic images of some children, but not others.").

117. 195 F.3d 645 (11th Cir. 1999).

118. *Id.* at 648.

119. *Id.*

120. *Id.* AOL is the world's largest Internet service provider. *America Online Gets the Message: Go Wireless* (Feb. 28, 2000), *at* http://www.cnn.com/2000/TECH/computing/02/28/aol.wireless.

121. *Acheson*, 195 F.3d at 648.

122. *Id.*

123. *Id.*

124. *Id.* at 650 ("The CPPA is a content-based restriction on speech, as it is the content of an image of a minor or cyber-minor engaged in sexually explicit conduct that defines its

challenge was insufficient, given that child pornography is not protected expression and may be regulated freely.[125] Considering whether the statute was overbroad, the court weighed the amount of constitutionally protected material swept within the statute against the material that it legitimately prohibits.[126] It then concluded that "[t]he CPPA's overbreadth is minimal when viewed in light of its plainly legitimate sweep."[127]

Mirroring the First Circuit's analysis, the *Acheson* court recognized the existence of the affirmative defense and scienter requirement.[128] As for Acheson's vagueness claim, the court again concurred with the standard enunciated in *Hilton*.[129] Thus, the court, in a unanimous panel decision, affirmed the lower court's ruling and held that the CPPA was constitutionally sound.[130]

C. Free Speech Coalition v. Reno[131]

The next court to consider a challenge to the CPPA was the Ninth Circuit Court of Appeals. Unlike the previous CPPA cases, this statutory challenge was not precipitated by a defendant charged under the statute, but instead involved an association of businesses (hereinafter "Coalition") involved in the production of "adult-oriented materials."[132] The Coalition sought declaratory and injunctive relief, claiming that the statute failed for vagueness and overbreadth.[133] In a two-to-one decision, the court of appeals overturned the district court, holding that Congress's attempt to criminalize "the generation of images of fictitious

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unlawful character.").

125. *Id.* The court preferred to analyze the constitutional challenges in terms of overbreadth and vagueness. *Id.*

126. *Id.*

127. *Id.* "To the extent it defines 'child pornography' as images of actual minors, the CPPA passes constitutional muster with room to spare." *Id.* at 651. "[T]he legitimate sweep of the CPPA far exceeds the threat of improper applications." *Id.* at 652.

128. *Id.* at 651–52.

129. *Id.* at 652–53; *see supra* text accompanying note 112.

130. *Acheson*, 195 F.3d at 648.

131. 198 F.3d 1083 (9th Cir. 1999).

132. *Id.* at 1086.

133. *Id* at 1086–87. The Coalition also challenged the CPPA affirmative defense as unconstitutionally shifting the burden of proof to the defendant. *Id.* at 1087. The Ninth Circuit did not assess the validity of this claim, however, because it found the statute to be unconstitutional. *Id.* at 1090.

children engaged in imaginary but explicit sexual conduct" violates the First Amendment.[134]

The district court had ruled that the CPPA was content-neutral because Congress intended to combat the deleterious secondary effects of child pornography, particularly "the exploitation and degradation of children."[135] The Ninth Circuit agreed with the First Circuit's conclusion in *Hilton* that the CPPA intends to proscribe expression based on its content.[136] The court then noted that "[w]hen a statute restricts speech by its content, it is presumptively unconstitutional" and "the government must establish a compelling interest that is served by the statute, and it must show that the CPPA is narrowly tailored to fulfill that interest."[137]

The court, relying on *Ferber*, determined that "Congress has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children."[138] The court analogized the CPPA's restrictions to the city of Indianapolis's attempted ban on pornography that depicted women in degrading or submissive situations because it would reduce "'the tendency of men to view women as sexual objects . . . that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it.'"[139] However, the critical link in the court's analysis was the absence of studies verifying the connection between virtual child pornography and the subsequent abuse of actual minors.[140] Even though the court acknowledged that images

134. *Id.* at 1086. The district court had ruled that the statute was content-neutral and was neither unconstitutionally vague nor overbroad. *Id.*

135. *Id.* at 1090.

