THE NEW FACE OF CHILD PORNOGRAPHY: DIGITAL IMAGING TECHNOLOGY AND THE LAW

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I. INTRODUCTION

> Child pornography is not just an aberrant form of free expression, it is a criminal tool, used to seduce and manipulate child victims, break down a child's inhibitions, and make sex between adults and children appear "normal." Just as we charge drug dealers with the possession of drug paraphernalia and would-be burglars with the possession of "burglary tools," so must we have the ability to limit the use of child pornography, a clear, unambiguous "molestation tool" for pedophiles and child molesters.[1]

Ernest E. Allen, President and CEO of the National Center for Missing and Exploited Children issued this statement during the 2002 Hearing before the Congressional Committee on the Judiciary ("2002 Hearing").[2] Numerous government agents, law enforcement personnel, prosecutors and activists alike have echoed the same concerns.[3]

The debate over the constitutional protection of pornographic material in general, and child pornography in particular, has been traditionally framed against the backdrop of morality, obscenity, and pedophilic criminality. Nevertheless, Mr. Allen's statements hint at a subtle change of perspective. Today, the issue of child pornography is justly fraught with complicated analyses striving to make sense of the fogginess created by ever-changing technological advances. Most recently, technological advances have successfully blurred the line between "real" and "virtual" children.

Congress and the Supreme Court have engaged in an intimate dance of

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1. *Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision, Ashcroft v. Free Speech Coalition: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. 17 (2002) [hereinafter *2002 Hearing*] (statement of Ernest E. Allen, President and CEO of the Nat'l Center for Missing and Exploited Children).

2. *Id*.

3. *See generally id.* (discussing concerns relating to child pornography).

sorts, alternating control over the war against child pornography: Congress passes a statute and the Court invalidates it, then Congress passes another statute and again, the Court invalidates it, and so on, leaving members of the pornography community and prosecutors alike in a state of confusion.[4]

The United States currently awaits a First Amendment constitutional challenge against the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act") before the Supreme Court.[5] Such a challenge will inevitably revive the controversial issues that spawned the *Ashcroft v. Free Speech Coalition* decision in 2002 invalidating the Child Pornography Prevention Act of 1996 ("CPPA").[6] At the heart of the *Ashcroft* decision, the CPPA, and the PROTECT Act lies the ultimate question: should child pornography laws be geared solely towards preventing actual children from being made part of pornography? Or are the laws meant to protect children (and society) from the sexualization and abuse of all minors? In other words, should pornography laws only control situations where actual children are depicted, or should they also intervene when pornographers use technological advances to create computer-generated images of children or to digitally morph images of adults so that they appear to be children? The Supreme Court's answer has been a resounding "no" to protecting virtual victims.[7] Nevertheless, Congress has responded with a more holistic approach to terminating child pornography that incorporates virtual victims.[8]

This Note explains how technological advances in digital imaging have been used to both hinder and further attempts to prosecute and prevent the dissemination of child pornography. Most importantly, this Note discusses the ways technological advances have interacted with First Amendment protections. Ultimately, this Note advocates for child-centered legislation that protects the vulnerability of children as victims of sexual exploitation rather than deferring to the "so-called" rights of pornographers and Hollywood film producers.

Part II will provide an analysis of the problem created by technological advances and their interconnectedness with child pornography laws and

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4. *See generally* ENCYCLOPEDIA OF EVERYDAY LAW: PORNOGRAPHY 2-3 (2006), http://www.enotes.com/everyday−law−encyclopedia/pornography [hereinafter ENCYCLOPEDIA OF PORNOGRAPHY] (discussing laws and issues related to pornography); HENRY COHEN, CONGRESSIONAL RESEARCH SERV., CHILD PORNOGRAPHY PRODUCED WITHOUT AN ACTUAL CHILD: CONSTITUTIONALITY OF 108TH CONGRESS LEGISLATION (2003), *available at* http://www.firstamendmentcenter.org/pdf/CRS.childporn2.pdf (examining the portion of the federal child pornography statute declared unconstitutional and the laws passed in response).

5. *See generally* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, 18 U.S.C. § 1466A(a) (2003); COHEN, *supra* note 4 (analyzing the First Amendment issues raised by legislation passed by the Senate and the House).

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

7. *See generally id*. (declaring the Child Pornography Prevention Act of 1995 unconstitutional if used to prohibit material produced without using an actual child).

8. *E.g.*, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, 18 U.S.C. § 2251(a) (2003); Child Pornography Prevention Act, 18 U.S.C. § 2251(8) (1996) (explaining that a computer-generated image is included within the meaning of "child pornography"); Child Obscenity and Pornography Prevention Act, H.R. 1161, 108th Cong. (2003).

legislation. Further, Part II will discuss the historical regulation of pornography generally and actual child pornography in particular, with special emphasis on the influence of technology (or more appropriately, the lack thereof). Part III will detail the diverging treatment of virtual child pornography by Congress and the Supreme Court. Finally, Part IV will document multi-faceted recommendations in striking a balance between constitutionality and the common-sense applicability of child pornography laws. Therein, this Note argues that the PROTECT Act should be upheld because it complies with the critiques central to the Supreme Court's constitutional analysis in *Ashcroft*. However, this Note advocates for a more fluid application that does away with the *California v. Miller* obscenity requirement imbedded in the PROTECT Act by legitimizing the regulation of all virtual child pornography under the *New York v. Ferber* analysis. Additionally, this Note emphasizes the importance of deference to congressional findings and the value of adopting a limiting statutory construction in lieu of an overbroad finding by the Court. Finally, this Note discusses the importance of using technology "for good" in facilitating the prosecution of child pornographers.

II. BACKGROUND: PORNOGRAPHY, THE FIRST AMENDMENT, AND TECHNOLOGY

The First Amendment prohibits Congress from "abridging the freedom of speech . . . ."[9] However, it is clear that the First Amendment is not intended to protect every utterance.[10] For example, the First Amendment does not protect falsely shouting "fire" in a crowded theatre.[11] Nevertheless, which utterances are afforded constitutional protection are determined by "political, social, cultural, historical, psychological, rhetorical, and economic forces . . . ."[12]

This section illustrates the ways in which technological advances impede the detection, prosecution and prevention of child pornography. Further, this section carefully delineates the different technological advances in virtual image manipulation and the dangers presented by the resulting virtual child pornography. Additionally, this section acknowledges the real threat of unnecessary government regulation of public information but stresses the minimal impact of virtual child pornography regulation. Finally, this section gives a historical account of the development of anti-child pornography laws both by Congress and the courts.

9. U.S. CONST. amend. I.

10. Roth v. United States, 354 U.S. 476, 482-83 (1957).

11. Schenck v. United States, 249 U.S. 47, 52 (1919) (explaining that speech may be restricted where it creates a "clear and present danger").

12. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

A. The Problem: Technological Advances and Prosecutorial Plight

In the 1980s, child pornography was discussed by prosecutors, pornographers, activists, scholars and the general public "in formats like magazines, 16-millimeter movie film, Polaroid pictures[, etc.]. Digital technology that the average person could manipulate didn't exist."[13] The technology did not exist to: (1) create computer-generated depictions of children that are indistinguishable from those of real children; (2) use parts of images of real children to create a composite image that is unidentifiable as a particular child in a way that prevents experts from concluding that parts of real children were actually used; or (3) disguise pictures of real children being abused by making the image look computer-generated.[14] The fact that most images seized from collectors are not an original copy makes it even more difficult for an expert to conclusively opine that a particular image depicts a real child.[15] Police rarely seize an original image; a particular image may be the 1000th generation.[16] This can be even more dubious depending on the quality of the image and the tools used to scan the image into the World Wide Web.[17]

Alarmingly, virtual child pornography poses a threat to the criminal justice system because defendants can use the defense that they possessed virtual pornography as opposed to pornography produced using real children.[18] This is particularly harmful since it is "virtually impossible for prosecutors . . . to prove that the offending material was produced using children."[19] This stacks the deck "against prosecutors, leaving them unable to prove . . . that real

13. *2002 Hearing*, *supra* note 1, at 32 (statement of William C. Walsh, Lieutenant of Police, Youth and Family Support Div., Dallas Police Dep't).

14. PROTECT Act, Pub. L. No. 108-21, § 501(4), 117 Stat. 650, 676-77 (2003). It is important to note, however, that no substantial evidence exists proving that child pornography images being trafficked today were made other than by the abuse of "real" children. PROTECT Act § 501(7). However, technological advances have led many criminal defendants to suggest that the images of child pornography they possess are not of "real" children, thus placing the burden on the government to prove beyond a reasonable doubt that the images are not computer-generated. *Id.* These challenges have significantly increased after the *Ashcroft v. Free Speech Coalition* decision in 2002. *Id.*

15. PROTECT Act § 501(8).

16. *2002 Hearing*, *supra* note 1, at 7 (statement of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, FBI).

17. *Id.* at 29.

18. Elizabeth Mansfield, *The New Iconoclasm*, ART J. Spring 2005 at 21, 22; *see, e.g.*, United States v. Hilton, 386 F.3d 13, 18 (1st Cir. 2004) (requiring government to adduce sufficient proof that a "real" child was depicted in the alleged child pornography pursuant to Aschroft v. Free Speech Coal., 535 U.S. 234, 256 (2002)). *But see* United States v. Rodriguez-Pacheco, 475 F.3d 434, 440-41 (1st Cir. 2007) (finding that the government had no duty to prove that the alleged child pornography depicted a "real" child); United States v. Sheldon, No. 06-3015, 2007 U.S. App. LEXIS 11807, at *20 (6th Cir. 2007) (finding that the prosecution did not have to prove that images depicted real children); United States v. Irving, 452 F.3d 110, 121-22 (2d Cir. 2006) (holding that the government was not required to present expert testimony proving that children in images were in fact real children rather than computer-generated images); McIntyre v. Maryland, 897 A.2d 296, 311 (Md. Ct. Spec. App. 2006) (finding that it was unnecessary for the prosecution to produce expert evidence that photographs at issue were of actual children rather than virtual images); Wisconsin v. Holze, No. 03-1506-CR, 2004 WL 1057623, at *9 (Wis. Ct. App. 2004) (affirming lower court ruling that state did not have to prove that images were of actual children).

19. Mansfield, *supra* note 18, at 22 (citing Child Pornography Prevention Act of 1995, Part IV § B, 16).

children were used in the production of images in any case."[20] In other words, prosecutors are left with the near impossible task of proving whether a particular image was created using an actual child.

The subversive and international nature of the crime only complicates the issue further.[21] The National Center for Missing and Exploited Children stated that prosecutors throughout the country have expressed these concerns.[22] The onslaught of defendants raising the contention that the images they possessed were virtual child pornography suggests an awareness of this gaping weakness in child pornography law.[23] Consequently, the number of child pornography cases prosecuted has significantly reduced.[24]

A requirement that the government identify a specific child as "actual" or "real" will further deter prosecutors from pursuing anything outside of the most clear-cut cases in which the government can specifically identify the child in the image.[25] This is particularly true because technological advances are making virtual child pornography "virtually indistinguishable from actual child porn."[26]

Furthermore, experts agree that the cost of computer-generated virtual pornography in terms of time, money, and expertise is, and will likely remain, "prohibitively expensive."[27] It continues to be cheaper, more time efficient, and simply easier to utilize real children in child pornography rather than investing in virtual child pornography.[28] Therefore, using real children and employing readily available technology to disguise their identity will remain the most cost-effective form of child pornography.[29] Thus it is crucial that the legislature unequivocally address this growing concern.

1. One Step Forward, Two Steps Back: Digital Imaging and Child Pornography

Today, "[w]e are living in a world where seeing is no longer believing—the technology that allows for digital media to be manipulated and distorted is developing at break-neck speeds. And at the same time, our understanding of the technological, ethical, and legal implications is lagging behind."[30] In other words, today's fast-paced technological advancements have left our courts ill-

20. *Id.*

21. *2002 Hearing*, *supra* note 1, at 34 (statement of Ernest E. Allen, President and CEO of the Nat'l Center for Missing and Exploited Children).

22. PROTECT Act, Pub. L. No. 108-21, § 501(9), 117 Stat. 650, 676-78 (2003).

23. PROTECT Act § 501(10).

24. *Id.*

25. *2002 Hearing*, *supra* note 1, at 34 (statement of Ernest E. Allen, President and CEO of the Nat'l Center for Missing and Exploited Children).

26. *Id.*

27. PROTECT Act § 501(11).

28. *2002 Hearing*, *supra* note 1, at 17 (statement of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, FBI).

29. PROTECT Act § 501(11).

30. Hany Farid, *Digital Doctoring: How to Tell the Real from the Fake*, 3 SIGNIFICANCE 162, 162 (2006), *available at* www.cs.dartmouth.edu/farid/publications/significance06.pdf.

equipped to apply a constitutional principle over two centuries old to modern child pornography. Congress must modernize this country's laws to appropriately respond to technological advances in child pornography.

"New photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable . . . from unretouched photographic images of actual children . . . ."[31] Thus technological advancements in the production of child pornography pose a real threat to the prosecution and detection of child pornographers by blurring the line between pornography using real as opposed to virtual children.

