A Question of Equivalence: Expanding the Definition of Child Pornography to Encompass "Virtual" Computer-Generated Images

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I. INTRODUCTION

Recent developments in computer technology have enabled pornographers to generate pornographic images of children who appear to be engaged in sexual activities without ever having the child actually present during the creation of such images.[1] Rather, the child depicted is

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1. "Today, visual depictions of children engaged in any imaginable form of sexual conduct can be produced entirely by computers without even using the actual children. . . . [T]he computer equipment and expertise required to produce such high-tech kiddie pornography is readily available to any individual. All a pornographer . . . needs is a personal computer with a few inexpensive and easy-to-use accessories, such as a scanner . . . image editing and morphing software costing as little as $50-$100, all available at virtually any computer store or through

scanned or manipulated into the image by the pornographer using computer graphics programs.[2] Categorized as either "virtual" or "computer-altered," computer-generated child pornography is essentially indistinguishable from pornographic images that have not been altered.[3]

Computer-altered child pornography contains the image of an actual or "identifiable minor" which is created by scanning a photograph of a child into a computer and then manipulating the picture so that, for example, the child's head appears on the body of an individual engaged in sexually explicit conduct.[4] The child is still recognizable despite alterations to the image. Virtual child pornography does not depict an actual or "identifiable minor," but rather transforms a picture of an adult into a picture of a child engaged in sexually explicit activity.[5] A technique called "morphing" can produce this result in two ways.[6] With true morphing, one image is transformed into another by imputing an initial and a final photograph into the software.[7] The pornographic images which result are the intermediate depictions of the transformation. True morphing of an actual adult into an unidentifiable child cannot occur without first using the final image of an actual child.[8] Additionally, photo retouching, which can be performed at the pixel

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mail-order computer catalogs." Hearing on S.1237 Child Pornography Prevention Act of 1995 Before the Senate Judiciary Comm., 104th Cong. 870, 1-2 (1996) (statement of Orrin Hatch, U.S. Senator).

2. Several types of computer graphics software programs are available, such as "Morph," which allows the user to manipulate computer images in a variety of ways. Computer Software Product: MORPH STUDIO (Ulead Systems, Inc. 1994-5). *See infra* note 6. According to computer graphics specialists, all that is required to create these pornographic materials is "an IBM-compatible personal computer with Windows 3.1 or Windows 95, or an Apple Macintosh computer" and "off-the-shelf imaging-edition and 'morphing' computer software costing as little as $50." *See* S. REP. NO. 104-358, at 15-16 (1996).

3. *See* S. REP. NO. 104-358, at 15-16; 18 U.S.C.A § 2256(9) (West Supp. 1999); Joseph N. Campolo, *Childpornography.gif: Establishing Liability for On-Line Service Providers*, Note, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 721, 735-36 (1996). Computer-generated child pornography is the broad category of images containing both virtual child pornography and computer-altered child pornography. It is the narrower class of virtual images that this comment seeks to address.

4. *See* S. REP. NO. 104-358, at 15-16 (1996). Images of children can be found in a number of sources including catalogs or magazines, which advertise toys or children's clothing.

5. *See id.*; 18 U.S.C.A § 2256(9) (West Supp.1999).

6. "Morphing" is short for "metamorphosing," a technique that allows a computer to fill in the blanks between dissimilar objects in order to produce a combined image." Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440 n.5 (1997).

7. *See* MORPH by Gryphon for Macintosh computers and ELECTRIC IMAGE for both Macintosh and SCI computers.

8. *See* STANLEY H. KREMEN, CDP, THE TECHNICAL AND EVIDENTIARY ASPECTS OF COMPUTERIZED CHILD PORNOGRAPHY 5 (1998).

level, is used to make subjects look younger than they actually are.[9] Child pornographers use this technique to decrease the size of male genitalia and female breasts, graft substitute areas of skin where hair previously existed, and reshape torsos and limbs to appear as having less fat and muscle mass.[10] It is this narrow class of computer-generated child pornography depicting fictional minors with which this comment is concerned.

Virtual child pornography raises a number of issues in the war against the child pornography industry.[11] Current legislation is founded on the notion that actual children are exploited during the production of child pornography and therefore does not account for such technological developments.[12] Virtual child pornography, by its very nature, represents a fictitious event. While it appears as, and is thought to be, a moment of reality frozen in time, the event depicted has not actually occurred.[13] It serves as an illustration of fantasy, not as a record. The question thus becomes, should these false images, indistinguishable from those documenting actual victimization of children, be included in the federal definition of child pornography?[14]

In October of 1996, Congress responded in the affirmative by enacting the Child Pornography Prevention Act (CPPA), which modernized federal child pornography legislation.[15] Criminalizing the

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9. *See* PHOTOSHOP by Adobe for Windows (PC) and Macintosh; *see also* PICTURE PUBLISHER by Micrografix, and KAI's PHOTO SOAP and XRES by Macromedia.

10. *See* KREMEN, *supra* note 8, at 5.

11. An example is the ability of pornographers to splice legal photographs of children with legal photographs of adult pornography to make it appear as if the child is engaged in sexual conduct. *See* Campolo, *supra* note 3, at 736. Prior to the recent amendment, child pornographers could use new computer technologies as a loophole by which to escape criminal liability since prosecutors carried the burden of proving that the image in question actually depicted real minors engaging in sexual activities. 18 U.S.C.A. § 2252 (1982). The exclusion of virtual images from the definition of child pornography would permit pedophiles, child molesters, and pornographers to avoid conviction simply by ensuring that their pornographic collections included only those images they could prove were not created using real children.

12. "Child pornography necessarily includes the sexual abuse of a real child." U.S. DEP'T OF JUSTICE, ATT'Y GEN. COMM'N ON PORNOGRAPHY: FINAL REPORT 406 (1986). Child pornography is a recording of a child's sexual abuse. *See id.* at 411; *see also* New York v. Ferber, 458 U.S. 747 (1982) (holding child pornography is not entitled to First Amendment protection).

13. We tend to assume that computer-manipulated photographs are "real" since more than sixty percent of our mental processing power is devoted to visual processing. Charles Grantham, *Visualization of Information Flows*, VIRTUAL REALITY: APPLICATIONS AND EXPLORATIONS 219, 224 (1993).

14. This is an issue to be addressed by the Supreme Court in October 2001. *See* Aschcroft v. Free Speech Coalition, No. 00-795, *cert. granted*, Jan. 22, 2001 (reviewing Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999)).

15. 18 U.S.C.A. § 2252 (1996); *see* S. REP. NO. 104-358, at pt. I (1996) (declaring that the statute addresses the "problem of 'high-tech kiddie pornography'").

production, distribution and reception of images that are electronically or mechanically created or altered to render sexual depictions of minors, the CPPA assumes no actual difference exists between virtual and traditional child pornography, creating an irrebuttable presumption that an image is child pornography.[16] While the CPPA's constitutionality has been upheld three, out of the four, times it has been tested at the federal court level, there has not been a single case documented involving bone fide virtual child pornography.[17] Rather, in each of these cases, the Circuits were responding to hypothetical scenarios that arose during prosecutions for material that was *traditionally* pornographic.[18] As of this date, the Supreme Court has yet to explicitly address the issue of "virtual" child pornography.[19]

This Comment will explore why virtual child pornography should fall within the definition of child pornography and why, like traditional child pornography, it should not be afforded protection under the law. Part II will identify why these computer-generated images may be

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16. The CPPA defines child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such visual depiction is advertised . . . in such a manner that conveys the impression that the material is . . . a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C.A. § 2256 (1996). When an image is so realistic that it appears on its face to be child pornography, the CPPA finds a presumption in favor of the prosecutor, as the inability to distinguish real from virtual pornography would render enforcement impossible.

17. The First, Fourth, and Eleventh Circuits have upheld the CPPA against constitutional challenge. *See* United States v. Hilton, 167 F.3d 61 (1st Cir. 1999); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999). The Ninth Circuit, however, has struck down the Act as an unlawful abridgment of the First Amendment's free-speech guarantees. *See* Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999).

18. The term "traditional pornography" is used to refer to those images defined as child pornography under the standard articulated in *New York v. Ferber*. 458 U.S. 747 (1982). *See supra* note 17. In each of these cases, the defendants challenged the charge of violating the 1996 CPPA on the ground that the Act is unconstitutional. In each scenario, the material at issue depicted actual children and therefore satisfied the traditional definition of child pornography. In *Free Speech*, for instance, the court found the statue severable and thus enforceable, except for what were the debatably unconstitutional provisions of the Act, holding that if morphed computer images are of an identifiable child, the statue is enforceable because there is then the potential harm to a real child. *See Free Speech*, 198 F.3d at 1097; *see also* Pub. L. No. 104-208, 110 Stat. 3009, § 101 (1996).

19. While child pornography has no constitutional protection under the First Amendment, the issue of whether virtual child pornography is actually child pornography is a constitutional issue which can ultimately only be answered by the Supreme Court, as the meaning of the Constitution and the First Amendment is the exclusive responsibility of the Supreme Court. 18 U.S.C.A. § 2252 (West 1996); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

regulated without violating the First Amendment by examining the legitimate state interests of actual harm to children, market creation, and secondary effects. Part III describes, compares, and evaluates virtual child pornography in light of four established categories of prohibited speech: libel, obscenity, traditional child pornography, and fighting words.

II. VIRTUAL CHILD PORNOGRAPHY MAY BE REGULATED WITHOUT VIOLATING THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[20] However, in *Schenck v. United States*, the Supreme Court held that Congress may suppress certain types of speech if it presents a clear and present danger that it will bring about substantive evils that Congress has a right to prevent.[21] The Court also implied that, when determining whether a regulation limiting a particular kind of speech is constitutional, the courts must balance the government's interest against the freedom of speech.[22] In 1982, the United States Supreme Court created child pornography as a new category of unprotected speech.[23] Virtual child pornography has not yet been classified within this category and thus the government's limitations on such speech, as with other forms of content-based restrictions, must satisfy the test for strict scrutiny.[24] To justify a regulation on the content of constitutionally protected speech, the restriction must be narrowly tailored to serve a compelling governmental interest.[25]

A. Previously Recognized Legitimate State Interests Are Present

This Part examines three legitimate state interests, which justify the regulation of virtual child pornography. Actual harm to children, market

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20. U.S. Const. amend. I.

21. 249 U.S. 47, 52 (1919). The way in which virtual child pornography presents a clear and present danger is addressed in Part III.

22. *See id.* at 52

23. *See* New York v. Ferber, 458 U.S. 747 (1992). Other categories of unprotected speech include obscenity, "fighting words," and libel. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382-85 (1982).

24. "Content-based" means discriminatory against either the message or the subject matter of the speech. *See* Turner Broad. Sys., Inc. v. F.C.C., 819 F. Supp. 32 (D.D.C. 1993). Regulation of virtual child pornography is content based, as it is the content of an image of a "virtual" minor engaged in sexually explicit conduct that defines its unlawful character. *See* United States v. Hilton, 167 F.3d 61, 68 (1st Cir. 1999) ("Blanket suppression of an entire type of speech is by its very nature a content-discriminating act.").

25. *See* Sable Communications v. F.C.C., 492 U.S. 115, 126 (1989).

creation, and secondary effects have each been previously recognized to outweigh an individual's First Amendment protection.

