Volume 81 | Number 5 Article 9

6-1-2003

Banning Virtual Child Pornography: Is There Any Way Around Ashcroft v. Free Speech Coalition

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Banning Virtual Child Pornography: Is There Any Way Around *Ashcroft v. Free Speech Coalition*?

Our nation has an undeniable interest in protecting children and punishing those who harm them.[1] At the same time, our nation values freedom of speech and has made significant efforts to ensure the preservation of this freedom.[2] Inevitably, instances arise where these two interests clash.[3] On April 16, 2002, the U.S. Supreme Court held in *Ashcroft v. Free Speech Coalition*[4] that the provisions of the Child Pornography Prevention Act of 1996 ("CPPA")[5] banning virtual child pornography[6] encroached on freedom of speech and were therefore unconstitutional.[7] Immediately following this decision, proponents of the CPPA vowed to create new legislation that would both accomplish their goal of banning virtual child pornography and meet the Court's standard for constitutionality.[8]

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1. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (stating that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens").

2. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

3. For example, the Supreme Court acknowledged a conflict between efforts to protect children and freedom of speech in *New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, the Court considered the constitutionality of a state statute that prohibited the distribution of child pornography. *Id.* at 749. The Court recognized that "laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy," but ultimately upheld the statute. *Id.* at 756.

4. 535 U.S. 234 (2002).

5. Pub. L. No. 104-208, div. A, sec. 121, 110 Stat. 3009-26 (codified as amended at 18 U.S.C.A §§ 2241(c), 2243(a), 2251(d), 2252(b), 2252A, 2256(5)–(9), 42 U.S.C.A. § 2000aa (West 2000 & Supp. 2003)).

6. 18 U.S.C. § 2256(8)(B), (D) (2000). In *Free Speech Coalition*, the Court defined "virtual child pornography" as including "computer-generated images as well as images produced by more traditional means." *Free Speech Coalition*, 535 U.S. at 241. The Court, in finding the statute unconstitutionally overbroad, explained that "the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a 'picture' that 'appears to be, of a minor engaging in sexually explicit conduct.' " *Id.* (quoting 18 U.S.C. § 2256(8)(B) (2000)).

7. *Free Speech Coalition*, 535 U.S. at 258. Specifically, the Court found § 2256(8)(B) and § 2256(8)(D) unconstitutionally overbroad. *Id.* at 258.

8. *See* David G. Savage, *Ban on 'Virtual' Child Porn Is Upset by Court*, L.A. TIMES, Apr. 17, 2002, at A1 (quoting Attorney General John Ashcroft as saying, "I am committed to working with the Congress to develop strong measures to fight child pornography that will survive judicial scrutiny").

This Recent Development provides an introduction to the CPPA and discusses the Supreme Court's rationale for finding the CPPA unconstitutional in *Free Speech Coalition*. It then examines the actions taken by Congress following the *Free Speech Coalition* decision, which attempted to justify legislation banning virtual child pornography and to restore the prohibitions of the CPPA. Finally, this Recent Development considers the constitutionality of the legislation passed by Congress following *Free Speech Coalition* and concludes that the goal of protecting children and preventing illegal child pornography could best be served by legislation that incorporates established limitations on speech and stronger enforcement of existing federal obscenity laws.

In response to the Court's decision in *Free Speech Coalition*, members of Congress have proposed new legislation banning virtual child pornography. To better understand how forthcoming legislation can pass constitutional muster, a brief overview of the legislation struck down in *Free Speech Coalition* is useful. In 1996, Congress enacted the CPPA, which banned both the use of actual children and virtual images of children in the production of pornography.[9] Congress specifically prohibited

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where ... such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct; ... [or] such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[10]

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9. The decision to enact legislation that banned the use of virtual images of children was supported by the congressional finding that:

> the effect of visual depictions of child sexual activity on a child molester or pedophile using that material to stimulate or whet his own sexual appetites, or on a child where the material is being used as a means of seducing or breaking down the child's inhibitions to sexual abuse or exploitation, is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of actual children.

Child Pornography Prevention Act of 1996, § 1, 110 Stat. at 3009-26 to 3009-27.

10. *Id.* § 2, 110 Stat. at 3009-28 (codified at 18 U.S.C. § 2256(8) (2000)) (emphasis added).

Additionally, the CPPA provided an affirmative defense for producers who could demonstrate that their material was produced using only adults and was not marketed with the suggestion that real children were depicted therein.[11]

From its enactment, the CPPA triggered controversy over its constitutionality under the First Amendment.[12] Most notably, defendants sought to avoid conviction by asserting that the CPPA is unconstitutional due to both overbreadth and vagueness.[13] Particularly, defendants claimed that the phrases "appears to be"[14] and "conveys the impression"[15] are both overbroad and vague.

Over the years, appellate decisions yielded inconsistent findings on the CPPA's constitutionality.[16] In *Free Speech Coalition v. Reno*,[17] the United States Court of Appeals for the Ninth Circuit found the CPPA unconstitutional,[18] while other appellate courts sustained the law's constitutionality.[19]

While appellate courts left the constitutionality of the CPPA unsettled, the Supreme Court did not consider the issue until 2001,

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11. *Id.* § 3, 110 Stat. at 3009-29 (codified as amended at 18 U.S.C.A § 2252A(c) (West 2000 & Supp. 2003)).

12. *Compare* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 470 (1997) (anticipating that the Court would find the "appears to be" provision of the CPPA unconstitutional), *with* Adam J. Wasserman, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 281–82 (1998) (arguing that the CPPA is constitutional).

