Virtual Child Pornography, Pandering, and the First Amendment: How Developments in Technology and Shifting First Amendment Jurisprudence Have Affected the Criminalization of Child Pornography

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Introduction

Though the depiction of minors engaged in obscene or sexual acts has been heavily criminalized,[1] modern technology and the Internet have allowed for the creation of *virtual* child pornography—sexually explicit images that appear to depict minors but are produced without the involvement of any real children. Though children are not directly harmed by the production of this type of material, Congress has found that virtual child pornography perpetuates a market for pornography involving actual children and thereby causes what I refer to as a substantial *indirect* harm to society.[2] Prosecution for possession and distribution of *actual* child pornographic material has also proven exceedingly difficult due to *virtual* child pornography, and the Court has struggled to devise a consistent scheme that can effectively stop the dissemination of this disturbing virtual material without overly infringing upon protected speech.[3]

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1. 18 U.S.C. § 2252 (2008).

2. *See infra* notes 19, 24, 31, 34, 71.

3. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002). *See also* United States v. Williams, 128 S. Ct. 1830 (2008).

In 2008 the United States Supreme Court decided *United States v. Williams,*[4] a landmark child pornography case, in which the Court held that offers to provide or requests to obtain child pornography were categorically excluded from First Amendment protection.[5] The Court strove to thwart challenges to current anti-child pornography statutes—as these statutes were considered overbroad and therefore vulnerable—by making more expansive definitions of child pornography.[6] The Court accomplished this by shifting the focus away from proscribing the illicit material itself and instead criminalizing the expressed intention or belief of the individual distributing those materials.[7] This Note will explore this area of First Amendment jurisprudence and argue that the confusion over the constitutionality of *virtual* child pornography persists. *Williams* did not resolve the tension between First Amendment protection and the need to criminalize *virtual* child pornography.

The Note is structured as follows: Part I documents the extent to which easy access to Internet child pornography has fueled a market for such material and enhanced the link between child pornography and the facilitation of other crimes against children, such as molestation. Part II discusses the creation of the child pornography exception to the First Amendment[8] developed in *Miller v. California,*[9] *New York v. Ferber,*[10] and *Osborne v. Ohio.*[11] Despite the fact that the Supreme Court held in *Ferber* that child pornography is not entitled to First Amendment protection, the Court limited its definition of child pornography to *actual* child pornography[12]—pornography that actual children participate in the production of—and left open a loophole for sexually explicit material that appears to depict minors but which is produced by technology without the use of actual children.

Part II argues that the Court in *Ferber* identified both direct and indirect harm to children as being compelling government interests

4. *Williams,* 128 S. Ct. 1830.
5. *Id.*
6. *See Free Speech Coal.*, 535 U.S. 234.
7. *Id.*
8. U.S. CONST. amend. I.
9. Miller v. California, 413 U.S. 15 (1973).
10. New York v. Ferber, 458 U.S. 747 (1982).
11. Osborne v. Ohio, 495 U.S. 103 (1990).
12. *Ferber*, 458 U.S. at 756.

for the criminalization of child pornography,[13] but the Court's failure to criminalize *virtual* child pornography created a market that, due to the current availability of the Internet and digital editing technology, has perpetuated the same perversion and indirect harm to children that the *Ferber* Court strove to subdue.

Part III examines the ongoing conflict between legislators and the courts—both of whom have the same goal: the criminalization of all forms of child pornography. But while legislators enact laws to prohibit the production, distribution and possession of child pornography (with an emphasis on "pandering provisions"[14]), the courts are in turn compelled to overturn such legislation on First Amendment grounds. Part III focuses on an analysis of *Ashcroft v. Free Speech Coalition*,[15] the Supreme Court's response to the Child Pornography Prevention Act of 1996 ("CPPA"),[16] and highlights unaddressed problems inherent in the opinion for fitting *virtual* child pornography into the *Ferber* rubric.

Part IV examines the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act"),[17] the legislative response to the Supreme Court's decision in *Free Speech Coalition*. This Part applies the holding from *Free Speech Coalition* to the PROTECT Act, arguing that if the PROTECT Act were analyzed under the same rubric as that which was used to analyze the CPPA, the PROTECT Act would also be found largely unconstitutional on the grounds that the CPPA was overbroad.[18] In *Williams*, however, the Court, in an attempt to avoid the same constitutional problems, used a different analysis to examine the constitutionality of the PROTECT Act, focusing instead on the intent of the provider of the illicit materials rather than on the content of the material being distributed.[19]

Further, in *Free Speech Coalition* the possibility was left open that technology might evolve to the point where it would become impossible for government to enforce actual child pornography laws

13. *Id.*

14. Pandering is "the act or offense of selling or distributing textual or visual material (such as magazines or videotapes) openly advertised to appeal to the recipient's sexual interest." BLACK'S LAW DICTIONARY 1142 (8th ed. 2004).

15. *Free Speech Coal.*, 535 U.S. 234.

16. 18 U.S.C. § 2256 (2008).

17. 18 U.S.C. § 2252A(a)(3)(B) (2008); *Williams*, 128 S. Ct. at 1836–37.

18. *Free Speech Coal.*, 535 U.S. at 256.

19. *Williams*, 128 S. Ct. 1830.

because the courts would be unable prove whether certain pornographic images were of real children.[20] In this event, the government should not be prevented from enacting appropriately narrow regulations for *virtual* child pornography.[21]

Today, professional-quality digital editing technology *has* developed to a level that paralyzes the government's ability to effectively enforce *actual* child pornography laws. These affordable and widely available photo editing programs provide even the most amateur digital editor with hundreds of easy-to-use design tools to create images thate are virtually indistinguishable from original photographs, films, or videotapes.[22]

The *Williams* decision reflects the Court's effort to address these technological developments. Rather than targeting the nature of the offensive material itself, as past protective measures have done, the PROTECT Act's new approach bans collateral speech that is "intended to cause another to believe" that "purported material is, or contains . . . an obscene visual depiction of a minor engaging in sexually explicit conduct."[23]

Part IV asserts, however, that the PROTECT ACT is arguably just as overbroad as the CPPA, because it criminalizes speech that reflects a defendant's *belief*, or "intention [for] another to believe,"[24] that the material he proffers is of the type that Congress *could* constitutionally prohibit anyone from possessing.

I. The Child Pornography Phenomenon

The proliferation of child pornography in our society is rampant. As Ernie Allen, President of the National Center for Missing & Exploited Children ("NCMEC"),[25] made clear while speaking before

20. *Free Speech Coal.*, 535 U.S. at 259 (Thomas, J., concurring).

21. *Id.*

22. ConsumerSearch.com, Photo-Editing Software: Full Report, http://www.consumersearch.com/photo-editing-software/review (last visited Mar. 21, 2010).