1. Actual Harm

In the one hearing failing to uphold the CPPA's constitutionality, Judge Donald Molloy stated, "If there's no real child, there's no real victim, and there's no real crime."[26] This reasoning identifies the primary criticism of virtual child pornography regulation.[27] Given that the distinction between virtual and traditional child pornography is based on the use of a real child during image production, opponents argue that expanding the child pornography definition to include virtual pornography extends it beyond what prior case law has held, denying First Amendment protection to speech that was previously protected.[28]

a. *New York v. Ferber*

In *New York v. Ferber*, the Court found the sexual acts committed during the production of pornographic materials to be psychologically, emotionally, and mentally harmful to minors.[29] The Court perceived child pornography to serve as a permanent record of the child's performance, which only aggravates the harm caused to the child through circulation.[30] Moreover, the court determined that the speech need not be obscene to be regulated, reasoning that the states' interest in protecting children from the dangers of premature exposure to sexual activity justified the prohibition of otherwise protected speech.[31] Opponents of the CPPA contend that *Ferber* prohibits only speech that utilizes children at the time of its creation.[32]

While it is true that the child depicted in virtual child pornography is not an actual child, an actual child still may be harmed through the image's production. For instance, even where a real child is used, image-

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26. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1096 (9th Cir.1999).

27. Without harm to the child depicted, the definition of child pornography is unconstitutionally expanded beyond *Ferber*. New York v. Ferber, 458 U.S. 747 (1982). Many legal scholars say that the CPPA for this reason is plainly unconstitutional. *See Child Pornography Crackdown on the Internet* (NPR broadcast, Nov. 11, 1996).

28. *Ferber* was the first and is the leading case on child pornography. *See Ferber*, 458 U.S. at 747. Thus, it will most likely guide the Supreme Court when it eventually addresses the issue of virtual child pornography. This will be the starting point of the current virtual child pornography analysis.

29. *Id.* at 758.

30. *See id.* at 759.

31. *See id.* at 759-60.

32. *See supra* note 27.

altering software can transform sexually explicit material in such a way that it is impossible for prosecutors to identify the person in the material or to prove that a real child was used in its production.[33] Circuits examining the issue have recognized harm exists to actual children whose faces have been cut and pasted to pictures of adult bodies in sexually explicit positions.[34] This indicates a tendency to accept part, if not all, of computer-generated child pornography's ability to be regulated. As noted previously, true morphing *requires* the use of a child's picture to generate a transformed image that is then unidentifiable as that child.[35] While the final image may result in a fictitious child, an actual child's image, which was once identifiable, has been used. Thus, harm is caused to what was once an actual, once identifiable, yet now unidentifiable minor.[36]

Ferber also stands for the more general proposition that a state has a legitimate interest in safeguarding children from psychological and physical abuse.[37] This interest should not be so narrowly interpreted as only applying to the children depicted in the image. While this is the most obvious level of abuse to children, the overall effect of child pornography also indicates a harmful effect on actual children not captured in the image. The child depicted in the virtual image may not suffer harm, however, actual children still feel the harmful effects of virtual child pornography.[38] *Osborne v. Ohio* supports this proposition, holding a ban on the possession of child pornography is justified given its use in the seduction of children.[39] Thus, the harm to "actual" children is real, regardless of whether these realistic images are actually computer-generated.

Ferber's claim to protect "depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances" was

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33. *See* S. REP. NO. 104-358, at 16 (1996).

34. Because the CPPA is severable, "if morphed computer images are of an identifiable child, the statute is enforceable because there is then the potential for harm to a real child." Free Speech Coalition v. Reno, 198 F.3d 1083, 1094 n.7 (1999).

35. The only way to get around the use of an actual child is to use a life-like painting of a child. However, it seems likely that pornographers will have greater access to actual photographs, from magazines etc., than paintings that look like photographs of children.

36. *See infra* note 142.

37. The court relied on a number of commission reports, which found that the use of children as pornographic subjects was harmful to society as a whole, as well as, the participating minor. New York v. Ferber, 458 U.S. 747, 759 (1982).

38. The harmful secondary effects to children not depicted in child pornography will be discussed below.

39. 495 U.S. 103, 111 (1990).

intended to limit regulation to those images that appear to be actual pornographic photographs, excluding speech such as cartoons or drawings.[40] At this time, the Court was unaware of the possibility to create what looked like an actual pornographic photograph without actually taking one, and incorrectly assumed visual reproductions or photographs could only contain live performances.[41] Virtual child pornography is admittedly not a live reproduction but represents a form of reproduction unforeseen at the time of *Ferber*. It cannot be concluded that the Court intended to exclude photographs that appeared to be live reproductions.

Were *Ferber* to be interpreted so narrowly as to include only those pornographic images depicting real minors, virtual child pornography would not necessarily be precluded from regulation. The *Ferber* Court did not specifically exclude virtual child pornography from its definition of prohibited conduct, but rather failed to anticipate it.[42] Nonexistent and inconceivable at the time, the technology to create virtual child pornography is a fairly recent invention. The Court's definition of child pornography and logic behind it reflect the context at the time of *Ferber*, not the Court's intention regarding future preclusions.

Ferber has two interpretations: Live reproductions are prohibited because they preserve the moment or because of what they illustrate. If prohibition stems from what the image illustrates, the "appears to be" language of the current statute is consistent with the *Ferber* decision.[43] This seems to be the likely interpretation, as the Court's intent to regulate images that appeared to be actual pornographic photographs referred to the danger of censoring less graphic material such as drawings.[44] "Virtual" pornographic images of children are arguably more graphic than the intended protected drawings. By requiring legislation prohibiting child pornography be addressed to works that "*visually* depict

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40. New York v. Ferber, 458 U.S. 747, 765 (1982).

41. In 1987, the Court in *United States v. Nolan* did not even consider the possibility of computer-generated porn, but rather assumed photos, if fake, contained wax dummies. 818 F.2d 1015, 1017-18 (1st Cir. 1987); *see infra* note 141.

42. *Free Speech's* claim that "non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment" is not actually stated anywhere. It is implied from past holdings, but is inconclusive as the past holdings from which such an implication arises did not occur at a time where virtual child pornography was conceived. Free Speech Coalition v. Reno, 198 F.3d 1083, 1095 (9th Cir. 1999). The Senate agreed by reasoning that advances in technology distinguished the *Ferber* Court's holding because in 1982 when *Ferber* was decided, "the technology to produce visual depictions of child sexual activity *indistinguishable* from unretouched photographs of actual children engaging in 'live performances' did not exist." S. REP. NO. 104-358, at 21 (1996).

43. 18 U.S.C.A § 2256(8); *see infra* note 16.

44. New York v. Ferber, 458 U.S. 747, 763 (1982).

sexual conduct by children below a specified age,"[45] the *Ferber* Court undoubtedly intended to protect unrealistic depictions of sexual conduct, but deny protection to visual reproductions of live performances. Effectively indistinguishable from a photograph of a live performance, virtual child pornography falls closer within the classification of what *Ferber* deems unprotected.

b. Legislative History

The historical background of federal legislation specifically prohibiting the sexual exploitation of children indicates the Supreme Court's tendency to increase the level of protection afforded to a child's well being. Originating in 1977 after an increase in the availability of child pornography,[46] federal legislation has since been amended five times.[47] The Child Pornography Protection Act of 1984, facilitating convictions for child pornography, modified the original statute by eliminating the obscenity standard and commercial transportation element previously required, as well as, by increasing the age of a minor by two years to age eighteen.[48] In 1986, the law was amended again to ban the production and use of advertisements for child pornography and made wrongdoers subject to liability for personal injuries to children resulting from the production of child pornography.[49] The effort to muster a means of stopping child pornography continued with the passing of yet another law in 1988, which made it unlawful to use a computer to transport, distribute or receive child pornography.[50] This law

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45. *Id.* at 764 (emphasis in original).

46. *See* The Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-2253). Investigative reports indicate the existence of a substantial child pornography market. *See* Note, *Child Pornography: A Role of the Obscenity Doctrine*, ILL. L. FORUM 711, 713-14 (1978). For example, the *New York Times* ran a front-page story that described the confiscation by the police of 4000 copies of sexually explicit films featuring children. *See id.* at 14 (citing N.Y. TIMES, Apr. 27, 1977, at A1, col. 6).

47. It can be argued that virtual child pornography could have been regulated by federal statute even as far back as 1977, as the purpose then was to establish federal criminal penalties for the depiction of minors as participants in sexually explicit conduct in film, books or other visual media. Nothing suggests that the visual depiction had to be real or use a live child and virtual child pornography could be classified as visual media. Evidence banning the use of computers to transmit child pornography exists as early as 1988.

48. *See* Miller v. California, 413 U.S. 15 (1973); 18 U.S.C. §§ 2251-2253; Pub. L. No. 98-292, 98 Stat. 204 (1984).

49. *See* The Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251); Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, 100 Stat. 1783 (1986) (codified as amended at 18 U.S.C. § 2255).

50. *See* The Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252, 7511).

also added a new provision, which prohibited the buying, selling, or otherwise obtaining of temporary custody or control of children for the purpose of producing child pornography.[51] In response to the Supreme Court's decision in *Osborne v. Ohio*, the Child Protection Restoration and Penalties Enhancement Act of 1990 was passed, criminalizing the possession of three or more pieces of child pornography.[52] The federal law concerning child pornography was again amended in 1994 to punish the production or importation of sexually explicit depictions of a minor.[53] Thus, the repeated amendments to expand the current statute as broadly as possible suggests an upward trend in the level of restriction over speech where children's safety is concerned and the serious approach with which child pornography should be attacked.

c. Case Law

Case law itself indicates the Court's willingness to view the protection afforded to child pornography very narrowly. In *Ferber*, the Court expanded its definition of child pornography by removing the obscenity requirement established in *Miller v. California*.[54] The Court found child pornography might be regulated regardless of whether it would otherwise be obscene, in comparison to pornography involving adults.[55] The Court's flexible attitude is further illustrated in *Osborne* as the Court deviated from the state interests articulated in *Ferber* by considering the additional factor of the harm experienced by children when child pornography is used for its power of seduction.[56] The Court's grasp over child pornography extended further by prohibiting the possession of child pornography even within one's home.[57]

By criminalizing the acts of distribution and possession regardless of whether the material in question was legally obscene, *Ferber* and

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51. *See id.* § 7512.

52. *See* Pub. L. No. 101-647, §§ 301, 323, 104 Stat. 4789 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4)); 495 U.S. 103, 111 (1990).

53. *See* Pub. L. No. 103-322, § 16001, 108 Stat. 2036 (1994) (codified as amended at 18 U.S.C. § 2259).

54. The obscenity test announced in *Miller v. California* established the following basic guidelines for the trier of fact: (1) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. 15, 24 (1973) (5-4 decision), *reh'g denied*, 414 U.S. 881 (1973) (citations omitted).

55. *See id.*

56. *See Osborne*, 495 U.S. at 111.

