Punishment For Virtual Child Pornography... It’s Just A Fantasy

Allison L Cochran
Punishment For Virtual Child Pornography...It’s Just A Fantasy

Do you think a picture of toddler taking a bath is child pornography? In a Burbank, California photo lab, it is store policy to inquire with their manager, who will then call the local police.¹

In Shakespeare's Romeo and Juliet, Juliet was only thirteen years old, Justice Kennedy said, modern productions of "Romeo and Juliet" could theoretically be vulnerable under the law, along with films such as "Traffic" and "American Beauty," which depict teenagers in explicit sexual situations.² Should we penalize those who watch, read or recreate these stories?

Larry C. Flynt finally won his case in the US Supreme Court. Which surely distorts the original intent of the First Amendment.³ Giving publishers of "adult" pornography delegation to publish whatever "satire" they choose is one thing that makes the line between "adult" pornography and child pornography slightly blurred.⁴

The line between art and illegal pornography has been a difficult line for law enforcement authorities to draw for decades. For example Jock Sturges⁵, his controversial work of photographs, some depicting naked adolescent girls, complied into coffee table art

¹ See James R. Kincaid, Mothers Who Think: Is this Child Pornography?
² See Linda Greenhouse, 'Virtual' Child Pornography Ban Overturned
³ Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), Respondent brought suit against petitioner for libel, slander, and intentional infliction of emotional distress arising from the publication of his caricature in an ad parody. The jury awarded damages on the intentional infliction of emotional distress charge, and the Court of appeals affirmed the award. Petitioner sought certiorari claiming the damages were inconsistent with the First Amendment. On review, the Court found that respondent, as a public figure, was required to show that the statements published in the advertisement parody were made with actual malice or reckless disregard of the truth. The Court found that the award of damages was inconsistent with the Court's longstanding refusal to allow damages just because a particular form of speech may have had an adverse emotional impact on the audience. The judgment of the Court of Appeals was accordingly reversed.
⁴ Id.
⁵ Jock Sturges is an American photographer, best known for his images of adolescents, often taken nude. His work, often taken on the nude beaches of California and France.
books. Even with the FBI’s raid, protests by angry mobs and a grand jury investigation, his books continue to sell.⁶

Congress started passing legislation in 1977 to regulate child pornography. Since 1977, these laws have become increasingly more severe. Congress has raised the age of a child for the purposes of defining child pornography from sixteen to eighteen via the Child Protection Act of 1984⁷, due to the "highly organized, multi-million-dollar industry." Later The Child Protection and Obscenity Enforcement Act of 1988⁸, was enacted, which made it illegal to use a computer to transport, distribute, or receive visual depictions of child pornography. After computer software became a recognized media for digitally altering images to "convey the impression" of child pornography, Congress passed the Child Pornography Prevention Act of 1996 (CPPA)⁹. The CPPA was aimed at banning virtual child pornography and the digital creation of images that resemble, child pornography, but are not. Downloading child pornography from the Internet falls within s 2252A(a)(5)(B), which punishes the knowing possession of "any material that contains an image of child pornography." Even with laws having tougher penalties and child pornography definitions broader scope, child pornography is now a billion dollar industry.

Is it right for the government to regulate our fantasies? What about the literary and artistic value presented in some works? Should the government stifle peoples’ “creative juices,” just because the legislature wants to remedy a separate problem? We are given a constitutional right to freedom of speech. Our country is founded on principles of

---

creativity and imagination. How can the government say no to something that does not actually harm another? What crime is actually being committed when a person creates images on a computer? Should “adult” stores stop selling schoolgirl uniforms because it was created to personify a female under the age of eighteen? The government should not be allowed to encroach upon some ones’ private thoughts and say they are illegal, just because they may not fit into some “social norm.” We are said to have a freedom of expression, does that mean we can express ourselves as long as it does not involve imaginary sexual situations involving those under the age of eighteen?

This paper will compare and contrast the differences between virtual child pornography and child erotica (which are both legal) to actual child pornography. It will go on to discuss the public policy reasons why those areas should be considered legal and how the legislature is in violation of our First Amendment otherwise.

I. Introduction

The explosive growth of the Internet has fueled an overwhelming increase in online child pornography.\textsuperscript{10} Child pornography was once an industry confined to underground mail-order catalogs and attempts of individuals to produce and share homemade child pornography. That has now evolved into an array of online communities\textsuperscript{11}, chat rooms, and electronic publications of child pornography.\textsuperscript{12}

\begin{footnotesize}

\textsuperscript{11} “virtual community”, e-community or online community is a group of people that primarily interact via communication media such as newsletters.