13. *See, e.g.*, United States v. Fox, 248 F.3d 394, 399 (5th Cir. 2001) (holding that the CPPA violated the First Amendment), *vacated*, 535 U.S. 1014 (2001) (mem.); United States v. Mento, 231 F.3d 912, 917 (4th Cir. 2000) (holding that the CPPA is impermissibly overbroad and vague), *vacated*, 535 U.S. 1014 (2001) (mem.); Free Speech Coalition v. Reno, 198 F.3d 1083, 1087 (9th Cir. 1999) (arguing the CPPA is unconstitutional), *aff'd sub nom.* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); United States v. Acheson, 195 F.3d 645, 648 (11th Cir. 1999) (disputing the constitutionality of the CPPA); United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999) (arguing that the CPPA is unconstitutionally vague), *aff'd in part and rev'd in part*, 257 F.3d 50 (1st Cir. 2001).

14. 18 U.S.C. § 2256(8)(B) (2000).

15. § 2256(8)(D); *see, e.g.*, *Free Speech Coalition*, 198 F.3d at 1087 (stating the defendant's argument "that where the statute fails to define 'appears to be' and 'conveys the impression,' it is so vague a person of ordinary intelligence cannot understand what is prohibited").

16. *See, e.g.*, *Free Speech Coalition*, 198 F.3d at 1086 (holding that the CPPA is unconstitutionally overbroad). *But see Fox*, 248 F.3d at 404 (holding that the CPPA does not violate the First Amendment); *Mento*, 231 F.3d at 923 (same); *Acheson*, 195 F.3d at 650 (same); *Hilton*, 167 F.3d at 61 (same).

17. 198 F.3d 1083 (9th Cir. 1999), *aff'd sub nom.* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

18. *Id.* at 1097.

19. *See supra* note 16.

when it granted certiorari in *Ashcroft v. Free Speech Coalition*.[20] An examination of three prior Supreme Court decisions, *Miller v. California*,[21] *New York v. Ferber*,[22] and *Osborne v. Ohio*,[23] provides the basis to understand the Court's rationale in *Free Speech Coalition*.

In *Miller*, the Court considered the constitutionality of a California statute that prohibited the distribution of obscene material.[24] In concluding that the First Amendment does not protect obscene material,[25] the *Miller* opinion set forth a three-prong test for establishing obscenity.[26] First, a proponent for finding a work to be obscene must establish that " 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[27] Second, the work must depict or describe, "in a patently offensive way, sexual conduct specifically defined by the applicable state law."[28] Finally, one must demonstrate that "the work, taken as a whole, lacks serious literary,

20. 531 U.S. 1124 (2001) (granting certiorari).

21. 413 U.S. 15 (1973).

22. 458 U.S. 747 (1982).

23. 495 U.S. 103 (1990).

24. *Miller*, 413 U.S. at 16–18.

25. *Id.* at 23. The *Miller* Court held obscene materials to be outside the protection of the First Amendment. *Id.* It is important to note that *Miller* only applies to the distribution of obscene material. *Id.* In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court held that a statute prohibiting the possession of obscene material was unconstitutional. *Id.* at 559. However, the Court has applied *Stanley* narrowly. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 996 (2d ed. 2002) (noting that in *United States v. Reidel*, 402 U.S. 351 (1971), the Court refused to extend *Stanley* to protect the receipt of obscene materials).

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

27. *Id.* (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (per curiam) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))). The Court justified the application of a "community standard" rather than a national standard: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32. Notably, this standard presents a problem with respect to the Internet, where the attitudes of the people of different states may be blurred. *See* Belinda Tiosavljevic, *A Field Day for Child Pornographers and Pedophiles If the Ninth Circuit Gets Its Way: Striking Down the Constitutional and Necessary Child Pornography Act of 1996*, 42 S. TEX. L. REV. 545, 546 (2001) (discussing how technology has contributed to the production and distribution of both real and virtual child pornography); Matthew K. Wegner, Note, *Teaching Old Dogs New Tricks: Why Traditional Free Speech Doctrine Supports Anti-Child-Pornography Regulations in Virtual Reality*, 85 MINN. L. REV. 2081, 2111 (2001) (arguing that "[t]he synthetic creation and rapid dissemination of both obscene images and pornography across traditional geographic boundaries is ample justification for a new national [obscenity] standard").

28. *Miller*, 413 U.S. at 24. As one critic of the *Miller* test commented: "The first two parts of [the *Miller* test] are incoherent: to put it crudely, they require the audience to be turned on and grossed out at the same time." Kathleen M. Sullivan, *The First Amendment Wars*, THE NEW REPUBLIC, Sept. 28, 1992, at 35, 38.

artistic, political, or scientific value."[29] To establish a work as obscene, the requirements of all three prongs of this test must be met.[30]

While *Miller* established the three-prong test for obscenity, a form of unprotected speech, in *New York v. Ferber* the Court recognized an additional category of speech that was not protected by the First Amendment: child pornography. In *Ferber*, the Court considered the constitutionality of a New York statute that prohibited the distribution of material depicting children engaged in sexual activity.[31] *Ferber* held that child pornography is another category of material not protected by the First Amendment, regardless of whether it is obscene under the *Miller* test.[32] The Court justified its creation of a new category of unprotected speech by reasoning that "a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' "[33] Moreover, the Court found that the distribution and sale of child pornography is "intrinsically related to the sexual abuse of children" in two ways: first, child pornography serves as a permanent record to the child, whose abuse is documented in the material, and second, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled."[34] Finally, the Court noted that the value of child pornography is "exceedingly modest, if not *de minimis*."[35]

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29. *Miller*, 413 U.S. at 24. In requiring "serious literary, artistic, political, or scientific value," the Court rejected the standard previously applied in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), which required that the material be "utterly without redeeming value." *Miller*, 413 U.S. at 24–25 (quoting *Memoirs*, 383 U.S. at 419).

30. New York v. Ferber, 458 U.S. 747, 764 (1982).

31. *Id.*

32. *Id.* at 756.

