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Reacting to Ashcroft v. Free Speech Coalition and the Burial of the CPPA: An Argument to Regulate Digital Child Pornography Because it Incites Imminent Lawless Action

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Reacting to *Ashcroft v. Free Speech Coalition* and the Burial of the CPPA:
An Argument to Regulate Digital Child Pornography Because It Incites Imminent Lawless Action

- By Justin Leach*

Explicit pictures of young girls and boys – images that to the human eye, appear to be real children engaging in real sex acts. Yet, actually, such images can be produced with readily available digital-imaging computer equipment. To many, these images are disgusting, but to others, they are erotic. Either way, according to the United States Supreme Court, a ban on these explicit images is unconstitutional.[1]

The regulation of online child pornography has been a touchy subject since the inception of the internet, and the debate has intensified with the internet's increased popularity. For pedophiles seeking entertainment, the introduction of faster computers and cheaper online access has fueled an unquenchable thirst for online child pornography.[2] Laws prohibiting pornographic images of actual children could not thwart pedophiles' desire to be entertained; as a result, they have taken advantage of technological advances to find another route to pleasure. These days, practically any "home-computer user can create photorealistic images that are virtually indistinguishable from actual photographs."[3] Through the use of widely available digital-imaging technology, "real" children are no longer needed to create child pornography.[4] The United States is one of several countries that have begun to grapple with the effects of this technological revolution on the child pornography trade.[5] To prevent a loophole in the law, Congress responded to these technological advances by passing the Child Pornography Prevention Act of 1996 ("CPPA")[6] to fight back against innovative pedophiles making and sharing digital child pornography. The new technology, though, has complicated the traditional legal framework prohibiting child pornography and raised constitutional challenges to Congress' regulation of this high-tech version of child pornography.[7] As with its analysis of traditional child pornography, the challenge facing the American judicial system is to strike a delicate balance between First Amendment free speech concerns and the exploitation of children.[8] Most recently, the case of Ashcroft v. Free Speech Coalition garnered interest because it concerned the CPPA and its review by the United States Supreme Court.[9] While the High Court ultimately sided with the Free Speech Coalition, this Note argues that things might have been different if the government had fully explored all available legal arguments in favor of the CPPA.

At first glance, the absence of actual child actors in the production of digital child pornography appears to upset the courts' traditional rationale for upholding laws making child pornography illegal, but a more in-depth analysis shows how virtual child pornography should still lack First Amendment protection under the "advocacy of illegal conduct"[10] exception to free speech.

Part I discusses the nature and origin of digital child pornography and how child pornography has traditionally fit into First Amendment analysis. Part II discusses Congress' reaction to digital innovations in child pornography by passing the Child Pornography Prevention Act and, Part II further explains the federal appellate courts' treatment of the CPPA. Part III discusses the history and arguments made for each side in Ashcroft v. Free Speech Coalition. Part IV discusses the legal and constitutional analysis of the Supreme Court in striking down the regulations that banned digital child pornography. Finally, Part V makes an additional constitutional argument, largely unexplored by the government in Free Speech, supporting the ban on digital child pornography – that digital child pornography advocates illegal conduct to such a degree that it incites imminent lawless action, specifically whetting the appetites of pedophiles to seduce and harm real children.

Legal and Factual Background

A. Nature and Origin of Digital Child Pornography

Developments in computer technology and digital photography have facilitated both the creation of child pornography and its distribution in cyberspace, thus increasing its availability to potential viewers.[11] Through a variety of techniques, including scanning, morphing, and animation, computer users can create virtual child pornography using inexpensive and readily available software.[12] Some photo editing programs are available for as little as $50, although the higher-end software such as Adobe Photoshop costs around $600.[13] 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."[14]

There are two categories of computer-generated pornography—computer-altered and virtual.[15] "Virtual" child pornography does not involve the depiction of an "actual, identifiable minor."[16] "Computer-altered child pornography," on the other hand, does depict an actual minor in some way.[17] In such instances, a photograph of a real child may be scanned and replicated, and an innocent picture of a child may be manipulated by computer to create a sexually-oriented photo.[18] Using a technique called "morphing," original, innocent pictures taken from books, magazines, or catalogs can be transformed digitally into pictures depicting children engaged in sexually explicit conduct.[19] These technological advances have presented new problems for the old constitutional analysis of pornography involving actual children, and seemingly created a loophole for virtual child pornography.

B. How Child Pornography Has Traditionally Fit Into First Amendment Analysis

According to the First Amendment, "Congress shall make no law ... abridging the freedom of speech, or of the press..."[20] However, while the First Amendment guarantees free speech, the Supreme Court has carved exceptions for several different types of speech including: child pornography,[21] obscenity,[22] and advocacy of illegal conduct.[2] With regard to actual child pornography, the Supreme Court in New York v. Ferber allowed a "time, place and manner" exception to the First Amendment.[24] Specifically, the Ferber Court deemed the prohibition on child pornography to be an incidental restriction, unrelated to the suppression of free expression, with a regulatory objective that furthered a compelling government interest of protecting children from the harm of being used as actors in the production of child pornography.[25] Under Miller v. California, the Court carved an exception to First Amendment protection for works that, taken as a whole, "appeal to the prurient interest, are patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value."[26] Finally, regarding the "advocacy of illegal conduct" exception to First Amendment protection, the Court in Brandenburg v. Ohio,[27] concluded that "constitutional guarantees of free speech and free press permit a State to forbid or proscribe advocacy of law violation where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[28]

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In justifying bans on actual child pornography, the Ferber and Osborne Supreme Court cases discussed infra did not rely on the obscenity standard set forth in Miller or the "incitement of imminent lawless action" rationale of Brandenburg because the Ferber and Osborne courts found a compelling state interest in preventing harm to children used in the production of child pornography that was sufficient to sustain an incidental "time, place, and manner" restriction on child pornography. However, the Supreme Court in Ashcroft v. Free Speech Coalition found that the Miller obscenity standard was not met and no "time, place and manner" restriction was justified with respect

to virtual child pornography.[29] This Note argues for the regulation of digital child pornography because it "incites imminent lawless action." This additional exception to First Amendment protection continues to justify a ban on virtual child pornography even where actual child actors are not used. In order to trace the development of child pornography regulation, it is necessary to start with a discussion of New York v. Ferber and Osborne v. Ohio, where the original framework was created for classifying child pornography as a category of material unprotected by the First Amendment.