57. *See id.*

Osborne both enlarged the actus reus of child pornography laws. In fact, the Court principally dealt with the actus reus element of child pornography jurisprudence, ignoring any mens rea requirement until *United States v. X-Citement Video* was decided in 1994.[58] Broadening the actus reus of child pornography crimes has also been the Congressional focus, as each of the five amendments to the 1977 Act has focused on the criminal act and not mental culpability.[59] This not only indicates it is the act of creating the child pornography that is problematic, but the tendency to expand a definition to encompass as much behavior as possible.[60] In light of what seems to be an "all inclusive" approach, it follows that the attendant circumstances composing the crime of child pornography be equally expansive to include virtual images. Regulating virtual child pornography generally because of the image it represents, not because of the truth it contains, seems consistent with Congress's previous attempts to redefine the actus reus element of child pornography legislation, as it represents one particular way in which the same act of creating pornographic images of children engaged in sexually explicit conduct is performed.

d. Mens Rea

Congress's intent to eradicate child pornography by encompassing as much behavior as possible is even further realized by the delayed attention they have paid to the mens rea element of child pornography statutes. *United States v. Maxwell* relaxed the mens rea standard of "knowledge" set out in *X-Citement* to the less demanding one of "belief."[61] The Court's reasoning in *Maxwell* for expanding the mens rea requirement seems to correlate with an expansion of the actus reus element to include virtual child pornography. The court stated, "Congress [did not] intend to erect a virtually insuperable barrier to

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58. 513 U.S. 64 (1994). This case was the first to read in a mens rea requirement into the child pornography statute. The court ruled that a mens rea standard of knowledge must be inferred from 18 U.S.C. § 2252 despite its plain language. *See id.* at 68, 78.

59. *See generally*, *Miller*, *supra* note 48.

60. The case law and revisions imply it is the tangible image, regardless of its truth, sought to be extinguished and therefore should include such images of the identical nature which contain virtual children.

61. United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996). The *Ferber* Court mentioned that at least some level of mens rea is needed in order for a child pornography statute to be constitutional. *See* New York v. Ferber, 458 U.S. 747, 765 (1982). In *Osborne*, the Court upheld a statute that had no express mens rea requirement finding a default statute would apply a recklessness standard. *See* Osborne v. Ohio, 495 U.S. 103, 115 (1990). Thus, the acceptance or requirement of belief as the mens rea requirement illustrates the Court's intent to expand the legislation as far as possible within the limits of constitutional construction.

prosecution by requiring that a recipient or a distributor of pornography must have knowledge of the actual age of the subject, which could only be proved by ascertaining his identity and then getting a birth certificate or finding someone who knew him to testify as to his age."[62] Similarly the Court cannot expect Congress intended to prevent prosecution because the child could not be identified as a result of computer imaging. While failing to identify the age of a child should not prevent the satisfaction of the mens rea element, efforts to preclude the identification of a child should not prevent satisfaction of the actus reus requirement. Just because altering the image prevents identification, Congress should not be precluded from criminalizing the act of creating images of children engaged in sexually explicit conduct. While Congress did not intend to prevent an individual from prosecution by failing to prove the age of the minor, Congress could not have intended to let computer technology provide an escape to the actus reus element by distorting the identification of the minor.

The pandering doctrine further supports the inclusion of virtual child pornography into the child pornography definition. Articulated after realizing child pornography's effects on the market, it finds probative one's belief, or the encouragement of others' belief, that the material in question actually constitutes child pornography if the visual depictions are debatable.[63] This debatable question of whether an image is child pornography or not is inherent in the nature of virtual child pornography. While the question is not whether the child depicted is a minor, but rather, whether the image of the child is classified as child pornography, the existence of a pandering doctrine suggests an individual should incur criminal liability simply because the images are pandered in a manner that represents them as child pornography. The existence of the pandering doctrine suggests that harm exists simply in the holding out of an image as child pornography, even if the image does not actually fall within this definition.[64] Virtual child pornography's lack of an actual child necessarily renders the child unidentifiable putting such images into the same category as child pornography where the child's age is debatable. Because the question of whether an image is child pornography or not is fundamental in the definition of virtual child pornography, the pandering doctrine could theoretically be used in

62. *Maxwell*, 45 M.J. at 424.

63. Ginzburg v. United States, 383 U.S. 463 (1966).

64. The mere act of holding out an image as child pornography, even absent the actual harm expressed in *Ferber*, is considered harmful. *See* New York v. Ferber, 458 U.S. 747 (1982).

virtually every situation where virtual child pornography is held out as child pornography.

As evidenced by the numerous amendments made to the legislation, the focus paid to the actus reus element of the definition, and the nature of the pandering doctrine, Congress's intent therefore seems to indicate that explicitly prohibiting virtual child pornography should be the next step in modernizing child pornography legislation.

2. Market Creation

In addition to recognizing the psychological and emotional well being of children, the *Ferber* Court acknowledged market creation as a legitimate state justification for regulating child pornography. Holding the prohibition of the distribution of illegally created pornography to be within constitutional limits, the Court concluded the resultant economic motive created an intimate relationship between marketing and production thereby increasing demand and exacerbating the potential for harm.[65] Market creation has been recognized as a legitimate state interest as far back as 1977, when child protection statutes were created after an increase in the availability of child pornography. Arising from the fear that current law would otherwise allow for a market, the entire chapter of, "Sexual Exploitation and Other Abuse of Children," was in fact created with the intention to eradicate the complete commercial chain involved in the production, distribution and sale of child pornography.[66] Congress's concern extended from the taking of the obscene pictures, to the processing of the prints, to the ultimate sale of such prints.[67] The desire to eradicate the entire process suggests the destruction of any one link in the chain would also constitute a legitimate state interest.

The *Ferber* court noted that the production of child pornography made the criminalization of distribution the most expeditious method of cutting off production, reasoning that the distribution network for such images needs to be terminated if it is to be effectively controlled.[68] The protection of virtual child pornography goes against the court's reasoning by essentially promoting the distribution of such images instead of terminating such distribution. The Supreme Court has recognized that states have a legitimate interest in destroying the child pornography

65. *Id.* at 762-63.

66. 18 U.S.C.A. § 2252, notes of decisions, Chapter 110; United States v. Langford, 688 F.2d 1088, (7th Cir. 1982) *cert. denied*, 103 S. Ct. 2433, 461 U.S. 959, 77 L.Ed.2d 1319.

67. *See* 18 U.S.C.A. § 2252, notes of decisions, pt. I, ch. 110.

68. New York v. Ferber, 458 U.S. 747, 760 (1982).

market.[69] Destruction of this market should not be limited to prohibiting only traditional child pornography given the significant impact virtual child pornography will have on sustaining its existence.[70]

The *Osborne* Court also advocated that anti-possession prohibitions may decrease the demand for the product, potentially having a subsequent chilling effect on production.[71] Perceiving that the child pornography market consists primarily of under-ground operations, Justice White found it imperative to extend criminal punishment to possessors, as it would be practically impossible to eradicate child pornography merely by imposing sanctions on the distributors and producers.[72] The Southern District Court of Florida in the *United States v. Kleiner* decision supports this notion by holding the knowledge element modifies the "transportation or shipment of sexually explicit material," not whether, "the sexually explicit material had been made using a minor" in a statute which prohibits the transportation or shipment in interstate/foreign commerce or mails of visual depictions of minors engaging in sexually explicit conduct.[73] This case recognizes that it is not the actual harm to the child depicted in the photograph that is at issue, but the image's transportation through, and inevitable effect on, the market. The fact that "child" is a strict liability element illustrates the irrelevance of the real or virtual nature of the image. Possessors of virtual child pornography should therefore similarly be sanctioned simply for knowing the material was sexually explicit, despite the images failure to depict actual children, because of the identical effect virtual child pornography has on the market.

The fundamental difference between virtual and traditional child pornography may actually cause virtual child pornography to have a greater impact on the child pornography industry. While the harm to the

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69. "The government's interest in stamping out child pornography and denying pedophiles and child abusers access thereto extends beyond the protection of the children involved in making the pornography. The government instead aspires to shield all children from sexual exploitation resulting from child pornography, and that interest is indeed compelling." United States v. Mento, 231 F.3d 912, 920 (2000) (referring to "the prevention of sexual exploitation and abuse of children constitutes a governmental objective of surpassing importance." *Id.* at 757; *see also* Osborne v. Ohio, 495 U.S. 103 (1990).

70. *See Osborne*, 495 U.S. at 110.

71. The court found that advertising and sales were an integral part of the production of child pornography because they provided the manufacturer and retailer with an economic motive. *See id.* at 109. The same state interest was recognized in *Ferber*. New York v. Ferber, 458 U.S. 747, 759 (1982).

72. "Given the importance of the state's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain." *See Osborne*, 495 U.S. at 110.

73. 663 F. Supp. 43 (S.D. Fla. 1987).

one or two children actually depicted is removed by the morphing of an actual child, the number of children harmed by child pornography's effects will increase. The protection of virtual child pornography will flood the market with images depicting unidentifiable children engaged in sexually explicit conduct. The child pornography market has already become a global industry through the organization of distributors and the sophistication of Internet technology.[74] It has generated what was once a personal endeavor into a mass market with virtually no overhead thereby increasing consumer demand.[75] Eliminating the elements of postal mail or meeting in person,[76] the Internet already promotes child pornography through the accessibility of child pornography cites, chat groups, and the ease at which one can purchase and download images to the hard-drive or disk with just the use of a credit card.[77] Exchanges may be anonymous and no license or registration is required.[78] The quality of digital images received via the Internet is superior in quality providing them with a longer lifespan.[79]

If virtual child pornography is not regulated, the demand for pornographic images depicting children will be easier to satisfy. Once legally able to access the images, the convenience of the Internet requires no payment to view, no order to receive, and delivery is instantaneous. Storage is automatic, access is constantly available, and anonymity is preserved.[80] Without requiring a child for production, such images will be easier to create. In fact, a pornographer may now decrease his risk of exposure by removing his reliance on any other individual for production, such as a cameraman. Any individual has the ability to create virtual child pornography within the privacy of their own home, as

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74. *See* Child Pornography and Obscenity Enforcement Act and Pornography Victims' Protection Act of 1987: Hearing on S. 703 and S. 2033 Before the Senate Comm. on the Judiciary, 104th Cong. 1 (1990) (statement of Hon. Dennis De Concini, U.S. Senator, Arizona) ("Child pornography has become a highly organized, multimillion-dollar industry preying on the youth of our country who are either unable to protect themselves or are induced into participating by those who they trust.").

75. *See* Jennifer Stewart, *If This Is the Global Community, We Must Be on the Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 HOUS. J. INT'L L. 205, 214-215 (1997).

76. *See id.* at 213.

77. *See* John Henley, *The Observer Campaign to Clean Up the Internet: Hackers Called in as Cyber Cops to Drive Out Pornography*, OBSERVER, Sept. 1, 1996, *available at* 1996 WL 12065705.

78. *See* Stewart, *supra* note 75, at 213.

79. *See id.* at 214.

80. *See id.* at 213.

all necessary materials are provided in abundance on the Internet.[81] Pornographers can use scanners to change photographic images into digital form, which may then be saved as files on a computer hard drive or floppy disk to be used in future pornographic creations.[82] They can also use "video-capture" devices to pick up a still frame from the television, video camera, or VCR to be placed into the computer.[83] Child pornography's illegal status may be the only thing preventing many potential consumers from creating or obtaining such material. Lifting what was once a strong deterrent by failing to classify virtual child pornography within the child pornography definition will only encourage individuals to explore what was previously prohibited.