23. 18 U.S.C. § 2252A(a)(3)(B) (2008).

24. *Id.*

25. National Center for Missing & Exploited Children, National Mandate and Mission, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1866 (last visited Mar. 21, 2010) (describing its mission "to help prevent child abduction and sexual exploitation; help find missing children; and assist victims of child abduction and sexual exploitation, their families, and the professionals who serve them"; and noting that the organization was established, under congressional mandate, "in 1984 as a private, nonprofit 501(c)(3) organization to provide services nationwide for

members of the United States Congress in September 2006, "[c]hild pornography has become a global crisis."[26] Data compiled by the NCMEC and other organizations revealed that "19 percent of identified offenders possessed images of children younger than three years old; 39 percent of offenders possessed images of children younger than six years old; and 83 percent of offenders possessed images of children younger than twelve years old."[27] In July 2007, the NCMEC's Cyber Tip Line "received its 500,000th report of suspected child pornography and other child exploitation crimes."[28] Thus, this child pornography phenomenon perpetuates a culture desensitized to pedophilia and is closely related to the rising levels of crimes against children in the United States.

The Chief Operations Officer of the FBI's Crimes Against Children Unit testified before Congress that "there is a clear correlation between sexual abuse of children and the collection of child pornography,"[29] and cited an FBI sting operation that caught ninety-two collectors of child pornography, thirteen of which admitted to having sexually molested a total of forty-eight children.[30] A 2000 study by the Bureau of Prisons revealed that of sixty-two offenders convicted of either child pornography or traveling with the intent to engage in sex with a minor, forty-seven (seventy-six percent) admitted to committing prior unprosecuted sex crimes against children.[31] The FBI Chief Operations Officer testified that images of

families and professionals in the prevention of abducted, endangered, and sexually exploited children").

26. *Deleting Commercial Pornography Sites from the Internet: The U.S. Financial Industry's Efforts to Combat This Problem: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 109th Cong. 29 (2006) [hereinafter *Deleting Commercial Pornography*] (statement of Ernie Allen, President and Chief Executive Officer, National Center for Missing & Exploited Children), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:31467.pdf (last visited Feb 27, 2009).

27. *Id.*

28. The NCMEC CyberTipline is a Congressionally mandated reporting mechanism for cases of child sexual exploitation including child pornography, online enticement of children for sex acts, molestation of children outside the family, sex tourism of children, child victims of prostitution, and unsolicited obscene material sent to a child. Press Release, National Center. for Missing & Exploited Children, National Cyber Tip Line Tops 500,000 Reports (July 10, 2007), *available at* http://www.cybertipline.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2446 (last visited Jan 21, 2009).

29. *Id.*

30. *Id.*

31. *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*

child pornography "whet [child predators'] appetites for real world sexual encounters with children."[32] Though viewing child pornography does not necessarily lead to sex crimes against children, these statistics suggest that the connection between viewing child pornography and committing sexual abuse crimes against children is significant.[33]

Child pornography revenue estimates now surpass $3 billion annually from the Internet alone,[34] and experts warn that the multi-billion-dollar child pornography industry is growing.[35] In a recent case, "investigators identified 70,000 individual customers paying $29.95 per month and using their credit cards to access graphic images of small children being sexually assaulted."[36] The Internet has therefore radically changed how child pornography is reproduced and disseminated. A 1984 study conducted by the Chicago Police Department confirmed that in almost 100 percent of their annual child pornography arrests, detectives found photos, films, and videos of the arrested individual sexually abusing children.[37] Today, however, easy access to child pornography on the Internet has fueled the market for such material and has enhanced the link between child pornography and molestation.[38]

When Ernie Allen returned to testify before Congress in July 2007, he stressed that as technology evolves, so does the creativity of the predator:

Homeland Security of the H. Comm. on the Judiciary, 107th Cong. 6 (2002) (statement of Michael J. Heimbach, unit chief, Crimes Against Children Unit, Federal Bureau of Investigation).

32. *Id.*

33. Stephen T. Fairchild, *Protecting The Least of These: A New Approach to Child Pornography Pander Provisions*, 57 DUKE L.J. 163, 168 (2007).

34. Wade Luders, *Child Pornography Web Sites: Techniques Used to Evade Law Enforcement*, 26 FBI L. ENFORCEMENT BULL. 7, at 17 (2007); Stacia Glenn, *Child Porn Thriving on Web*, SAN BERNADINO COUNTY SUN (Cal.), Nov. 5, 2006 (reporting that "[c]hild pornography is now a multibillion-dollar commercial enterprise").

35. Taryn Brodwater, *Tracking Child Porn*, SPOKESMAN REV. (Spokane, Wash.), Apr. 9, 2007, at A1 (reporting that "[c]omputer-related crimes as a whole are increasing, but those involving child victims are top priority . . . .").

36. *Deleting Commercial Pornography*, *supra* note 26, at 5.

37. *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 60–61 (2002).

38. *Protecting Children on the Internet: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. (2007) (statement of Ernie Allen).

> New innovations such as webcams and social networking sites are increasing the vulnerability of our children when they use the Internet. New technology to access the Internet is used by those who profit from the predominantly online market in child pornography and seek to evade detection by law enforcement.[39]

The use of the Internet to victimize children continues to present increasingly complicated challenges that require constant reassessment of our tools and methods.[40] The Child Exploitation and Obscenity Section determined that "[t]he technological ease, lack of expense, and anonymity in obtaining and distributing child pornography has resulted in an explosion in the availability, accessibility, and volume of child pornography."[41]

Child pornography is causally linked to actual child molestation, and "[researchers] believe that child pornography is central to pedophiliac psychology, social orientation, and behavior .... [T]he pedophile can use the computer to troll for and communicate with potential victims with minimal risk of being identified."[42] In addition to the direct harm to children from child pornography, a child can also be *indirectly* "victimized" as the arousal and fantasy fueled by child pornography can be a prelude to actual sexual activity with children.[43] The proliferation of child pornography is a large scale, international problem.[44] Equally unsettling, is the difficulty the Court has encountered in effectively criminalizing and therefore proscribing the distribution of all forms of child pornography.[45]

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39. *Id.*

40. *Id.*

41. Child Exploitation and Obscenity Section, DOJ, Child Pornography, *available at* http://www.usdoj.gov/criminal/ceos/childporn.html (last visited Mar. 21, 2010). The Child Exploitation and Obscenity Section is a special unit of the U.S. Department of Justice that works with the 93 United States Attorney offices around the country and investigative agencies to vigorously combat this growing problem.

42. DIANE SCHETKY & ARTHUR GREEN, CHILD SEXUAL ABUSE: A HANDBOOK FOR HEALTH CARE AND LEGAL PROFESSIONALS 154 (1988).

43. *See* KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS FOR LAW-ENFORCEMENT OFFICERS INVESTIGATING CASES OF CHILD SEXUAL EXPLOITATION 31 (3d ed. 1992), *available at* http://www.skeptictank.org/nc70.pdf (last visited Mar. 21, 2010).