I. *New York v. Ferber*

In the 1982 landmark decision of New York v. Ferber,[30] the Supreme Court held that child pornography was not worthy of First Amendment protection.[31] The Ferber court considered the constitutionality of a New York criminal statute that prohibited the distribution of materials depicting sexual performances by minors.[32] In upholding the constitutionality of this statute, the Court offered five reasons for allowing states greater leeway in the regulation of pornographic depictions of children.[33] Most significant to the current analysis of digital child pornography, the Court found that the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways.[34] The Court noted that the pornographic material serves as a permanent record of the child's abuse, and, most importantly, its distribution encourages the production of more child pornography.[35]

In conclusion, the Ferber Court pointed out that in regulation of child pornography, the "evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake," that no case-by-case adjudication would be required.[36] According to the Court, when a definable class of material, such as that covered by the New York 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 it is permissible to impose a time, place and manner exception to the First Amendment protection of such materials.[37]

II. *Osborne v. Ohio*

Eight years after the Ferber decision, the Court was confronted with an Ohio statute that prohibited the private possession and viewing of child pornography in the case of Osborne v. Ohio.[38] The Court in Osborne accepted Ohio's three reasons for banning the private possession of child pornography: (1) reducing the demand for child pornography which would, in turn, reduce its production; (2) encouraging the destruction of child pornography, the permanent and potentially harmful record of a child's abuse; and (3) eliminating materials that could be used by pedophiles to seduce other children into sexual activity.[39]

Thus, the Osborne Court expanded the proscription of child pornography introduced in Ferber. Whereas the Ferber Court emphasized the harm inflicted on children used in the production of pornographic material,[40] Osborne articulated an additional harm done to children whose inhibitions to engage in sexual conduct are lowered where pedophiles use child pornography to seduce other children into sexual activity.[41]

The Child Pornography Prevention Act and Its Treatment by the Courts

A. Child Pornography Prevention Act

The Child Pornography Prevention Act of 1996 ("CPPA")[42] expanded the federal prohibitions on child pornography such that simulations of children engaged in explicit sexual conduct were deemed illegal.[43] The relevant provision, as enacted, defines child pornography as "any visual depiction, including any photograph, film, video image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct" or "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."[44] First-time offenders may be fined, sentenced to a maximum of fifteen years in prison, or both.[45] However, violators with a criminal record involving sexual abuse or child pornography shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.[46] The law provides an affirmative defense for images produced using actual adults as long as "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."[47]

Congress found that technology has enabled producers of child pornography to alter innocent pictures of actual children,[48] such that this computer-altered pornography contains images of still-recogniz-

able children and could affect their reputations for years.[49] In general, Congress also found that computer-generated child pornography has many of the same effects on children, as does pornography using actual children.[50] Perhaps most significantly, Congress concluded that no distinction existed between using "virtual" or "real" pornography to seduce and molest children.[51] For these reasons and others, Congress enacted the CPPA "to attack the rise of computerized or 'virtual' child pornography."[52]

B. Four Federal Courts of Appeals Have Upheld the Constitutionality of the CPPA

I. *United States v. Hilton*

The first challenge to the constitutionality of the CPPA in federal court came in United States v. Hilton[53] with the indictment of David Hilton for possession of materials appearing to depict a minor engaging in sexually explicit conduct under 18 U.S.C. 2252A(a)(5)(B).[54] Challenging the statute on constitutional grounds, Hilton argued that section 2252A(a)(5)(B), in conjunction with the definition of "child pornography" contained in section 2256(8)(B), did not clearly identify the conduct which it prohibits.[55] Specifically, the defendant asserted that the definition of "child pornography," which includes visual depictions that appear to be of minors engaged in sexually explicit conduct, is too subjective to enable ordinary persons to know with certainty what conduct is prohibited by the statute. The United States District Court for the District of Maine agreed that the CPPA's definition of "child pornography" creates substantial uncertainty for viewers presented with materials depicting post-pubescent individuals, for the determination as to whether those individuals have yet reached eighteen years of age will often not be easy or clear.[56] Further, the District Court accepted defendant's argument that section 2252A(a)(5)(B) of the CPPA was overbroad because a substantial amount of protected expression involving young-looking adults would be "chilled" by this statute.[57]

However, the First Circuit Court of Appeals unanimously rejected the district court's decision and declared the CPPA constitutional.[58] Before upholding the constitutionality of the CPPA, the Hilton court noted four lessons that could be drawn from the Ferber and Osborne decisions.[59] Under that pre-existing framework, the court held the CPPA was not overbroad because "to the extent the CPPA criminalizes the possession, reproduction or distribution of a visual representation of an actual minor engaged in sexual conduct, it falls easily within the parameters established by Ferber[60] and Osborne."[61] Further, the court held that the government's interests in deterring the direct abuse of children justified the "appropriate" methods of the CPPA, and "Congress's statements provide us with a precise and limited understanding of the 'appears to be' language."[62] In response to Hilton's vagueness claims, the court went on to state that the CPPA's "provisions 'suitably limit' the reach of the Act so that a person of ordinary intelligence can easily discern likely unlawful conduct and conform his or her conduct appropriately."[63]

II. *United States v. Acheson*

Similarly, in United States v. Acheson,[64] the defendant was caught downloading child pornography off the internet in violation of the CPPA.[65] The defendant, Acheson, contended that the "appears to be" language rendered the statute impermissibly vague, overbroad, and generally violative of the First Amendment.[66] The Acheson court found the CPPA to be a content-based restriction that must be narrowly drawn to serve a compelling governmental interest.[67] In response to the defendant's claims that the CPPA was overbroad, the Eleventh Circuit concluded that "the CPPA's overbreadth is minimal when viewed in light of its plainly legitimate sweep."[68] According to the court, "In crafting the definitional language at issue in this case, Congress took careful aim at a narrow range of images that otherwise evaded the

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law's reach." [69] Specifically, Congress found that, "the 'appears to be' language targets images 'which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct." [70] Also, in support of it's finding that the CPPA was not overbroad, the court noted that under the statutory framework established by Congress, a defendant charged with unlawful distribution or sale would be entitled to a complete defense by showing that the person depicted was as an adult. [71] As for Acheson's vagueness claim, the court again concurred with the standard enunciated in Hilton and found that the "CPPA defines the criminal offense with enough certainty to put an ordinary person on notice of what conduct is prohibited." [72] Thus, in a unanimous panel decision, the Court of Appeals affirmed the lower court's ruling and held that the CPPA was constitutional. [73]

III. *United States v. Mento*

The Fourth Circuit Court of Appeals, in United States v. Mento, [74] became the third federal appellate court to issue a unanimous panel decision upholding the constitutionality of the CPPA. [75] Invoking Osborne, the court noted that the Supreme Court has recognized government interests in combating child pornography such as shutting down the distribution network, eliminating child pornography from the marketplace, and keeping pedophiles from using it to coerce or seduce other minors. [76] In response to the defendant's claim that Ferber limited the government's interests to the protection of actual children, the court explained that Ferber was decided long before computer-generated pornography became a problem. [77] The court stated that the government's interest in protecting all children from the sexual exploitation resulting from child pornography – not just children used in its production – is compelling. [78] Because the "connection between the 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," the court held that the Act survives constitutional scrutiny. [79]

IV. *United States v. Fox*

The most recent federal appellate court to consider and uphold the constitutionality of the CPPA was the Fifth Circuit decision in United States v. Fox on April 13, 2001. [80] In Fox, the defendant appealed after being convicted and sentenced for knowingly receiving child pornography via computer in violation of 18 U.S.C. § 2252A. [81] On appeal, the Fifth Circuit affirmed the defendant's conviction and upheld the constitutionality of the CPPA. [82] Though the court found Section 2252A to be a content-based restriction on speech subject to strict scrutiny, the court held that Section 2252A's extension of the prohibition on child pornography to visual depictions that "appear to be" or "convey the impression of" minors engaging in sexually explicit conduct was fully consonant with the First Amendment of the Constitution. [83] Specifically, Section 2252A survived strict scrutiny under the First Amendment because Section 2252A was the least restrictive means of furthering the government's compelling interest [84] in protecting the "vulnerable young from the harms generated by child pornography." [85]