Because computer enhanced material can be bought, sold or traded like any other form of child pornography, its protection will provide pornographers with a way to circumvent current laws, furnishing them with an alternative and risk-free way to create their product.[84] While no child is actually depicted in virtual child pornography, society at large does not necessarily know or care about this fact and therefore individuals who deal in virtual images of children engaged in sexual activity "keep the market for child pornography thriving."[85] Society will view virtual child pornography as equivalent to traditional child pornography, a form of expression from which it has previously been denied exposure and the size and influence of the Internet will only spread this exposure at an increased rate.[86] Thus, only limiting the production and distribution of images that "appear to be" of children

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81. *See* Margaret A. Healy, *Child Pornography: An International Perspective*, World Congress Against Commercial Sexual Exploitation of Children, http://www.susis.usemb.se/children/sec/215e.htm (last visited May 9, 1999).

82. *See* Stewart, *supra* note 75, at 213-14.

83. *See id.* at 213.

84. *See* United States v. Hilton, 17 F.3d 61, 73 (1st Cir. 1999); Free Speech Coalition v. Reno, 198 F.3d 1083 1087-89 (9th Cir. 1999).

85. Hearing on S.1237 Child Pornography Prevention Act of 1995 before the Senate Judiciary Comm., 104th Cong. 870, at 91(1996) (Testimony of Bruce Taylor).

86. The Internet is a vast computer network, which extends worldwide. *See* PAUL GILSTER, THE INTERNET NAVIGATOR 13 (1993). The technological forum of the Internet is "a consensual hallucination experienced daily by billions of legitimate operators in every nation . . . a graphic representation of data abstracted from the bank of every computer in the human system." *Id.* Bulletin board services, which allow users to download images after paying a membership fee, inter-relay chats, which allow "real-time chatting" between users on a particular topic, and newsgroups, which allow for the posting and access of messages and files, have complicated the enforcement of child pornography laws. WILLIAM GIBSON, NEUROMANCER 51 (1984).

engaged in sexual activity will help rid the market of all child pornography.[87]

Moreover, the protection of virtual child pornography will prevent the drainage of the child pornography market by bestowing upon accused possessors of child pornography what is called the "morphing defense." This strategy is used to cast reasonable doubt as to whether or not the subjects in the image are actually children. The defense may try to show that an image of a child originates as an adult. A similar argument is illustrated in *United States v. Kimbrough* for example, as the defendant relied on advances in computer technology to argue that the government had failed "to meet its burden of proving that each item of the alleged child pornography did in fact depict an actual minor rather than an adult made to look like one."[88]

Prohibiting virtual child pornography, and therefore eliminating this defense, may prevent the harm of children actually depicted, as the casting of reasonable doubt over traditionally pornographic material proves more likely with the continual advancement of technology and the inability of even experts to distinguish transformations.[89] The impossibility of proving the child's identity renders statutes prohibiting the possession of traditional child pornography unenforceable and pedophiles possessing such pornographic depictions of unidentifiable actual children will thus go free from punishment.[90] Efforts to eradicate the child pornography industry would therefore be effectively frustrated should Congress be denied the benefit of the "appears to be" language. The impossibility of distinguishing between child pornography that depicts a real child, an imaginary child, and only the head of a real child leads to a slippery slope when the line of what is prohibited is drawn, requiring what can only be an absolute ban on all computer-generated images.

Denying virtual images classification as child pornography only increases the burden on prosecutors, as identification of a virtual child is unavailable to the lay witness. However, in *United States v. Nolan*, the

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87. *See Hearing*, *supra* note 85 at 122 (testimony of Professor Frederick Schauer, Frank Stanton Professor of the First Amendment, Kennedy School of Government, Harvard University) (stating that "it is "undoubtedly true" that somewhere in this chain of computer generated production there are going to be real children . . . involved").

88. 69 F.3d 723,733 (5th Cir. 1995).

89. Under 18 U.S.C.A. § 2252 (1982), prior to the CPPA, prosecutors have the burden of proving that the pornography in question actually depicts real minors engaging in sexual activity. If prosecutors and law enforcement officials cannot differentiate between the two forms of pornography, identification will be impossible and conviction will not occur.

90. *See* S. REP. NO. 104-358, pt. IV(B).

court held that it is within the range of ordinary competence for laypersons to determine if a photograph which appears to be child pornography is in fact a real photograph or an artistic rendition.[91] Trying to identify if a child is virtual or not would be timely and costly if not impossible. Prosecutors will not know if they are just unable to locate the child or if the child is truly imaginary. Just as the assumption was made that the court did not intend to place such a burden on the enforcement of child pornography in *Maxwell*, it cannot be assumed that the court would intend to make the prosecution of the creation of child pornography so difficult.[92]

Thus, even if *Ferber* only recognizes alleviating the harm caused to actual children as a legitimate state interest, market creation is an additional state interest, which has been consistently accepted and recognized for regulating virtual child pornography.

3. Secondary Effects

The proposal of the Child Pornography Prevention Act and the repeated upholding of its constitutionality suggest that the secondary effects of child pornography are substantial. While the Court in *Free Speech Coalition v. Reno* argued that the nexus between computer-generated child pornography and subsequent sexual abuse of children required to withstand constitutional scrutiny does not yet exist, studies used to illustrate the secondary effects of traditional child pornography would arguably yield similar results given the distinction between the two types of images involves a mere technicality.[93] Reported cases are increasingly noting the causal role of pornography in some sexual abuse.[94] Whether a real or imaginary child who appeared real was

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91. 818 F.2d 1015, 1017-18 (1st Cir. 1987). It could be argued that this suggests the class of images that actually would be denied protection would be extremely narrow since the average layperson would assume what they saw was real even though it may be virtual child pornography. This also makes it likely that the reasonable doubt argument will be frequently successful.

92. *See* United States v. Maxwell, 45 M.J. 406, 424 (C.A.A.F. 1996).

93. Finding no justification in the state's interest of preventing the indirect, yet harmful secondary effects of the victimization of children arising from pedophiles use of or response to child pornography, the Ninth Circuit in *Free Speech* denied the constitutionality of the CPPA for providing criminal proscription when no actual child is involved in the production or depiction of the illicit images. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1092 (9th Cir. 1999).

94. For example, "pornography and the offense being tried had a clear correlation: the pornography depicted deviate sexual acts by young males and the crime charged was deviate sexual acts of a forty-two-year-old man and a six-year-old boy. More importantly, the pornography was used as the instrument by which the crime itself was solicited—the child was encouraged to look at the pictures and then encouraged to engage in it. The value of the evidence as proof of the crime is obvious." Hoggard v. State, 640 S.W. 2d 102, 106 (Ark. 1982), *cert. denied*, 460 U.S. 1022 (1983).

depicted likely had little influence on whether such abuse was committed. The final report, upon which the legislative justification for the CPPA was based, consequently predating existing technology, stated that the use of sexually explicit photographs or films of real children to lure does play a part, albeit a small part, in the overall problem involving harm to children.[95] The *Free Speech* Court wrongly dismissed virtual child pornography for lacking a nexus to secondary harm, as this final report illustrates the potential to examine that one exists.[96]

In addition, the *Osborne* Court recognized that states have a legitimate interest in preventing pedophiles from using child pornography to seduce unwilling children; "The Supreme Court has approved as narrowly tailored the banning of child pornography, including its possession, in part because of the causal link between child pornography and the sexual abuse and exploitation of children."[97] Congress relied on this justification when enacting the CPPA after finding,

> child pornography is often used as part of a method of seducing other children into 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.[98]

Osborne's reasoning behind the ban on the possession of child pornography indicates the presence of a substantial harm to real children not depicted in the images.[99] Congress also found that when child

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95. *See* Ronald w. Adelman, *The Constitutionality of Congressional Effort to Ban Computer Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 J. MARSHALL J. COMPUTER & INFO. L. 483, 490 (1996) (citing the Final Report of Attorney General's Commission on Pornography at 649-50).

96. Moreover, the court could have analogized findings based on the relationship between regular pornography and its effect on women and child pornography and its effect on children. Major sources illustrating the correlation between pornography and rape include: L. BARON & M. STRAUSS, SEXUAL STRATIFICATION, PORNOGRAPHY, AND RAPE IN THE UNITED STATES IN PORNOGRAPHY AND SEXUAL AGGRESSION 185 (N. Malamuth & E. Donnerstein eds., 1984); D. ZILLMAN, CONNECTIONS BETWEEN SEX AND AGGRESSION (1984); Ed. Donnerstein & Leonard Berkowitz, *Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women*, 41 J. PERSONALITY & SOC. PSYCHOLOGY 710-24 (1981); Neil Malamuth, Scott Haber & Seymour Feshbach, *Testing Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Difference, and the "Normality" of Rapists*, 14 J. RESEARCH PERSONALITY 121 (1980).

97. United States v. Mento, 231 F.3d 912, 920 (2000).

98. 18 U.S.C.A. § 2251, Congressional Findings at 3 (West 2000), Pub. L. No. 104-208, Div. A, tit. I, § 101(a), Sept. 30, 1996, 110 Stat. 3009-26.

99. The *Osborne* Court justified the prohibition of the possession of child pornography on the notion that such child pornography was used in the seduction of children. *See* Osborne v. Ohio, 495 U.S. 103 (1990). The children being seduced are not necessarily the ones depicted in

pornography is used as a means of seducing or breaking down a child's inhibitions, the images are equally as effective regardless of whether they are real or computer-generated photographs.[100] Thus, a significant harm remains even after the elimination of the direct harm felt by children actually captured in the image.[101]

"Perceived as minors to the psyche,"[102] virtual child pornography and traditional child pornography both have the identical effect on a pedophile's brain as he views these images, chemically altering it making it easier to fantasize about sex with children and to become emotionally and sexually aroused.[103] The perception created by either image that children, not necessary actual children, are involved in the depicted sexual activity, coupled with masturbatory activities, not only creates but perpetuates an illness.[104] As one expert states, "in the case of pedophiles, the overwhelming majority . . . use child pornography and/or create it to stimulate and whet their sexual appetites which they masturbate to, then later use as a model for their own sexual acting-out with children."[105] Sixty-seven percent of child molesters and eighty-three percent of rapists admitted to using hardcore sexual materials and that fifty-three percent of all child molesters said they deliberately view the material in preparation for molestation.[106] "Child pornography is actually a 'hard copy'. . .visualization of the pedophiles dangerous mental fantasies of having sex with children."[107] Just because the scenario in a virtual image may not be happening to that particular child, it is happening to real children at any given moment. It is "an addiction that escalates, requiring more graphic or violent material for arousal."[108] Pedophiles and

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the traditional images. The *Osborne* Court therefore acknowledged a harm resulted to minors not depicted, which justified the ban of possession of child pornography. *See id.*

100. 18 U.S.C.A. § 2251, Congressional Findings at 8. Congress has found that pornography involving actors who "appear to be minors has all of the same effects on child molesters as actual child pornography." *Mento*, 231 F.3d at 920.

101. *See* 100 Stat. 3009-26.

102. CPPA of 1995: Hearing on S.1237 Before the Senate Comm. on the Judiciary, 104th Cong. 16, 115 (1996) (statement of Victor Cline, Emeritus Professor of Psychology, University of Utah).

103. *See id.* at 37-41 (citing JUDITH REISMAN, SEXUALLY EXPLICIT MEDIA/IMAGES (SEMI) AND THE HUMAN BRAIN (1996) (statement of Dee Jepson, President, Enough Is Enough!).

104. *See id.* at 115 (statement of Victor Cline, Emeritus Professor of Psychology, University of Utah).

105. *See id.*

106. *Id.* at 92 (testimony of Bruce a Taylor, President and Chief Counsel for the National Law Center for Children and Families discussing study by William Marshall).