On such technological advancement is morphed imagery. "'Morphing' refers to a software process in which one image is transformed into another over a period of time. This term of art is . . . used to refer to generic digital image manipulations . . . ."[32] It may be possible to morph two distinct images such as that of a child and an adult; however, the final product would not be believable.[33] Consequently, morphing is most successful when the original images are extremely similar such as two children or a young-looking adult and a child.[34]

Another technological advancement is composite imagery. "'Compositing' refers to the digital combination of multiple photographic images into a single image, in effect cutting up different photographic prints and then gluing the pieces together to create a new collage image."[35] The compositing process is surprisingly simple, and the necessary software is readily available.[36] Retouching is an element of compositing in which one uses "digital paint tools to modify a digital photograph" thereby making the collage image blend naturally.[37] For example, magazines frequently airbrush their photographs to achieve this natural yet flawless look.[38] Consequently, forensic investigators face nearly insurmountable obstacles in "determining whether an actual minor was used in an image where compositing is alleged."[39] Since they only have segments of the child's actual body to inspect,[40] they must work with very limited investigative clues.[41]

A third type of technological advancement is the ability to create entirely computer-generated images. This recent technological development enables a pornographer to create a child's image from scratch by using imaging software

31. Mansfield, *supra* note 18, at 22 (citing S. Rep. No. 104-358, at 2 (1996)).
32. *2002 Hearing*, *supra* note 1, at 12 (statement of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, FBI).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

without actually utilizing any part of another child or person.[42] In other words, the frightening ability to completely manufacture the image of a child and sexually manipulate it is currently in existence.[43]

2. The Danger of Virtual Child Pornography

FBI Special Agent Ken Lanning outlined for Congress the multiple reasons as to why pedophiles collect and distribute child pornography.[44] These reasons are to justify their obsession with children, to stimulate their own sexual drive, to lower a child's inhibitions, to preserve a child's youth, to blackmail, as a medium of exchange with like-minded individuals, and for profit.[45]

Legislative history further stipulates that "molesters use child pornography to stimulate their own desires and fuel their fantasies for children as sexual partners."[46] Thus, molesters view child pornography in order to feed their appetite and prepare themselves for sexual acts with real children.[47] The frequency with which an individual—adult or child—is exposed to child pornography correlates with his or her desensitization to the abnormality of such conduct.[48] Child pornography normalizes the behavior and ultimately feeds the molester's need for increasingly explicit child pornography.[49] In this way, child pornography acts as a "training manual"[50] or as "fuel for criminal behavior."[51]

Similarly, child molesters may use virtual images "as a device to break down the resistance and inhibitions of . . . victims or targets of molestation."[52] This way, the child may be seduced or blackmailed into sexual abuse.[53] Ultimately, mere visual stimulation may be insufficient and the child pornography consumer will often progress to sexually molesting actual children.[54]

The Congressional Record establishes this intrinsic connection between the use of child pornography and pedophilic acts.[55] "In a study of convicted child molesters, 77 percent of those who molested boys and 87 percent of those

42. *Id.*
43. *Id.* at 11.
44. *Id.* at 17.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Mansfield, *supra* note 18, at 22 (quoting Child Pornography Prevention Act of 1995, Part IV "Discussion," § B, 13).
51. *Id.*
52. *Id.* at 23 (quoting Child Pornography Prevention Act of 1995, Part IV "Discussion," § B, 16).
53. *Id.* (quoting Child Pornography Prevention Act of 1995, Part IV "Discussion," § B, 16).
54. *2002 Hearing*, *supra* note 1, at 17 (statement of Ernest E. Allen, President and CEO of the Nat'l Center for Missing and Exploited Children).
55. *Id.* at 2 (statement of Hon. Lamar Smith, Chairman, Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary).

who molested girls admitted to their habitual use of pornography."[56] The U.S. Postal Inspection Service studies indicated that nearly 40% of all child pornographers investigated have been determined to be child molesters as well.[57] Thus, it is not surprising that evidence supports the conclusion that "acts of child molestation would diminish considerably in the absence of child pornography, including digital or virtual images."[58]

Although courts seem oddly preoccupied with an infringement on legitimate educational and artistic uses of child pornography in films such as Romeo and Juliet,[59] Traffic,[60] and American Beauty;[61] child pornography experts and prosecutors focus almost entirely on the "graphic sexual victimization of [real or virtual] children which is captured on film or on video or on the Internet or is used as an integral part of the victimization of [real] children by pedophiles and predators."[62]

B. Drawing Parallels: Government Regulation of Public Information

The government's potential for infringing upon our constitutional rights is ever-present and must be recognized.[63] In addition to blatant censorship, the government uses indirect tools to control public information.[64] Indirect tools fall into three categories: (1) propaganda such as over-characterizing a particular group as dangerous or deviant; (2) accusing individuals who oppose the particular legislation or interest of lacking patriotism; and (3) public stigmatization of people with certain beliefs or who belong to particular groups.[65] In navigating the politically sensitive arena of censorship and pornography, it is important to give voice to these concerns and the justifiable fear of government manipulation when decidedly limiting access to pornographic material.

This Note acknowledges the legitimate concerns echoed by anti-censorship and pro-pornography activists but advocates for the equally legitimate interests in government and society in protecting children from sexual exploitation.

Throughout the relatively short-lived history of child-pornography regulation, the United States (and the world at large) has witnessed astonishing

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56. *Id.*

57. *Id.* at 9 (statement of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, FBI).

58. Mansfield, *supra* note 18, at 23.

59. ROMEO AND JULIET (20th Century Fox 1996).

60. TRAFFIC (USA Films 2000).

61. AMERICAN BEAUTY (Dreamworks 1999).

62. *2002 Hearing*, *supra* note 1, at 24 (statement of Ernest E. Allen, President and CEO of the Nat'l Center for Missing and Exploited Children).

63. Thornburgh v. Abbott, 490 U.S. 401, 420-21 (1989) (Stevens, J., concurring in part, dissenting in part) (warning that restrictions must be scrutinized because of potential abuse, and noting the use of Federal Bureau of Prison's regulations to reject the dissemination of a prisoners' rights magazine article documenting the death of an inmate by neglect).

64. Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451, 461 (2004).

65. *Id.* at 463-64.

changes in the control, punishment, and deterrence of the sexualization of children.[66] The majority of these changes reflect the give and take relationship between our Legislative and Judicial branches of government. Wielding the First Amendment as a weapon, child pornographers seem to have convinced courts that their rights to sexually explicit materials outweigh those of the government in protecting our most vulnerable victims—children.

1. The Role of the Courts in the Development of Child Pornography Legislation

The Supreme Court has been active in the development of a rich discourse with which to analyze, critique, and defend virtual and actual child pornography. The Court has created a unique framework for the treatment of child pornography that began with the Court's exclusion of "obscenity" from free speech protection in *Roth v. United States*,[67] followed by the Court's tripartite "obscenity" test in *Miller v. California*,[68] and solidified by the Court's finding of child pornography as *per se* unconstitutional obscenity in *New York v. Ferber*.[69]

a. Drawing the Line at Obscenity: *Roth v. United States*[70]

Roth v. United States was the first Supreme Court decision to candidly discuss the place of "obscenity" within First Amendment freedom of speech considerations.[71] In *Roth*, the Court reasoned that "[i]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[72] Thus, the Court held that "[o]bscenity is not within the area of constitutionally protected speech . . . ."[73]

Furthermore, the Court argued that "sex and obscenity are not synonymous."[74] That is, "[o]bscene material is material which deals with sex in a manner appealing to prurient interest."[75] Thus, the Court boldly differentiated between sex and obscenity. The proper test for obscenity is whether, to the average person applying contemporary community standards, the dominant theme of the material in question taken as a whole appeals to prurient interest.[76]