In addition, the court held that Section 2252A was not unconstitutionally overbroad or vague. [86] Fox's overbreadth challenge was based on the application of the statute to images of youthful-looking adult models. [87] As well as the affirmative defense for persons depicted that are actually adults at the time the images are created, the court found significant the statute's scienter requirement, "which applies to the age of the persons depicted as well as the nature of the materials." [88]

After discarding Fox's overbreadth claim, the court considered Fox's claim that Section 2252A's "appears to be" language is "overly subjective" and thus creates "substantial uncertainty" for viewers because it may be difficult to distinguish between depictions of teenagers from those of young adults with even younger appearances. [89] The Fox court considered the reasoning of the Ninth Circuit in Free Speech Coalition v. Reno, [90] discussed infra, which found the CPPA's provisions unconstitutionally vague. Yet, ultimately, the court decided in accord with the analysis of the First, Fourth, and Eleventh Circuits, [91] agreeing that the "appears to be" language was "not so subjective as to fail to put reasonable persons on notice of what it is that the statute prohibits." [92]

Ashcroft v. Free Speech Coalition

A. Origin of the Case

The only federal appellate court striking down the CPPA as unconstitutional has been the Ninth Circuit in Free Speech Coalition v. Reno. [93] After the CPPA was signed into law, the Free Speech Coalition

and others (respondents) filed suit in the Northern District of California against the Attorney General of the United States and the United States Department of Justice.[94] The Free Speech Coalition is a "trade association of businesses involved in the production and distribution of 'adult-oriented materials;'" and the other respondents were a publisher of a book on nudism, an artist who paints nudes, and a photographer who specializes in erotic photography.[95] Respondents alleged that the "appears to be" and the "conveys the impression" provisions of the CPPA are vague and overbroad in violation of the First Amendment.[96]

THE court also concluded that there was no "demonstrated basis to link computer-generated images with harm to real children," and absent such a link, the court reasoned, "the law does not withstand constitutional scrutiny."

Even though respondents' works fell within the Act's affirmative defense in Section 2252A(c) because respondents use only adults in their works and that they do not market their works as child pornography, the court nonetheless ruled that respondents had standing based on their allegations that the challenged prohibitions have caused them to refrain from distributing certain works.[97] On the merits, the court concluded that the CPPA was "content-neutral," because it is designed to counteract the effect that child pornography has on innocent children and not to regulate ideas.[98] The court concluded that the challenged provisions "clearly advance important and compelling government interests: the protection of children from the harms brought on by child pornography and the industry that such pornography has created."[99] The court further concluded that the prohibitions "burden no more speech than necessary in order to protect children from the harms of child pornography."[100] Also, the court concluded that under a fair reading of the Act and its affirmative defenses, it was "highly unlikely" that the Act would prevent the production of "valuable works."[101] Ultimately, the district court held that the "appears to be" and the "conveys the impression" prohibitions were not unconstitutionally overbroad, and the CPPA was not unconstitutionally vague.[102]

B. Appeal to the Ninth Circuit

The U.S. Court of Appeals for the Ninth Circuit reversed and held that the CPPA restricts speech based on its content.[103] The court ruled that the government was required to show that the CPPA's provisions were narrowly tailored to further a compelling interest.[104] The court found that those provisions were not supported by a compelling interest and the CPPA was unconstitutional because it was vague and overbroad. The court explained that the phrases "appears to be a minor" and "conveys the impression" were "highly subjective" and that a person of ordinary intelligence "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."[105] The court's sole reason for deeming the CPPA overbroad was because it felt that Congress can only regulate depictions of child pornography using actual children, and the "CPPA is insufficiently related" to that interest to "justify its infringement on protected speech."[106]

Besides being unconstitutionally vague and overbroad, the court held that preventing the devastating secondary effects on viewers of "pornography apparently depicting children engaging in explicit sexual activity is not a sufficiently compelling justification for the CPPA's speech restrictions."[107] While the Ninth Circuit agreed, under its reading of Ferber, that protecting actual children used in the creation of child pornography is a "compelling state interest" sufficient to clear the First Amendment hurdle,[108] the court overruled the district court and found no compelling interest in regulating sexually explicit images that do not contain depictions of actual children.[109] The court also concluded that there was no "demonstrated basis to link computer-generated images with harm to real children," and absent such a link, the court reasoned, "the law does not withstand constitutional scrutiny."[110]

C. Consideration by the United States Supreme Court

Recently, with Attorney General Ashcroft replacing Janet Reno, the government appealed the Ninth Circuit's decision to the Supreme Court of the United States. [111] The Court heard arguments on October 30, 2001. [112] The government continued to argue that digital child pornography results in many of the same secondary harms to children as actual child pornography and expanded definitions of child pornography were necessary for effective law enforcement. [113] According to reporters, the justices seemed concerned about the potentially broad sweep of the CPPA. [114] When Justice Stephen G. Breyer inquired why it would not now be a federal crime to rent such movies as "Traffic" or "Lolita," deputy solicitor general, Paul D. Clement, responded that the law required the prosecution to prove that the offense was intentional and not accidental and that video makers could protect their customers with a written disclaimer that gave the performer's age. [115] Reportedly, "the justices did not seem reassured." [116]

Supreme Court's Analysis in Striking Down the Regulations

A. Applying the First Amendment to Online Virtual Child Pornography

In Justice Kennedy's opinion for the Court, he enunciated the principle issue of the case as: "whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under Miller nor child pornography under Ferber." [117] The Court considered the government's argument that while digital images do not harm any children in the production process, Congress had decided "the materials threaten children in other, less direct ways." [118] The Court also considered the fact that "pedophiles might 'whet their own sexual appetites' with the pornographic images, 'thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children.'" [119] Finally, the Court heard the government's main argument that as technology improves it would become more difficult to prove that a particular picture was produced using actual children, thus, allowing defendants that possessed actual child pornography to evade prosecution. [120]

The Court quickly disposed of the government's main argument in support of the CPPA, its necessity for law enforcement, and also denied the government's argument under Ferber that virtual child pornography is also "'intrinsically related' to the sexual abuse of children." [121] According to the Court, "While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." [122] Since the Court deemed the CPPA to cover materials beyond the categories recognized in Ferber and Miller, thus, abridging the freedom to engage in a substantial amount of lawful speech, the Court held that the CPPA was overbroad and unconstitutional. [123]

However, though the Court quickly considered and dismissed the "advocacy of illegal conduct" justification for the CPPA's ban on digital child pornography, the Court's brief treatment of the rationale seemed to indicate that it may have been swayed by a more fully developed argument incorporating the Brandenburg analysis and more evidence of a closer link between virtual child pornography and harm to real children. [124] Citing Brandenburg, the Court reminded that "The government may suppress speech for advocating the use of force or a violation of law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" [125] According to the Court, "The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." [126] Seemingly, the Court left open the possibility that a more fully developed argument incorporating the Brandenburg analysis and more evidence linking digital child pornography to harm of real children could have been sufficient grounds to uphold the CPPA against First Amendment scrutiny.