107. CPPA of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary, 104th Cong.16, 38 (1996) (testimony of Dee Jepsen, President of Enough is Enough! A nonprofit, nonpartisan women's organization opposing child pornography and illegal obscenity).

108. *Id.*

child sex abusers are led "to view children as pornographic material," as objects, having no "personality, rights, dignity or feelings."[109] The final stage is "acting out," doing what has been viewed in the pornography, leading to crimes of sexual exploitation and violence.[110] Virtual and traditional child pornography have essentially the same effect on a predator's mind, and therefore, the same influence on the vicious cycle that leads to the exploitation of real children.[111]

Child pornography is used by pedophiles to achieve several goals. Aside from sexual stimulation for the pedophile, the pornography is used to reduce the inhibition of a potential child sexual assault victim.[112] Furthermore, there is also evidence that pedophiles use child pornography as an instructional tool with which to teach children how to engage in sexual activities.[113] It is also produced to barter, sell or trade with other pedophiles.[114] Even if the consumers of child pornography can distinguish between actual and computer generated child pornography, the children who are introduced to such images will lack such ability. If a child believes that the material involves a minor, although it technically may not be child pornography, such materials can have the effect of lowering the inhibitions of children. Sexually explicit images of children, whether they constitute the real or imaginary, are utilized in what can be seen as the grooming process. Children are shown pornographic images of children in an attempt to lower their inhibitions, to teach them what to do, encourage them to pose for sexually explicit photographs, and/or influence them to engage in sexual activity with an adult.[115] Child molesters can use child pornography to blackmail a

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109. *Id.*

110. *See id.*

111. "The effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the matter is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by . . . computer." 100 Stat. 3009, 3027.

112. *See* SHIRLEY O'BRIEN, CHILD PORNOGRAPHY, at xi-xiii (1983).

113. *See id.*

114. *See id.*; "Manipulated imagery has the same effect on pedophiles as actual child pornography and therefore, is every bit as dangerous to society as actual child pornography." CPPA of 1995: Hearing on S.1237 Before the Senate Comm. on the Judiciary, 104th Cong.16, 895 (1996) (testimony of Bruce Taylor). This statement assumes that the danger of actual child pornography is its effect on the pedophile, and not on the child subjects. Taylor maintained that "it is irrelevant whether [the image] is 'real' or 'apparent', whether it is an actual crime scene photo or is a realistic fact or counterfeit recreation of one." *Id.*

115. Six steps have been identified in the cycle of the sexual victimization of children: (1) pornography is shown to the child for sex education; (2) an attempt is made to convince child that explicit sex is acceptable, even desirable; (3) child pornography is used to convince the child

victimized child into silence.[116] Because of a pornographer's ability to manipulate a picture of a child's sibling or friend into a pornographic image, virtual child pornography has even greater potential to help pedophiles seduce a child.[117]

Congress deemed the threat of these forms of physical and emotional abuse to be as grave as when images of real children are used, for a child shown a computer-generated image cannot be expected to know whether the child portrayed is real or a fanciful creation.[118] "Logically then, 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."[119]

Child pornography's effect on children is analogous to adult pornography's effect on women. "Pornography is the permission and direction and rehearsal for sexual violence."[120] It is the "tools of sexual assault,"[121] "a way in which they practice" their crimes, "the chemical of sexual addiction."[122] However, given the discrepancy between the age of an adult woman and that of a minor, child pornography must be viewed more stringently, deserving less protection.[123] *Ferber* has placed

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that other kids are sexually active; (4) child pornography desensitizes, lowers kids inhibitions; (5) some of these sessions progress to sexual activity; (6) photographs or movies are taken of the sexual activity. *See* O'BRIEN, *supra* note 112, at 89; U.S. DEP'T OF JUSTICE, ATT'Y GEN. COMM'N ON PORNOGRAPHY: FINAL REPORT 406, 649 (1986).

116. *See id.*

117. A child may be more convinced to engage in sexual activities by looking at a pornographic image of someone that he or she knows, as opposed to looking at child pornography of a stranger. Children are taught to believe what they see in pictures. David B. Johnson, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 327 (1994).

118. *See* S. REP. 104-358, § 2(3).

119. United States v. Mento, 231 F.3d 912, 919 (2000).

120. Public Hearings on Ordinances to Add Pornography as Discrimination Against Women, Committee on Government Operations, City Council, Minneapolis, Minn. (Dec. 12-13, 1983), III Hearing at 36 (testimony of Barbara Chester, Director of the Rape and Sexual Assault Center, Hennepin county, Minn.) (on file with Harvard Civil Rights-Civil Liberties Law Review).

121. *Id.* at 44-45 (testimony of Bill Seals, Director of Sexual Assault Services, Center for Behavior Therapy, Minneapolis, Minn.).

122. *Id.* at 88 (testimony of Michael Laslett (reading statement by Floyd Winecoff, psychotherapist specializing in services for men)).

123. The traditional definition of child pornography refers to an individual lacking the maturity to consent to posing or production. A child very likely has little choice and clearly no legal consent to pose for pornographic pictures while an adult may choose to earn a living in this way. While the argument exists that there is no child contained in virtual child pornography so no consent is needed, the child whose photograph is morphed from an originally innocent image has not provided consent to use that image to create an entirely new pornographic one. While no actual child is required to transform images of adults into images of children, such computer-generated images are not at issue here since an affirmative defense exists for such images created

nonobscene child pornography on the same constitutional plane as obscene adult material and, in doing so, has identified the unique harm that occurs in the production of child pornography.[124] Both serve as sexual stimuli, promoting the sexual abuse of the individual depicted and perpetuating the social subordination of that class; however, the obvious difference being that children, as a less sophisticated class, do not have the ability to protect themselves, requiring the protection of the state.[125]

Thus, the secondary effects that virtual child pornography has on society and its children, in addition to, the presence of the two additional previously recognized legitimate interests of actual harm and market creation outweigh an individual's First Amendment rights and justify virtual child pornography's regulation.

B. The Restriction on Virtual Child Pornography Is Not Overbroad

The "appears to be" language of the CPPA has been criticized as overbroad for its tendency to "sweep up a great deal of constitutionally protected activity."[126] Fearful that the classification of virtual child pornography within the definition of child pornography will unnecessarily impinge one's First Amendment rights by encompassing a variety of expression containing constitutionally protected and legitimately prohibited activity,[127] opponents argue such legislation prohibits the free flow of ideas, silencing a creator's imagination.[128] The

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from images of adults. *See* 18 U.S.C.A § 2252A. It could therefore be argued that production of the virtual child pornography was created without consent of the minor.

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

125. A level of governmental paternalism is necessary in some circumstances. Children, by the virtue of their age and inexperience, are usually not able to defend themselves from exploitation and abuse, and often their family structures offer no protection. The government therefore has a compelling interest in protecting children from sexual exploitation. *See id.* at 764.

126. John Schwartz, *New Law on 'Virtual" Child Porn Is Criticized*, SEATTLE TIMES, Oct. 6, 1996, at A24 (quoting Daniel Katz, legislative counsel of the American civil Liberties Union). Others suggest the legislation will lead to "strange results such as allowing the prosecution of legitimate works, such as the film "Kids," in addition to causing a chilling effect on future productions based on works such as "Lolita." *Id.*

127. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1096 (9th Cir. 1999). Opponents argue that such a definition of child pornography will prohibit legitimate images of children such as those contained in National Geographic or medical textbooks. However, *Ferber* concluded that such arguably impermissible applications of the statute amounted to no more than a tiny fraction within the statute's reach. *See* New York v. Ferber, 458 U.S. 747 (1982). Medical textbooks and National Geographic are not likely to utilize virtual images of children so the prohibition of such material would be found constitutional under the authority of *Ferber*.

128. If the idea behind virtual child pornography is itself illegal, why should the promotion of such an idea be encouraged? Child pornography is not offered from the perspective of a victimized child to educate the public on its negative effects and its prevalence in society, but rather, is a form of expression intended to promote such behavior. Encouraging the spreading of such an idea results in individuals believing the conduct depicted in the images is acceptable.

CPPA is not only more tailored than opponents are willing to recognize, but any overbreadth present on the outer edges of the statute fails to be substantial.[129]

Legislative history reflects the CPPA was intended to target only a narrow class of images, specifically, those visual depictions that are "virtually indistinguishable to unsuspecting viewers from unretouched photographs" of real children engaging in sexually explicit conduct.[130] By employing the phrase, "appears to be," the Senate intended to "extend [the prohibition of child pornography] from photographic depictions of actual minors engaging in sexually explicit conduct to the identical type of depiction, one which is virtually indistinguishable from the banned photographic depiction" and no further.[131] The new definition of child pornography therefore extends the existing prohibition on real child pornography to the narrow class of computer-generated pictures easily mistaken for real photographs of children, thereby only prohibiting the works necessary to prevent the secondary pernicious effects of child pornography from reaching minors.[132] The CPPA "does not pose a threat to the vast majority of every day artistic expression, even to speech involving sexual themes."[133] Images in textbooks or other photographs that are not intended as child pornography will not be regulated by this provision since they are not intended to dupe child pornography consumers.

The existence of an affirmative defense in the statute further narrows the First Amendment effects of the statute, authorizing legally alternative means for expressing such ideas about children.[134] *Ferber* supports such a defense permitting the use of adults in those rare instances where the depiction of children performing sexual acts might be necessary for literary or artistic reasons.[135] Utilizing a young-looking

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129. A statute should not be invalidated as overbroad unless the overbreadth is "substantial . . . in relation to the statute's plainly legitimate sweep." Boradrick v. Oklahoma, 413 U.S. 601, 615 (1973).

130. S. REP. 104-358, at 7, pt. I, IV(B) (1996).

131. S. REP. NO. 104-358, at 21, pt. IV(c).

132. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1096;; 18 U.S.C.A. § 2251, Congressional Findings at 13 (West 2000).

133. United States v. Hilton, 167 F.3d 61, 72 (1st Cir. 1999).

134. "It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that: (1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; (2) each such person was an adult at the time the material was produced; and (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C.A. § 2252A (West 2000).

135. "[A] person over the statutory age who perhaps looks younger could be utilized." New York v. Ferber, 458 U.S. 747, 763 (1982).

adult to convey the idea that a child is engaged in sexually explicit conduct does not satisfy the actus reus of the CPPA, as the resulting expression constitutes regular pornography, as opposed to, child pornography.[136] However, because child pornographers cater to pedophiles, such photographs created to satisfy their demand will, by definition, depict pre-pubescent children.[137] In effect, the CPPA only eliminates those images which portray children at such a young age that the use of adults is impossible.[138] Increasing the average age of the children depicted by permitting adult substitution, the CPPA extends protection only to those pornographic images of what appears to be older children. The government's requirement to prove a defendant knowingly possessed child pornography further limits the scope of the Act's application because the desire for prosecutorial efficiency dictates that the "vast majority of prosecutions under the 'appears to be a minor' provision would appear to be under the age of 18."[139] Inclusion of the affirmative defense therefore allows "reasonable freedom of thought and expression, while leaving the government with sufficient power to prosecute those pornographers who are an actual danger to children."[140]

United States v. Nolan illustrates the lack of overbreadth resulting from virtual child pornography's inclusion into the child pornography definition. *Nolan* implies most images appearing to be child pornography are already properly assumed to be child pornography by the fact finder.[141] The recommended classification of virtual child

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136. No restriction is therefore imposed on regular pornography unless the image is pandered as child pornography. S. REP. NO. 104-358, at 10, 21; 18 U.S.C.A. § 2252A (West 2000).