\textsuperscript{12} Silberman, supra note 1, at 157. At one point, the child pornography industry was driven so far underground that practically “the only publishers of child-porn magazines left in the US were law enforcement agencies, who used them as bait in sting operations.” Id. The government was limited to
\end{footnotesize}
II. What is Child Pornography?

Child Pornography is defined by the 18 U.S.C. §2256 as "any visual depiction ... of sexually explicit conduct" involving a minor." Based on the statute the visual depiction must be of a minor engaged in some sort of sexual activity. That leaves a lot of grey area, what about a minor just standing in a picture in their underclothes or even naked? Is that really “sexually explicit?” What about one teen taking a picture of themselves engaged in some sort of sexual activity, then they send it out to their friends or post it on a blog, are they guilty of child pornography?

So, how does the Court determine whether images are child pornography? In Knox, a man who had previously been convicted of receiving child pornography through the mail ordered video tapes by mail of girls between the ages of ten and seventeen who, in the Court's words, "were dancing or gyrating in a fashion not natural for their age." The girls wore bikini bathing suits, leotards, or underwear - none of the girls in the videos was nude. The videos were set to music, and it appeared that someone off-camera was directing the targeting parents who used their own children to manufacture pornographic videos rather than those who obtained the material elsewhere and merely "possessed" it. Id.

13 18 U.S.C. s2256, “child pornography” any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; or (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; " Also see Orin S. Kerr, Computer Internet Law, 211 (2006).

14 United States v Knox, 977 F.2d 815 (3d Cir. 1992), Based on three videotapes seized by police, defendant was indicted on two counts: knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct; and knowingly possessing three or more videotapes containing a visual depiction of a minor engaging in sexually explicit conduct in violation of 18 U.S.C.S. 2252(a)(2), (4). Sexually explicit conduct for both offenses was defined in 18 U.S.C.S. 2256(2)(E). Defendant appealed his convictions and the denial of his post-trial motion for judgment of acquittal, and the Court affirmed. The Court held that the district Court did not abuse its discretion in denying defendant's post-trial motion because it was untimely. The Court found that an "exhibition" pursuant to 2256(2)(E) encompassed visual depictions of a child's genitals or pubic area even when the areas were covered by clothing and that nude exposure was not required under the statute. The Court determined that the district Court did not err when it ruled that there was sufficient evidence to establish beyond a reasonable doubt that defendant knowingly received and possessed the videotapes and the films traveled through interstate mail.
girls. The photographer videotaped the girls dancing, and zoomed in on each girl's pubic area for an extended period of time. Knox was prosecuted under United States Child Pornography laws.

Legal counsel for Knox argued that "lascivious exhibition of the genitals or pubic area" meant that the girls had to be nude - wearing clothing meant that that genitals and pubic area were clearly not exhibited. The Court disagreed and held that there was no nudity requirement in the statute: "the statutory term "lascivious exhibition of the genitals or pubic area," as used in 18 U.S.C. § 2256(2)(E), does not contain any requirement that the child subject's genitals or pubic area be fully or partially exposed or discernible through his or her opaque clothing.

Max Hardcore, had allegations that the portrayals in Max Hardcore Extreme 4 constituted child pornography. On May 17, 2007, a federal grand jury in the Middle District of Florida, Tampa Division, returned a ten-count indictment against the Defendants. Counts one through five charge Defendants with knowingly using an interactive computer service for the purpose of selling and distributing obscene matter, to

---

15 Id.
16 Id.
17 Id.
18 See Knox, infra note 14.
19 Id. The Protection of Children Against Sexual Exploitation Act of 1977, as subsequently amended, criminalizes knowingly receiving through the mail visual depictions of a minor engaged in sexually explicit conduct and knowingly possessing three or more videotapes which contain a visual depiction of a minor engaging in sexually explicit conduct. 18 U.S.C.S. 2252(a)(2), (4). Sexually explicit conduct for purposes of both of these offenses is defined to include the lascivious exhibition of the genitals or pubic area. 18 U.S.C.S. 2256 (2)(E).
20 Id. Displaying any portion of the inner thighs does not constitute an exhibition of the pubic area under 18 U.S.C.S. 2256(2)(E)
21 Max Hardcore s a controversial former male porn star and producer whose films usually featured him engaging in a variety of sexual acts with young women who dress like prepubescent girls. He is currently in prison appealing against a 46 month prison sentence for multiple obscenity offenses.
23 Id.
wit, a specific video file, through the Max Hardcore website in violation of 18 U.S.C. §1465 and 2. The video files were located on the Max Hardcore website and were downloaded by agents in Tampa, Florida. Counts six through ten charge acts of commercial distribution of obscene matters, to wit, specific DVD's, through the mail, in violation of 18 U.S.C. § 1461 and 2. The DVD's were purchased by agents through the Max Hardcore website and mailed to a post office box located in Tampa, Florida.