Digital Child Pornography Incites Imminent Lawless Action

Before 1996, the actual participation and abuse of children in the production or dissemination of pornography involving minors was "the sine qua non of the regulating scheme." [127] However, in 1996, Con-

gress became aware of the documented evidence that the possession and distribution of digital child pornography also causes actual harm to children.[128] Unfortunately, the main rationale allowing the CPPA to survive First Amendment scrutiny in four federal appellate court decisions [129] - that the CPPA is designed to counteract the effect that digital child pornography has on innocent children (specifically, its use in seducing children to engage in sex acts) and not to regulate ideas – was challenged and shot down by the Supreme Court in Ashcroft v. Free Speech Coalition.[130] However, in the wake of the Court's decision in Free Speech, a legitimate, yet largely unexplored argument by the Government in its appeal to the Supreme Court seems to support the CPPA's ban on digital child pornography. In fact, there remains a strong argument that production of digital child pornography can be considered "advocacy of illegal conduct" that incites "imminent lawless action" and can be regulated under Brandenburg.[131] As applied in this context, the way pedophiles use virtual child pornography is "likely to incite" [132] pedophiles to seduce and harm children. Specifically, evidence that digital child pornography "whets the appetite" [133] of pedophiles supports the conclusion that such images "incite imminent lawless action," [134] causing pedophiles to be stimulated into action, resulting in harm to real children.

A. *Brandenburg v. Ohio*: Exploring the "Advocacy of Illegal Conduct" Exception

The defendant in Brandenburg was convicted under an Ohio statute for "advocating violence," after he invited a news reporter to tape portions of a KKK rally that were replayed on the evening news in which the defendant gave a speech filled with hateful remarks towards blacks and Jews.[135] According to the Court, the tape of the KKK leader's speech played on the evening news amounted to nothing more than mere advocacy of illegal conduct that was insufficient to pass the First Amendment hurdle.[136] In fact, the Court held that a State may only forbid or proscribe advocacy of the use of force or law violation, "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[137] In applying Brandenburg to the digital child pornography scenario, it becomes clear that the Court left two important questions unanswered. Depending on the answers to those questions, a strong argument can be made that the CPPA's ban on digital child pornography is constitutional under the Brandenburg analysis.

I. What Sort of Speech "Incites Imminent Lawless Action"?

In trying to define "imminent" for purposes of this First Amendment exception, Brandenburg gives very little guidance except to say that a KKK rally where the defendant's exclamation, "bury the niggers," was broadcast on the nightly news did not "incite imminent lawless action."[138] Though giving no guidance as to what would constitute "imminence," the Court did go on to mention several other examples of speech that would merely be considered "advocacy of illegal conduct" and would retain First Amendment protection, including: advocating or teaching the duty, necessity, or propriety of violence as a means of accomplishing reform; publishing, circulating, or displaying a book containing such advocacy; or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism.[139] Though Brandenburg gives little specific guidance as to what does constitute, "inciting imminent lawless action," it is clear from the Court's non-imminent examples that a very direct link is necessary between the inciting speech and the lawless action it inspires.

II. What Effect, if Any, Does the "Audience" of the Concerned Speech Have on Whether the Speech is Likely to Incite Imminent Lawless Action?

In Brandenburg, the "audience" of the defendant's speech included the entire general public that happened to be watching the evening news the night of the KKK rally news clip.[140] Perhaps the Court felt that the defendant's hateful comments would not incite any sort of similar lawless action on the part of the general public because it was not likely that a very high percentage of the television viewers shared the same feelings of hatred as the KKK leaders, such that they would be incited to go out and harm blacks and Jews. In fact, it seems most likely that the Court felt that the views expressed in the KKK video were so radical that they would have no effect of encouraging violence similar to that encouraged in the video, especially among the general public. Ultimately, though not mentioned specifically by the Brandenburg Court, taking the "audience" into consideration seems likely to be a major factor in determining the "imminence"

of lawless action.

B. Imminent Danger to Children Exists As Pedophiles "Whet Their Appetites"

I. How the CPPA Can Theoretically Be Constitutional Under *Brandenburg*

Remembering the necessary balance of interests that must be struck between protecting the interests of children and infringing on the right to "free speech" by regulating the production and dissemination of digital child pornography, it still seems that the CPPA might withstand First Amendment scrutiny under the analysis of Brandenburg. In fact, when the CPPA's ban on digital child pornography is analogized to the facts of Brandenburg, the following scenario results: Consider whether it would be constitutional to ban digitally created images of KKK members killing or torturing blacks, where such images are passed among other KKK members with the intention that the acts depicted would be emulated by other members. The CPPA proscribes the possession or distribution of digitally created images of child pornography, an illegal act, normally passed between pedophiles. In the case of digital child pornography, the "audience" is likely just made up of pedophiles or other sexual abusers who know how to find child pornography on the Web. Because the "audience" is made up specifically of the type of people who are likely to take part in the crime depicted in the digital photographs, there seems to be a much greater likelihood of "inciting imminent lawless action" than if those photographs were shown to the general public over the nightly news like in Brandenburg. Also, as contrasted to the situation in Brandenburg where the nightly news displayed video footage from a rally depicting the encouragement of lawless action by the KKK leader, digital images of children involved in sex acts depict actual lawless action taking place.

Further, consider the above hypothetical where there is evidence suggesting that the digital photographs depicting the KKK's violence toward blacks, circulated among members of the KKK, results in the commission of those same digitally depicted acts perpetrated against real blacks and Jews. Under this scenario, it seems likely that the Court in Brandenburg would have considered the advocacy of illegal conduct much more "imminent," such that the digital photographs depicting violence toward blacks and Jews would not be protected by the First Amendment. Under that same analysis, due to the evidence suggesting that pedophiles use digital photographs to "whet their appetites," there seems to be a strong argument that the CPPA's ban on digital child pornography should withstand First Amendment scrutiny. In fact, the Court in Free Speech seemed to hint at that the possibility of that conclusion, but found that "without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct." [141] Here, though the government had barely mentioned an argument for the CPPA's constitutionality under Brandenburg, the Court seemingly admitted that if the government had shown "more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse," [142] the CPPA could be deemed constitutional.