137. The American Psychiatric Association classifies pedophilia as a mental illness marked by "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child" no older than thirteen. Sharon Begley, *What Is a Pedophile*?, NEWSWEEK, Mar. 19, 2001; *see* United States v. Hilton, 167 F.3d 61, 72 (1999) (quoting S. REP. NO. 104-358, at 7 (1996)). Thus, the statute would only cover images of pre-pubescent children "who otherwise clearly appear to be under the age of 18." *Id.* at 73.

138. While a young-looking adult may be morphed into the image of a child, the extent of the physical differences make it difficult to morph a young-looking adult into an infant. Thus, the morphing of images using young-looking adults will result in images of children above a certain age.

139. *Id.*

140. Samantha Friel, *Porn By Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 VAL. U. L. REV. 207, 258 (1997).

141. 818 F.2d 1015 (1st Cir. 1987). Such an assumption is made as the characterization of the image is left to the layperson jury. *Id.* at 1017. In this case, the defendant appealed his conviction for receiving child pornography through the mail by arguing that the government should have required proof that the photographs in question were truly representations of minors engaging in sexual conduct. *Id.* at 1016. The pictures of their faces appeared to be child pornography and the state presented pediatric testimony that the subjects were minors, however,

pornography will merely codify an existing presumption. Perceived by many as a formality, expanding the definition of child pornography simply results in the explicit inclusion of something currently considered to be child pornography.

Critics further contend the inclusion of virtual child pornography within child pornography's definition interferes with one's ability to freely contribute to the marketplace of ideas protected under the First Amendment.[142] However, the prohibition of child pornography even within the privacy of one's own home indicates it is the particular method of expression, not the idea it contains, that is prohibited. Expanding the definition of child pornography does not infringe on any right previously afforded, but prohibits an identical manner of expression. While the means of creating traditional and virtual child pornography vary, the resulting form of expression is the same. If it were the ideas behind these images that were regulated, words alone would be considered child pornography.[143] However, because a pornographic story involving children constitutes protected material, the prohibition of visual depictions of children does not prohibit the idea displayed, but the expression in the form of visual reproductions of children engaged in sexually explicit conduct, including those which are virtually indistinguishable from unretouched photographs of actual children.

Even if the proposed definition results in minor infringement at the margins of protected expression, "a few possibly impermissible applications . . . do not warrant its condemnation."[144] "Facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of feasibly identifiable and constitutionally proscribable conduct."[145] The

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Nolan claimed that a photography expert should have been required. *Id.* at 1017. The First Circuit held it is within the range of ordinary competence for laypersons to determine if they are viewing a real photograph and not an artistic rendition. *Id.* at 1017-18. The court upheld the trial courts decision to convict, stating that the trial judge could reasonably infer that the subjects of the pictures were real children since photographs are taken of something and not generated by an artist. *Id.* at 1018. The court did not consider computer graphics technology as an issue, nor did the defendant raise it, arguing instead that the subjects could have been wax dummies or other simulated images. *Id.*

142. This rationale was articulated by Justice Holmes and has been expanded on by others in broadening the protection of free thought and expression. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

143. Words themselves are never considered child pornography. *See* New York v. Ferber, 458 U.S. 747, 764 (1982); *see also* Josephine R. Potuto, *Stanley Ferber — Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15, 16 (1987) (citing Effect of Pornography on Women and Children: Hearing Before the Subcomm. on Juvenile Justice of the Senate Judiciary Comm., 98th Cong., 2d Sess. 303-04 (1984)).

144. United States v. Hilton, 167 F.3d 61, 74 (1999).

145. Osborne v. Ohio, 495 U.S. 103, 112 (1990).

CPPA unquestionably fulfills this requirement, capturing a broad range of conduct squarely defined within the parameters of constitutionally proscribable child pornography.[146] The Court of Appeals in *Hilton* found, "whatever overbreadth may exist at the edges are more appropriately cured through a more precise case-by-case evaluation of the facts in a given case."[147] Because the demand driving the child pornography market is primarily for images falling far from any constitutional protection, the risk of impermissible applications should be outweighed by the CPPA's legitimate scope.[148]

III. VIRTUAL CHILD PORNOGRAPHY SHOULD NOT BE AFFORDED THE PROTECTION OF THE FIRST AMENDMENT

While Congress secures free speech in order to protect the marketplace of ideas, the Supreme Court has held that not all speech is entitled to the same protection under the Constitution: "It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problems."[149] The Court has "plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression."[150] Similar to these unprotected classes, computer-generated pornographic images of children "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[151] Virtual child pornography as a class does not deserve First Amendment protection, rendering the outcome of a strict scrutiny balancing test irrelevant.[152]

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146. *See* United States v. Acheson, 195 F.3d 645, 651 (11th Cir. 1999).

147. *See Hilton*, 167 F.3d at 74.

148. *See Acheson*, 195 F.3d at 651.

149. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."). *See generally* New York v. Ferber, 458 U.S. 747 (1982) (holding the state's compelling interest in eradicating child pornography outweighs any possible First Amendment right a defendant may have).

150. *Chaplinsky*, 315 U.S. at 571-72.

151. *Id.* at 571.

152. The Supreme Court has utilized such a balancing test in prior child pornography decisions. In *New York v. Ferber*, the government's justifications for proscribing child pornography outweighed the limited social value of such materials. 458 U.S. 747, 164 (1982). In *Osborne v. Ohio*, the gravity of the state's interest in destroying the child pornography market and

Traditionally, categories serving as exceptions to free speech include libel, obscenity, and incitement to illegal acts.[153] In 1982, *New York v. Ferber* carved child pornography out as an additional category of unprotected speech.[154] While virtual child pornography does not fall comfortably within any of these aforementioned traditional categories, the concerns underlying the constitutionally disfavored status of each type of expression arguably justifies a similar disfavored status. Compounded with the courts' tendency to apply a more lenient perspective where child welfare is concerned, virtual child pornography's closer alignment with these unprotected categories suggests its similar disentitlement to First Amendment protection.[155]

A. Libel

Reflecting an understanding that "words [alone] . . . by their very utterance [may] inflict injury," the First Amendment acknowledges that individuals have an interest in protecting their own reputations.[156] The First Amendment therefore denies protection to libelous speech because of its failure to serve the underlying values of the First Amendment: preparing citizens to make the decisions required of a self-governing

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its use for seduction outweighed Osborne's First Amendment right to possess child pornography. 495 U.S. 103, 111 (1990). The combined interests articulated in *Ferber* and *Osborne* present in the case of virtual child pornography suggest the balance falls in favor of regulating child pornography without unconstitutionally impinging on an individual's First Amendment protection. *See* 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, 274-78 (1998). For a strict scrutiny analysis of virtual child pornography, see *supra* Part II.

153. *See* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Roth v. United States, 354 U.S. 476, 484 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

154. 458 U.S. 747, 764 (1982) ("[C]hild pornography . . . , like obscenity, is unprotected by the First Amendment.").

155. In *Prince v. Massachusetts*, Judge Rutledge made it clear that because the stat has a significant interest in protecting children, the state could regulate expansively the First Amendment rights of children. 321 U.S. 158 (1943). Commentators explaining the Prince decision rationale have articulated, "[d]ifferent factors come into play, also where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, imposes different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults." Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963).

156. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

society, advancing the universal search for truth, and promoting self expression in order to foster personal development.[157]

Analogous to the notion that libelous speech injures an individual by lowering her standing in the community,[158] virtual child pornography lowers children's standing in the eyes of its viewing community. It is the influence on this community that matters, as it consists of the pedophiles and child molesters perpetuating the cycle of child abuse. Moreover, virtual child pornography, unlike traditional child pornography, by definition consists of false statements of fact; they represent images of children as though they were factual representations of children's nature. Such defamatory speech does not advance the exchange of ideas,[159] as any residual value it may contain is outweighed by the interest in protecting children's innocence.[160]

The lenient standard of negligence for recovery in libelous speech cases involving private person plaintiffs[161] is attributable to the fact that the harm to one's reputation from defamatory statements flows directly from the publication itself and requires no intermediary to act upon the speech and then cause the harm.[162] Thus, cases in which virtual child pornography was generated using photographs of actual children, either by retouching or morphing the image, are analogous because harm flows directly from the realistic, yet, false, pornographic image.

Generally, so long as ideas, no matter how repulsive, remain ideas and are not acted upon, they should be protected.[163] However, the words of libelous speech, as are words functioning to discriminate,[164] are

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157. *See* A. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 24-28 (1960) (asserting that absolute first amendment protection should be accorded only to speech on public issues related to self-government); *see also* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971) (arguing that, for first amendment purposes, 'public issues' should signify only clearly political topics); Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 25 (1975); Police Dep't v. Mosley, 408 U.S. 92, 96-97 (1972); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 396, 879 (1970).

158. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977); K. KEETON, D. DOBBS, R. KEETON & D. OWEN PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed.1984).

159. Defamatory speech is defined as false statements of fact. *See Gertz*, 418 U.S. at 340.

160. *See id.*

161. *See id.* at 323.

162. *See* Brian J. Cullen, Note, *Putting a "Chill" on Contract Murder:* Braun v. Soldier of Fortune *and Tort Liability for Negligent Publishing*, 38 VILL. L. REV. 625, 626 (1993).

163. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972) (holding unconstitutionally overbroad a statute forbidding use of opprobrious or abusive language tending to cause a breach of the peace). "There is no protection against offensive idea, only against offensive conduct." Paris Adult Theatre I, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting).

164. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

recognized for the acts that they are, rather than the idea expressed.[165] For example, a sign reading, "White Only" or a professor's statement, "I'll give you an A if you sleep with me," are seen as the illegal acts of segregation and sexual harassment, not the protected expression of a point of view.[166] As Professor Catherine MacKinnon says, "There are many ways to say what pornography says, in the sense of its content. But nothing else does what pornography does. The question becomes, do the pornographers—saying that they are only saying what it says—have a right to do what only it does?"[167] Virtual child pornography "does the same thing" that traditional child pornography does, however traditional child pornography constitutionally lacks the right to do it.

Virtual child pornography not only depicts conduct, but also is conduct, an act resulting in the harm of children. Aside from the fact that pornographic images of virtual children are indistinguishable from those traditional images that truly do capture conduct, it is the industry, the creation of the false images depicting a staged reality, "not the ideas in the materials, that forces, threatens, blackmails, pressures, tricks, and cajoles [children] into sex."[168] Child pornography is a "form of forced sex" and the experience of the majority of its consumers "is therefore not fantasy or catharsis, but sexual reality."[169] Similarly, virtual child pornography, identical to traditional child pornography in the hands of the viewer, does not merely advocate sex with children, but is sex with children, and can therefore be regulated without First Amendment concerns. Expression of the idea a practice embodies does not convert that practice into an idea.[170] In the same way segregation expresses the idea of the inferiority of one group to another on the basis of race, but does not render "segregation" an idea, virtual child pornography

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165. *See* CATHARINE A. MACKINNON, ONLY WORDS 29-30 (1993); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). This acts versus thoughts notion extends into the obscenity realm as the Supreme Court has stated: "Appellant was not prosecuted here for anything he said or believed, but for what he did, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books." Mishkin v. New York, 383 U.S. 502, 504-05 (1966).