How do the Courts determine if images are actual child pornography? Dost dealt with the factors, which are used to determine if the picture is really child pornography. Some of these factors include whether the focal point of the visual depiction is on the child's genitalia or pubic area; whether the setting of the visual depiction is sexually suggestive (i.e., in a place or pose generally associated with sexual activity); whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; whether the child is fully or partially clothed, or nude; whether the visual depiction

---

24 Id.
25 Id.
26 Id. The Supreme Court has consistently held that obscenity is not protected by the First Amendment. Aschcroft v. American Civil Liberties Union, 535 U.S. 564, 574, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (stating “obscene speech, for example, has long been held to fall outside the purview of the First Amendment.”) (citing Roth v. United States, 354 U.S. 476, 484-485, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)); Miller v. California, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Supreme Court has also considered and upheld the federal obscenity statutes in the context of the right to privacy. See United States v. Extreme Associates, Inc. 431 F.3rd 150, 159 (3rd Cir.2005).
27 Id.
28 United States v. Dost. 636 F. Supp. 828 (S.D. Cal. 1986). Defendants took 22 photographs, 21 of a 14-year old girl and 1 of a 10-year old girl. In the photographs, the girls were nude and obviously posed in unnatural positions. The stipulated facts established that defendants conspired, used minors as subjects of visual depictions knowing that the visual depictions would be mailed, and knowingly received visual depictions through the mail. After determining that the photographs depicted minors engaging in sexually explicit conduct as defined in 18 U.S.C.S. § 2255(2)(E), the Court found defendants guilty of all charges. In so holding, the Court noted that § 2255(2)(E) had been amended to change the prohibited exhibition from "lewd" to "lascivious," which was intended to be a lower standard. The Court then set forth six factors to be considered in determining whether a photograph was "lascivious" but cautioned that the determination had to be made based on the overall content of the visual depiction, taking into account the age of the minor. Applying the factors to the photographs at issue, the Court found that each and every one of the photographs depicted a "lascivious exhibition of the genitals or pubic area" under § 2255(2)(E).
suggests sexual coyness or a willingness to engage in sexual activity; and whether the visual depiction is intended or designed to elicit a sexual response in the viewer.29

The major players in the child pornography business include producers, middlemen, distributors, and collectors. Producers are publishers, creators of home videos, photographers and creators of “morphed”30 pornography.31 The middlemen are the people who make contact with children. They can also be called procurers, the middleman is not limited to strangers and can include family members.32 Procurers befriend children and prey upon the vulnerabilities.33 Children can be solicited by email, chat rooms or in person.34 Distributors are those who advertise and also trade in child pornography. Collectors are persons who purchase child pornography.35 A “preferential offender,” is another type of collector who is usually “sexually indiscriminate adult with a wide variety of deviant sexual interest or a pedophile with a definite preference for children”36 A “preferential child molester,” is distinguished from a pedophile, while pedophiles act on their impulses and actually sexually abuse children, preferential child molesters only fantasize about sexual encounters with children.37 However, a “dabbler” is classified as a

29 Id. 18 U.S.C.S. § 2255(2) defines “sexually explicit conduct” as actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;(B) bestiality;(C) masturbation;(D) sadistic or masochistic; abuse; or(E) lascivious exhibition of the genitals or pubic area of any person.
30 “morphed” to undergo transformation from an image of one object into that of another especially by means of computer-generated animation
33 Id.
34 Id.
35 See Shay Bilchik, Understanding Child Sexual Exploitation <http://www.ncjrs.org/162427.txt>
36 Id.
III. Protection(s)

The Communications Decency Act of 1996 (CDA)\(^{39}\) was enacted to limit the exposure children to indecent materials online. It seeks to protect minors from harmful material on the Internet, an international network of interconnected computers that enables millions of people to communicate with one another in "cyberspace" and to access vast amounts of information from around the world.\(^{40}\) However, it was invalidated when the Courts in \textit{Reno} found that the act was not narrowly tailored to a compelling state interest in the protection of children.\(^{41}\) Stating that it was so vague that it violates U.S. Const. amend. V, the many ambiguities concerning the scope of its coverage render it problematic for purposes of U.S. Const. amend. I.\(^{42}\) That has raised two concerns, 1) content-based regulation of speech and 2) CDA is a criminal statute. The Court also reasoned that

\(^{38}\) Id. Dabblers' interest are not long term or persistent, they tend to only view child pornography over the internet. Dabblers cross the line when viewing of child pornography becomes long terms, which leads to chat rooms and internet groups that discuss sexual deviant behavior, thus dabblers can be prosecuted.