II. Evidence of the Imminent Lawless Action that Digital Child Pornography Incites and Past Courts' Consideration of Such

Evidence suggests that digital child pornography incites several types of lawless action, including: downloading actual child pornography, distributing and sharing files of actual child pornography, and most significantly, seducing and molesting actual children. [143]

In fact, according to many researchers, virtual images whet the appetite of pedophiles and "fuel the market" for pornography involving real children. [144]

For example, the Attorney General's Commission on Pornography concluded that child pornography is not only used to break down the inhibitions and resistance of children, but feeds the appetite of pedophiles. [145] Congress found that child pornography can have that effect, regardless of whether the pornography takes the form of computer-generated images or photographs of real children. [146] Congress also heard evidence that computer-generated images of children engaged in sexually explicit conduct are often exchanged for pictures of real children engaged in such conduct. [147] Further, Congress learned that because of that phenomenon, the production and distribution of computer-generated child pornography helps sustain the market for the production of visual depictions that involve real children. [148] While this evidence shows how digital child pornography incites pedophiles to engage in the lawless action of downloading, possessing, and distributing actual child pornography, most

significant is the inference that pedophiles use digital child pornography to seduce and molest actual children.

While the Supreme Court in Free Speech claimed there to be little or no empirical proof of the connection, Congressional hearings on the CPPA produced testimony from a number of scholars and practitioners supporting the inference of a link between digital child pornography and the seduction of real children.[149] One practitioner, for example, a clinical psychologist specializing in the treatment of sexual compulsions, testified before the Senate Committee that pedophiles use child pornography to seduce children into engaging in sexual acts with them.[150] According to the practitioner, once a youngster is selected, child pornography is utilized to systematically reduce his inhibitions through calculated exposure to varying degrees of the material.[151] After the child's anxiety to the material has been reduced, the pedophile can convince him to participate and be photographed.[152] The child, after having seen 'all the other kids do it' and being reassured by a trusted adult friend, will participate in sexual conduct with the pedophile.[153] The pedophile needs the child pornography to facilitate the seduction of other children.[154] Clearly, one of the primary uses of child pornography, and, thus virtual child pornography, is for the systematic desensitization, as part of an insidious process, to induce children to engage in the acts depicted.[155]

Past courts have recognized this and have also been concerned with the problem. For instance, the need to prevent pedophiles from using child pornography to "seduce other children into sexual activity" by lowering their inhibition to engage in sexual conduct was a major concern of the Osborne Court and one of the reasons it found a substantial government interest in regulating digital child pornography.[156] The Osborne Court expressly stated that preventing the use of child pornography to seduce children is a valid state interest.[157] The Court adopted the findings of the 1986 Attorney General Report that explained how pedophiles use child pornography featuring children engaged in sexual activity with the aim of persuading the child viewers to believe that if other children are doing it, then it is acceptable.[158] The Osborne Court indicated that the state's interest in protecting children extended to material other than child pornography, i.e., depictions that facilitate the sexual abuse of children.[159] Therefore, Osborne recognized that the state's interest in protecting children from devastating effects of child pornography applied to the protection of all children, including not only children who could be abused in the creation of pornographic materials, but also child viewers of child pornography who could be seduced into sexual activity through exposure to such materials.[160]

Also, though its focus was on the harm done to children in the actual production of child pornography, the Ferber Court described how the distribution of photographs and films depicting sexual activity is intrinsically related to the sexual abuse of children and how its distribution encourages the production of more child pornography.[161] Similarly, the court in United States v. Hilton noted that distribution of digital child pornography would provide encouragement for production of real child pornography.[162] Further, the Hilton court believed that depriving child abusers of a "criminal tool" frequently used to facilitate the sexual abuse of children is the main purpose of the CPPA, which mirrors the reason for the original ban on actual child pornography.[163] As the Fourth Circuit found in Mento, the government's interest in protecting all children from the sexual exploitation resulting from child pornography – not just children used in its production – is compelling.[164] Finally, as the court simply stated in Hilton, "considerations beyond preventing the direct abuse of actual children can qualify as compelling government objectives where child pornography is concerned."[165]

III. Doubting the Court's Claim of Overbreadth: How the CPPA is Narrowly Tailored

Unlike the court in Free Speech Coalition v. Reno, four other circuits considered claims that the CPPA was overbroad and vague and all found that the CPPA passed constitutional muster.[166] All four circuits upholding the constitutionality of the CPPA recognized that Congress only intended for the "appears to be" and "conveys the impression" provisions of the CPPA to reach a narrow category of material-depictions that are "virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct."[167] In response to vagueness claims, the Hilton court found that the CPPA's "provisions 'suitably limit' the reach of the Act so that a person of ordinary intelligence can easily discern likely unlawful conduct appropriately."[168] In fact, the district court in Hilton, which had considered the defendant's vague-

ness and overbreadth challenges, found that the statute was narrowly-tailored because it "directly advances this (Ferber) objective by limiting the possession and distribution of visual depictions that are, or appear to be, of children engaged in sexual activities.[169] The court in United States v. Fox,[170] which also held that the CPPA was neither constitutionally overbroad nor vague, was in accord with the reasoning of the First, Fourth, and Eleventh Circuits in concluding that "taken together, the statute's scienter requirement and affirmative defenses provide sufficient protection against improper prosecution."[171] Finally, as the court in Fox noted, "the 'appears to be' language is not so subjective as to fail to put reasonable persons on notice of what it is that the statute prohibits."[172]

C. Counterarguments

I. Enough Evidence of a Link to Harm?

In Free Speech Coalition v. Reno, the Ninth Circuit found the contested provisions of the CPPA unconstitutional, but indicated that a proper demonstration of a nexus between computer-generated child pornography and harm to real children could effectively recast the issue.[173] Similarly, the Supreme Court in Free Speech declared that the government lacked sufficient evidence linking digital child pornography to harm of real children.[174] While more definitive proof would be helpful in demonstrating to CPPA opponents the real harm caused by digital child pornography, as one commentator pointed out, "to the extent that these crimes remain silent and secretive due to children's inability to bring their harm to the surface, we are left with little empirical research."[175]

II. Movies and Other Works of Art Banned?

Another problem with banning images that "appear to be" minors engaging in sex acts is the possibility of sweeping away works of value to society that do not involve the use of actual children in production and are likely not used as seduction tools by pedophiles. However, according to the legislators who passed the CPPA,[176] as well as the court in U.S. v. Fox, materials or works with any artistic or social value are not included in the grasp of the CPPA.[177] Also, the court in Fox, found that "any imprecision that may remain at the margins after employing this limiting construction ... is more appropriately handled not by invalidating the statute, but rather by case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."[178] Further, even the Supreme Court in Ferber noted that it is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."[179]

III. Other Types of Entertainment and Media Also Arguably Incite Imminent Lawless Action

Though the Brandenburg analysis lends support to the CPPA's constitutionality based on the way digital child pornography whets the appetite of pedophiles, critics of this justification for the CPPA's encroachment on the right to "free speech" may argue that many other types of entertainment depict or even encourage lawless action as well. For example, movies or television shows depicting the use of drugs and violence could arguably incite lawless action among the viewers. However, the difference between lawless action depicted by most other types of media and the lawless action encouraged by digital child pornography has to do with the imminence of the lawless action, which is or may be incited. Like the depiction and encouragement of violence on the nightly news in the Brandenburg case, the audience for movies and television shows is made up of the general public. Considering such a broad audience, any depiction or encouragement of lawless action would be unlikely to have an imminent effect on the viewers and would most likely be deemed mere advocacy of illegal conduct. Based on Brandenburg, there must be a direct link between the speech and the imminent lawless action that it incites. Seemingly, such a direct link is only presented in situations where, as in the case of digital child pornography, the depiction or encouragement of lawless action is presented to or sought out by the very narrow, specific audience that is likely to be stimulated to react to it. For this reason, other forms of media like movies and television that depict lawless action do not reach the level of imminence required by Brandenburg, and, thus, retain First Amendment protection.