44. *See supra* Part I.

45. *See infra* Parts II-IV.

II. *New York v. Ferber*: Direct Harm, Indirect Harm, and the Virtual Loophole

Child pornography is a reviled form of speech that falls outside the scope of First Amendment protection and is illegal to produce, distribute, or possess in the United States.[46] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[47] This guarantee of protected expression exists, at least in part, in order to protect one's right to communicate one's conscience freely and to encourage public discourse of all views, even those views which may be considered vile or repugnant at the time of their airing.[48] Although the First Amendment operates by extending immunity from government regulation to certain forms of speech, several categories of speech have been held to be unprotected by the First Amendment.[49] One category of unprotected speech is characterized as "obscene" speech.[50]

In *Miller v. California*,[51] the United States Supreme Court reaffirmed an earlier plurality decision, *Roth v. United States*,[52] and determined that states could permissibly regulate "obscene" expression despite the First Amendment.[53] The *Miller* Court defined the test to be used in determining whether given subject matter was "obscene" by setting forth three criteria: (1) whether a reasonable person, applying current "community standards," would find that the material as a whole work appeals to the "prurient interest,"[54] (2)

46. 18 U.S.C. § 2252A (2008).

47. U.S. CONST. amend. I.

48. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

49. Types of unprotected speech include: incitement of illegal activity (*See* Brandenburg v. Ohio, 395 U.S. 44 (1969)), fighting words (*See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)), incitement of a hostile audience (*See* Feiner v. New York, 340 U.S. 315 (1951)), libel against a group (*See* Beaucharnais v. Illinois, 343 U.S. 250 (1952); Virginia v. Black, 538 U.S. 343 (2003)).

50. *Miller*, 413 U.S. 15.

51. *Id.*

52. *Roth*, 354 U.S. 476, 484 (1957) (holding that the constitutional test for determining what constitutes obscene material unprotected by the First Amendment is whether the material has redeeming social importance) "All ideas having even the slightest redeeming social importance," the Court stated, ". . . have the full protection of [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.*

53. *Miller*, 413 U.S. at 23.

54. "Prurient interest" was defined by the *Roth* Court as "material having a tendency to excite lustful thoughts." *Roth*, 354 U.S. at 487 n.20. In declaring that "prurient

whether the work describes sexual conduct in a patently offensive way; and (3) whether the work lacks serious literary, artistic, political, or scientific value.[55] Thus, under the *Miller* rubric, a depiction of sexual conduct would be protected speech as long as the work could be classified as having literary, artistic, political, or scientific value; a medical textbook focusing on anatomy and depicting sexual intercourse, for instance, would be protected from regulation due to its scientific merit.[56] The Court did not, however, address the question of whether depictions of sexual acts involving minors—even if such depictions had literary, artistic, political, or scientific value—could be prohibited by the government.[57]

In 1982, nine years after the *Miller* decision, the Supreme Court heard the first challenge to a child pornography statute in *New York v. Ferber*.[58] A bookseller, Paul Ferber, was convicted under a New York child pornography law[59] for selling films of young boys engaging in sexual acts to an undercover agent.[60] In *Ferber*, the Court addressed the issue of how to deal with depictions of children in pornographic scenarios that had been left unanswered in *Miller*. The Court held that the production and distribution of child pornography was not protected by the First Amendment guarantee of free speech, stating that the classification of "child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."[61] The Court deferred to the New York state legislature's findings that involvement in child pornography was harmful to a child's health,[62] and cited several studies documenting the harmful effects of sexual exploitation on children later in life and linking children's participation in

interests" were to be determined based on "community standards," as opposed to by a national standard, Justice Brennan's test for determining whether speech was to be constitutionally protected created something of a constitutional paradox whereby the First Amendment was to be applied *differently* in different locales. *Id.* at 489.

55. *Miller*, 413 U.S. at 24.

56. *Id.* at 26.

57. In his dissent in *Miller*, Justice Brennan considered whether state regulation of the distribution to minors of sexually oriented material to minors would be permissible. Neither Brennan nor the majority, however, addressed the implications of material whose content included sexually explicit acts involving minors. *Id.* at 47 (Brennan, J., dissenting).

58. *Ferber*, 458 U.S. 747.

59. N.Y. PENAL LAW § 263.15 (2006).

60. *Ferber*, 458 U.S. at 751–52.

61. *Id.* at 763.

62. *Id.* at 757–58.

pornographic materials to molestation by adults.[63] The Court therefore reasoned in *Ferber* that the government has a compelling interest in preventing children from both the *direct* and *indirect* harm of sexual exploitation and that "the states are entitled to greater leeway in the regulation of pornographic depictions of children."[64]

It is important to note that the Court based its opinion in *Ferber* on the *direct* harm to actual children caused by child-pornography materials and not the broader harm that child pornography causes in society. *Direct* harm, Justice White reasoned, is the injury inflicted on the actual children who are the subjects of pornographic materials.[65] This injury to a child's physical, mental, psychological, and emotional well-being is "brutish and pervasive."[66] This kind of harm, the Court elaborated, includes the additional trauma caused to a child when the pornographic materials are advertised, distributed, and circulated because the materials form a "permanent record of the children's participation, and the harm to the child is exacerbated by their circulation."[67]

Justice White also recognized that "pedophiles use child pornography to seduce other children into sexual activity."[68] Furthermore, White noted that "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."[69] Thus in making these assertions, White appears to acknowledge that the production of child pornography is harmful to the participating children, and the viewing of child pornography can inspire pedophiles to exploit and abuse even more children. Because of this intrinsic relationship between child pornography and the sexual abuse of other children, the advertisement, distribution and circulation of child pornography promote the infliction of harm on additional children. This is why White considered "drying up the market for [child pornographic] material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product" to be a compelling

63. *Id.* at 758 n.9.

64. *Id.* at 756.

65. *Id.* at 756–57.

66. Shepard Liu, *Ashcroft, Virtual Child Pornography and First Amendment Jurisprudence*, 11 UC DAVIS J. JUV. L. & POL'Y 1, 8 (2007).

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

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

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

government interest.[70] Justice White appears to distinguish between two types of harm caused by child pornography: Harm to those children who directly participate in the production of child pornography, which I refer to as *direct* harm, and harm to those children who are later exploited by child pornography, which I refer to as *indirect* harm.

The *Ferber* Court held that a state may regulate the dissemination of child pornography because of the state's interest in closing the distribution network of material that sexually exploits children.[71] This holding is not, however, consistent with Justice White's observation of the *indirect* harms of child pornography.[72] Despite his recognition of the direct and indirect harm child pornography causes, the *Ferber* remedy only focused on curtailing the market for materials that directly harm children, and Justice White's solution stopped short of creating an absolute prohibition on materials that *indirectly* harm children.