136. *Id.* at 1090–91.

137. *Id.* at 1091.

138. *Id.* at 1092. The court identified three compelling reasons for proscribing child pornography containing actual children: (1) the harm to the children used in the production of the images; (2) whetting the appetites of pedophiles encourages the sexual abuse of children; and (3) that the images themselves are morally repugnant. *Id.* at 1091–92. The Ninth Circuit interprets *Ferber* to mean that only the protection of the actual children used to produce child pornography can justify its regulation. *Id.* at 1092. This interpretation, while perhaps accurate, overlooks the fact that neither Congress nor the Supreme Court had any reason to be concerned with the use of computers to digitally create lifelike "virtual" pornography—a capability that did not exist at the time *Ferber* was decided. The court also ignores the recognition of secondary interests expressed in *Osborne*.

139. *Id.* at 1093 (quoting Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)).

140. *Id.* at 1094. It is difficult to see how the presence of such studies would have altered the court's decision, as the majority previously stated in their opinion that "any victimization of children that may arise from pedophiles' sexual responses to pornography

of virtual child pornography may be morally repugnant, it determined that, absent a nexus between computer-generated pornography and harm to real children, the CPPA could not stand.[141]

Turning to the vagueness challenge, the Ninth Circuit took issue with the *Hilton* court's determination that the "appears to be" and "conveys the impression" standards are objective ones.[142] Instead, the *Free Speech Coalition* court concluded that such language was "highly subjective"[143] and did not "'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"[144] In addition, the failure to provide a specific standard to those in charge of enforcing the CPPA risks arbitrary application of the statute.[145]

As for appellants' overbreadth claim, the *Free Speech Coalition* majority held that the CPPA encompasses an unacceptable amount of material protected by the First Amendment because it includes in its scope depictions that are completely virtual.[146] Therefore, the Ninth Circuit deemed the statute overbroad.[147]

In dissent, Judge Ferguson strenuously objected to the majority's conclusions and articulated five reasons why Congress may, without violating the Constitution, proscribe computer-generated pornography.[148] First, though *Ferber* focused on the effects that child pornography has on the actual participant, *Osborne* clearly relied on the harm caused to other children when child pornography is used to coerce or seduce them into sexual acts.[149] Second, the Supreme Court has also recognized that Congress has a legitimate interest in destroying the market for child pornography.[150] Third, the majority failed to consider some of Congress's other justifications for the statute, such as the prosecutorial diffi-

apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions." *Id.* at 1093. *But see* Eng, *supra* note 25, at 126–27.

141. *Free Speech Coalition*, 198 F.3d at 1094.

142. *Id.* at 1095.

143. *Id.*

144. *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

145. *Id.*

146. *Id.* at 1096.

147. *Id.* ("The CPPA's inclusion of constitutionally protected activity as well as legitimately prohibited activity makes it overbroad.").

148. *Id.* at 1097–1101 (Ferguson, J., dissenting).

149. *Id.* at 1098–99.

150. *Id.* at 1099.

culty involved in establishing that the subject of an image is an actual child.[151] Fourth, child pornography of either type, virtual or real, "has little or no social value."[152] Finally, the majority improperly used a strict-scrutiny approach to analyze the CPPA instead of "balancing the competing interests," as the Supreme Court did in *Ferber* and *Osborne*.[153]

With respect to the overbreadth challenge, Judge Ferguson referred to the legislative history of the CPPA in concluding that "everyday artistic expressions like paintings, drawings, and sculptures that depict youthful looking subjects in a sexual manner" will not be criminalized because Congress clearly intended the CPPA to cover only computerized visual depictions that are "virtually indistinguishable" from images of actual children.[154] In light of Congress's intent, Judge Ferguson reasoned that the CPPA is not overbroad.[155] As for the claim of vagueness, Judge Ferguson found it "unlikely that a person of ordinary intelligence would be unable to determine what activities are prohibited."[156] The jury could use an objective standard, such as the one expressed in *Hilton*,[157] to evaluate the age of the individual depicted.[158]

D. United States v. Mento

The Fourth Circuit Court of Appeals, in *United States v. Mento*,[159] became the most recent circuit to examine the constitutionality of the CPPA and the third federal appellate court to issue a unanimous panel decision upholding its constitutionality.[160] In December 1997, the FBI, acting on a tip, searched the defen-

151. *Id.* at 1100.