Conclusion

For many reasons, the CPPA's ban on digital child pornography is a worthy prosecutorial effort.[180] Ultimately, while no children are used in the production of digital child pornography, evidence strongly suggests that actual children are still harmed as a result

of the possession and distribution of virtual child pornography. In Ashcroft v. Free Speech Coalition, Congress' attempt to protect children from the harms presented by virtual child pornography was deemed unconstitutional.[181] However, the government did not thoroughly explore all arguments in support of the CPPA. Ultimately, the CPPA would be best packaged to withstand constitutional scrutiny through a detailed consideration of the Brandenburg rationale. Analogizing the Brandenburg facts and reasoning to this specific situation offers the most support for finding that the CPPA's ban on virtual child pornography passes First Amendment muster.

ENDNOTES

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[1] *See* Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1406 (2002).

[2] Wade T. Anderson, Comment, *Criminalizing "Virtual" Child Pornography Under the Child Pornography Prevention Act: Is It Really What It "Appears To Be?"* 35 U. Rich. L. Rev. 393, 394 (2001), discussing S. REP. NO. 104-358, at 15 (1996).

[3] *Id.* at n.9. ("All 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.")

[4] *Id.*

[5] *See* United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999) ("Canada, for example, recently updated its child pornography laws by banning visual representations that show a person 'who is or is depicted as being under the age of eighteen years and is engaged in or is depicted in explicit sexual activity.' Criminal Code, R.S.C., ch. C-46, §163.1(1)(a)(i) (1998) (Can.). Likewise, Great Britain's child pornography laws reach 'pseudo-photographs' created by computer and provide that 'if the impression conveyed by a pseudo-photograph is that the person shown is a child, the pseudo-phorograph shall be treated for all purposes... as showing a child.' Protection of Children Act, 1978, § 7(8), amended by Criminal Justice and Public Order Act, 1994, § 84(3)(c) (Eng.).").

[6] Child Pornography Prevention Act of 1996, 18 U.S.C.A. § 2256(8), Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 to 3009-31 (1996).

[7] *See e.g.*, United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Fox, 248 F.3d 384 (5th Cir. 2001); Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).

[8] *Supreme Court Set to Consider "Virtual" Child Pornography*, N.Y. TIMES, October 19, 2001, *available at* http://www.nytimes.com; Linda Greenhouse, *Justices Weigh Law Barring Virtual Child Pornography*, N.Y. TIMES, Oct. 31, 2001, at A13.

[9] *See id. See also* Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).

[10] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[11] Andrea I. Mason, *Virtual Children, Actual Harm: Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999)*, 69 U. Cin. L. Rev. 693, 711 (2001).

[12] *Id.*

[13] *See* Anderson, *supra* note 2, at 394.

[14] S. REP. NO. 104-358, at 2 (1996); *see also* 18 U.S.C. § 2251 note (Supp.V 1999) (Finding 5).

[15] *See* Anderson, *supra* note 2, at 402.

[16] *Id.*

[17] *Id.*

[18] *See Hilton*, 167 F.3d at 65.

[19] *See* S. REP. NO. 104-358.

[20] U.S. CONST. amend. I.

[21] See New York v. Ferber, 458 U.S. 747 (1982).

[22] See Miller v. California, 413 U.S. 15 (1973) (defining obscenity as material, taken as a whole, that the average person, applying contemporary community standards, would find appeals to the prurient interest in sex; depicts in a patently offensive way, sexual conduct specifically defined by the state law; and lacks serious literary, artistic, political, or scientific value).

[23] See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that speech "directed to inciting or producing imminent lawless action that is likely to incite or produce such action" is unprotected speech).

[24] See Ferber, 458 U.S. 747 (1982).

[25] See *id.*

[26] *Miller*, 413 U.S. at 24.

[27] *Brandenburg*, 395 U.S. 444.

[28] *Id.* at 447.

[29] See Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).

[30] See Ferber, 458 U.S. 747 (1982).

[31] See *id.*

[32] See *id.*

[33] See *id.* at 756-65. First, due to the legislative findings accompanying passage of the New York laws, the Court found a "compelling state interest" in protecting the physiological, emotional, and mental health of children. Second, the Court found that the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children. Third, the Court found that the advertising and selling of child pornography provides an economic motive for the production of such materials, an activity illegal throughout the nation. Fourth, the Court opined that the value of permitting live performances and photographic reproductions of children involved in lewd sexual conduct "is exceedingly modest, if not de minimis." Finally, the Court held that recognizing and classifying child pornography as a category of material outside the protection of the First Amendment would not be incompatible with their earlier decisions.

[34] *Id.* at 759.

[35] *Id.* Further the court noted, "there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies." According to the court, "the most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.* at 579-60.

[36] *Id.* at 763-64.

[37] *Id.*

[38] Osborne v. Ohio, 495 U.S. 103 (1990).

[39] *Id.* at 110-111; see *also* 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (1986) (stating that a "child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity").

[40] See *Ferber*, 458 U.S. 747.

[41] *Osborne*, 495 U.S. at 111.

[42] Child Pornography Prevention Act of 1996, 18 U.S.C.A. § 2256(8)(B) (2000).

[43] See *id.*

[44] *Id.*

[45] *Id.* at § 2252A(b)(1).

[46] *Id.*

[47] *Id.* at § 2252A(c)(1)-(3).

[48] United States v. Hilton, 999 F. Supp. 131 (D. Me. 1998) (reporting Congress' findings and reasons for supplementing existing federal law regulating child pornogra-

phy with passage of the CPPA).

[49] See Anderson, *supra* note 2. *See also*, United States v. Hilton, 999 F. Supp. 131,134 (1998) (citing Osborne v. Ohio, 495 U.S. 103 (1990) in listing factors that justify regulating possession of child pornography). "However, the government argues, and the Court concurs, that there are significant harmful effects for children resulting from the exchange of materials appearing to depict children engaged in sexually explicit activities."

[50] See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, §121(1)(3), 110 Stat. 3009-26 (1996); see *also* Omnibus Consolidated Appropriations Act of 1997, 142 CONG REC. S11838, 11840 (1996) ("Such computer generated child pornography has many of the same harmful effects, and thus poses the same threat to the physical and mental health, safety and well-being of our children and of our society as pornographic material produced using actual children.") (statement of Senator Orrin Hatch).