Ultimately, the Court made clear that "[f]reedom of expression can be [constitutionally] suppressed if, and to the extent that, it is so closely brigaded

66. *See* ENCYCLOPEDIA OF PORNOGRAPHY, *supra* note 4, at 4 (describing the history of state laws regarding child pornography and the Internet).
67. 354 U.S. 476, 483 (1957).
68. 413 U.S. 15, 25 (1973).
69. 458 U.S. 747, 765 (1982).
70. 354 U.S. 476 (1957).
71. *Id.* at 479-94.
72. *Id.* at 484.
73. *Id.* at 485.
74. *Id.* at 487.
75. *Id.*
76. *Id.* at 489-90.

with illegal action as to be an inseparable part of it."[77] With this murky language, the *Roth* Court drew the line at obscenity, ruling it undeserving of First Amendment protection.[78]

b. Testing Obscenity: *Miller v. California*[79]

The Court in *Miller v. California* recognized the legitimate interest in prohibiting obscene material that presents a significant risk of offending unwilling recipients or innocent juveniles.[80] Motivated by this concern, the *Miller* court embarked on the historical journey to define obscenity.

As a result of its analysis, the *Miller* court concluded that the appropriate test encompassed the following considerations:

> (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as whole, lacks serious literary, artistic, political, or scientific value.[81]

However, the material need not be "*utterly* without redeeming social value . . . ."[82] Thus, material that has *some* social value may still be banned.

In short, the appropriate consideration should be whether the material, "taken as a whole, appeal[s] to the prurient interest in sex, . . . portray[s] sexual conduct in a patently offensive way, and . . . [lacks] serious literary, artistic, political, or scientific value."[83] In this way, the *Miller* court clarified the *Roth* obscenity exception to the First Amendment by creating what is often referred to as "the obscenity test."[84]

c. Obscenity and Child Pornography: *New York v. Ferber*[85]

The Court in *New York v. Ferber* held that child pornography is outside the protection of the First Amendment if it involves a scienter requirement and a visual depiction of sexual conduct by children without serious literary, artistic, political, or scientific value.[86] To be valid under the First Amendment, legislation prohibiting child pornography must: (1) be limited—or subsequently construed to be limited—to visual depictions of sexual conduct by children; and (2) suitably limit and describe the category of forbidden

77. *Id.* at 514 (Douglas, J., Black, J., dissenting).
78. *Id.* at 484.
79. 413 U.S. 15 (1973).
80. *Id.* at 18-19.
81. *Id.* at 24 (citations and quotations omitted).
82. *Id.*
83. *Id.*
84. *See, e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 506 (1984) (referring to the obscenity test of *Miller*).
85. 458 U.S. 747 (1982).
86. *Id*. at 764.

sexual conduct.[87]

Ultimately, the Court stated that before a statute can be invalidated on its face pursuant to an overbreadth challenge, it must involve *substantial* overbreadth carefully tied to the circumstances in which facial invalidation is truly warranted.[88] It must also be employed with hesitation and only as a last resort.[89] Further, a narrow construction of the challenged statutory language should be sought before overbreadth challenges are considered.[90]

The Court reiterated that there is a strong and legitimate interest in "safeguarding the physical and psychological well-being of a minor . . . ."[91] Thus, preventing the sexual exploitation of children constitutes an important government interest.[92] Greater leeway is afforded in the regulation of pornographic depictions of children because of legislative judgment finding that children's treatment as subjects of pornographic materials is harmful to their physiological, emotional and mental health.[93] Further, the distribution of child pornography is intrinsically related to the sexual abuse of children because it produces a permanent record of the child's harm.[94] The distribution chain for such materials must be terminated to effectively control and diminish the sexual exploitation of children.[95]

Additionally, the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."[96] In other words, reducing the demand for child pornography should effectively reduce the supply, thereby minimizing the existence of child pornography in general. Additionally, the Court noted that the economic motivation behind advertising and selling pornography makes it integral to the production of such materials.[97]

Further, the Court held that the *Miller* obscenity test is inappropriate in addressing the child pornography problem.[98] The Court decreed that there should be no requirement that the work appeal to the prurient interest of the average person, that the depiction be patently offensive, and that it should matter whether the work has artistic, literary, political, scientific, or social value.[99] In sum, the Court found that even if the *Miller* obscenity test is not met, child pornography is still not worthy of First Amendment protection because of its capacity to be very damaging to children.[100]

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87. *Id.* at 764-65.
88. *Id.* at 769.
89. *Id.*
90. *Id.*
91. *Id.* at 756-57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).
92. *Id.* at 757.
93. *Id.* at 758.
94. *Id.* at 759.
95. *Id.*
96. *Id.* at 760.
97. *Id.* at 761.
98. *Id.*
99. *Id.*
100. *Id.*

Finally, the Court considered the fact that child pornography will rarely be an important or necessary part of a literary or educational performance.[101] Even if child pornography is necessary for literary or artistic value, the Court suggests that the use of a young-looking adult can be employed instead of a child.[102] Ultimately, the Court recognized and classified child pornography as a category of material that falls entirely outside of the First Amendment's protection, predominantly because it bears so heavily on the welfare of children.[103]

2. The Role of the Legislature in the Development of Child Pornography Legislation

The legislature has been very active in addressing the child pornography crisis. Seeking to control the avalanche of Internet pornography, Congress passed numerous pieces of legislation criminalizing the dissemination of obscene or indecent material to children over computer networks, criminalizing the sale of such materials to minors, requiring the reporting of such materials to authorities, prohibiting the unsupervised Internet use of federal prisoners, and regulating access to such pornography at libraries and schools.[104] As Part III of this Note details, most, if not all of these laws were challenged and often blocked from enforcement by the courts under the auspices of the *elusive* First Amendment.[105]

III. ANALYSIS: THE HYPOCRISY OF VIRTUAL PORNOGRAPHY

Obscenity and child pornography are not entitled to protection under the First Amendment and thus may be prohibited.[106] "The government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers."[107] This interest extends to "stamping out the vice of child pornography at all levels in the distribution chain."[108] Thus, the government "has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective."[109]

Congress has feverishly attempted to prevent the creation, dissemination and ownership of child pornography by creating legislation tailored to address

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101. *Id.* at 762.
102. *Id.* at 763.
103. *Id.* at 764.
104. *See generally* ENCYCLOPEDIA OF PORNOGRAPHY, *supra* note 4, at 2 (listing various pieces of legislation passed).
105. *See generally id.* (noting that federal courts tended to treat laws controlling Internet pornography as censorship).
106. *See* Roth v. United States, 354 U.S. 467, 481 (1957) (discussing no-protected obscenity); *see also* Miller v. California, 413 U.S. 15, 21 (1973) (discussing non-protected obscenity); *see also Ferber*, 458 U.S. 747 (discussing non-protected child pornography).
107. Child Obscenity and Pornography Prevention Act, H.R. 1161, 108th Cong. § 2 (1)–(2) (2003).
108. *Id.* § 2(2).
109. *Id.* § 2(3).

the loophole created by technological advances in digital imaging—namely, the existence of virtual child pornography.