\(^{39}\) The Communication Decency Act of 1996 was an amendment to the U.S. 1996 Telecommunications Bill that went into effect on 08 February 1996, outraging thousands of Internet users who turned their web pages black in protest. The law, originally proposed by Senator James Exon to protect children from obscenity on the Internet, ended up making it punishable by fines of up to $250,000 to post indecent language on the Internet anywhere that a minor could read it.

\(^{40}\) Communications Decency Act of 1996

\(^{41}\) \textit{Reno v. ACLU}, 521 U.S. 844 (1997). After Congress passed the Communications Decency Act of 1996 (CDA), 47 U.S.C.S. 223, appellees sought a declaratory judgment deeming it an unconstitutional violation of U.S. Const. amends. I and V. Appellants challenged the ruling of a three-judge federal district Court panel that enjoined enforcement of the CDA. The Court upheld the district Court's judgment on First Amendment grounds declining to reach the Fifth Amendment question. The Court found that (a) the CDA's vague provisions chilled free speech since speakers could not be certain if their speech was proscribed; (b) the CDA's provisions criminalized legitimate protected speech (including sexually explicit indecent speech) as well as unprotected obscene speech, and thus were overinclusive; (c) since the CDA regulated a fundamental freedom, it must be narrowly tailored; (d) time, place, and manner analysis was inapplicable since the CDA regulated the content of speech, not how it was presented; and (e) the CDA was unconstitutional due to its overbreadth.

\(^{42}\) Id.
“sexual expression which is indecent but not obscene” is protected by U.S. Const. amend. I where obscenity is not involved, the fact that protected speech may be offensive to some does not justify its suppression. The fact that society may find speech offensive is not a sufficient reason for suppression. Finding that the CDA presented a great threat of censoring speech, that in fact, falls outside the statute's scope.

The Child Pornography Prevention Act of 1996 (CPPA) extended the existing federal criminal laws against child pornography to the new computer media. As part of the overhaul, the definition of "child pornography" was extended to include "morphed" or computer generated images, and material advertised as child pornography.

In United States v. X-Citement Video, the Court held that in order to convict a defendant for violating child pornography statute, government must prove that the defendant knew the sexually explicit nature of the material and that person(s) depicted in

---

See Miller, infra note 100, the basic guidelines in determining whether material is obscene are: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id.

The vagueness of the Communications Decency Act of 1996 (CDA), 47 U.S.C.S.223, is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special U.S. Const. amend. I concerns because of its obvious chilling effect on free speech. Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater U.S. Const. amend. I concerns than those implicated by certain civil regulations.

The Child Pornography Prevention Act expanded the federal ban on child pornography from pornographic images made using actual children to include computer-generated images appearing to be children engaged in sexually explicit conduct.

See “morphed,” supra note 30

18 U.S.C. § 2256, "child pornography' means any visual depiction, including any photograph, film, video, picture, drawing, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where‘(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;' (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; or ‘(C) 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.'
the material were under eighteen years of age.\textsuperscript{49} The mens rea\textsuperscript{50} requirement of 18 U.S.C. §2252(a)(1) and (a)(2) require proof that the defendant knew the images were of a minor. The Court stated that is was not enough for a person to just transport or receive images that happen to include child pornography; there must be proof of knowledge that person in the images is a child.\textsuperscript{51} It also went on to say that a persons good faith belief that an image is virtual child pornography could not presumably act knowingly with respect to the factual element that the image is actual child pornography.\textsuperscript{52}

The Child Pornography Prevention Act of 2005 was introduced to enhance prosecution of child pornography and obscenity by strengthening 18 U.S.C. §2257, to ensure that children are not exploited in the production of pornography, prohibiting distribution of child pornography used as evidence in prosecutions, authorizing assets forfeiture in child pornography and obscenity cases, expanding administrative subpoena

\textsuperscript{49} United States v. X-Citement Video, 115 S. Ct. 464, Respondent criminals were convicted of violating the Protection of Children Against Sexual Exploitation Act of 1977, under 18 U.S.C.S. 2252 (a)(1), (a)(2), 371. Respondents challenged their convictions. The appellate Court reversed, holding that 2252 was facially unconstitutional because it did not require a showing that respondents had knowledge that one of the performers was a minor. The government appealed from the judgment. The Court reversed, holding that 2252 was not unconstitutional and required knowledge because the term “knowingly” in 2252 extended to both the sexually explicit nature of the material and to the age of the performers.