[51] See 142 CONG REC. S11838, 11842 (1996) ("New photographic and computer imaging technologies are capable of producing computer-generated 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. The effect of such child pornography on a child molester or pedophile using the material to whet his sexual appetites, or on a child show such material as a means of seducing the child into sexual activity."); *see also* H.R. CONF. REP. NO. 104-863 (1996). Congress' formal legislative findings included "(1) that new photographic and computer technologies allow the production of visual depictions that appear to be of children engaging in sexually explicit conduct that are virtually indistinguishable from images of actual children engaging in sexually explicit conduct; and (2) that computers and computer imaging technology can be used to alter sexually explicit media in such a way as to make it virtually impossible to determine if real children were used in the production, to alter innocent depictions of children to create visual depictions of children engaged in sexual activity to satisfy the individual preferences of child molesters, pedophiles, and child pornography collectors."

[52] See Anderson, *supra* note 2, at 403 (citing United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999)).

[53] *Hilton*, 167 F.3d at 65.

[54] *Id.* at 67.

[55] United States v. Hilton, 999 F. Supp. 131, 135-136 (D. Me. 1998) (The definition of child pornography includes visual depictions which "appear to be of a minor," as well as those which are of a minor. 18 U.S.C. §2256(8)(B). Section 2256(1) defines the term "minor" as "any person under the age of eighteen years." 18 U.S.C. § 2256(1).).

[56] *Id.* at 136. "Although the Court realizes that it is unrealistic to expect 'mathematical certainty' from statutory language, the language contained in section 2256(8)(B) fails to clarify with sufficient definiteness the conduct which is prohibited. For this reason, section 2252(a)(5)(B), as applied with the definition of 'child pornography' contained in section 2256(8)(B), is unconstitutionally vague."

[57] *Id.* at 136-37.

[58] *Hilton*, 167 F.3d at 65.

[59] *See id.* at 70. "First, sexually explicit material may be seen to fall along a constitutional continuum entitling it to varying degrees of protection. Sexually explicit material created without the benefit of a live child model but which appears to depict an actual minor, or produced by having an adult pose as a minor and later presented or sold as if it depicted an actual minor, arguably falls somewhere in between. Second, considerations beyond preventing the direct abuse of actual children can qualify as compelling governmental objectives where child pornography is concerned. Third, in effecting such a prohibition, a criminal statute must cabin government authority by 'adequately defining' the type of image that is to be forbidden. Fourth, wherever the constitutional demarcation is to be properly drawn, 'greater leeway' ought to be afforded legislatures to regulate sexual depictions of children."

[60] *Id.* at 69. "The Ferber Court did not establish single one-size-fits-all constitutional definition of child pornography . . . but provided general guiding principles."

[61] *Id.* at 71.

[62] *Id.*

[63] *Id.* at 76. The court went further in refuting Hilton's vagueness claim stating: "The statute carefully defines the term 'minor.' The scope of its prohibition, like the law evaluated in Ferber, is restricted to visual images. The statute describes, in painstaking detail, the types of sexually explicit depictions of children that are forbidden. As the Court said in Osborne, such limiting language 'avoids penalizing persons for viewing or possessing innocuous photographs of naked children.'"

[64] United States v. Acheson, 195 F.3d 645, 648 (11th Cir. 1999).

[65] *Id.*

[66] *Id.* at 649.

[67] *Id.* at 650 (citing Boos v. Barry, 485 U.S. 312, 321 (1998)). The court went on to cite *Hilton* for the proposition that "it is well-settled that child pornography, an unprotected category of expression identified by its content, may be freely regulated."

[68] *See id.* at 649-50. "Thus, defining child pornography in a manner which captures images that 'appear to be' minors engaged in sexually explicit activity serves the two goals of the Act which are 'the elimination of child pornography and the protection of children from sexual exploitation.'"

[69] *Id.* at 651.

[70] *Id.* The court further noted the consequences of finding the CPPA overbroad and striking it down "(l)eft unregulated, the computer-created images present the potential for tremendous expansion of child pornography. Criminalizing the possession of these materials is consistent with a scheme that counts as its ultimate goal the destruction of this type of material."

[71] *Id.* at 651; 18 U.S.C. § 2252A(c).

[72] *Acheson*, 195 F.3d at 652-53. "A reasonable person is on notice that possessing images appearing to be children engaged in sexually explicit conduct is illegal . . . Under the CPPA, a jury must 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.' The physical characteristics of the person depicted in the image go a long way towards determining whether the person appears to be a minor."

[73] *Id.*

[74] *See* United States v. Mento, 231 F.3d 912, 915 (4th Cir. 2000).

[75] *Mento*, 231 F.3d at 915.

[76] Anderson, *supra* note 2, at 402.

[77] *Mento*, 231 F.3d at 919.

[78] *Id.* at 920.

[79] *Id.*

[80] United States v. Fox, 248 F.3d 394 (5th Cir. 2001).

[81] *See id.* at 398-99. (" . . . Fox was sentenced to 46 months of confinement, ordered to pay a $5000 fine and a $100 special assessment, and assessed a term of supervised release for three years.")

[82] *Id.* at 397, 404.

[83] *Id.*

[84] *Id.* at 402. "In sum, we conclude that Ferber and Osborne, decided long before the specter of 'virtual' child pornography appeared, in no way limit the government's interests in the area of child pornography to the prevention of only the harm suffered by the actual children who participate in the production of pornography. To the contrary, we agree with the Fourth Circuit htat the government has an interest in 'shielding all children from sexual exploitation resulting from child pornography,' and that the government's interests in this regard is indeed compelling."

[85] *See id.* (referring to evidence that digital child pornography is used to seduce children into engaging in sexual behavior and that those digital images also whet the appetites of pedophiles for actual child pornography).

[86] *Id.*

[87] *Id.* at 404.

[88] *Id.* Court agreed that the scienter requirement "limits the scope of the statute because the desire for prosecutorial efficiency dictates the vast majority of prosecutions ... would involve images of prepubescent children or persons who otherwise clearly appear to be under the age of 18."

[89] See *id.* at 406.

[90] Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999).

[91] See *id.* at 407. (" . . . concluding that, taken together, the statute's scienter requirement and affirmative defense provides sufficient protection against improper prosecution.")

[92] See *id.*

[93] Free Speech Coalition v. Reno, 198 F.3d 1083.

[94] See Brief for Petitioners at 9, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002) (No. 00-795).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Brief for Petitioners at 9, Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002) (No. 00-795).

[101] *Id.*

[102] *Id.*

[103] See Free Speech Coalition v. Reno, 198 F.3d 1083, 1086.

[104] See *id.*

[105] *Id.* at 1095.

[106] *Id.* at 1096.

[107] *Id.* at 1093.

[108] *Id.* at 1091-92 (citing *Ferber*, 458 U.S. at 764).

[109] Free Speech Coalition v. Reno, 198 F.3d 1083, 1090-92. "The district judge reasoned that the law was passed to prevent the secondary effects of the child pornography industry, specifically the exploitation and degredation of children. The court also found that the Act addressed the need to control child pornography because virtual pornography led to the encouragement of pedophilia and the molestation of children. This reasoning was based on a finding that the CPPA is intended 'to counteract the effect [that real or virtual child pornography] has on its viewers, on children, and to society as a whole. The lower court expressly found the legislation was not intended to regulate or outlaw the ideas themselves. We do not agree."

[110] *Id.* at 1094.