152. *Id.* ("Why should virtual child pornography be treated differently than real child pornography? Is it more valued speech? I do not think so.").

153. *Id.* at 1101 ("Since the balance of competing interests tips in favor of the government, virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment.").

154. *Id.* at 1101-02.

155. *Id.* at 1102.

156. *Id.* at 1103.

157. *See supra* note 113 and accompanying text.

158. *Free Speech Coalition*, 198 F.3d at 1103 (Ferguson, J., dissenting).

159. 231 F.3d 912 (4th Cir. 2000).

160. *See id.*; United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999).

dant's home and seized "more than one hundred images of naked, prepubescent children in sexually explicit situations."[161] The defendant pled guilty in the district court, but reserved the right to appeal the constitutionality of the CPPA.[162]

The Fourth Circuit, acknowledging the three prior circuit court decisions,[163] determined that the CPPA is a content-based restriction on speech requiring strict-scrutiny review.[164] Invoking *Osborne*, the court noted that the Supreme Court has recognized such government interests in combating child pornography as shutting down the distribution network, eliminating child pornography from the marketplace, and keeping pedophiles from using it to coerce or seduce other minors.[165] The court also identified six purposes for the act as defined by other courts and commentators.[166] In response to the defendant's claim that *Ferber* limited the government's interests to the protection of actual children,[167] the court explained that *Ferber* was decided long before computer-generated pornography became a problem.[168] The court stated that the government's interest in protecting *all* children from the sexual exploitation resulting from child pornogra-

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161. *Mento*, 231 F.3d at 915. Information on one of the images indicated the child was five years old. *Id.*

162. *Id.*

163. *Id.* at 916–17.

164. *Id.* at 918 ("Limitations imposed on speech because of its content are therefore subject to strict scrutiny, that is, no such limitation is valid unless it is narrowly tailored to serve a compelling government interest.") (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).

165. *Id.*

166. *Id.* at 918–19. Those interests identified by the court are:

> (1) to prevent the use of virtual child pornography to stimulate the sexual appetites of pedophiles and child sexual abusers;
>
> (2) to destroy the network and market for child pornography;
>
> (3) to prevent the use of pornographic depictions of children in the seduction or coercion of other children into sexual activity;
>
> (4) to solve the problem of prosecution in those cases where the government cannot call as a witness or otherwise identify the child involved to establish his/her age;
>
> (5) to prevent harm to actual children involved, where child pornography serves as a lasting record of their abuse; and
>
> (6) to prevent harm to children caused by the sexualization and eroticization of minors in child pornography.

Id. (citing *Hilton*, 167 F.3d at 66–67; Burke, *supra* note 14, at 452).

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

168. *Id.*

phy—not just children used in its production—is compelling.[169] Because the "connection between virtual child pornography and the sexual abuse of children is as powerful as the causal link that justifies the utter prohibition of pornographic images involving actual child participants,"[170] and the statute is the least restrictive regulatory means, the court held that the Act survives constitutional scrutiny.[171]

The court agreed with the *Hilton* court that the CPPA does not cover cartoons, paintings, or drawings, but "only those images that are virtually indistinguishable from previously banned photographic depictions."[172] The CPPA is not overbroad because it restricts no more speech than is necessary to effectuate the government's interest in proscribing child pornography.[173]

As for the defendant's vagueness challenge, because the CPPA adequately lists the elements of the offense, provides an affirmative defense to those charged, requires the prosecution to establish scienter, and focuses only on depictions that are practically indistinguishable from photographic images, the requisite constitutional specificity exists.[174] Therefore, the court held that the CPPA withstands First Amendment review.[175]

IV. ANALYSIS AND DISCUSSION

A. *To Strictly Scrutinize or Balance the Compelling Interests: Doesn't Anyone Have Standards Anymore?*

Even a casual glance at the four circuit court cases that have thus far reviewed the constitutionality of the CPPA makes one thing perfectly clear: the courts are just as confused as commentators about what standard of review to apply to virtual child pornography.[176] Three of the circuit courts that have addressed

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169. *Id.* at 920.