The *Ferber* opinion created a viable loophole for pedophiles: virtual depictions of children engaged in pornographic situations nonetheless escaped criminalization if such depictions were "necessary for literary or artistic value."[73] Further, "a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative."[74] White also explained that depictions of sexual conduct "which do not involve live performance or photographic or other visual reproduction of live performances, retain First Amendment protection."[75] Thus, though the Supreme Court closed the front door to the child pornography market in *Ferber* by criminalizing the distribution of pornography depicting actual minors, Justice White nonetheless opened a back door by conceding that *virtual* child pornography was protected under the First Amendment because of the lack of direct harm. Though the Supreme Court later paved the way for the criminalization of the possession of child pornography in *Osborne v. Ohio*,[76] in that case Justice White provided

70. *Id.* at 760.
71. *Id.* at 756, 759.
72. *See id.* at 760.
73. *Id.* at 763.
74. *Id.*
75. *Id.* at 765.
76. *Osborne*, 495 U.S. 103.

no further measures to address this *Ferber* loophole, and the issue of the criminalization of virtual child pornography was left unresolved.[77]

III. The CPPA and *Ashcroft v. Free Speech Coalition*

As a result of the Court's decisions in *Ferber* and *Osborne*, child pornography became a limited, underground phenomenon throughout the 1980s and early 1990s.[78] Improved law enforcement efforts increased the transaction costs to consumers dealing in child pornographic materials, and over the next decade Congress acted to strengthen the prohibition against the dissemination of child pornography by increasing the minimum punishment from two years to five years.[79] Indeed, it appeared to many that the market for child pornography had been paralyzed.[80]

The Internet boom of the mid-1990s, however, presented new challenges to which legislators and law enforcement were unprepared to respond as the number of host computers connected to the Internet grew from 300 in 1981 to 9,400,000 in 1996.[81] Additionally, as discussed above, new technologies emerged that made it possible for child pornographers to produce images that appeared to depict children engaging in sexual acts, but were in fact created by computer without the use of any actual children.[82] Because of the *virtual* loophole left open in *Ferber*, child pornographers could present an

77. In *Osborne*, the Supreme Court upheld a state's ability to convict defendants on the basis of private possession of child pornography. Justice White reasoned that given the importance of a 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." *Id.* at 110. Justice White also recognized that in the eight years since *Ferber*, much of the child pornography market had been driven underground, and as a result, it was now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. *Id.*

78. PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 39–40 (2001).

79. Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, § 704(b), 100 Stat. 1783-75. The minimum sentence for distribution, transportation, sale, intent to sell, or knowing receipt, 18 U.S.C. § 2252(a)(1)–(3) (2000), was later increased to fifteen years for repeat offenders of crimes against children by the PROTECT Act. PROTECT Act of 2003, Pub. L. No. 108-21, § 103(b)(1)(C)(iii), 117 Stat. 650, 653.

80. JENKINS, *supra* note 78, at 40. As a precursor to the technological explosion to come later in the decade, in the early 1990s electronic bulletin boards served to facilitate communications between parties interested in exchanging and distributing child pornography. Thus, though this limited computing technology prohibited the distribution of pornographic material, an electronic distribution network was already thriving. *Id.* at 41–45.

81. Reno v. ACLU, 521 U.S. 844, 850 (1997).

82. S. REP. NO. 104-358, at 7 (1996).

affirmative defense to a charge under the federal statute[83] by establishing that the images of children used in their pornographic materials did not in fact depict actual children.[84] Effective prosecution was therefore unfeasible, as even skilled agents were unable to distinguish between virtual "children" and actual child victims of sexual exploitation.[85]

In reaction to the influx of new technology, Congress passed the CPPA to respond to these emerging technologies.[86] Based on Congressional findings of a compelling state interest in protecting actual children from all child pornography, whether it depicted real or virtual children,[87] the CPPA aimed to reduce the volume of virtual child pornography used by child molesters to "stimulate or whet their own sexual appetites,"[88] to destroy the network of, and market for, child pornography,[89] to protect the privacy of actual children whose innocent images have been altered to create sexually explicit depictions,[90] and to deprive child molesters of criminal means used to facilitate the sexual abuse of children.[91]

The CPPA imposed criminal penalties on any person who knowingly possessed, produced, sold, transported, shipped, received, mailed, or distributed in interstate or foreign commerce any child pornography by any means, including by computer.[92] The CPPA's broad scope defined "child pornography" as including "any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[93] The phrases "appears to be" and "conveys the impression" were added specifically "to close loopholes in our Federal child

83. 18 U.S.C. § 2252A(a)(5)(B) (2000).

84. *Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the S. Comm. on the Judiciary*, 104th Cong. 72 (1996) (statement of Bruce A. Taylor, president and chief counsel, National Law Center for Children and Families) ("Under present law, the Government must prove that every piece of child pornography . . . is of a real minor being sexually exploited.").

85. *Id.*

86. 18 U.S.C. § 2256(8)(B) (2008).

87. S. REP. NO. 104-358, at 2 (1996).

88. *Id.* at 20.

89. *Id.*

90. *Id.* at 16.

91. *Id.* at 2.

92. *Id.* at 4.

93. 18 U.S.C. § 2256(8)(B) (2008).

pornography laws caused by advances in computer technology."[94] The CPPA therefore covered actual child pornography, wholly computer-generated virtual child pornography, as well as morphed child pornography, and child pornography made by using youthful-looking adults. It also covered the production and promotion of such pornographic materials.

Additionally, Congress added statutory language that banned the pandering of such visual depictions by including within the definition of child pornography any visual depictions that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[95] Congress found that the difficulty in prosecution and enforcement of child pornography laws, due to the indistinguishability of actual and virtual child pornography, "could have the effect of increasing the sexually abusive and exploitive use of children to produce child pornography"[96]; the broad scope of the CPPA aimed to eliminate that difficulty. In sum, the CPPA sought to achieve the government's compelling interest in protecting children from indirect and direct harm produced by actual or virtual child pornography, closing the loophole left open in *Ferber*.

Shortly after the passage of the CPPA, however, several federal circuit courts adjudicated cases that challenged the constitutionality of the CPPA, claiming it to be overbroad. Of these, the First Circuit in *United States v. Hilton*,[97] the Fourth Circuit in *United States v. Mento*,[98] the Fifth Circuit in *United States v. Fox*,[99] and the Eleventh Circuit in *United States v. Acheson*[100] all upheld the constitutionality of the CPPA. However, all upheld the constitutionality of the CPPA.

94. S. REP. NO. 104-358, at 28 (1996).

95. 18 U.S.C. § 2256(8)(D) (2008).