A. A Congressional Response: The Child Pornography Prevention Act of 1996

The CPPA criminalized any visual depiction that *appears to be* child pornography, including virtual pornography.[110] The CPPA defined sexually explicit conduct as "actual or simulated" sexual abuse or lascivious exhibition of the genitals or pubic area of any person.[111]

Further, the CCPA noted that the visual depiction is prohibited if it "is or appears to be" of a minor engaging in sexually explicit conduct.[112] The Act additionally prohibited the advertisement, promotion, or distribution of such visual depiction in such a manner that it "conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct . . . ."[113]

The Act further provided an affirmative defense that allows a defendant to avoid conviction for non-possession offenses by demonstrating that the pornography was produced using only adults and was not distributed in a manner that gave the impression that real children were depicted.[114] This comprehensive Act promised to protect the rights of individuals on both sides of the child pornography spectrum.

B. A Judicial Response: Ashcroft v. Free Speech Coalition

In 2002, the Supreme Court in *Ashcroft v. Free Speech Coalition* invalidated the CPPA, holding that the Act cannot be read to prohibit obscenity, and that speech prohibited by the ban on virtual pornography is distinguishable from child pornography.[115] More specifically, the Court held that the CPPA abridges the pornographers' freedom to engage in a substantial amount of lawful speech, and thus is unconstitutionally overbroad under the First Amendment.[116]

First, the Court noted that the Act cannot be sustained under obscenity law principles because under a strict textual interpretation, it expressly reaches beyond obscene materials by prohibiting even psychology manuals, movies depicting the horrors of sexual abuse, and even mainstream films such as *Traffic*[117] and *American Beauty*.[118]

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110. *See generally* ENCYCLOPEDIA OF PORNOGRAPHY, *supra* note 4 at 2 (explaining that the CPPA was passed to close existing loopholes and address technological issues such as e-mail and virtual depictions of child pornography).

111. The Child Pornography Prevention Act, 18 U.S.C. § 2256 (2000), *amended by* 18 U.S.C. § 2252A (2003).

112. *Id.*

113. *Id.*

114. *Id.* §§ 2252A(c), 2256(8)(b).

115. Ashcroft v. Free Speech Coal., 535 U.S. 234, 256 (2002).

116. *Id.*

117. *Id.* at 247-48.

118. *Id.*

Next, the Court found that the mere fact that virtual child pornography is akin to real child pornography is insufficient.[119] The Court explained that it is only because real children are harmed in the production of real child pornography and the continuous distribution of such material re-victimizes the child interminably that the Court in *Ferber* excluded child pornography from First Amendment protection.[120] However, because the CPPA seeks to protect speech that does not involve real children, no such harm is implicated.[121]

Similarly, the Court dismissed the idea that the CPPA is narrowly tailored to further a compelling government interest.[122] The Court reasoned that although child pornography is used to seduce real children into becoming victims, many innocent items such as candy and cartoons are also used for the same purpose.[123] Of course, unlike child pornography, candy and cartoons serve innocent purposes in addition to being used as tools for child molestation.

The fact that child pornography "whets the appetite" of pedophiles is also dismissed because the government may not target speech simply because it encourages unlawful conduct.[124] In other words, the Court argued that virtual child pornography actually discourages the production of real child pornography by providing a risk-free alternative to child exploitation.

Also, the Court dismissed the government's assertion that the ban is necessary to secure prosecutions of real child pornographers since the defendants would be able to argue that they used virtual children rather than real children.[125] This would place the burden of proving beyond a reasonable doubt that a real child was used on the Government.[126] The Court rejected this because protected speech may not be banned "as a means to ban unprotected speech."[127]

Additionally, the Court invalidated the Act's prohibition on pandering because it allowed for the punishment of a person who possesses mislabeled or erroneously marketed pornography.[128] Thus, the Court found this prohibition to be overbroad.

Finally, the Court declared that the affirmative defense contained in the CPPA was not sufficient to pass constitutional muster because when the defendant is not the producer of the work, "he may have no way of establishing the identity, or even the existence, of the actors."[129]

In his concurrence, Justice Thomas noted that "the Government points to

119. *See id.* at 236 ("In contrast to . . . speech that is itself the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production.").
120. *Id.*
121. *Id.*
122. *Id.* at 251-53.
123. *Id.* at 251.
124. *Id.* at 253.
125. *Id.* at 254-55.
126. *Id.*
127. *Id.* at 255.
128. *Id.* at 256-57.
129. *Id.* at 255-56.

no case in which a defendant was acquitted based on a computer-generated images defense."[130] Nevertheless, Congress is not prohibited from enacting preventative legislation.[131] Additionally, Congress has put forth sufficient evidence to legitimize their concern that while such a defense may not have yet been successful, the feasibility of such defense significantly deters prosecutors from litigating unidentified child cases.[132] In fact, the record stipulates that the day after the Court's decision in *Ashcroft*, a federal prosecutor dismissed a pornography possession case because he knew he would be unable to identify the children depicted as "real" individuals.[133]

Justice Thomas made clear in his concurrence, however, that if technology evolves to the point were the government is unable to effectively prosecute real child pornography, they should be able to draft narrow language addressing the problem.[134] Additionally, he noted that a more complete affirmative defense may help more narrowly tailor the statute to the underlying interest of bringing an end to child sexual abuse.[135]

Justice O'Connor also wrote separately, concurring in striking down the prohibition on pornography that "appears" to involve minors but instead involves youthful looking adults; but dissenting in the decision to strike down the prohibition against computer-generated minors.[136] This instruction would read "appears to be" as "virtually indistinguishable from . . . ."[137] Thus, the Act would be read solely to bar images that are "virtually indistinguishable" from actual children.[138] This narrowly tailored construction remedies the vagueness and overbreadth issues thereby greatly limiting any risk of discriminatory enforcement.[139] Justice O'Connor dismissed the argument that this new interpretation will be too subjective by declaring that the argument "exaggerated" reality and by stating that "the Court has never required 'mathematical certainty' or 'meticulous specificity' from the language of a statute."[140]

Chief Justice Rehnquist and Justice Scalia dissented, arguing that the statute should have been upheld in its entirety provided that a limiting construction was imposed.[141] They argued that the Court should have adhered to the principle that it should "not strike down a statute on First Amendment grounds 'when a limiting construction has been or could be placed on the

130. *Id.* at 259 (Thomas, J., concurring).

131. Mansfield, *supra* note 18, at 2 (citing *Ashcroft*, 535 U.S. at 264 (O'Connor, J., concurring in part and dissenting in part)).

132. *2002 Hearing*, *supra* note 1, at 17 (statement of Ernest E. Allen, President and CEO of the Nat'l Center for Missing and Exploited Children).

133. *Id.* at 22 (statement of William C. Walsh, Lieutenant of Police, Youth and Family Support Div., Dallas Police Dep't).