170. *Id.*

171. *Id.* at 921.

172. *Id.*

173. *Id.* at 922.

174. *Id.*

175. *Id.* at 923.

176. *See* Burke, *supra* note 14, at 459 ("It is altogether possible that the *Ferber* Court created child pornography as a separate category of unprotected expression."); Gary

the CPPA have properly upheld its constitutionality. However, in some cases, these courts have reached the proper conclusion using an incorrect standard, and in the Ninth Circuit's case, the wrong conclusion using the wrong standard. As the dissent in *Free Speech Coalition v. Reno* noted, the CPPA should not be evaluated under strict scrutiny—instead, it warrants the application of the balancing test as applied by the Supreme Court in *Ferber* and *Osborne*.[177]

The First Amendment prohibits Congress from making any law "abridging the freedom of speech."[178] However, this right to free speech is not absolute. Over the years the Supreme Court has carved out specific areas of speech that are not afforded First Amendment protection.[179] Typically, "[a] 'content-based' restriction on speech is subject to strict scrutiny review."[180] However, the Court has generally not subjected sexually explicit materials to strict-scrutiny review.[181] There are two reasons why the circuit courts that have subjected the CPPA to strict-scrutiny review have done so incorrectly. First, child pornography is speech with little, if any, social value. Second, the *Ferber* and *Osborne* Courts applied a balancing test weighing "the state's interest in regulating child pornography against the material's limited social value."[182]

Geating, *Obscenity and Other Unprotected Speech:* Free Speech Coalition v. Reno, 13 BERKELEY TECH. L.J. 389, 397–99 (1998) (concluding that as a content-based restriction, the CPPA must undergo strict scrutiny review); Eng, *supra* note 25, at 123–24 ("[T]he Ninth Circuit should have evaluated the CPPA under the balancing approach suggested by the Supreme Court in *Ferber* and *Osborne*, rather than applying the strict scrutiny standard of review."); Lodato, *supra* note 51, at 1335 ("*Ferber* held child pornography to be unprotected speech under the First Amendment . . . ."); Wasserman, *supra* note 17, at 256–62 (analyzing Professor Schauer's four paths toward non-protection under the First Amendment, and concluding that "*Ferber* and *Osborne* draw from each of the paths toward nonprotection to declare child pornography unprotected . . . ." *Id.* at 259).

177. Free Speech Coalition v. Reno, 198 F.3d 1083, 1101 (1999) (Ferguson, J., dissenting).

178. U.S. CONST. amend. I.

179. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). Professor Frederick Schauer has developed what he calls the four "paths" of nonprotection. For a discussion of these paths, see Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285 (1982). For a discussion of the four paths in the context of the CPPA, see Wasserman, *supra* note 17, at 256–61.

180. United States v. Mento, 231 F.3d 912, 918 (4th Cir. 2000) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

181. Wasserman, *supra* note 17, at 257.

182. *Free Speech Coalition*, 198 F.3d at 1101 (Ferguson, J., dissenting).

1. Child Pornography, Virtual or Real, Has Little or No Value as Speech and Has Little or No First Amendment Protection

Obscenity lies outside the bounds of First Amendment protection.[183] "'[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.'"[184] However, in *Stanley v. Georgia*,[185] the Supreme Court prohibited a state from proscribing the mere possession of obscene materials.[186] In *Ferber*, the Court upheld this very same proscription—the mere possession of child pornography—because the "value of permitting . . . photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."[187]

Furthermore, the test for child pornography enunciated in *Ferber* employs a substantially less stringent standard than the *Miller* formulation for obscenity.[188] Not only can one conclude that child pornography clearly receives considerably less protection under the First Amendment than obscenity, the *Ferber* decision also indicates that child pornography categorically rests outside the First Amendment's protections.[189] This assessment amounts to an "a priori" determination that child pornography holds less

183. *Roth*, 354 U.S. at 484–85.