96. S. REP. NO. 104-358, at 2 (1996).

97. *United States v. Hilton*, 167 F.3d 61, 76–77 (1st Cir. 1999) (holding that that CPPA falls outside constitutionally-protected speech and that the CPPA's definition of child pornography is "adequately precise").

98. *United States v. Mento*, 231 F.3d 912, 923 (4th Cir. 2000) (holding that the "appears to be" language of CPPA remains constitutionally well-defined to substantiate conviction of defendant).

99. *United States v. Fox*, 248 F.3d 394, 411 (5th Cir. 2001) (affirming the conviction of a defendant who knowingly downloaded and transmitted pornographic images of children from computer at place of employment).

100. *United States v. Acheson*, 195 F.3d 645, 650–53 (11th Cir. 1999) (discussing a defendant's failure to prove CPPA language is sufficiently vague or overbroad).

Recognizing that the CPPA was a content-based restriction on speech, these courts applied strict scrutiny review. First, these courts held that, as laid out in *Ferber*, the prevention of indirect, as well as direct harm was a compelling government interest.[101] These courts held that the CPPA was not unconstitutionally vague, as defined in *Kolender v. Lawson*,[102] because it provided a scienter requirement and allowed for affirmative defenses. Thus, the government could prosecute only those who knowingly possessed, received, or distributed the prohibited materials.[103]

These courts also held that the CPPA was not unconstitutionally overbroad because the constitutional standard for substantial overbreadth—as defined in *Broadrick v. Oklahoma*[104]—was not satisfied.[105] Focusing on the "appears to be" and the "conveys the impression" provisions of the CPPA, these courts determined that though the statute could reach some individual cases where the involved materials might be protected, this did not rise to the level of substantiality required for the CPPA to be declared unconstitutional on overbreadth grounds.[106] Not only did the CPPA require virtual indistinguishability between virtual and real child pornography in order for the imagery to be prohibited,[107] but these marginal infringements on protected expression could also be properly handled on a case-by-case basis.[108]

One circuit court, however, upon review of the CPPA, did find the statute to be unconstitutionally overbroad.[109] In *Free Speech Coalition v. Reno*, the appellant, a trade association involved in the production and distribution of "adult-oriented materials," feared that the CPPA's language would prohibit their legitimate work, and filed

101. *Hilton*, 167 F.3d at 69; *Mento*, 231 F.3d at 918, 921; *Fox*, 248 F.3d at 402.

102. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (holding that a statute is not vague unless it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement").

103. *Hilton*, 167 F.3d at 74–75; *Mento*, 231 F.3d at 922; *Fox*, 248 F.3d at 407; *Acheson*, 195 F.3d at 652.

104. *Broadrick v. Oklahoma*, 413 U.S. 601, 615–16 (1973) (holding that a statute is unconstitutional only if its overbreadth is substantial in relation to its plainly legitimate sweep).

105. *Hilton*, 167 F.3d at 74; *Mento*, 231 F.3d at 921; *Fox* 248 F.3d at 404; *Acheson* 195 F.3d at 650, 652.

106. *Fox*, 248 F.3d at 405–06.

107. *Id.* at 405.

108. *Id.*

109. 198 F.3d 1083, 1097 (9th Cir. 1999).

suit against the government shortly after the CPPA's passage.[110] Like the petitioners in *Fox*, *Hilton*, *Mento*, and *Acheson*, the Free Speech Coalition alleged that the "appears to be" and "conveys the impression" provisions of the CPPA[111] were substantially overbroad and chilled their valid expression of works protected by the First Amendment.[112] After the Ninth Circuit reversed a lower court decision and found the CPPA facially invalid on those grounds,[113] the government appealed to the Supreme Court, which held in *Ashcroft v. Free Speech Coalition* that as written, these provisions of the CPPA "abridge the freedom to engage in a substantial amount of lawful speech."[114]

The Court therefore held that the ban on *virtual* child pornography could not be upheld because it was overbroad and therefore unconstitutional under the First Amendment.[115] The government presented four arguments in response to the Free Speech Coalition's theory that the "appears to be" and "conveys the impression" provisions criminalized "visual depictions, such as movies, even if they have redeeming social value"[116] and prohibited items, such as reproductions of paintings "depicting a scene from classical mythology," because the subject matter appeared to depict minors involved in sexually explicit conduct even when real children were not used.[117]

The government reminded the Court of the finding in *Ferber* that *virtual* child pornography causes indirect harm to actual children,[118] and contended that the production of virtual pornographic images

110. Brief for Respondents at 9–10, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795). The Free Speech Coalition included a painter of nudes, an erotic photographer, and the publisher of a naturist-oriented book. The respondents made clear that their work did not include child pornography, and that they opposed child pornography by offering a reward for information leading to the arrest of persons involved in its production. *Id.*

111. 18 U.S.C. §§ 2256(8)(B), (D) (2008).

112. *Free Speech Coal.*, 198 F.3d at 1087.

113. *Id.*

114. *Free Speech Coal.*, 535 U.S. 234, 256 (2002). By the time of the government appeal to the Supreme Court, the Attorney General, Janet Reno, had been replaced by John Ashcroft. Therefore, Ashcroft replaced Reno as the petitioner for the government.

115. *Id.*

116. *Id.* at 240.

117. *Id.* at 241.

118. *Id.* at 250–51.

can lead to child abuse.[119] The *Free Speech Coalition* Court did not, however, accept the government's indirect harm argument and noted instead that "[v]irtual child pornography is not 'intrinsically related' to the sexual abuse of children."[120] "[T]he causal link is contingent and indirect."[121] Thus, the *Free Speech Coalition* Court seemed to hold that the *Ferber* decision provided no support for the elimination of the distinction between *actual* and *virtual* child pornography. Though the Court did not deny that virtual child pornography causes indirect harm, the Court seemed to nonetheless deny that the prevention of indirect harm was sufficient to justify the banning of *virtual* child pornography.