134. *Ashcroft*, 535 U.S. at 259 (Thomas, J., concurring).

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

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

137. *Id.* at 264 (O'Connor, J., concurring in part and dissenting in part).

138. *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part).

139. *Id.* at 264-65 (O'Connor, J., concurring in part and dissenting in part).

140. *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part).

141. *Id.* at 267-68 (Rehnquist, C.J., dissenting).

challenged statute.'"[142] In doing so, the Justices argued that the very graphic definition of "sexually explicit conduct" provided by the CPPA does not include youthful looking adult actors simply because of the "simulated" intercourse language.[143] Instead, the Justices argued that this language should be interpreted to reach only the "hard core of child pornography" that was already excluded from First Amendment protections in *Ferber*.[144]

In other words, the CPPA bans "visual depictions of youthful looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity . . . fall outside the purview of the statute."[145] This "hard core" pornography interpretation would still allow protection to visual depictions utilized for artistic, political, and other reasons such as the movies Traffic,[146] American Beauty,[147] and the Shakespearean tragedy of Romeo and Juliet.[148] Similarly, construing the provision on pandering to apply only to the actual panderer erases any remaining constitutional qualms.[149]

C. Rebuttal: Protecting Children Through the PROTECT Act

In response to the *Ashcroft* decision, Congress drafted the Child Obscenity and Pornography Prevention Act of 2003 ("COPPA").[150] Although COPPA was not adopted into law, the relevant portions of the bill were incorporated into the PROTECT Act.[151] Subsequently, the PROTECT Act amends the CCPA in several crucial ways.

First, "sexually explicit conduct" is defined as "actual or simulated" sexual abuse or lascivious exhibition of the genitals or pubic area of any person.[152] Second, "child pornography" is defined as:

> any visual depiction including computer-generated images or pictures whether produced electronically, mechanically, or by other means where:
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to

142. *Id.* at 268 (Rehnquist, C.J., dissenting) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).
143. *Id.* at 268-69 (Rehnquist, C.J., dissenting).
144. *Id.* at 269 (Rehnquist, C.J., dissenting).
145. *Id.*
146. *Id.* at 268 (Rehnquist, C.J., dissenting).
147. *Id*
148. *Id.* at 270 (Rehnquist, C.J., dissenting).
149. *Id.* at 272 (Rehnquist, C.J., dissenting); *see also* United States v. Williams, 444 F.3d 1286, 1300 (11th Cir. 2006) (holding pandering provision unconstitutional).
150. Child Obscenity and Pornography Prevention Act, H.R. 1161, 108th Cong. (2003).
151. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, 18 U.S.C. § 2256(2) (2003).
152. *Id.*

> appear that an identifiable minor is engaging in sexually explicit conduct.[153]

Third, an "identifiable minor" is defined as a person who was a minor at the time the visual depiction was created or modified, or whose image as a minor was used in the visual depiction and who is recognizable as an actual person.[154] However, no proof of the actual identity of the identifiable minor is required.[155] Fourth, the term "indistinguishable" means "virtually indistinguishable, in that the depiction is such that an ordinary person viewing [it] would conclude that the depiction is of an actual minor engaging in sexually explicit conduct."[156]

The Act also contained a new provision on pandering prohibiting anyone from knowingly promoting, distributing or soliciting by any means any material in a manner that reflects the belief, or is intended to cause another to believe, that the material contains an actual minor or an obscene visual depiction of a minor engaging in sexually explicit conduct.[157]

Furthermore, the Act delineates liability by incorporating the *Miller* obscenity test.[158] Namely, a person is liable under the PROTECT Act if he or she (1) knowingly (2) produces, distributes or receives (3) a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that (4)(a) depicts a minor engaging in sexually explicit conduct and is obscene *or* (4)(b) depicts an image that is or appears to be of a minor engaging in graphic sexual conduct and lacks serious literary, artistic, political, or scientific value.[159]

However, the Act creates an affirmative defense when the alleged child pornography was produced using an actual person that was an adult at the time of production or if no actual minors were used.[160] However, this affirmative defense is invalid if the depiction was virtually indistinguishable so that an ordinary person might conclude that the depiction is of an actual minor.[161]

In clearer terms, the PROTECT Act prohibits the production, possession, and pandering of computer-generated child pornography, and prohibits obscene (as defined by *Miller*) drawings, sculptures, pictures, and other depictions by displaying minors engaged in any sex acts.[162]

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153. *Id.* § 2256(8).
154. *Id.* § 2256(9).
155. *Id.* § 2256(9)(B).
156. *Id.* § 2256(11).
157. *Id.* § 2252A(a)(3)(B). While the Act itself has not been successfully challenged by any courts, the pandering provision as it pertains to people's rights to speech that advertises, promotes or solicits the protected material has recently been declared unconstitutional by the Eleventh Circuit. *See generally* United States v. Williams, 444 F.3d 1288, 1305 (11th Cir. 2006) (stating that the pandering provision merely requires talk to prove liability).
158. *See* discussion *supra* Part II.B.1.b.
159. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, 18 U.S.C. § 1466A(a).
160. *Id.* § 2252A(c).
161. *Id.* § 2252A(c).
162. *Id.* §§ 2252A(a)(3)(B), 1466A(a).

D. Implementing the PROTECT Act: Record-Keeping Requirements

Pursuant to the PROTECT Act, the U.S. Department of Justice enacted implementing regulations ("Regulations") creating record-keeping requirements for producers of sexually explicit materials.[163] These Regulations are intended to facilitate the enforcement of the PROTECT Act and consequently the monitoring of the pornography industry by requiring the producers of sexually explicit materials to ascertain the age of their "actors."[164]

The record-keeping requirements differentiate between a "primary producer" and a "secondary producer."[165] A primary producer is "any person who actually films, videotapes, photographs, or creates a digitally- or computer-manipulated image . . . of an actual human being engaged in actual sexually explicit conduct."[166]

In contrast, a secondary producer is described in more detail as being someone who:

> produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, digitally- or computer-manipulated image . . . intended for commercial distribution that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct, or who inserts on a computer site or service a digital image of, or otherwise manages the sexually explicit content of a computer site or service that contains a visual depiction of an actual human being engaged in actual sexually explicit conduct . . . .[167]

Thus virtually anyone who touched sexually explicit materials in any way could arguably qualify as a secondary producer.[168]

Nevertheless, the Regulations specifically exclude from the definition of "producer" any person whose role is limited to: (1) photo or film processing; (2) mere distribution of materials; (3) any activity outside of the stated definition of "producer" that does not involve hiring, managing or arranging for the participation of depicted performers; or (4) providers of web-hosting or electronic communication services who cannot reasonably manage the sexually explicit content of the site.[169] This exception is narrowly carved so as to exclude only those who lack the requisite management responsibility and those who work with mediums that prevent them from possibly managing the sexually explicit content.[170]

Primary producers of sexually explicit materials that depict an actual

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163. Child Protection Restoration and Penalties Enhancement Act of 1990 and PROTECT Act; Record Keeping and Record Inspection Provisions, 28 C.F.R. § 75.2 (2005).