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

34. *Id.* at 759. Congressional hearings have focused on the relationship between production and distribution. *See, e.g.*, *id.* at 760 n.11 (citing *Sexual Exploitation of Children: Hearings Before the Subcomm. on Crime of the House Judiciary Comm.*, 95th Cong. 34 (1977) (statement of Charles Rembar) ("It is an impossible prosecutorial job to try to get at the acts themselves.")).

35. *Id.* at 762. The three-prong test for obscenity defined in *Miller* indicated that the value of speech is a consideration in finding the material to be outside the ambit of the First Amendment, at least with respect to obscenity laws. *Miller*, 413 U.S. at 24. The marketplace of ideas theory stresses the importance of freedom even for unpopular speech: "[O]nly in an unfettered marketplace of ideas can truth ultimately be discovered." Kelly Guglielmi, *Virtual Child Pornography as a New Category of Unprotected Speech*, 9 COMMLAW CONSPECTUS 207, 215 (2001). With respect to virtual child pornography and its value, some argue that "virtual child pornography is not necessary to reach an ultimate truth" and thus does not contribute to the marketplace of ideas. *Id.* at 216. In considering

After holding that production and distribution can be constitutionally prohibited, the Court considered whether mere possession of child pornography could be proscribed in *Osborne v. Ohio*.[36] In *Osborne*, the Court considered the constitutionality of an Ohio statute that prohibited the possession of material depicting children in the nude.[37] It upheld the statute based on the conclusion that states have a compelling interest in protecting children.[38]

With this precedent in mind, the Supreme Court decided *Ashcroft v. Free Speech Coalition* in 2002. The Free Speech Coalition represented a number of parties who believed that the CPPA threatened the work they produced.[39] The case came to the Supreme Court following the United States Court of Appeals for the Ninth Circuit's decision that the CPPA was unconstitutionally overbroad.[40] The Court identified the issue before it as "whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber*."[41] In analyzing the CPPA, the Court found that the "appears to be" and "conveys the impression" provisions were overbroad.[42]

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the value of child pornography, the *Ferber* Court found it "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance of scientific or educational work." *Ferber*, 458 U.S. at 762–63.

36. 495 U.S. 103, 108 (1990).

37. *Id.*

38. *Id.* at 110. The Court was further persuaded by the State's argument that, "since the time of [the] decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." *Id.*

39. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243 (2002). For example, members of the Free Speech Coalition feared that even if they could show that only adults were used in the production of their works, the affirmative defense would not protect them if these works were promoted in such a way that "conveys the impression" that children were therein engaging in sexually explicit conduct. *Id.* at 242 (citing 18 U.S.C. § 2256(8)(D) (2000)).

40. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999) (holding that "the language 'appears to be a minor' set forth in 18 U.S.C. § 2256(8)(B) and the language 'conveys the impression' set forth in 18 U.S.C. § 2256(8)(D) are unconstitutionally vague and overbroad"), *aff'd sub nom.* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

41. *Free Speech Coalition*, 535 U.S. at 240. The Court explained that the CPPA proscribes material beyond that which would satisfy the *Miller* obscenity standard. *Id.* The Court also found the material proscribed by the CPPA distinguishable from that in *Ferber*. *Id.* In *Ferber*, the Court allowed the government to prohibit child pornography based on the government's interest in protecting children who may be exploited in production. New York v. Ferber, 458 U.S. 747, 757 (1982). The material addressed by the CPPA, unlike the material in *Ferber*, does not involve the use of real children in production. *See Free Speech Coalition*, 535 U.S. at 250–51.

42. *Free Speech Coalition*, 535 U.S. at 258.

Ultimately, the Supreme Court affirmed the decision of the Ninth Circuit, finding the CPPA unconstitutional.[43]

The government advanced four major arguments in support of the CPPA's constitutionality. First, the government asserted that virtual child pornography harms actual children in that "pedophiles may use virtual child pornography to seduce children."[44] Second, the government argued that "virtual child pornography whets the appetite of pedophiles and encourages them to engage in illegal conduct."[45] Third, the government claimed that its "objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well."[46] Finally, the government argued that the existence of virtual child pornography makes it more difficult to prosecute defendants who use actual children in pornography;[47] that is, defendants could possibly evade prosecution for using actual children in the production of pornography by claiming that the images are computer-generated or images of young-looking adults.[48] Thus, the government asserted that it would be left with the heavy burden of proving that the material was produced using a real child.[49]

Before specifically addressing each of the government's arguments, the Court considered the constitutionality of the CPPA and found that the legislation prohibited speech regardless of whether it met the obscenity test under *Miller*.[50] The Court explained that the material proscribed by the CPPA did not necessarily "appeal to the prurient interest," as required by the first prong of the *Miller* test.[51] Furthermore, the CPPA prohibited work that would not qualify as "patently offensive" under *Miller*'s second prong as the CPPA prohibited work that explores common themes of today's society,

43. *Id.*
44. *Id.* at 251.
45. *Id.* at 253.
46. *Id.* at 254.
47. *Id.* at 254–55.
48. *See id.* at 242.
49. *See id.* Congress found that "computers and computer imaging technology can be used to . . . alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals or to determine if the offending material was produced using real children." Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, div. A, sec. 121, § 1, 110 Stat. 3009-26, 3009-26. Arguably, current technology also makes it "virtually impossible" for prosecutors to establish that real children were involved in production.
50. *Free Speech Coalition*, 535 U.S. at 246–47.
51. *Id.* at 246. The Court illustrated that "[t]he CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse." *Id.*; *see also supra* notes 25–30 and accompanying text.

themes that our society has accepted as depictions of reality.[52] Finally, the Court found that the CPPA gave no consideration to the value of the speech as mandated by *Miller*'s third prong.[53] The Court concluded that "the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity."[54]