166. *Pittsburgh Press* illustrates this distinction between regulating conduct, rather than an idea. While this case resulted in the regulation of written words, it was the act of the words, not the idea behind them that justified such a holding. The language of the help-wanted advertising columns listed by sex preference violated the law by aiding discrimination on the basis of sex, "an unlawful employment practice." Failing to constitute a "prior restraint on expression," the expression was actionable as discriminatory conduct.

167. MACKINNON, *supra* note 165, at 14.

168. *Id.* at 15.

169. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 148-49 (1987).

170. *See* Catharine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 65 (1985).

expresses the idea of minors engaged in sexual activity, but does not render the creation or effect of such tangible images an idea.[171] Virtual child pornography becomes an act as soon as it results in harm.

B. Obscenity

To classify speech as legally obscene, the material must "appeal to the prurient interest," portray specifically defined sexual conduct in a "patently offensive way," and lack "serious literary, artistic, political or scientific value" when viewed as a whole.[172] While it may be tempting to ban only those virtual pornographic images of children constitutionally classifiable as obscene, failure to comply with the obscenity standard does not necessarily preclude regulation of such speech: traditional child pornography's regulation does not require the satisfaction of this standard.[173] For example, the Supreme Court permitted criminal bans on traditional child pornography regardless of its obscene nature.[174] So while obscenity may not technically reach the harm done to children, the rationales underlying the removal of obscenity from the broad category of protected speech are equally present in the context of virtual child pornography: both are offensive and dangerous.[175] While not all will rise to the level of legally "obscene," virtual images depicting sexual activity involving children are viewed by many as patently offensive and are utterly devoid of any redeeming social importance.[176] Even if some such images did have artistic or literary value, denying First Amendment protection to this class of speech would affect only a small number of cases.

For some, the very definition of obscenity turns on the line between public and private; "obscenity consists in making public that which is private; it consists in an intrusion upon intimate physical processes and acts or physical-emotional states . . . . The essence of obscene is its invasion of the public realm by 'private' maters, or an 'invasion of publicity.'"[177] Under such a definition, a two-fold justification exists for

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171. *See id.*

172. Miller v. California, 413 U.S. 15, 24 (1973).

173. *See* New York v. Ferber, 458 U.S. 747, 761, 764 (1982).

174. *See* Address by Catherine A. MacKinnon, New York Workshop for Lawyers, Nov. 1984 (draft from transcript, at 11) (on file with *Texas Tech Law Review*).

175. *See* Jeffrey M. Gamso, Sex Discrimination and the First Amendment: Pornography and Free Speech, 17 TEX. TECH L. REV. 1577, 1578 (1986) (citing Dominus Rex v. Curl, 2 Strange 789, 792, 93 Eng. Rep. 849, 851 (K.B. 1727); Miller v. California, 413 U.S. 15, 24 (1973)).

176. *See* Roth v. United States, 354 U.S. 476, 484 (1957).

177. HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY 225 (1969).

silencing virtual child pornography. Not only is it created, enjoyed, and perpetuated behind closed doors, but it makes public something that is illegal in either realm. Even the hardest-core pornography, obscene because it publicizes the most private activities and perhaps even illegal activities like battery, does not contain activity punishable by law when occurring between two consenting adults. Virtual child pornography goes one step beyond this definition, making public that which is not even legally permitted in private.[178]

Obscenity is "nonspeech" because it functions physically rather than ideationally:[179]

> To the extent that any form of expression influences its audience through means that bypass the process of conscious deliberation and choice presupposed by the notion of the marketplace of ideas, such expression cannot be said to further two important goals of the First Amendment: promoting self-government and fostering the search for truth.[180]

Virtual child pornography's sexually explicit images likewise elicit mere physical noncognitive responses from their audience and are thus void of contributions to the marketplace of ideas.[181] They do not appeal the intellect, but generate sexual arousal like any other sexual aid, which

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178. While there is no actual child, so there can be no actual crime, virtual child pornography often depicts the strict liability crime of statutory rape. Prior to the enactment of child pornography laws, states relied predominantly upon child welfare, incest and rape statutes to punish adolescent sex abusers. David Shouvlin, *Preventing the Sexual Exploitation of Children: A Model*, 17 WAKE FOREST L. REV. 535, 538 (1981). Thus, child pornography depicts the crimes that were originally the only ways to catch abusers. Enactment of child pornography laws should facilitate the prosecution of abusers, not encourage crimes by glorifying what were previously the predominant means of conviction. While the depiction of illegal acts such as sodomy and rape do not render adult pornography illegal, statutory rape is considered a more serious crime. The fact that what appears to be sodomy or rape in adult pornography may actually be consensual removes such acts from criminal liability. Sex with a child remains criminal regardless of consent. In other words, virtual child pornography depicts an activity that is impermissible even behind closed doors outside of the public realm. Sexual activity between consensual adults, no matter how odd or repugnant to some, is legally protected by the First Amendment, as the First Amendment protects such ideas that are legal yet usually explored in private.

179. Speech is defined as communicating ideas. Obscenity produces a physical response instead of communicating ideas.

180. Note, *Anti-Pornography Law and First Amendment Values*, 98 HARV. L. REV. 460, 472 (1984).

181. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57-58 (1973); *cf.* John Finnis, *'Reason and Passion': The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222 (1967) (defending the distinction between expression that appeals to reason and expression that appeals to passion); *see also* STEPHEN MARCUS, THE OTHER VICTORIANS: A STUDY OF SEXUALITY AND PORNOGRAPHY IN MID-NINETEENTH-CENTURY ENGLAND 281 (1974) ("Pornography is not interested in persons but in organs. Emotions are an embarrassment to it, and motives are distractions."); Frederick Schauer, *Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605, 608 n.14 (1979) ("Direct sexual excitement can hardly be said to contribute to the marketplace of ideas. . . .").

would not receive First Amendment protection.[182] This is virtual child pornography's primary, if not sole, purpose, functioning as a substitute for pedophiles' inability to legally experience the real thing. Noncognitive in nature,[183] competing interests such as quality of life or public safety will easily outweigh any residual intellectual value.

While categories of speech having less protection arguably fail to convey valuable ideas, they may also be justifiably suppressed because "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[184] Virtual child pornography, like obscenity, contributes nothing to the "unfettered exchange of ideas" and has a negative impact on social morality.[185] Such socially worthless speech can be suppressed in order "to prevent people from having immoral thoughts,"[186] as the failure to do so arguably "threatens the moral fabric of our society."[187] As was stated by the Supreme Court in *Roth*, "[t]he State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade . . . will have an eroding effect on moral standards."[188] Neither virtual child pornography nor obscenity necessarily induce immediate conduct, yet both are likely to corrupt morals. "[I]t requires little judicial notice to know that one whose morals have been corrupted is likely to engage in sex (sic) conduct which society has a right to prohibit. In this slower but no less serious way, obscenity," as does virtual child pornography, "brings about immoral conduct."[189]

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182. "The pornographic item is in a real sense a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification by those means . . . . Consider further rubber, plastic, or leather sex aids. It's hard to find any free speech aspects in their sale or use. If pornography is viewed merely as a type of aid to sexual satisfaction, any distinction between pornography and so-called rubber products is meaningless." Frederick Schauer, *Speech and "Speech"-Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922-23 (1979).

183. *Cf.* Herceg v. Hustler Magazine, 814 F.2d 1017, 1026 (5th Cir. 1987) (Jones, J., concurring in part and dissenting in part) ("[P]ornography's appeal is therefore non-cognitive and unrelated to, in fact exactly the opposite of, the transmission of ideas).

184. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

185. Roth v. United States, 354 U.S. 476, 484 (1957). "[I]mplicit in the first amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484-85.

186. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 78 (1989) (Stevens, J., dissenting) (footnote omitted).

187. *Id.*

188. *Roth*, 354 U.S. at 502 (Harlan, J., concurring in part, dissenting in part).

189. *See* 53 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 127-28, 219 (Philip B. Kurland & Gerhard Casper eds., 1975).

While obscene speech can be completely banned by the test articulated in *Miller v. California*,[190] speech that is less than obscene may be regulated by time, place, and manner restrictions based upon the "secondary effects" of the commercialization of sexually explicit speech.[191] The government is afforded greater leeway when regulating "offensive" sexual speech as opposed to "offensive" political speech because "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."[192] Therefore, Voltaire's remark, "I disapprove of what you say, but I will defend to the death your right to say it" does not fully apply to the subject of sex.[193] Regardless of the availability and acceptability of content-neutral restrictions, however, the imposition of such restrictions will resolve none of virtual child pornography's secondary effects. The dangers present to society and its children exist whenever and wherever the images are shown, merely as a result of the nature of the photographs.[194] Its inferior ranking on the "hierarchy of first amendment values,"[195] its qualitative difference from political speech renders the content-based regulation of sexual expression permissible.

The "offensive speech" doctrine has developed without any attempt to define what constitutes offensive sexual speech, yet the claim is "I

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190. 413 U.S. 15, 24 (1973) (5-4 decision), *reh'g denied*, 414 U.S. 881 (1973); *see supra* note 54.

191. The government can proceed in two distinct fashions when it interferes with the marketplace of ideas. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (observing that the state may regulate by either content-neutral or content based restrictions). It may regulate the content of expression or create restriction aimed at the time, place and manner of speech thereby appearing neutral as to speech's conduct. *See* Burson v. Freeman, 504 U.S. 191, 196 (1992) (explaining that the Court has held that the government may regulate time, place, and manner of speech so long as the restrictions are content-neutral). Neutral-based restrictions require a lower level of scrutiny. *See id.* at 191 (holding that content-based restrictions must be subjected to exacting scrutiny). Because of the ineffectiveness of content-neutral regulations on virtual child pornography, the government is left with no choice but to impose content-based regulations.

192. Young v. Am. Mini Theatres, 427 U.S. 50, 70 (1976).

193. S.G. TALLENTYRE, *THE FRIENDS OF VOLTAIRE* 199 (1907), (quoted in Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 63 (1976).

194. Regulations have been imposed to censor where sexually explicit images are shown and when they maybe advertised in order to preserve the morality of the city and the innocence of children. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978) (authorizing the regulation of indecent speech over the airways); Sable Communications v. FCC, 492 U.S. 115 (1989) (banning all obscene and indecent interstate telephone messages for commercial purposes). Such regulations would be ineffective with virtual child pornography as it is the adults who cause the harm. Restricting when and where virtual child pornography may be viewed will not modify children as the target.

195. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); FCC v. Pacifica Found., 438 U.S. 726 (1978).

know it when I see it."[196] This implies that sexual expression can and perhaps must be regulated by law even if and precisely because it is beyond reasoned discussion. The state is not obliged to offer a compelling rationale, and the courts' decisions proceed by assertion rather than logical reasoning. The ability to suppress, combined with the inability to intelligibly articulate a standard, illustrates that it is what is demonstrated in the image itself, not the truth of what is presented, upon which the decision is based. The reliance on a visual determination requires the prohibition of that which is virtually indistinguishable from child pornography, as such a standard will already find virtual child pornography unprotected as traditional child pornography.