164. Sundance Assocs., Inc. v. Reno, 139 F.3d 804, 805 (10th Cir. 1998).

165. 28 C.F.R. § 75.1(c) (2007).

166. *Id.* § 75.1(c)(1).

167. *Id.* § 75.1(c)(2).

168. *See id.* (defining "secondary producer" broadly).

169. *Id.* § 75.1(c)(4)(i)-(iv).

170. *See id.* (confining the exceptions to the definition of "producer" to those without managerial control).

human being are required to maintain identification records of those depicted within a specified indexing system.[171] The records must include: (1) the legal name and date of birth of each performer along with a photocopy of the picture identification document utilized; (2) a copy of the sexually explicit material and its place of publication, i.e., URL; and (3) any other name ever used by the performer.[172] These records must be organized alphabetically or numerically and must be cross-referenced to each alias used by the performer as well as to each depiction's publication locale.[173]

Unlike primary producers, secondary producers are only required to maintain copies of the primary producer's identification records.[174] However, secondary producers must also record the name and address of the primary producer from whom they received the identification records.[175]

Federal inspectors may request these records from producers at any time.[176] Nevertheless, these regulations have not yet been tested in a court of law.[177] This forces us to question the true motivation behind these Regulations and the vigorousness with which they are being enforced. Are they just for show?

Consequently, it is not surprising that on December 28, 2005, the Honorable Judge Walker D. Miller of the U.S. District Court for the District of Colorado granted the Free Speech Coalition's request for a preliminary injunction preventing the Department of Justice from implementing the Regulations until they can be fully challenged in court.[178] Judge Miller reasoned that the Regulations were likely to be found overbroad in court so far as they apply to secondary producers.[179]

Because this case is still being decided in court, uncertainty exists as to the validity and effectiveness of these Regulations. This represents yet another instance where courts step in to halt progressive anti-child pornography legislation in the name of the First Amendment.

IV. RECOMMENDATION: FIRM STEPS IN THE RIGHT DIRECTION

After journeying through the historical struggle to categorize, control and deter the sexualization of children via pornography; exploring the impact of technological advances in the field of digital imaging; noting the significant danger that child pornography poses to real children; and detailing the notable obstacles created in prosecuting child pornography—several recommendations to improve the *protection* offered by the PROTECT Act emerge.

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171. *Id.* § 75.2(a).
172. *Id.* § 75.2(a)(1)-(2).
173. *Id.* §§ 75.2(a)(3), (d).
174. *Id.* § 75.2(b).
175. *Id.*
176. *Id.* § 75.5(a)-(b).
177. *Child Protection and Obscenity Enforcement Act*, WIKIPEDIA: THE FREE ENCYCLOPEDIA (Jan.30, 2008), http://en.wikipedia.org/wiki/Child_Protection_and_Obscenity_Enforcement_Act.
178. Free Speech Coal. v. Gonzales, 406 F. Supp. 2d 1196, 1212-13 (D. Colo. 2005).
179. *Id.* at 1204.

First, it is important to utilize technological advances for "good" thus allowing law enforcement agents to "catch up" to tech-savvy child pornographers. Second, it is crucial that law enforcement agents cut out the "middle persons" within the child pornography industry to apprehend and prevent the continued dissemination of child pornography by offering financial incentives to Internet services and other distribution forums. Third, providing stiffer penalties and differentiating between penalties given to virtual as opposed to real child pornographers might help pornographers choose the lesser of two evils. Fourth, moving towards child-centered legislation that unabashedly elects the protection of children over possible free speech impediments to pornographers will send an unequivocal message of zero tolerance to child pornographers. Finally, a more First Amendment friendly balance can be struck by limiting the construction of child pornography laws so as to focus on indistinguishableness rather than on obscenity, especially if such a construction allows for a legitimate use exception.

This way, courts can allow the PROTECT Act to do what it is designed to do—*protect* children's right to live in a world that does not encourage, promote or facilitate their sexual exploitation.

A. The Use of Technological Advances for Crime Detection and Prevention

Technological advances have been used to favor the prosecution of child pornographers.[180] Two main areas have been utilized by government agencies: (1) the creation of search agents with the capacity to operate on large information databases; and (2) the development of intelligent software agents with the ability to collect data from the Internet and other sources and recognize faces, files, text, and data.[181]

Between these two categories lies a very recent technological development that facilitates the prosecution of child pornographers by linking digital images to the camera with which they were taken.[182] This would allow for solid proof that a particular producer is responsible for a particular act of child pornography. It would also tend to suggest that an actual child was utilized in the alleged depiction of child pornography.

Another example of good technology use is the application of identical aging technology by the National Center for Missing and Exploited Children in aging photographs of long-missing children and performing facial reconstructions from morgue photos and skeletal remains.[183] This is particularly useful in convicting pedophiles and child pornographers who

180. ANSER ANALYTICAL SERVS., INC., TECHNOLOGIES FOR IDENTIFYING MISSING CHILDREN, FINAL REPORT 5 (2001).

181. *Id.*

182. *An End to Child Pornography: New Technology Can Link Digital Images to the Camera with Which They Were Taken*, MED. NEWS TODAY, Apr. 20, 2006, http://medicalnewstoday.com/printerfriendlynews.php?newsid=41859.

183. *2002 Hearing*, *supra* note 1, at 40 (statement of Ernest E. Allen, President and CEO of the Nat'l Center for Missing and Exploited Children).

discard the children they sexually exploit.

B. The Importance of Financial Incentives to "Middle" Persons

Another possible approach is to focus "the legal response on introducing a stabilizing institutional response at the point of destabilization, rather than at the point of production or reception of the information."[184] In other words, this approach focuses on criminalizing the exchange of child pornography instead of its production or possession. The most effective way to do this is to create financial incentives for Internet service providers to create and apply filtering mechanisms to prevent the dissemination of child pornography.[185] Thus, there would be some shift in focus towards intercepting the continued proliferation of child pornography.

C. Tough Love: Stiffer Penalties for Offenders

"[S]tiffer penalties for actual child pornographers and sexual abusers would prevent . . . abuse . . . ."[186] Differentiating between the penalties given because of virtual, as opposed to actual, child pornography would likely deter both crimes, while slightly encouraging profit-driven criminals to engage in the lesser of two evils.

D. The Validity of Child-Centered Legislation

The world-wide focus on child-pornography prevention is not only necessary, but is also essential to protecting the welfare of children and society as a whole. Pornography is dangerous and should be treated as such.

> The damage that pornography can do—to minds or cultures—is not by any means negligible. Especially in our modern age of passive entertainment, saturated as we are by an unending storm of noises and images and barren prattle, portrayals of violence or of sexual degradation possess a remarkable power to permeate, shape, and deprave the imagination; and the imagination is, after all, the wellspring of desire, of personality, of character.[187]

Other countries have taken this broad approach to eliminating the connection between children and explicit sexual acts. For example, under the Protection of Children Act of 1978, as amended by the Criminal Justice and Public Order Act of 1994, the United Kingdom prohibits the possession or

184. Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1246 (2000).