The Court subsequently distinguished the material proscribed by the CPPA from that at issue in *Ferber*. The Court explained that the *Ferber*-warranted ban on child pornography only applies to child pornography that is produced using actual children.[55] That is, the *Ferber* decision did not speak to the content of the material but rather only to how it was produced.[56] Unlike pornography involving the use of actual children, which requires the abuse of actual children in its making, the Court found that "the CPPA prohibits speech that records no crime and creates no victims in its production."[57] The Court reasoned that the harm to actual children resulting from the production of virtual child pornography was too speculative.[58] Additionally, the Court explained that *Ferber* did not declare child pornography unconditionally without value and, therefore, the CPPA was not justified in prohibiting such speech as valueless.[59] Although *Ferber* indicated that child pornography often lacks value as speech, the Court reasoned that child pornography is not "by definition

52. *Free Speech Coalition*, 535 U.S. at 247–48. In particular, the Court addressed the theme of teenagers and sexual activity, using two recent, successful movies, *Traffic* and *American Beauty*, to illustrate that this theme is both pervasive and accepted by society and, therefore, not patently offensive. *Id.*

53. *Id.* at 246. The Court acknowledged that some material proscribed by the CPPA might have value. "Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach." *Id.* at 248. Thus, the Court recognized that materials that might violate the CPPA may have artistic value.

54. *Id.* at 249. In other words, the Court concluded that the CPPA does not *just* prohibit obscenity, which may be justified on the basis of the *Miller* holding.

55. *Id. But see* Alison R. Gladoway, *Has the Computer Revolution Placed Our Children in Danger?: A Closer Look at the Child Pornography Prevention Act of 1996*, 8 CARDOZO WOMEN'S L.J. 21, 36 (2001) (claiming that virtual child pornography "poses the same threats and dangers to children" as the material in *Ferber*).

56. *Free Speech Coalition*, 535 U.S. at 249.

57. *Id.* at 250.

58. *Id.*

59. *Id.* at 251. The *Ferber* Court acknowledged that material may satisfy the value requirement of *Miller*, yet still "embody the hardest core of child pornography." New York v. Ferber, 458 U.S. 747, 761 (1982).

without value."[60] In fact, the Court pointed out, *Ferber* specifically left open the option of using virtual images as an alternative means of producing the same material without harming children in the process.[61]

Finally, the Court analyzed the CPPA through the lens of *Osborne*, a case in which the Court allowed the state to prohibit possession of child pornography.[62] The Court explained that *Osborne* "anchored its holding" on the state's compelling concern for children who are abused in the production of pornography.[63] The CPPA is distinguishable from *Osborne* because the material sought to be proscribed by the CPPA does not involve actual children.[64] Therefore, the compelling interest that was crucial to the Court's decision in *Osborne* is too indirect to be a compelling interest for banning virtual child pornography.

After establishing that the CPPA was "inconsistent with *Miller* and [found] no support in *Ferber*,"[65] the Court specifically addressed each of the government's arguments for upholding the CPPA. First, the Court considered the government's argument that virtual child pornography may be used to encourage children to participate in sexual activity.[66] The Court was not persuaded by this justification for the CPPA[67] and noted that there are "many things innocent in themselves" that may be misused for such purposes but, nonetheless, may not be prohibited.[68] Furthermore, the Court was unimpressed with the government's argument that virtual child pornography whets the appetites of pedophiles and may lead them to abuse actual children.[69] The Court explained: "The mere tendency of speech to

60. *Free Speech Coalition*, 535 U.S. at 251. The Court noted, "On the contrary, the [*Ferber*] Court recognized some works in this category might have significant value." *Id.* As the prohibition of child pornography in *Ferber* was justified based on the method of production, where that justification is absent, it is difficult to argue that material of value should escape the protection of the First Amendment.

61. *Id.* " 'If it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside the prohibition of the statute could provide another alternative.' " *Id.* (quoting New York v. Ferber, 458 U.S. 747, 763 (1982)).

62. *Id.* at 250; *see* Osborne v. Ohio, 495 U.S. 103, 110 (1990).

63. *Free Speech Coalition*, 535 U.S. at 250.

64. *Id.*

65. *Id.* at 251.

66. *Id.*

67. *Id.* at 252 (" '[G]overnmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.' " (quoting Reno v. ACLU, 521 U.S. 844, 874 (1997))).

68. *Id.* at 251.

69. *Id.* at 253.

encourage unlawful acts is not a sufficient reason for banning it."[70] Additionally, the government's argument that the prohibition of virtual child pornography is necessary to eliminate the market for child pornography did not convince the Court.[71] Rather, the Court concluded that the abuse of real children may actually decrease if similar images could be produced legally.[72] Next, the Court examined the government's fourth argument, that virtual child pornography hinders the prosecution of producers who use actual children to make pornography.[73] The Court interpreted this argument as rationalizing the prohibition of protected speech as a means of banning unprotected speech.[74] The Court rejected the government's argument, explaining that the overbreadth doctrine provides that unprotected speech may not be banned if, as a result, a significant amount of protected speech is prohibited.[75]

Finally, the Court found that the affirmative defense provided for in the CPPA was "incomplete and insufficient" and, therefore, did not pass constitutional muster.[76] First, the Court established that the statute imposed too heavy a burden on defendants to prove that the material was produced using only adults.[77] Second, the Court found that the affirmative defense applied inconsistently to producers and

70. *Id.* The Court further contended that "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end." *Id.* The Court has recognized a limited number of situations when the government may suppress speech that advocates violating the law but only when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). In *Free Speech Coalition*, the Court found that there was "no attempt, incitement, solicitation, or conspiracy. The government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse." *Free Speech Coalition*, 535 U.S. at 253.

71. *Free Speech Coalition*, 535 U.S. at 254.

72. *Id.* (stating that "few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice").

73. *Id.* at 254–55.

74. *Id.*

75. *Id.* The Court elaborated: " 'The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.' " *Id.* at 255 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).