184. Miller v. California, 413 U.S. 15, 20 (1973) (quoting *Roth*, 354 U.S. at 484).

185. 394 U.S. 557 (1969).

186. *Id.* at 568.

187. United States v. Ferber, 458 U.S. 747, 762 (1982).

188. *Id.* at 764–65 ("A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.").

189. *Id.* at 763 ("Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."). At least one commentator believes this statement by the court is a red herring. *See* Wasserman, *supra* note 17, at 260 ("This suggestion is deceiving. Courts in noncoverage cases typically do not examine a state's justification for restricting speech: if the speech is not covered by the First Amendment, then there is no reason to consider why the state desires to regulate it."). It is difficult to read the Court's statement as merely a projection of what the Court *could* do. A common interpretation of this statement indicates that it is meant to reflect what the court is doing—declaring child pornography outside the First Amendment umbrella. It is perfectly understandable for the *Ferber* Court to evaluate the state's reasons for regulating child pornography, as this is the evidence used to support the proposition that it falls outside the First Amendment. Having no precedent by which to evaluate the proper status of child pornography, the court could hardly be expected to simply declare it out of bounds without an inquiry into the legitimate reasons for doing so.

value than other forms of speech. The only question is whether the "virtual" nature of computer-generated child pornography is enough to force open the First Amendment's protective umbrella. Considering the following rationales for banning "virtual" child pornography, it is not.

a. Permitting Virtual Child Pornography Would Mean No Prosecutions for Actual Child Pornography

Permitting virtual child pornography while proscribing actual child pornography would place an insurmountable burden upon prosecutors. If prosecutors in child pornography cases are forced to prove that the children are real and not computer-generated, "'there could be a built-in reasonable doubt argument in every child exploitation/pornography prosecution.'"[190] In fact, as Deputy Assistant Attorney General Kevin Di Gregory noted in his comments during the CPPA congressional hearings, the United States faced just such a prosecutorial problem during a 1993 child pornography case,[191] at a time when the imaging capabilities of everyday home computers were far inferior to those capabilities today.[192] This threat is real. Describing his situation as "really hamstrung,"[193] a Virginia prosecutor plea bargained a ninety-one count indictment down to five counts when he could not prove the images in question depicted actual children.[194] The Virginia General Assembly, like other state legislatures, has recently introduced legislation to ban computer-generated child pornography.[195]

The legal existence of virtual child pornography would make prosecuting those using "real" children an almost insurmountable task.[196] The combination of "hamstrung" prosecutors and the re-

190. S. REP. NO. 104-358, at 16 (1996) (quoting written testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families).

191. United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995).

192. S. REP. NO. 104-358, at 17–18. Luckily, cross-examination combined with production of some of the original magazines containing the scanned images at issue helped secure the conviction. *Id.*

193. Ron Scherer, *Computer-Created Child Pornography Stymies Police*, CHRISTIAN SCI. MONITOR, Feb. 7, 2001, at 2.

194. *Id.*

195. H.D. 2586, 2001 Gen. Assem., Reg. Sess. (Va. 2001). Similar bans have been enacted by Vermont and Missouri, and legislation is pending in Arizona and New Mexico. Scherer, *supra* note 193, at 2.

196. Dan Armagh, a former state prosecutor who now works for the National Center

sultant decline in child pornography prosecutions would likely result in a renewed increase in the use of actual children in sexually explicit images, yet again thwarting Congress's legitimate attempt to destroy the child pornography market,[197] and rendering *Ferber* and *Osborne* legally impotent.

b. Child Victims Can Be Seduced/Coerced by Virtual Pornography

Virtual pornography is just as useful a tool as depictions of actual children for the coercion and seduction of other children. Through the extensive testimony of child pornography experts, Congress found that child molesters could use computer-generated depictions of child sexual activity to break down inhibitions to sexual conduct just as effectively as pictures of real children.[198] In many ways, virtual pornography can be even more dangerous. A pedophile can coerce children into performing sexual acts by altering innocent pictures of those children into images of them engaging in sexually explicit conduct.[199] Furthermore, it can be easier to seduce a child into performing sexual acts if innocent pictures of that child's friends have been manipulated to depict them engaging in sexual acts.[200] Additionally, the *Osborne* Court endorsed the legitimacy of the effort to protect children other than those depicted in the images.[201]

It can hardly be contemplated that the First Amendment grants states wide leeway to combat the injurious effects of "actual" child pornography while simultaneously safeguarding the identical evils of "virtual" child pornography.