\textsuperscript{50} “mens rea” a guilty mind, a guilty or wrongful purpose, a criminal intent (An act does not make the doer guilty unless the mind is guilty, criminal intent). \textit{US v. Cordoba-Hincapié}, 825 F. Supp. 485. Defendants, who thought they were carrying cocaine, were arrested and charged with knowingly and intentionally importing heroin into the United States. They entered guilty pleas. The government demanded that defendants be sentenced under U.S. Sentencing Guidelines Manual provisions for importing heroin, which would have imposed a far greater punishment than for bringing in cocaine. The Court imposed sentences commensurate with U.S. Sentencing Guidelines Manual provisions for importing cocaine. It found beyond a reasonable doubt that defendants believed that they were importing cocaine. The Court reasoned that defendants’ punishments had to be limited by their culpability, because that result was consistent with the fundamental tradition that blameworthiness hinged upon a culpable state of mind. It announced that it was adopting a rule whereby in sentencing a defendant who had been convicted of narcotics importation, the district judge should presume that the defendant was aware of the type of narcotics he or she carried, but the defendant would be afforded the opportunity to rebut this presumption; the government would then have the burden to establish mens rea.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}
power to cover obscenity cases, and prohibiting the production of obscenity, as well as its transportation, distribution, and sale, and for other purposes. This bill never became law.

The Child Online Protection Act (COPA) prohibits any individual or entity from knowingly making a communication, using the World Wide Web for commercial purposes when that communication is available to minors and is harmful to minors. Although more narrow than the CDA, COPA’s constitutionality remains questionable.

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act)\(^{54}\), was enacted a year after the *Free Speech Coalition*\(^ {55}\) decision. Its main purpose was to redefine the definition of “child pornography.” It prohibits certain types of virtual child pornography, and another part of the act specifically prohibits obscene virtual child pornography\(^ {56}\) while satisfying the constitutional requirements of free expression outlined by the Court in *Free Speech Coalition*.\(^ {57}\) The PROTECT Act emphasizes that the legalization of virtual child pornography hampers prosecution for child pornography.\(^ {58}\)

---

\(^{53}\) Possession of digital images of child pornography, however, are prohibited by section 847.0135, Florida Statutes. Arguably anyone who posts an image to a Web site could be transmitting the image to another person because they are placing the image in a forum where they know Internet users are likely to view them.

\(^{54}\) See PROTECT Act, infra note 56.

\(^{55}\) See *Free Speech Coalition*, infra note 97

\(^{56}\) *Id.*, The PROTECT Act states: (a) IN GENERAL- Any person who, in a circumstance described in subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, 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; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction


\(^{58}\) *Id.*
The First Amendment, unlike pornographic images of adults, does not protect the possession or distribution of child pornography. Content that depicts children engaged in sexual conduct is "a category of material outside the protection of the First Amendment." The First Amendment does protect some material that could be considered child pornography, for example images in a medical textbook that show a child's genitalia. Although the possession or distribution of such images might be protected by the First Amendment when used in a pediatric context, the same images would probably not be protected if they were displayed on an adult website.

Content that depicts children engaged in sexual conduct is "a category of material outside the protection of the First Amendment." The distribution, receipt, and possession of child pornography is prohibited to protect children against sexual molestation and abuse. The Court reasoned that prohibition would create deterrence. The Court further explained that because the creation of child pornography includes the sexual abuse of children, prohibiting such material would "dry up the market."