76. *Id.* at 255–56. The government argued that the CPPA was not a suppression of speech, but rather only shifted the burden to the defendant to prove that the speech was lawful. *Id.* at 255.

77. *Id.* "If the evidentiary issue is a serious problem for the government, as it asserts, it will be at least as difficult for the innocent possessor." *Id.* at 255–56. *But see infra* notes 87–88 and accompanying text (discussing Justice Thomas's concurring opinion and the idea that an affirmative defense could possibly redeem the constitutionality of a statute prohibiting this type of material).

possessors.[78] Unlike producers, possessors could not avail themselves of the affirmative defense by showing that only adults were used in production.[79] Consequently, possessors may be subject to prosecution even if they can meet the difficult burden of proving that children were not used in the production of the material.[80] Furthermore, the CPPA's affirmative defense only applies to producers who can demonstrate that they used only adults in the production of their material;[81] the use of computer-generated images does not fall under the affirmative defense provision.[82] Therefore, producers may be subject to prosecution even when they can demonstrate that no actual children were involved in the production of their material.

Under this analysis of the CPPA, and in light of precedent, the Supreme Court found that the CPPA phrases "appears to be" and "conveys the impression" prohibits protected speech and is therefore unconstitutional.[83] The Court noted that the constitutionality of the CPPA depended on the creation of a new category of unprotected speech for virtual child pornography,[84] a step the Court was unwilling to take.[85] In essence, the Court's concern with the overbreadth of the CPPA led to its conclusion that the law is unconstitutional because it

78. *Id.* at 256.

79. *Id.* Possessors of child pornography, while not directly involved in the production of the pornography, contribute to the harm by creating a market for material created through the abuse of children. *See* Osborne v. Ohio, 495 U.S. 103, 109 (1990). Therefore, prohibiting possession of such material is justified in the interest of protecting the victims of child pornography. *Id.* at 109–10. While this rationale for proscribing the possession of actual child pornography makes sense, it is subject to criticism when applied to virtual child pornography, where no children are harmed in the production of the material.

80. *Free Speech Coalition*, 535 U.S. at 256.

81. *Id.*

82. *Id.* In other words, a producer is not protected by the affirmative defense if a nonchild method of production was used but that method did not involve adults.

83. *Id.* at 258.

84. *Id.* at 245–46. Notably, Judge Ferguson of the United States Court of Appeals for the Ninth Circuit advocated this exact view in his dissent. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1098 (9th Cir. 1999) (Ferguson, J., dissenting) (arguing that "virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment"), *aff'd sub nom* Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

85. Historically, the Court has recognized that there are "inherent dangers of undertaking to regulate any form of expression." Miller v. California, 413 U.S. 15, 23 (1972). In *Ferber*, where the Court created a new category of unprotected speech—child pornography—the Court justified the classification because "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *New York v. Ferber*, 458 U.S. 747, 763–64 (1982). In essence, the government did not convince the Court in *Free Speech Coalition* that the evils of virtual child pornography outweighed First Amendment values.

is inconsistent with the principle that "[t]he government may not suppress lawful speech as the means to suppress unlawful speech."[86]

Although the Court struck down the CPPA as unconstitutionally overbroad in *Free Speech Coalition*, the possibility remained that virtual child pornography could be prohibited in a manner that would survive judicial scrutiny. For example, Justice Thomas, in his concurring opinion, acknowledged that there may be some constitutional means of prohibiting virtual child pornography.[87] Specifically, Justice Thomas noted that "[t]he Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality."[88] In other words, legislation may be constitutional if it overcomes the Court's concerns regarding the affirmative defense's inconsistent application to producers and possessors and lack of application to producers who use only virtual images.

In part due to the words of Justice Thomas, proponents of the virtual child pornography prohibition were hopeful that the substance of the CPPA could be rescued from complete destruction. Without delay, supporters of the CPPA sought alternative approaches for banning virtual child pornography.[89] This Recent Development examines potential avenues for reconciling the goal of prohibiting virtual child pornography with the First Amendment and considers the potential success of each approach.

One approach taken by Congress is demonstrated in the effort to prove that virtual child pornography is related to the harm of real children. Following the *Free Speech Coalition* decision, Congress promptly made inquiries into the future harmful effects that child pornography may have on children.[90] The investigation focused on

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86. *Free Speech Coalition*, 535 U.S. at 255.

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

88. *Id.* (Thomas, J., concurring).

89. One of these approaches is the joint resolution introduced in the House of Representatives proposing an amendment to the Constitution. H.R.J. Res. 106, 107th Cong. (2002). The proposed amendment reads:

> Section 1. Neither the Constitution nor any State constitution shall be construed to protect child pornography, defined as visual depictions by any technological means of minor persons, whether actual or virtual, engaged in explicit sexual activity.
>
> Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Id. Because of the challenge of adding constitutional amendments, this proposal is beyond the scope of this Recent Development and will not be considered here.

90. *See, e.g.*, *Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision, Ashcroft v. Free Speech Coalition: Hearing Before the Subcomm. on Crime,*

harm that occurs, not in the production, but rather as a result of the circulation of such material. On May 1, 2002, the House of Representatives called on the Unit Chief of the FBI's Crimes Against Children Unit, Michael J. Heimbach, to report on this subject.[91] Mr. Heimbach testified that, to his knowledge:

> (1) "there is [a] connection between those who trade or possess child pornography and those who molest children;"
>
> (2) "child molesters use child pornography to seduce children;" and
>
> (3) "child pornography can sexually arouse [individuals that have a predisposed sexual interest in children], fuel their sexual fantasies about children, validate their sexual attraction to children, and help them rationalize this behavior."[92]

Furthermore, Mr. Heimbach reported that "[t]here is every reason to believe that offenders who obtain and distribute [computer-generated] images on the Internet can and will use them in much the same manner that they currently use images with real child victims."[93] Overall, Mr. Heimbach's testimony conveyed that virtual child pornography, like actual child pornography, threatens to harm real children.[94]

The information provided to the House of Representatives speaks to the Supreme Court's finding that harm to actual children is "contingent and indirect."[95] Congress thus appears to be attempting to strengthen the connection between virtual child pornography and harm to actual children. Our society has a strong interest in protecting all children from harm, not just those abused in the

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Terrorism, and Homeland Security of the House Comm. on the Judiciary, 107th Cong. (2002) (report of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, Federal Bureau of Investigation) [hereinafter Heimbach Report], *available at* http://www.house.gov/judiciary/70366.pdf (on file with the North Carolina Law Review).