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for Missing and Exploited Children believes that "[t]his could cause an incredible burden on the prosecutors who investigate crimes against children." Scherer, *supra* note 193, at 2.

197. This interest is expressed in the Congressional Findings supporting the CPPA, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(12), 110 Stat. 3009, 3009–27 (1996), and validated by the Supreme Court in *Osborne v. Ohio*, 495 U.S. 103, 110–11 (1990).

198. Child Pornography Prevention Act § 121(7)–(9).

199. S. REP. NO. 104-358, at 15–16 (1996).

200. *Id.* at 16.

201. *Osborne*, 495 U.S. at 111.

2. Only a "Balancing of the Interests" is Required

The *Ferber* and *Osborne* Courts did not use strict scrutiny to evaluate the statutes at issue. In fact, the term "strict scrutiny" does not appear in either case.[202] Instead, as the Court in *Ferber* noted:

> it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no case-by-case adjudication is required. When a definable class of material, such as that covered by [the N.Y. child pornography statute], bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.[203]

Although the Court here refers to the children "engaged in [child pornography's] production,"[204] it is important to note that the issue of virtual pornography was not before the Court, nor was it even a technical possibility at the time of the decision. Furthermore, the Court went so far as to recognize that "a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography."[205] The assertion seems to be that even these types of works would survive the *Miller* obscenity standard, and therefore the test for child pornography should be relaxed—hardly the type of concession a court would make in a strict-scrutiny case.

Judge Ferguson summarized the *Osborne* balancing test in his *Free Speech Coalition* dissent—"the 'gravity of the State's interests' outweighed Osborne's limited First Amendment right to possess child pornography."[206] By assessing child pornography laws using a balancing approach, and in light of the low speech value of child pornography, the Supreme Court makes it clear that

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202. *See Osborne*, 495 U.S. 103; New York v. Ferber, 458 U.S. 747 (1982).

203. *Ferber*, 458 U.S. at 764–65.

204. *Id.* at 764.

205. *Id.* at 761.

206. Free Speech Coalition v. Reno, 198 F.3d 1083, 1101 (9th Cir. 1999) (Ferguson, J., dissenting) (quoting *Osborne*, 495 U.S. at 111).

Congress has wide latitude in regulating child pornography.[207]

The Eleventh and Fourth Circuits, in *Acheson* and *Mento* respectively, upheld the CPPA, clearly using "strict scrutiny" analysis.[208] These courts deemed the government's interest in banning virtual child pornography compelling and in addressing the defendant's overbreadth claims found the respective statutes sufficiently narrowly tailored. Although the balancing approach discussed above could have, and should have, been applied by these courts, surviving strict scrutiny review means that the CPPA would survive constitutional muster under the less stringent "balancing of the interests" standard with room to spare.

In *Hilton*, the First Circuit did not expressly use a strict-scrutiny analysis or a balancing approach, focusing instead on the defendant's overbreadth and vagueness claims.[209] However, an examination of the court's decision indicates the majority's inclination toward the balancing test. Specifically, the court recognized that *Ferber* "carved out an entire category of speech 'which, like obscenity, is unprotected by the First Amendment,'"[210] and that legislatures have "'greater leeway'" in regulating child pornography.[211]

Of the four primary cases discussed in this comment, it is the Ninth Circuit's *Free Speech Coalition* decision that most completely misses the mark. The court used the wrong standard to come to the wrong conclusion.[212] The court used strict-scrutiny analysis[213] to strike down the statute, finding that Congress lacked a compelling interest in regulating child pornography that does not contain visual depictions involving real minors.[214]

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207. *See* Eng, *supra* note 25, at 130.