---

59 See Ferber, infra note 60.
60 New York v. Ferber, 458 U.S. 747 (1982). Respondent, the proprietor of a bookstore, sold two films to an undercover police officer depicting young boys masturbating. He was found guilty on two counts of violating N.Y. Penal Law 263.15, a law that did not require proof that the films were obscene. The appellate Court held that 263.15 violated the First Amendment. On appeal, the United States Supreme Court reversed. It held that 263.15 did not fail under First Amendment scrutiny. There was nothing constitutionally "under inclusive" about a statute that singled out this category of material for proscription. The First Amendment, the Court held, did not bar the state from prohibiting the distribution of unprotected material produced outside the state. Respondent argued that 263.15 was "overbroad," as an impermissible application because it included medical books and educational sources. The Court held such applications were no more than a tiny fraction of the materials that were within the statute's reach, and whatever overbreadth might have existed was curable through case-by-case analysis of the fact situations.
61 See Kerr, supra note 13
62 See Ferber, supra note 60.
63 Id.
In *Osborne v. Ohio*, the Supreme Court stated that child pornography only qualifies as "minimally protected speech." The Court did however find that banning possession of child pornography would encourage possessors to get rid of them and eliminating pedophiles use of such pictures to show other children that sexual behavior is a norm. And that is because of a compelling state interests in protecting children, that child pornography may be treated similar to contraband.

The CDA, CPPA, COPA and PROTECT Act all fail to stop pedophiles or protect children by prohibiting virtual child pornography. While we will agree that child pornography is wrong and that there is a compelling interest in the protection of children, what is the correlation between child pornography and virtual child pornography? The Courts have failed to show that those who watch child pornography or child erotica will actually go out and commit an offense. Thus, they should not be able to use the statutes to regulate a “what if” scenario.

**IV. Punishment**

64 *Osborne v. Ohio*, 495 U.S. 103 (1993), Petitioner was convicted of violating Ohio Rev. Code Ann. 2907.323(A)(3) (Supp. 1989), prohibiting possession or viewing of child pornography. The Ohio Supreme Court affirmed. The Court rejected the contention that the U.S. Const. amend. I prohibited proscribing private possession of child pornography. Further, by narrowly construing the statute, the Court determined it was not unconstitutionally overbroad. Finally, although the Court also found scienter an essential element of the statute, it held that the state's failure to prove lewd exhibition and scienter was not plain error. The United State Supreme Court reversed. Although the Court found the statute was constitutional because of the state's compelling interest in safeguarding minors and the Court could narrow the statute to avoid overbreadth, the Court held the U.S. Const. amend. XIV, Due Process Clause required the state to prove each element of the statute to sustain a conviction.

65 *Id.*

66 *Id.* It is evident beyond the need for elaboration that a state's interest in safeguarding the physical and psychological well-being of a minor is "compelling." The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, easily passes muster under the U.S. Const. amend. I.

67 See Child Decency Act of 1984, supra note 39

68 See Child Pornography Prevention Act of 1996, supra note 46

69 See PROTECT Act, supra note 56
The consequences of child pornography apply to people who knowingly transport child pornography (interstate or foreign commerce) for the purpose of sale or distribution.\(^{70}\) The transportation of obscene\(^ {71}\) material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent\(^ {72}\) or immoral\(^ {73}\) character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.\(^ {74}\)

We all should agree that anyone caught with child pornography should be prosecuted to fullest extent possible. This statute\(^ {75}\) is laced with all kinds of morality issues. Here they are trying to use this same punishment for those who watch, create, etc. virtual child pornography. Why? Because it does not fit into “social norms”\(^ {76}\),\(^ {77}\) which the government uses as a requirement. The government should not be allowed to make

\(^{70}\) 18 U.S.C. § 1465. Whoever knowingly produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) [1] of the Communications Act of 1934) in or affecting such commerce, for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

\(^{71}\) See Miller, infra note 100.

\(^{72}\) “indecent” not in keeping with accepted standards of what is right or proper in polite society.

\(^{73}\) “immoral” morally wrong; corrupt; sexually depraved or promiscuous.

\(^{74}\) See 18 U.S.C. § 1465, supra note 70

\(^{75}\) Id.

\(^{76}\) “social norm” Pattern of behavior in a particular group, community, or culture, accepted as normal and to which an individual is accepted to conform.

\(^{77}\) See “indecent”, supra note 72
judgment calls on one’s private behavior that occurs in one’s own home and does not hurt children.

V. Child Erotica

Child erotica is, child modeling, erotic child modeling for photographs or videos and stories about children in sexual scenarios. It can be distributed commercially or freely, in magazines or over the Internet.

Most of the child erotica sites characterizes their sites' content as art and declares an intense opposition to child pornography. But convictions for such sites are very limited, as it is expected for such sites to continue to increase in popularity as the government continues to break up hard-core child pornography rings.

The site Little Boyz states that it supports the laws of the United States of America and gladly and willingly conforms to these laws. Little Boyz, in accordance with the Constitution, believes that the right to view and appreciate nude images of minors in an artistic and aesthetic manner is guaranteed. But even if the sites don't show minors engaged in sexually explicit conduct, they could be charged for lascivious intent.