C. Traditional Child Pornography

Traditional child pornography is not required to be obscene or lack literary, artistic, political, or scientific value to be prohibited. *Ferber* carved out this entire category of unprotected speech because of its "slight social value" and its failure to constitute an "essential part of the exposition of ideas."[197] The First Amendment does not protect certain limited categories that are "utterly without redeeming social importance" and the resultant pornographic speech involving children, whether it contains a virtual or real child, lacks any socially redeeming value.[198] The substitution of an actual child for a virtual child does not transform an "exceedingly modest, if not de minimis" valued image into valuable speech.[199] Moreover, the feasibility of states to regulate expansively the First Amendment rights of children advocates the expansion of the prohibition of child pornography to encompass those virtually pornographic images of children as well.[200] *Ferber* does not limit the lack of protection to only those images that contain actual children, as the court found it "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting there genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."[201]

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196. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

197. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1100 (9th Cir. 1999) (Ferguson, J., dissenting) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

198. *See* Roth v. United States, 354 U.S. 476, 484 (1957).

199. New York v. Ferber, 458 U.S. 747, 762 (1982).

200. *Ferber* has held that "when a definable class of material bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interest is clearly struck and that it is permissible to consider these materials as without the protection of the first amendment." *Id.* at 764.

201. *Id.* at 762-63.

Subject-matter protection requires courts to determine the degree of protection granted to speech solely on the basis of the category to which it belongs. However, courts cannot discriminate among different forms of speech that belong to the same subject category.[202] Hence the Equal Protection principle states that all forms of speech that belong to the same category enjoy the same degree of protection. Thus, it establishes a hierarchy among different subject categories and grants special status to those subjects that are privileged.

> Sexually explicit material may be seen to fall along a constitutional continuum entitling it to varying degrees of free speech protection. At one end of the spectrum, pictures of actual children in sexually compromising positions, deemed to have little or no social value, are entitled to no constitutional protection. At the opposite end of the spectrum, nonobscene images involving actual adults are entitled to full protection. . . .[203]

In constitutional terms, sexually explicit material produced without the benefit of a live child model but giving the appearance as if it had been, is more akin to traditional unprotected child pornography than adult pornography, which is afforded protection. The same is true of material created by a youthful looking adult posing as a minor to be sold or represented as though it contained a pornographic image of an actual minor, because it captures the same depictions and appeals to the identical market furthering the child pornography trade and facilitating abuse. Because only pedophiles and child molesters consume child pornography, as no other market exists for such images, all images that support this market should fall within same category.[204] What virtual child pornography communicates does not depend on its use of a virtual child; its expression is identical to traditional child pornography, and as

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202. The court is not entitled to discriminate, for instance, between political speech that is valuable and that which is not. The doctrine of content neutrality guarantees that courts will not discriminate among different forms of speech on the basis of their value. *See, e.g.*, Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("There is an 'equality of status in the field of ideas' and government must afford all points of view an equal opportunity to be heard."). The use of a virtual child does not transform virtual child pornography into valuable speech. Thus while virtual child pornography is a different "form" of the same speech, it does not deserve a different level of protection. It falls into a designated category imposing "a veil between a direct assessment of the value of protecting the particular speech and the degree of protection granted by the court." Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1931 (1992). Therefore, it is possible that the process of categorization as practiced by the court places speech into a protected category has no value at all. *See id.*

203. U.S.C.A. CONST. amend. 1; *Hilton*, 167 F.3d at 70 (1999).

204. *See* Effect of Pornography on Women and Children: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary, 98th Cong. 31 (1985) (testimony of Kenneth v. Lanning, special agent, FBI).

such, should fall within the same category. Just representing different "forms" of the same expression, the equal protection principle requires that the two enjoy the same lack of Constitutional protection.

D. Inciting Speech

Finally, the First Amendment permits prohibitions on speech advocating lawless action, "where advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action."[205] For instance, '[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic." Virtual child pornography's failure to fall within this category of unprotected speech does not disqualify its regulation and the rationales behind prohibiting this category actually suggest the prohibition of such computer-generated images. While virtual child pornography does not necessarily incite immediate lawless action, it does not merely advocate such conduct, posing a "clear and present danger" to children when used for seduction.[206] For even when speech merely advocates lawless action, "the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the morals, and the degree of probability that the substantive evil actually will result."[207] Such factors merit consideration in defining when sexually explicit speech that causes specific harm should be punishable. Courts must ask whether the gravity of the "evil" discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger."[208] Thus, only speech believed to actually cause specific harm, not just the corruption of morals, will be chilled. As seen in Part II, significant specific harm results from the existence, use, and production of virtual child pornography.

While not guaranteed to result in an immediate danger, virtual child pornography posses a great enough risk to public safety that the Constitution should not offer it protection.[209] Justice Douglas required that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of

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205. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

206. Herceg v. Hustler Magazine, 814 F.2d 1017, 1023 (5th Cir. 1987) (citing Noto v. United States, 367 U.S. 297-98 (1961)).

207. Musser v. Utah, 333 U.S. 95, 101 (1994) (Rutledge, J., dissenting) (discussing Bridges v. California, 314 U.S. 252, 262-63 (1941)).

208. United States v. Dennis, 183 F.2d 201, 212 (1950), *aff'd*, 341 U.S. 494 (1951).

209. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

it."[210] Virtual child pornography, like traditional child pornography, is not speech of the creator but the act of silencing children.[211] In the cycle of child abuse, these images are such a central link that they are an inseparable part of the illegal act. The entire cycle cannot be eliminated without doing something about its source, what consumers *believe* is child pornography. Virtual child pornography will play such a role in the maintenance of this cycle that its equivalence to child pornography requires its prohibition.

Given the incitement doctrine was developed primarily in response to efforts to restrict a highly valued type of speech, political speech, the standard of imminence should be lowered for lesser valued, nonideological speech.[212] This exception, narrowly drawn to afford *political* speech maximum protection, is not applicable in the virtual child pornography context because of its valuelessness. The constitutional protection of ideas stems, not from their acceptability, but rather, from their ability to bring about political and social change.[213] Virtual child pornography cannot legitimately affect our political obligations, as any residual value or ideas are not genuine competitors in the political marketplace. Consequently, its exclusion from First Amendment protection does not undermine the integrity of political discourse. While sexuality and social meaning has entered into the political arena, virtual child pornography does not raise the issue of the acceptability of homosexuality for example, but something that is illegal to do; sexual relations with a minor is not something which can be fought to be accepted. Thus, the qualitative difference between political and pornographic speech of virtual children indicates that virtual child pornography is more closely akin to the less valued types of speech as obscenity and libel, which do not enjoy full First Amendment protection.[214]

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210. Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949); Labor Bd. v. Va. Power Co., 314 U.S. 469, 477-78 (1941); *see also* Memoirs v. Massachusetts, 383 U.S. 413, 426 (1966) (Douglas, J., concurring) (holding that the First Amendment does not permit the censorship of expression not brigaded with illegal action); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting) (finding speech and action not so closely brigaded as to be one).

211. *See supra* text accompanying note 141.

212. *See* FCC v. Pacifica Found., 438 U.S. 726, 743 (1978) ("[W]hile some of these references [to excretory and sexual organs and activities] may be protected, they surely lie at the periphery of first amendment concern.").

213. *See* Miller v. California, 413 U.S. 15, 34-35 (1973).

214. Most of the significant incitement cases have involved unpopular political groups or the advocacy of unpopular political ideas. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973) (per curium) (antiwar protestors); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curium) (Ku Klux

In *R.A.V. v. City of St. Paul*, Justice Scalia stated that fighting words can, "consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation) not that they are categories of speech entirely invisible to the constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content."[215] The court's hesitancy was not due to certain instances of speech becoming prohibited, but the wider ramifications of a government entity taking a stand against any particular viewpoint. In the realm of virtual child pornography, however, no such apprehension is necessary as the court can afford to take a stand, given the position against child pornography has already been made. In the same opinion, Justice Stevens suggested he would have found the ordinance constitutional because it would regulate speech "not on the basis of its subject matter or on the viewpoint expressed, but rather on the basis of the harm the speech causes."[216] By criminalizing expression known to inflict injury, "the ordinance resembles the child pornography law [upheld] in *Ferber*, which in effect singled out child pornography because those publications caused far greater harms than pornography involving adults."[217] A correlation therefore exists between the rational for denying protection of child pornography and fighting words, and its presence in the context of virtual child pornography suggests a willingness to accept as constitutional anti-pornography legislation based on a showing of harm.

IV. CONCLUSION

In sum, the existence of multiple legitimate state interests, the actual harm resulting to children, the market that is sustained, and the secondary effects that are created, combined with the existence of a narrowly drawn statute permit the regulation of virtual child pornography without unnecessarily impinging on an individual's First Amendment rights. Even if this strict scrutiny analysis were not satisfied, virtual child pornography as a category of speech does not deserve First Amendment protection. Consideration of the rationales behind the prohibition of libel, obscenity, child pornography and fighting words illustrates virtual child pornography's closer alignment to prohibited categories of speech than those deserving protection. Its false and defamatory content and

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Klan); Whitney v. California, 274 U.S. 357 (1927) (revolutionary unionism); Schenck v. United States, 249 U.S. 47 (1919) (draft evasion during World War I).

215. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

216. *Id.* at 433.

217. *Id.* (citing New York v. Ferber, 458 U.S. 747 (1982)).

nonrational appeal, its lack of socially redeeming value and effective regulation, and its contribution to the erodation of morality, beg its prohibition. Virtual child pornography's dangerous, harmful, and offensive nature warrants its regulation under the same theoretical basis, speculative harm, that led to standards adopted for the regulation of child pornography in *Ferber*.[218] The Constitution never intended to prevent the Court from concluding other modes of speech were not within the meaning of the amendments purview and recognizing virtual child pornography as a new category of unprotected speech simply combines rationales historically accepted for denying protection.[219]

The comparison of virtual child pornography with unprotected categories of speech is important "because the appropriate standard of review of restrictions on speech depend on the value of the particular form of expression at stake."[220] When the expression at issue is deemed not to have significant First Amendment value, the Court requires the state to demonstrate only an arguable correlation between that expression and the occurrence of harm to justify a legislative determination that the challenged expression causes harm.[221] If the court recognizes a similarly meager First Amendment value in virtual child pornography, it should grant the same deference to reasonable legislative determinations of its harms as to determinations of obscenity's or group libel's harms. Evidence presented in Part II. A show at least an arguable correlation between computer-generated images of children and their harm to children, a connection that should be sufficient to sustain ordinances directed at virtual child pornography. The fact that the evidence is disputed should not undercut the legislature's authority to choose which set of conclusions to believe as long as there exists at least an arguable correlation between expression and harm.[222]

Failing to prohibit virtual pornographic images of children would be sending the wrong message to society, implying that the law does not care about its children viewing the harm resulting from computer-generated child pornography as insignificant. Permitting such images to be legally available gives molesters the false idea that this can be done to children. What was originally seen as an outlet, stigmatized as bad and

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218. *See Ferber*, 458 U.S. at 756.

219. *See* United States v. Roth, 354 U.S. 476, 483 (1957) (citing Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)).

220. Note, *supra* note 180, at 476.

221. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974); *see* Stephen Daniels, *The Supreme Court and Obscenity: An Exercise in Empirical Constitutional Policy-Making*, 17 SAN DIEGO L. REV. 757, 795-98 (1980).

222. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973).

wrong because of its illegality, will now be viewed as acceptable, turning pedophiles' obsession into a reality and perpetuating the cycle of abuse.