91. *Id.* at 6–13. For this testimony, Mr. Heimbach relied on information provided by the FBI's National Center for the Analysis of Violent Crime's ("NCAVC") Behavioral Analysis Unit ("BAU"). *Id.* at 8 (stating that the testimony was based on information collected by the NCAVC and the BAU in their extensive investigations of child sex abuse and their many interviews with child sex offenders).

92. *Id.* at 8–10.

93. *Id.* at 11–12.

94. *Id.* at 6–13.

95. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250 (2002). The Court found that "[t]he harm [allegedly related to virtual child pornography] does not follow from the speech, but depends upon some unquantified potential for subsequent criminal acts." *Id.*

production of child pornography.[96] If a significant relationship between virtual child pornography and harm to actual children can be substantiated, the harm of virtual child pornography to children begins to resemble the harm discussed in *Ferber*, where harm to children warranted the creation of a category of unprotected speech. Hence, the *Ferber* rationale is arguably applicable here, and thus the Court should develop a special category of unprotected speech.

These congressional efforts to pass legislation that would survive constitutional challenges are likely to fail. The link between virtual child pornography and actual harm to children will not likely be verified to the extent that real child pornography was connected to actual harm in *Ferber*. In *Ferber*, the pornographic material involved was a product of child abuse and, therefore, served as documentation that the abuse had occurred.[97] It is difficult to imagine a study of virtual child pornography that could prove such an irrefutable connection as the alleged child abuse would unlikely be documented in the same manner. Even if Congress could establish such a relationship, *Ferber* could still be distinguished as creating only a production-based prohibition, while the effect that virtual child pornography has in circulation is a content-based argument. That is, in *Ferber*, the Court was concerned with the harm that resulted to children from involving them in production and prohibited child pornography on that basis, not because of the substance of the material produced.[98]

Another approach suggested to uphold the prohibition of virtual child pornography is exemplified through efforts to prove that virtual child pornography hinders the prosecution of real child pornography offenders. In light of this possibility, Congress has requested reports examining the effect of legalization of virtual child pornography on prosecution efforts under existing child pornography laws.[99] This investigation stems from the government's assertion in *Free Speech Coalition* that defendants who use actual children in the production of pornography may defend themselves by arguing that an image is

96. The Supreme Court has supported statutes that prohibit child pornography for reasons other than protecting the child abused in production. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (noting the state's interest in prohibiting child pornography from being used to lure other children); *see also* Wasserman *supra* note 12, at 266 (stating that *Osborne* "signals the Court's willingness to accept states' justifications for child pornography statutes that do not involve protecting the children exploited in the pornography's creation").

97. *See supra* note 34 and accompanying text.

98. *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982).

99. *See* Heimbach Report, *supra* note 90, at 6–13.

legal, made using only computer-generated images.[100] In response to Congress's request, the FBI reported that although most images of child pornography are produced using actual children, experts are unable to show with scientific certainty that a particular image was produced using an identifiable child.[101] The FBI further reported that this loophole may enable offenders who use actual children in producing pornography to evade prosecution.[102]

At least one member of the Court, Justice Thomas, found this argument to be a persuasive point.[103] In his concurring opinion, Justice Thomas left open the possibility that, "if technological advances thwart prosecution of 'unlawful speech,' the government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children."[104] That is, if the government could substantiate that offenders of actual child pornography were avoiding prosecution, a ban on virtual child pornography might be justified.

The problem with the government's argument, as articulated by the Court, was that the government did not identify any cases that demonstrate that hindrance to prosecution is a legitimate concern.[105] Until the government can unequivocally show that pornographers who use actual children are evading conviction, the Supreme Court will most likely maintain the position that the hindrance to prosecution argument is too speculative.

Following the reports to Congress concerning virtual child pornography, Congress developed new legislation aimed at banning

100. *See Free Speech Coalition*, 535 U.S. at 241–42.

101. Heimbach Report, *supra* note 90, at 11. Some supporters of this position have gone so far as to argue that "[c]omputer-generated child pornography . . . supplies a 'built-in reasonable doubt standard in every child exploitation/pornography prosecution.' " Wasserman, *supra* note 12, at 269 (quoting *Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Bruce Taylor, President and Chief Counsel, Nat'l Law Center for Children and Families)).

102. *See* Heimbach Report, *supra* note 90, at 11.

103. *See Free Speech Coalition*, 535 U.S. at 259 (Thomas, J., concurring).

104. *Id.* (Thomas, J., concurring). In *Free Speech Coalition*, the Court explained that the overbreadth doctrine "prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Id.* at 255. Arguably, a more narrow construction of the language used in the CPPA would ensure that a "substantial amount" of protected speech would not be swept into the prohibition and this result, in conjunction with the alleged difficulty the government faces in prosecuting actual child pornography offenders, would be enough to warrant banning virtual child pornography.

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

such material. On March, 6, 2003, the House of Representatives introduced the Child Obscenity and Pornography Prevention Act of 2003 ("COPPA").[106] In an attempt to circumvent the decision in *Free Speech Coalition*, Congress modified the language used in the CPPA to prohibit virtual child pornography. Congress addressed many of the Court's criticisms of the CPPA in drafting the COPPA.