[111] See Ashcroft v. Free Speech Coalition, 121 S.Ct. 876 (2001).

[112] Linda Greenhouse, *Justices Weigh Law Barring Virtual Child Pornography*, N.Y. TIMES, October 31, 2001, at A13.

[113] *Id.* "The law protects 'real children from real abuse,' Mr. Clement said, because computer-generated images were 'virtually indistinguishable' from real images and were 'as effective as traditional child pornography' in enticing children into posing with pornographers. He urged the court to regard the law as an update to enable prosecutors 'to keep pace with technological developments.'"

[114] *Id.* "By the end of the argument in their borrowed courtroom, the justices made it clear that while they disapproved of pornography in general and child pornography in particular, they were uneasy about the sweep of a law that made it a crime to distribute, receive or possess an image that 'appears to be of a minor engaging in sexually explicit conduct,' as the Child Pornography Prevention Act defined the offense."

[115] See *id.*

[116] *Id.*

[117] Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1396 (2002).

[118] *Id.* "Pedophiles might use the materials to encourage children to participate in sexual activity. A child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." Congressional Findings, note (3) following § 2251.

[119] *Id.* at 1405 (citing Congressional Findings from Pub. L. No. 104-208, Div. A., tit. I, § 121) (codified in 18 U.S.C. § 2251).

[120] *Id.*

[121] *Id.* at 1401-02.

[122] *Id.* at 1402.

[123] *Id.*

[124] *Id.* at 1426.

[125] *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

[126] *Id.* at 1426.

[127] Free Speech Coalition v. Reno, 198 F.3d 1083, 1089.

[128] Pub. L. No. 104-208, Div. A., titl. I, § 121 (codified in 18 U.S.C. § 2251). *See also* ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (1986).

[129] *See generally* United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Fox, 248 F.3d 394 (5th Cir. 2001).

[130] See Ashcroft v. Free Speech Coalition, 122 S. Ct. 1396, 1411 (2002).

[131] See Brandenburg v. Ohio, 395 U.S. 444, 449 n. 4 (1969) (per curiam).

[132] *Id.* at 447.

[133] *See e.g.*, 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (1986); H.R. CONF. REP. NO. 104-863 (1996); S. REP. NO. 104-358.

[134] *See Brandenburg*, 395 U.S. 444 (1969).

[135] *Id.* at 445.

[136] *Id.* at 448.

[137] *Id.* at 447.

[138] *Brandenburg*, 395 U.S. 444 (1969).

[139] *Id.* at 448.

[140] *Id.* at 445.

[141] Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389, 1403 (2002).

[142] *Id.*

[143] *See e.g.*, 18 U.S.C. § 2251 note (Supp.V 1999) (Findings 3, 4, and 8); 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (1986); H.R. CONF. REP. NO. 104-863 (1996); S. REP. NO. 104-358.

[144] 18 U.S.C. § 2251 note (Supp. V 1999) (Finding 4).

[145] 1 ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (1986). *See also*, 18 U.S.C. § 2251 note (Supp.V 1999) (Finding 4) (stating Congress' finding that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their sexual appetites").

[146] 18 U.S.C. § 2251 note (Supp.V 1999) (Finding 8).

[147] See Child Pornography Prevention Act of 1996, *Hearings on S1237 Before the Senate Committee on the Judiciary*, 104th Cong. 20, 23, 30, 35, 90 (1996) [hereinafter *Senate Hearings*].

[148] *Id.* at 91.

[149] See Mason, *supra* note 11, at 712 (discussing *Senate Hearings*). *See also* Ashcroft v. Free Speech Coalition,

122 S. Ct. at 1426.

[150] See Mason, *supra* note 11 (citing *Senate Hearings*, statement of Dr. Victor Cline, Emeritus Professor of Psychology, University of Utah).

[151] See *Senate Hearings* at 20, 23, 30, 35, 90.

[152] See *id.*

[153] See *id.*

[154] See *id.*

[155] State v. Meadows, 503 N.E.2d 697, 706 (1986) (Holmes, J., concurring).

[156] See *Osborne*, 495 U.S. at 111; see *also* 18 U.S.C. § 2251 note (Supp.V 1999) (Finding 8).

[157] Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 653 (1999) (citing *Osborne*, 495 U.S. at 111).

[158] *Id.* at 649 (discussing Attorney General's Commission on Pornography).

[159] *Id.*

[160] *Id.* at 654.

[161] See *Ferber*, 458 U.S. 747 (1982).

[162] See United States v. Hilton, 999 F. Supp. 131, 134 (1998) (Similarly, pornography featuring images that appear to be of children will stimulate the market for child pornography in the same way as pornography featuring actual children.). See *also* Brief for Petitioners, Ashcroft v. Free Speech Coalition, 198 F.3d 1083 (9th Cir. 2001) (No. 00-795) (citing *Senate Hearings* 20, 23, 30, 35, 90).

[163] See *Hilton*, 167 F.3d at 66-67. The Court also recounted the other main purpose of the CPPA -- reducing the "sheer volume of computerized child pornography that could be used by child molesters and pedophiles to 'stimulate or whet their own sexual appetites.'" S. REP. NO. 104-358, at pt. IV(B).

[164] See *Mento*, 231 F.3d 912 (4th Circ. 2000); see *also*, Free Speech Coalition v. Reno, 220 F.3d 1113 (9th Cir. 2000) (Wardlaw, J., dissenting to Court's denial of petition for rehearing) ("Thus, the harm to 'real' children is real, whether or not the pornographic images which look real are actually computer-generated.").

[165] *Hilton*, 167 F.3d at 70.

[166] United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Fox, 248 F.3d 394 (5th Cir. 2001).

[167] 18 U.S.C. § 2251 note (Supp.V 1999) (Finding 5).

[168] *Hilton*, 167 F.3d at 76.

[169] See United States v. Hilton, 999 F. Supp. at 135 (1998) (citing 18 U.S.C. § 2252A(a) and § 2256(8)).

[170] *Fox*, 248 F.3d 394 (5th Cir. 2001).

[171] See *id.* at 407.

[172] See *id.*

[173] See Mason, *supra* note 11 (citing Free Speech Coalition v. Reno, 198 F.3d 1083, 1093-94 (9th Cir. 1999)).

[174] See Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).

[175] See Mason, *supra* note 11 (citing Lee, 8 S. CAL. INTERDISC. L.J. at 661 (1999)).

[176] See S. REP. NO. 104-358, pt. IV(c), at 21. "[The CPPA] does not, and is not intended to, apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor."

[177] See *Fox*, 248 F.3d at 405. "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, thereby placing 'the vast majority of every day artistic expression such as drawings, cartoons, sculptures, and paintings, even ... speech involving sexual themes' outside § 2252A's statutory reach."

[178] See *id.* at 406.

[179] See *Ferber*, 458 U.S. at 762.

[180] Besides preventing pedophiles from whetting their appetites and seducing children, a legitimate policy reason supporting the ban on digital child pornography by the CPPA is its necessity for the effective prosecution of pedophiles. See 8 S. CAL. INTERDISC. L.J. 649.

[181] See Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (2002).

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