Still, there are many child erotica sites that suggest their content isn't aimed at art connoisseurs. For those who try to conduct child pornography sites under the guise of child erotica should be prosecuted. With sites that contain what seems like questionable content such as: Lolitas For Sale, Boys Mania, Boy Erection, Second Life and Pedo Art

---

78 See Julia Scheeres, supra note 6.
79 Id.
80 Id.
81 Id.
82 Id.
83 "Second Life" is one of a very small number of so-called virtual worlds that eschew the traditional medieval fantasy-based role-playing game play common to such online blockbusters as "World of Warcraft," "EverQuest" and "Ultima Online." As such, Linden Lab is loathe to call "Second Life" a game, despite the
(pedophile art), among others, should be looked into more closely. Some sites consist of images that are available during a preview tour. These pictures can seem blatantly suggestive (i.e. a photograph of a pair of young boys in a shower, with one boy directing the water nozzle at the other's buttocks). Some sites even prohibit U.S. law enforcement agents from joining and forbade members from holding the site owners responsible for breaking laws. However, most of the sites are registered in foreign countries.

VI. Virtual Child Pornography

A. What is Virtual Child Pornography?

The term ‘virtual child pornography’ refers to computer-generated images where no real child is involved, whereas the term ‘child pornography’ refers to the records of real child sexual abuse or exploitation. “Virtual child” pornography does not use real children or images of real identifiable children.

accessibility of such a term. While "Second Life" maker Linden Lab acknowledges that age play occurs in its virtual world, the extent to which it happens in its most discomfiting form is unclear. The game's forums frequently buzz with debates over the appropriateness of "age play." Legal experts said such virtual behavior between adults isn't likely to break the law, since there are no real children involved.

Many child and adult pornography distributors offer free “teasers,” which are either pictures, images, or short film clips, to people who log onto their sites or may send to e-mail sites.

See Julia Scheeres, supra note 6, 18 U.S.C.S. § 2256(8)(B) prohibits any visual depiction, including any photograph, 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. The prohibition on any visual depiction does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called virtual child pornography, which include computer-generated images, as well as images produced by more traditional means. For instance, 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. The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor appears to be a minor engaging in actual or simulated sexual intercourse.

“Computer-generated,” most often refers to a sound or visual that has been created in whole or in part with the aid of computer software.

See Free Speech Coalition, infra note 97
B. Is Virtual Child Pornography Legal?

In recent years there has been growing concern in the media, for virtual worlds like Second Life, who allow those with a sexual interest in children to “act out” their fantasies. ‘Wonderland’, where young “children” were offering sex in a playground, is an example of what can be found on Second Life. These children are virtual children (not real children), graphical representation avatars and the playground were a virtual playground created with computer software in this technological world. Second Life is a good demonstration of a form of virtual child pornography; on this site the pornography is created only by using computer software and no real children are involved or physically abused.

Can the government criminalize the production of virtual child pornography if no real child is used in the production of the pornography and the images are completely computer-generated? U.S. Supreme Court held that the government may not criminalize such action because the production of “virtual child” pornography does not sexually abuse an actual child. The Court rejected the government’s argument that “virtual child” pornography encourages pedophiles to

---

88 "Second Life" is one of a very small number of so-called virtual worlds that eschew the traditional medieval fantasy-based role-playing game play common to such online blockbusters as "World of Warcraft," "EverQuest" and "Ultima Online." Also see Second Life, infra note 43.
89 See Julia Scheeres, supra note 6.
90 Id.
91 "Avatar" is a computer user's representation of himself/herself or alter ego, whether in the form of a three-dimensional model used in computer games, a two-dimensional icon (picture) used on Internet forums and other communities, or a text construct found on early systems such as MUDs. It is an “object” representing the embodiment of the user. The term "avatar" can also refer to the personality connected with the screen name, or handle, of an Internet user.
92 See Julia Scheeres, supra note 6.
93 Id.
95 See Free Speech Coalition, infra note 97
abuse children and specified that child pornography must be of actual children rather than virtual images.\textsuperscript{96}

C. Virtual Child Pornography Does Not Directly Exploit Children

Most people will agree that the production, distribution and possession of child pornography should all be criminal offences. However the criminalization of virtual child pornography should be viewed more critically since it has not be proven that there is a direct link of harm to real children. One of the main arguments in the debate regarding this issue is whether it is right for the law to regulate peoples’ fantasies, imaginations or creations. This is a direct threat to ones’ individual privacy and right of freedom of expression.