Most noteworthy, the COPPA revises § 2256(8)(B) of the CPPA by replacing the "appears to be" language with "is, or is indistinguishable from."[107] The modified language of the COPPA appears to be an attempt by Congress to more narrowly define prohibited material.[108] The phrase "is, or is indistinguishable from," however, still leaves room for criticism.[109] Arguably, this language remains too ambiguous and poses many of the same problems of the original "appears to be" language of the CPPA;[110] that is, it is still possible that material that is neither obscene under *Miller* nor child pornography under *Ferber* would nonetheless be subject to prohibition. For example, a movie involving computer-generated images that are "indistinguishable from" seventeen-year-olds engaging in sexually explicit conduct may not qualify as obscenity or child pornography, yet would still be prohibited by this act.[111]

Additionally, the COPPA strikes § 2256(8)(D) of the CPPA, the subparagraph containing the term "conveys the impression."[112] In effect, this elimination entirely removes the CPPA's prohibition on material that "is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[113] The COPPA, however, prohibits

106. H.R. 1161, 108th Cong. (2003).

107. H.R. 1161 § 3(a). The new language in context reads: "such visual depiction is a digital image that *is, or is indistinguishable from*, that of a minor engaging in sexually explicit conduct." *Id.* (emphasis added).

108. The Court found the "appears to be" language of the CPPA unconstitutionally overbroad in *Free Speech Coalition*, 535 U.S. at 258.

109. Notably, Justice O'Connor advocated interpreting the "appears to be" language of the CPPA as "is virtually indistinguishable from" in her concurring and dissenting opinion in *Free Speech Coalition*, 535 U.S. at 265 (O'Connor, J., concurring in part and dissenting in part) (stating that "[r]eading the statute only to bar images that are virtually indistinguishable from actual children would not only assure that the ban on virtual-child pornography is narrowly tailored, but would also assuage any fears that the 'appears to be . . . of a minor' language is vague").

110. *See supra* note 10 and accompanying text.

111. Notably, producers of such a movie are protected by the affirmative defense if they can show that the material was produced without involving actual children.

112. H.R. 1161 § 4(a)(2).

113. *See* 18 U.S.C. § 2256(8)(D) (2000).

producers and distributors from knowingly suggesting that material portrays a minor engaging in sexually explicit material.[114]

The removal of this requirement—that the defendant prove that the material was not promoted or distributed as containing depictions of a minor engaged in sexually explicit activity—is redeeming, as this requirement was found to be overbroad by the Court in *Free Speech Coalition*.[115] The COPPA modification incorporating knowledge to the defendant should alleviate the Court's concern that material marketed as depicting minors is "unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described."[116]

Finally, Congress modified the affirmative defense of the CPPA to read: "[I]t shall be an affirmative defense to a charge of violating this section that the production of the alleged child pornography did not involve the use of a minor or an attempt or conspiracy to commit an offense under this section involving such use."[117] Hence, the COPPA allows a defendant to show that either an adult or a computer-generated image was used in production.[118]

The amended affirmative defense provision, which exonerates a defendant who can show that the image was not produced using actual children, may resolve the issue of overbreadth. However, this affirmative defense raises some of the same concerns that the Court expressed with respect to the CPPA's affirmative defense. For example, the revised affirmative defense, like the original, may apply inconsistently to producers and possessors.[119] That is, mere possessors may have a more difficult time proving that actual children were not used in the production of the material. Moreover, the Court's position that "[t]he government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful"[120] is unlikely to be shaken. For these reasons, it is improbable that the Court will find this revision to the affirmative defense complete and sufficient.[121]

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114. H.R. 1161 § 4(b)(1).

115. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).

116. *Id.* at 258.

117. H.R. 1161 § 3(d).

118. *Id.*

119. *See supra* notes 76–80 and accompanying text.

120. *Free Speech Coalition*, 535 U.S. at 255.

121. *See id.* at 256. The Court, in commenting on the affirmative defense of the CPPA, stated, "Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient." *Id.*

Like the House of Representatives, the Senate considered legislation prohibiting virtual child pornography following the *Free Speech Coalition* decision. On April 30, 2003, the President signed the Senate's Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act").[122] Like the COPPA, the PROTECT Act modifies § 2256(8)(B), the "appears to be" provision, of the CPPA.[123] The PROTECT Act also revised the language to prohibit an image that "is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."[124] Again, this modification is subject to criticism as the prohibition of "indistinguishable" images without consideration of whether the images are obscene or whether actual children were exploited in production does not find support under *Miller* or *Ferber*.

The PROTECT Act also removes the entire "conveys the impression" portion of the CPPA located in § 2256(8)(D).[125] Like the COPPA, the PROTECT Act incorporates a knowledge requirement—limiting the violations of this section to a person who:

> (3) knowingly—
>
> > (A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or
> >
> > (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—
> >
> > > (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
> > >
> > > (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.[126]

This knowledge requirement addresses the Court's concern in *Free Speech Coalition* that the "conveys the impression" language of

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122. Pub. L. No. 108-21, 117 Stat. 649.

123. § 502(a)(1), 117 Stat. at 678.

124. *Id.* The PROTECT Act further defines "indistinguishable" with respect to a depiction as: "virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct." *Id.* § 502(c), 117 Stat. at 679.

125. *Id.* § 502(a)(3), 117 Stat. at 678.