The problem with this aspect of the *Free Speech Coalition* decision is that it is patently inconsistent with *Ferber* in terms of the government's interest in preventing the *indirect* harm caused by child pornography. As discussed above, *Ferber* explicitly determined that there is an "intrinsic relationship" between child pornography and indirect harm to children.[122] The *Ferber* Court listed the prevention of *indirect* harm as one of five compelling government interests,[123] and asserted, "the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."[124] By definition, virtual child pornography is virtually *indistinguishable* from actual child pornography. Thus, if the prevention of child pornography's indirect harm suffices to be a compelling government interest, the prevention of that indirect harm caused by *virtual* child pornography should also suffice. The *Free Speech Coalition* Court, however, failed to acknowledge that the Supreme Court had ever held that the protection of children from *indirect* harm of child pornography was a compelling interest, and consequentially denied that the protection of children from *virtual* child pornography was a compelling interest.[125] In order to serve its purpose of invalidating the CPPA, the Court therefore overturned *Ferber* on this issue, but without admitting the change.[126]

119. *Id.* at 250.
120. *Id.*
121. *Id.*
122. *Ferber*, 458 U.S. at 759.
123. *Id.*
124. *Id.*
125. *Free Speech Coal.*, 535 U.S. at 251.
126. *Id.*

The government's second argument in *Free Speech Coalition* further asserted that *virtual* child pornography could have the tendency to persuade the audience to commit crimes.[127] The Court disagreed and rejected this argument as well, stating, "the prospect of crime, however, by itself, does not justify laws suppressing protected speech."[128] Even if virtual pornography encourages unlawful acts, the Court held that it "is not a sufficient reason for banning it."[129]

The government's third argument asserted that the elimination of the market for actual child pornography was a sufficient justification for the Court to uphold the constitutionality of the CPPA.[130] The Court again disagreed and suggested that the market for actual child pornography could, in fact, be eliminated by the *use* of virtual images rather than the *prohibition* of them. If virtual images are identical to illegal child pornography, the Court argued, "few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice."[131]

This argument relies on the false assumption of pragmatic rationality, and it is therefore inherently problematic. The *Free Speech Coalition* opinion assumes that child pornographers are pragmatically rational. This assumption is inaccurate, because if child pornographers were rational, they would not use or create child pornography in the first place. As described by numerous experts, the motivation behind the creation of child pornography is not grounded in rational thought; unfortunately, these child molesters and pornographers derive sexual gratification from the pain inflicted on actual children, and the recording of it.[132] This false assumption of pragmatic rationality therefore leads to a highly problematic theory of desirability. Under this theory, it seems that the Court is asserting that *virtual* child pornography is in fact desirable for society because it drives illegal actual child pornography from the market, and the "best defense against child pornography may be to embrace virtual pornography."[133]

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127. *Id.* at 245.

128. *Free Speech Coal.*, 535 U.S. at 245 (citing Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 680 (1959)). *See also* Stanley v. Georgia, 394 U.S. 557, 566 (1969).

129. *Id.* at 253.

130. *Id.* at 254.

131. *Id.*

132. Audrey Rogers, *Playing Hide and Seek: How to Protect Virtual Pornographers and Actual Children on the Internet*, 50 VILL. L. REV. 87, 102 (2005).

133. *Id.* at 111.

According to the Court, a commercial market for *virtual* child pornography was the solution for actual child pornography. But, again, this desirability theory wrongly assumes that child pornographers are pragmatically rational. Thus, these producers of child pornography would not be interested in *virtual* pornography as a viable substitute, nor would some purveyors of child pornography have their appetites satiated if they knew they were viewing images of *virtual* pornography. Moreover, permitting and protecting a commercial market for *virtual* child pornography positively promotes the indirect harm to children as a result of the use and production of virtual images that was explicitly outlined in *Ferber*. This is highly problematic, regardless of whether or not regulation against *virtual* child pornography is constitutional.

The government's final argument in *Free Speech Coalition* pointed to the potential for more difficult prosecutions of actual child molesters and pornographers due to the fact that virtual images look so realistic.[134] The Court responded by asserting that the CPPA impermissibly passed this difficulty on to defendants; by allowing a defendant to affirmatively defend on the grounds that the alleged child pornography was made using real persons who were adults and that the material was not marketed as depicting children, the defendant would, essentially, carry the burden of proving that the material was protected by the First Amendment.[135] The Court therefore noted, "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter."[136]

The Court therefore invalidated the CPPA for overbreadth in *Free Speech Coalition* because the CPPA criminalized the possession of visual depictions that appeared to be minors (but might have actually been adults or computer renderings) as well as material that had been pandered in a way that "conveyed the impression" that it was child pornography, regardless of whether it actually was child pornography. Indeed, the *Free Speech Coalition* Court had a legitimate concern that the "conveys the impression" provision of the CPPA could apply to speech that merely conveyed the *impression* of prohibited speech but did not actually contain prohibited content.[137]

134. *Free Speech Coal.*, 535 U.S. at 255.

135. *Id.*

136. *Id.*

137. *Id.* at 257.

The CPPA is a content-based regulation, and should not have such application. Having admitted this, the Court's suggestion of interpreting the CPPA's scienter requirement as applying to the content of the material in question could effectively resolve this problem. The Court in *Broadrick* had warned that the overbreadth doctrine is "strong medicine," and should be used "sparingly and only as a last resort."[138] Thus, striking down the entire statute was not a proper response when a less destructive solution—more narrowly construing the scienter requirement—existed.

After *Free Speech Coalition*, the government's enforcement fears were realized, as prosecuting purveyors of child pornography became exceedingly difficult. Because the government could not prosecute a child pornographer unless it proved that the pornographic images were of *actual* children,[139] the *Free Speech Coalition* decision imposed a heavy burden on the government in prosecuting *any* illegal child pornographers, given that the technology made *virtual* child pornography and actual child pornography effectively indistinguishable. Congress, in fact, noted that "the [*Free Speech Coalition*] decision has placed prosecutors in a difficult position."[140] Indeed, as it turned out, prosecutors were unable to meet that burden, which resulted in the re-proliferation of virtual child pornography.[141]

Free Speech Coalition also created significant confusion in the lower courts in adjudicating child pornography cases. In *United States v. Kimler*, for example, the Tenth Circuit held that despite the *Free Speech Coalition* decision, "[j]uries are still capable of distinguishing between real and virtual images."[142] Yet, in *United States v. Deaton*, the Eighth Circuit held that it was not unreasonable to accept "a jury's conclusion that real children were depicted even where the images themselves were the only evidence the government presented on the subject."[143] Furthermore, in *United States v. Hall*, the Eleventh Circuit affirmed a pre-*Free Speech Coalition* conviction on the ground that "no reasonable jury could have found that the images were

138. *Broadrick*, 413 U.S. at 613.

139. Rogers, *supra* note 132, at 111.

140. S. REP. NO. 108-2, at 4 (2003).

141. Robert M. Sieg, *Attempted Possession of Child Pornography—A Proposed Approach for Criminalizing Possession of Child Pornographic Images of Unknown Origin*, 36 U. TOL. L. REV. 263, 263 (2005).

142. *United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir. 2003).

143. *United States v. Deaton*, 328 F.3d 454, 455 (8th Cir. 2003).

virtual children created by computer technology as opposed to actual children."[144] In *United States v. Slanina*, the Fifth Circuit held that the "[g]overnment was not required to present any additional evidence or expert testimony to meet its burden of proof to show that the images downloaded by [the defendant] depicted real children, and not virtual children,"[145] and that the jury "was capable of reviewing the evidence to determine whether the [g]overnment met its burden to show that the images depicted real children."[146] Furthermore, in *United States v. Farrelly*, the Sixth Circuit held that a jury could determine whether an image was a virtual creation and that no additional evidence such as real identity or expert testimony was necessary.[147]

These cases demonstrate that the government's fears (outlined in *Free Speech Coalition*) surrounding the difficulty in prosecuting purveyors of child pornography are real and growing, especially in the wake of this Supreme Court decision—a decision that further tied the hands of prosecutors.