185. Jeffrey Rosen, *Pornography and the Internet: The End of Obscenity*, 6 THE NEW ATLANTIS: A J. OF TECH. & SOC'Y 75, 82 (2004).

186. Dannielle Cisneros, *"Virtual Child" Pornography on the Internet: A "Virtual" Victim?*, 2002 DUKE L. & TECH. REV. 19 (2002), http://www.law.duke.edu/journals/dltr/articles/2002dltr0019.html.

187. David B. Hart, *The Pornography Culture*, 6 THE NEW ATLANTIS: A J. OF TECH. & SOC'Y 82, 84 (2004).

production of child "pseudophotographs."[188] A "pseudophotograph" is defined as an image that appears to be that of a child regardless of its digital production.[189]

Likewise, the United States should follow suit by establishing this bright line rule that prohibits all sexualized images of children. The language of the PROTECT Act resembles but falls short of this type of blanket prohibition.

E. A Limiting Construction Allowing the PROTECT Act to Protect

As pointed out by the dissent in *Ashcroft*, First Amendment enthusiasts need not openly disregard Congress' legitimate legislative acts in order to protect the constitutional rights of child pornographers.[190] This is particularly true when Congress enacts legislation pursuant to a valid grant of authority that is backed by an overflowing abundance of findings that document the dangers posed by virtual child pornography to real children as a whole.[191]

The CPPA—and consequently its successor, the PROTECT Act—contain language aiming to minimize First Amendment infringement by focusing exclusively on depictions of real or virtually indistinguishable children engaged in hard core sexually explicit acts.[192] Nevertheless, the primary concerns of First Amendment aficionados is the way these Acts infringe on the rights of young-looking adults to engage in pornography, and the right of Hollywood producers to create artistic depictions of child sexuality and/or abuse.[193]

To handle this obstacle, the *Ashcroft* dissent argues that a limiting construction should be employed that respects the rights of Hollywood producers and young-looking adults.[194] The construction would create an exception for legitimate artistic depictions.[195] Such a construction has already been provided by the PROTECT Act by its adoption of the *Miller* obscenity test in contravention of the *Ferber* Court's holding that all child pornography is on its face unconstitutional obscenity.[196]

Nevertheless, the PROTECT Act should not specifically include the *Miller* obscenity test[197] after the *Ferber* Court's categorical rejection of all child pornography as unprotected obscenity under the First Amendment.[198]

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188. Farid, *supra* note 30, at 165 n.1.
189. *Id.*
190. Ashcroft v. Free Speech Coal., 535 U.S. 234, 267-73 (2002) (Rehnquist, C.J., dissenting).
191. *Id.*
192. *Id.* at 269 (Rehnquist, C.J., dissenting).
193. *Id.* at 269-71 (Rehnquist, C.J., dissenting).
194. *Id.* at 267-73 (Rehnquist, C.J., dissenting).
195. *Id.*
196. Prosecutorial Remedies and Tools to End the Exploitation of Children Act, 18 U.S.C. §§ 1466A, 2252A-2252B (2003); *see generally* Miller v. California, 413 U.S. 15 (1972) (establishing a multi-step test for child pornography); New York v. Ferber, 458 U.S. 747 (1982) (altering the *Miller* test by holding that child pornography is *per se* unprotected speech).
197. *See* Prosecutorial Remedies and Tools to End the Exploitation of Children Act § 2252B(d) (specifically including the obscenity test developed in *Miller*).
198. *Ferber*, 458 U.S. at 764.

Requiring the detailed *Miller* obscenity test ignores the countless official testimonials proving a disconnect between the concerns of legal enforcement agents and child activist and the concerns of the courts: namely, that while courts focus on Hollywood productions, child activists and prosecutors focus on hard core depictions, which simply should *never* be utilized.[199]

Rather than requiring a showing of "obscenity," courts should simply construe the PROTECT Act to provide a "legitimate purpose" exception that allows for artistic depictions. This should allow for the production of movies such as American Beauty, while preventing the manipulation of this "artist exception" to allow depictions of children that Congress seeks to prevent.

The concerns over the rights of young looking adults have been quieted. The defendant may avail him/herself of an affirmative defense under the PROTECT Act if the alleged child pornography: (1) was produced using an actual person who was an adult at the time of production;[200] or "(2) was not produced using any actual children"[201] unless the "visual depiction has been created, adapted or modified to appear that an identifiable [or real] minor is engaging in sexually explicit conduct . . . ."[202] Under this analysis, a child pornographer who utilized young looking adults would be able to assert the abovementioned affirmative defense.

Nevertheless, the PROTECT Act should not allow this affirmative defense to extend to young looking adults *when the image is virtually indistinguishable from that of a real child*. When a child pornographer goes to great lengths to create a depiction that is virtually indistinguishable from that of a real child engaging in sexually explicit activity, the pornographer is intentionally circumventing the spirit of the PROTECT Act and profiting off the sexual victimization of children.

The use of a young-looking adult does nothing to mitigate the possible harm suffered by real children at the hands of pedophilic child pornography consumers who have whet their appetites for children by viewing young-looking adults engaging in sexual activity. To these individuals, the image is not only virtually indistinguishable, but it also has a virtually indistinguishable impact on their sexual appetite for children.

In this way, courts can shift the analytical focus away from the antiquated and inefficient obscenity test, which grows increasingly difficult to apply with the advent of image-manipulation technologies. And towards the *indistinguishability* of the image while still carving out a legitimate purpose exception that protects "innocent" depictions in accordance with the First Amendment.

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199. *2002 Hearing*, *supra* note 1, at 13 (statement of Ernest E. Allen, President and CEO of the Nat'l Center for Missing and Exploited Children).

200. Prosecutorial Remedies and Tools to End the Exploitation of Children Act § 2252A(c)(1)(A), (B).

201. *Id.* § 2252A(c)(2).

202. *Id.* §§ 2256(8)(C), 2252A(c).

V. CONCLUSION

The Courts must afford Congress the discretion and deference it is entitled to in creating legislation to help end the sexual abuse of children by giving them wide latitude to regulate the "criminal tools" used by pedophiles and pornographers to abuse the most vulnerable members of our society—children.

In a time where technological advancement races at light speed in the hands of protectors and abusers alike, courts must modernize their legal analysis and take into account the new and devious ways in which child abusers are wielding technology to satisfy their obscene desires. Most importantly, the courts must respect, encourage and uphold child-centered legislation that balances against the First Amendment rights of pornographers rather than allowing free speech to trump the compelling state interest of child safety and efficient law enforcement.

Ultimately, courts, congress, and citizens alike must realize that "no man is an island,"[203] and the part must sacrifice for the better good of the whole so long as there is evidence that this sacrifice will not be in vain.

203. John Donne, *Meditation XVII*, *in* DEVOTIONS UPON EMERGENT OCCASIONS (1624).