126. *Id.* § 503(1)(A), 117 Stat. at 680.

the CPPA was overbroad in that it prohibited "possession of material described, or pandered, as child pornography by someone earlier in the distribution chain."[127] However, the PROTECT Act does include a prohibition of possession of certain materials.[128] Specifically, the PROTECT Act prohibits a person from knowingly possessing an image that:

> (1)(A) depicts a minor engaging in sexually explicit conduct; and
>
> (B) is obscene; or
>
> (2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and
>
> (B) lacks serious literary, artistic, political, or scientific value.[129]

This provision of the PROTECT Act is subject to constitutional criticism. While *Miller* allowed the prohibition of obscene material with respect to producers and distributors,[130] *Stanley v. Georgia*[131] provided that the government may not prohibit possession of obscene material.[132] However, the government may have a strong argument that the prohibition of the PROTECT Act, which requires that an image is both obscene and depicts sexually explicit conduct of a minor, is more closely related to the holding in *Osborne*, where the prohibition of possession of child pornography was upheld.[133] It is possible that the Court will find that the justifications for prohibiting possession in *Osborne*, the protection of children and the goal of destroying the market for child pornography,[134] also support a narrow prohibition of possession of obscene virtual child pornography.

Finally, the PROTECT Act, like the COPPA, calls for an amended affirmative defense.[135] This affirmative defense requires a defendant to prove either that the production involved actual persons

127. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).
128. § 504(a), 117 Stat. at 680–81.
129. *Id.*
130. Miller v. California, 413 U.S. 15, 16–17 (1973).
131. 394 U.S. 557 (1969).
132. *Id.* at 559.
133. Osborne v. Ohio, 495 U.S. 103 (1990).
134. *Id.* at 108–09.
135. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act) of 2003, Pub. L. No. 108-21, § 502(d), 117 Stat. 649, 679–80.

who were adults at the time of production or that no minors were used in production.[136] The affirmative defense here is virtually no different than that in the COPPA. Although the PROTECT Act affirmative defense appears to give a defendant the option of showing either that adults were used in the production or that no children were used, these two choices could be condensed. That is, the PROTECT Act, like the COPPA, could simply require the defendant to show that no children were used in production.[137] Therefore, this affirmative defense is subject to the same criticisms as the COPPA's; specifically, the affirmative defense in the PROTECT Act imposes a heavy burden on the defendant and applies inconsistently to producers and possessors.[138] Nonetheless, where so much of the statutorily prohibited material resembles speech that the Supreme Court has already found to be unprotected by the First Amendment, this act may not need to rely on an affirmative defense to save its constitutionality. For these reasons, the PROTECT Act is a promising attempt to address both distribution and possession of virtual child pornography.

Another approach to banning virtual child pornography that Congress has taken involves existing obscenity laws. On July 23, 2002, Congress proposed a concurrent resolution that supported the vigorous enforcement of federal obscenity laws.[139] Stricter enforcement of existing obscenity laws is a good attempt to banish virtual child pornography, yet this approach will not completely satisfy Congress's objective. Although arguably many of the materials that the CPPA sought to prohibit satisfy the obscenity test defined in *Miller*, *Miller* only applies to the production and distribution of obscenity. Furthermore, it is difficult to define precisely what constitutes "serious literary, artistic, political, or scientific value"[140] as required by the third prong of the *Miller* test.[141]

136. *Id.*

137. One way the defendant may satisfy this burden is by showing that production involved only adults. Notably, the affirmative defense of the PROTECT Act and the COPPA is broader than the CPPA's affirmative defense which only allowed a producer to evade prosecution by showing that the material was produced using only adults. *See* 18 U.S.C. § 2252A(c) (2000).

138. *See supra* note 78 and accompanying text.

139. H.R. Con. Res. 445, 107th Cong. (2002). "Whereas vigorous enforcement of obscenity laws can help reduce the amount of 'virtual child pornography' now readily available to sexual predators . . . it is the sense of Congress that the Federal obscenity laws should be vigorously enforced throughout the United States." *Id.*

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

141. *See id.* For example, some internet pornographers have tried to avoid falling under the *Miller* obscenity standard by providing some "value" on their Web sites. *See,*

The enforcement of obscenity laws is not a completely futile attempt by Congress to eliminate virtual child pornography, however, because production and distribution are important parts of the problem. Undoubtedly, the Supreme Court will support Congress's efforts in this area.[142] Therefore, the strict enforcement of obscenity laws could make a solid contribution to accomplishing the goal of prohibiting virtual child pornography while honoring the value of freedom of speech.

Congress's commitment to the strict enforcement of obscenity laws coupled with legislation that complies with Supreme Court precedent is the best approach to banning virtual child pornography. Legislation that is closely tailored to traditionally unprotected categories of speech is a promising attempt to avoid the dilemma of overbreadth found by the Court in its analysis of the CPPA in *Free Speech Coalition.*

In *Free Speech Coalition*, the Supreme Court was faced with the difficult task of balancing Congress's interest in protecting children from harm with the constitutional guarantee of freedom of speech. In finding the CPPA unconstitutional, the Court was not necessarily showing preference for the latter. Rather, *Free Speech Coalition* recognized that there were already measures in place to ensure children's safety while preserving the right to free speech. Instead of struggling to get around the *Free Speech Coalition* decision in an attempt to eradicate virtual child pornography, Congress should use the opportunity to improve upon established means of prosecuting unprotected speakers. Recent legislation that incorporates Court-approved prohibition of speech and stricter enforcement of obscenity laws are the best vehicles for banning virtual child pornography while imposing the least threat to protected speech.

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e.g., Adult Web Law, *at* http://www.adultweblaw.com/laws/obscene.htm (last visited May 20, 2003) (on file with the North Carolina Law Review) (explaining that Web site producers "might want to consider displaying or linking to content that has something other than masturbatory value such as information about health care issues in the adult entertainment industry, safe sex information, a discussion of fetishes, or political links to other websites"). Especially in light of this effort, the prosecution of obscenity cases should be improved upon by more specifically defining what constitutes "value."

142. The Court specifically allowed the prohibition of production and distribution of obscene material in *Miller*, 413 U.S. at 23.