Indeed, after *Free Speech Coalition,* appellate courts reversed convictions, some without the opportunity of retrial, and set aside guilty pleas. Still no jury acquitted a defendant on the basis that he was ignorant that his pornographic images were of actual children.[148]

IV. The PROTECT Act and *United States v. Williams*

The congressional response to *Free Speech Coalition* and its wake of inconsistent lower court decisions came in the form of the PROTECT Act.[149] The PROTECT Act acknowledged the *Free Speech Coalition* decision, but recognized the detrimental impact of that case on child pornography prosecutions. To comport with *Free Speech Coalition*, the PROTECT Act modified the language of the CPPA to prohibit visual depictions "that [are] of, or [are] virtually

144. *United States v. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002).

145. *United States v. Slanina*, 359 F.3d 356, 357 (5th Cir. 2004).

146. *Id.*

147. *United States v. Farrelly*, 389 F.3d 649, 655 (6th Cir. 2004).

148. John P. Feldmeier, *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. KY. L. REV. 205, 220–21 (2003) (noting that no jury has acquitted based on lack of knowledge defense).

149. 18 U.S.C. § 2252A (2008).

indistinguishable from that of an actual minor."[150] Further, to fit within *Free Speech Coalition*'s mandate, the definition in the PROTECT Act expressly excludes depictions "that are drawings, cartoons, sculptures, or paintings depicting minors or adults."[151]

The PROTECT Act also attempted to respond to the Supreme Court's rejection of the CPPA's pandering provision by substituting what Congress thought was more narrowly tailored language.[152] The PROTECT Act sought to punish anyone who knowingly advertises, promotes, presents, distributes, or solicits by any means (including by computer) any purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material contains an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.[153]

In drafting the PROTECT Act to comply with *Free Speech Coalition*, Congress resurrected the market deterrence and indirect harm rationales rejected in *Free Speech Coalition*, justifying the new pandering provision on the grounds that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material."[154] Congress also argued that this new pandering provision was crucial to assisting prosecutors' ability to convict child pornographers.[155]

Though significantly narrower than its CPPA counterpart, the language of the PROTECT Act has not, however, escaped First Amendment challenges for overbreadth. The lack of a nexus between the pandering of obscenity and proving the existence of any actual obscene material, for example, suggests that protected speech could be punished because of its marketing. This suggestion is due to the fact that criminal liability under the PROTECT Act does not require any underlying obscene material to be possessed or distributed. These were precisely the issues raised in *United States v.*

150. S. REP. NO. 108-2, at 6–7 (2003). Congress intended an objective, reasonable person standard—an ordinary observer—in determining whether a "virtually indistinguishable" depiction looked like an actual child. *Id.*

151. 18 U.S.C. § 2256(11) (2008).

152. *See id.* at § 2252A(a)(3)(B).

153. *Id.*

154. S. REP. NO. 108–2, at 12 (2003).

155. *Id.* at 23–24.

Williams, the Supreme Court decision that tested the constitutionality of the PROTECT Act.[156]

In *Williams*, the defendant, Michael Williams, posted a message in a public Internet chat room claiming that "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam."[157] Williams then told an undercover Secret Service agent that he had pictures of himself and other men sexually abusing his four-year-old daughter, and he also requested pictures of the agent's daughter.[158] Next, Williams then posted a public message that read: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL. . . ."[159] This posting contained a link to photographs of children engaging in sexually explicit conduct.[160] Williams was charged with possessing and promoting child pornography under the PROTECT Act.[161] He entered a conditional plea of guilty, but reserved his right to challenge the constitutionality of the pandering[162] offense on overbreadth grounds.[163]

Analyzing the PROTECT Act for substantial overbreadth, the District Court found the statute to be "a legitimate effort to close the market for child pornography, which has seen a revival as a result of technology."[164] The District Court also found that any prohibition of protected speech that results from the PROTECT Act's sweep "is not substantial, particularly in light of the statute's logical sweep."[165] The Eleventh Circuit, however, reversed[166] on the grounds that because the statute was not concerned with the actual *content* of the purported child pornography (but rather punished any speech expressing a belief about its content), the PROTECT Act "wrongly punishes individuals for the non-inciteful expression of their thoughts and

156. *Williams*, 128 S. Ct. 1830.

157. *Id.* at 1837.

158. United States v. Williams, 444 F.3d 1286, 1288 (11th Cir. 2006).

159. *Williams*, 128 S. Ct. at 1837.

160. *Id.*

161. *Williams*, 444 F.3d at 1289.

162. *Id.*; Although the PROTECT Act does not include the word "pandering," the offenses of advertising, promoting, presenting, and distributing are commonly referred to as such and will be referred to as "pandering" in this Note.

163. *Id.*

164. United States v. Williams, No. 04-20299, 2004 U.S. Dist. LEXIS 30603, at 34 (S.D. Fla. Aug. 20, 2004).

165. *Id.*

166. *Williams*, 444 F.3d at 1309.

beliefs."[167] The Eleventh Circuit therefore held that the pandering provision "abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep" and struck it down as overbroad.[168]

The Supreme Court reversed.[169] Writing for the Court, Justice Scalia held that a statute is facially invalid under the overbreadth doctrine only "if it prohibits a substantial amount of protected speech . . . not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[170]

In the opinion, Scalia first construed the PROTECT Act to exclude "abstract advocacy" of the illegality of child pornography, reading the "advertises, promotes, presents, distributes" language as "hav[ing] a transactional connotation."[171] This distinction is important because it expresses the Court's recognition of the broader market for child pornography and the *indirect* harm it creates. While the *Free Speech Coalition* Court rejected such indirect harm as not being a compelling governmental interest in proscribing the distribution of child pornography, the *Williams* decision places indirect harm at the center of its analysis.

Justice Scalia also defined the scope of the PROTECT Act by finding that the statute required not only *knowledge* of pandering or solicitation, but also one of two types of conduct: either the subjective belief that the material being pandered or solicited is child pornography, and the understanding that a reasonable person would be led to believe that the speaker held that belief,[172] or the subjective intent to cause another person to believe that the material at issue is child pornography.[173]

After construing the PROTECT Act, Justice Scalia asked whether the statute "criminalizes a substantial amount of protected expressive activity" to the extent necessary to be constitutionally overbroad.[174] He answered in the negative, holding that "offers to engage in illegal transactions are categorically excluded from First

167. *Id.* at 1300.
168. *Id.* at 1305.
169. *Williams*, 128 S. Ct. 1830.
170. *Id.* at 1838.
171. *Id.* at 1839.
172. *Id.* at 1839–40, 1843.
173. *Id.* at 1839–40.
174. *Id.* at 1841.