208. United States v. Mento, 231 F.3d 912, 918 (4th Cir. 2000) (recognizing that content-based restrictions require strict scrutiny review); United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999) (recognizing that child pornography, like obscenity, libel, and fighting words, is one type of unprotected speech and requiring the government to provide a compelling interest and a narrowly drawn statute).

209. United States v. Hilton, 167 F.3d 61, 71 (1st Cir. 1999).

210. *Id.* at 69 (quoting New York v. Ferber, 458 U.S. 747, 764 (1982)).

211. *Id.* at 70 (quoting *Ferber*, 458 U.S. at 756).

212. For a more thorough discussion of the infirmaties in the *Free Speech Coalition* decision, see Eng, *supra* note 25.

213. *Free Speech Coalition*, 198 F.3d at 1091 ("[T]o survive the constitutional inquiry the government must establish a compelling interest that is served by the statute, and it must show that the CPPA is narrowly tailored to fulfill that interest.").

214. *Id.* at 1092.

There are several problems with the Ninth Circuit's rationale. Citing a law review article, the court flatly stated that "[f]actual studies that establish the link between computer-generated child pornography and the subsequent sexual abuse of children apparently do not yet exist."[215] The court concluded that, "[a]bsent this nexus,"[216] the CPPA is unconstitutional.[217] The implication in the court's statement is that the existence of such studies would be enough to overcome strict-scrutiny review. However, this directly contradicts the court's earlier assertion that "any victimization of children that may arise from pedophiles' sexual responses to pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for CPPA's speech restrictions."[218] This suggests that, at least as far as the Ninth Circuit is concerned, harm to actual children is the only compelling interest Congress may successfully advance under strict-scrutiny review. This conclusion clearly contradicts the Supreme Court's ruling in *Osborne* which validated Congress's attack on the "secondary" effects of child pornography.[219]

The Ninth Circuit should have employed the balancing approach, weighing the low value of child pornography against Congress's interest in banning virtual child pornography.[220] Furthermore, the short shrift given to Congress's justifications improperly substituted the court's determination of the facts for that of Congress, which is far better equipped to handle that role. This point was not overlooked in the government's petition for writ of certiorari where, citing *Turner Broadcasting System, Inc. v. FCC*,[221] the appellants note that "[t]he court of appeals had no basis for disregarding that congressional judgment."[222]

In *United States v. Pearl*,[223] the District Court for the District of Utah also criticized the *Free Speech Coalition* court for sup-

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215. *Id.* at 1093 (citing Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. MARSHALL J. COMPUTER & INFO. L. 483, 488, 490 (1996)).

216. *Id.* at 1094.

217. *Id.* at 1093–94.

218. *Id.* at 1093.

219. *See supra* notes 62–63 and accompanying text.

220. *Free Speech Coalition*, 198 F.3d at 1101 (Ferguson, J., dissenting).

221. 520 U.S. 180 (1997).

222. Petition for Writ of Certiorari at 16 n. 2, Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999) (No. 00-795).

223. 89 F. Supp. 2d 1237 (D. Utah 2000).

planting Congress's views with its own:[224] "[i]n reviewing the constitutionality of a statute, 'courts must accord substantial deference to the predictive judgments of Congress.'"[225]

V. CONCLUSION

Computers will continue to blur the distinctions between reality and fiction. Congress's first significant foray into "virtual crime," the Child Pornography Prevention Act, is not only constitutional, but also critical to our social fabric. Prohibiting the distribution or possession of virtual child pornography, whether computer-generated or computer-altered, survives scrutiny under the Supreme Court's decisions in *Ferber* and *Osborne*. The evils of each are the same—victimization, abuse, and sexual exploitation of children. Legalizing virtual child pornography would effectively end the government's ability to combat the use of actual children in pornography—a result that no enlightened society can morally or ethically tolerate.

Wade T. Anderson

224. *Id.* at 1239.
225. *Id.* (quoting *Turner Broadcasting*, 520 U.S. at 195).

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