Amendment protection."[175] Furthermore, fraudulent offers are proscribable, as are offers to engage in illegal activity, even where "the offeror is mistaken about the factual predicate of his offer."[176]

Thus, although the PROTECT Act did not require proof of actual child pornography, the Court found the statute to be consistent with *Ferber* and *Free Speech Coalition* because it would not force the suppression of "simulated child pornography," but only require that it be "offered and sought as such, and not as real child pornography."[177]

The Court found that the actual content of the material being pandered or solicited is irrelevant; what matters is the intent of the solicitor or panderer. A violation of the PROTECT Act occurs even if the material being pandered is later determined *not* to be child pornography; the fact that the panderer offered up the material as child pornography is enough to constitute a violation. The logic behind this rationale stems from the same logic that serves to justify punishment for "attempted" criminal activity; it is well established that a drug dealer may be validly convicted of an attempted drug sale even if it is later determined that he was only selling baking powder.[178]

Justice Souter dissented, arguing that that the PROTECT Act was overbroad. Souter maintained that "the First Amendment protection of . . . fake child pornography requires a limit to the law's criminalization of pandering proposals."[179] The PROTECT Act therefore undermined *Ferber* and *Free Speech Coalition* by circumventing the requirement that a depiction of real children be proven in order for a prosecution to succeed. Justice Souter rejected the majority's holding that pandering proposals and attempted crimes are categorically excluded from First Amendment protection.[180] Instead, Justice Souter believed that the constitutionality of a statute that criminalizes such conduct should "turn on its consequences for protected expression and the law that protects it."[181] Here, "a protected category of expression [non-obscene pornography created using adults] would inevitably be suppressed."[182] Even so, Justice Souter would have upheld the statute if he had found it to be

175. *Id.*
176. *Id.* at 1842-43.
177. *Id.* at 1844 (emphasis omitted).
178. *Id.* at 1853 (Souter, J., dissenting).
179. *Id.* at 1849 (Souter, J., dissenting).
180. *Id.* at 1854 (Souter, J., dissenting).
181. *Id.* at 1854-55 (Souter, J., dissenting).
182. *Id.* at 1855 (Souter, J., dissenting).

"grounded in a realistic, factual assessment of harm."[183] Justice Souter contended that the PROTECT Act lacked any such "substantial justification"[184] and should have been found unconstitutional because it substantially inhibited protected speech.

Conclusion

Though the *Free Speech Coalition* Court agreed with the goal of the CPPA that the proliferation of child pornography is a serious crisis that demands increased government regulation, ultimately the Court's greater concern in that case was for preserving those areas of protected speech that the CPPA could criminalize. Thus, the *Free Speech Coalition* Court's fear that the scope of the CPPA was so broad that it would subsume and proscribe protected speech was great enough to justify striking down that legislation on overbreadth grounds.

Thus, the PROTECT Act was intended to resolve these problems by establishing a narrower, workable scheme that was limited to effectively quelling the child pornography market and facilitating prosecutions. Instead of crafting a more limited First Amendment exception to deal with the realities of today's technologically advanced *virtual* child pornography, the new *Williams* standard focuses on limiting offers to provide or requests to obtain child pornography regardless of the nature of the actual content of the proffered materials.

Free Speech Coalition was problematic on several grounds, and though *Williams* has addressed some of those issues, the PROTECT Act's scheme is arguably just as questionable. First, the *Free Speech Coalition* Court failed to recognize that the prevention of indirect harm to children caused by *virtual* child pornography is a compelling government interest. The *Williams* Court directly addressed this problem by recognizing that virtual imagery feeds the broader child pornography market. Indeed, under *Williams* there need not be any direct harm to children, as pandering virtual imagery proffered as child pornography is criminal.

Additionally, *Free Speech Coalition* created too heavy a burden for government to effectively prosecute child pornography offenses. In addition to failing to criminalize *virtual* child pornography, the Court failed to recognize the difficulty in distinguishing between

183. *Id.* (Souter, J., dissenting).

184. *Id.* (Souter, J., dissenting).

permissible virtual imagery and proscribable actual imagery by allowing defendants the affirmative defense of arguing their material was virtual. With no clear framework for the trier of fact to distinguish between the two types of imagery, prosecutions were rendered ineffective. The *Williams* Court did not directly address the technological quandary. Instead of devising a rubric for differentiating between the two types of imagery, or declaring *virtual* child pornography illegal, the *Williams* Court sidestepped the issues presented by technological advancement by focusing on the collateral speech surrounding the material as opposed to the material itself.

Furthermore, *Free Speech Coalition* created confusion in the lower courts as to how to consistently adjudicate child pornography cases because the standard to be applied was so broad. It is still too soon to know what the judicial response to *Williams* will be, and whether this decision construes the PROTECT Act in a sufficiently narrow way so as to establish a coherent and enforceable standard. Though the Court asserts that the scheme established in *Williams* is not overbroad in its scope, the PROTECT Act is arguably just as overbroad as its counterpart, the CPPA, and therefore not an effective solution. As the *Free Speech Coalition* Court specifically stated, "The Government may not suppress lawful speech as the means to suppress unlawful speech," because "[p]rotected speech does not become unprotected merely because it resembles the latter."[185] In *Williams*, however, the Court seems to be doing just that; proscribing an espoused belief as a means of suppressing child pornography.

Alternatively, it could be argued that the PROTECT Act and the *Williams* decision are *under*inclusive, and will therefore prove to be ineffective at suppressing virtual child pornography. Though *Williams* likely establishes an effective mechanism for dealing with the distribution of child pornography, the holding could prove to be problematic because it does not directly address virtual child pornography as a crisis in its own right, but rather criminalizes the pandering of imagery held out as child pornography. Pornography depicting actual children is criminal regardless of how it is pandered, but pornography depicting virtual children is not criminal, according to *Williams,* if it is not pandered as child pornography. Thus, neither the creation nor the possession of this material has been proscribed,

185. *Free Speech Coal.*, 535 U.S. at 255.

and may still be distributed as if it is held out as something other than "child pornography."

Can this new scheme really be an effective means of controlling this harmful imagery? It would seem that for those dealing in this repugnant material, the PROTECT Act proscribes how they market their photos, not the photos themselves. Advancement in technology has driven the modern explosion of *virtual* child pornography as a means of circumventing child pornography law, and only time will tell whether this new focus will be effective in finally quelling both the direct and indirect harm caused by virtual child pornography. It is very likely that *Williams* will not be the final word on the subject.