Privacy and freedom of expression have been in the focus of the civil liberties and technology debate for more than a century. One of the main characteristics of virtual child pornography is that there is no real child being abused. So should the possession of virtual child pornography be a criminal offence? Better yet is it a criminalization of peoples’ fantasies?

In \textit{Free Speech Coalition}, held that the production and possession of virtual child pornography is protected by the right of freedom of speech, since there is no actual child involved, and therefore no real victim.\textsuperscript{97} Furthermore the Court

\begin{itemize}
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} \textit{Ashcroft v. The Free Speech Coalition}, 122 S. Ct. 1389 (2002). Respondents contended that the CPPA’s ban on sexually explicit images that appeared to depict minors, but were not produced using minors, unconstitutionally proscribed protected speech. Petitioners argued that the prohibition of virtual child pornography was necessary to discourage the criminal conduct of pedophiles and to preclude a defense of virtual imaging in prosecuting actual child pornographers. The United States Supreme Court held that the ban on virtual child pornography was unconstitutionally overbroad since it proscribed speech which was neither child pornography nor obscene and thus abridged the freedom to engage in a substantial amount of lawful speech. The visual depiction of teenage sexual activity was a common theme in acclaimed artistic works and a fact of modern society, and the CPPA unlawfully prohibited speech which recorded no crime and created no victims. Further, the unquantified potential for criminal conduct by pedophiles had merely a contingent and
rejected the government’s argument that virtual child pornography images may lead to pedophiles sexually abusing real children. The Court found the CPPA “substantially overbroad” because it bans materials that are neither obscene nor produced by the exploitation of real children. The Court sided with the ninth circuit and against the 1st, 4th, 5th and 11th U.S. Circuit Courts of Appeal and the Federal District Court in Utah, all of which had upheld the CPPA against identical challenges.

The Court reasoned that non-obscene “simulated sexual conduct” by an adult actor depicting a child could lead to the prosecution of movies such as American Beauty, Traffic, Titanic and Lolita. As a result, the Court held that the CPPA violated the First Amendment because it criminalized non-obscene “virtual” images of a child engaged in “simulated” sexual conduct.

The Court speculated about the possible reach of the CPPA, citing concerns about movies such as, “Titanic,” “American Beauty,” “Traffic,” Renaissance indirect causal connection to child abuse. Also, the government was not permitted to bar protected virtual child pornography as a means to enforce its proper ban of actual child pornography.

---

98 Id.
99 See Child Pornography Prevention Act of 1996, supra note 46
100 Miller v. California, 413 U.S. 15 (1973), the defendant mailed brochures that contained pictures of sexually explicit activities to individuals who had not requested the material, and the individuals notified the police. After a trial, defendant was convicted of violating Cal. Penal Code 311.2(a) by knowingly distributing obscene matter. The Court defined the standards that were to be used to identify obscene material that a state might regulate without infringing on the First Amendment, applicable to the states through the Fourteenth Amendment. The Court held that the standard to determine whether material was obscene was whether the average person, applying contemporary community standards, not national standards, would find that the work appealed to the prurient interest, whether the work depicted sexual conduct defined by state law, and whether the work lacked serious literary, artistic, or scientific value. The Court vacated and remanded the state Court’s decision.
101 See Ferber, supra note 60.
102 Id.
103 See Free Speech Coalition, supra note 97
104 “virtual” being on or simulated on a computer or computer network as a: occurring or existing primarily online, b: of, relating to, or existing within a virtual reality
105 See Free Speech Coalition, supra note 97
paintings and Shakespeare’s “Romeo and Juliet.” The Court did not construe and limit the reach of the CPPA within the mandate of Jenkins v. Georgia.\(^{106}\)

In Jenkins, the Court reversed the obscenity conviction of a theater owner for exhibiting the movie Carnal Knowledge\(^{107}\)\(^{108}\). The Court held that the movie could not be found obscene, because it did not include patently offensive depictions of sexual conduct and, in fact, did not include any legally cognizable “depiction” of any sexual conduct.\(^{109}\) The Court stated that, at most, some form of sexual activity was implied and though it was “understood to be taking place, the camera does not focus on the bodies of the actors at such times.”\(^{110}\) The Court held that, as a matter of law, no visual material could be held to be obscene unless it included patently offensive “depictions” of the hard-core sex acts.\(^{111}\)

In Free Speech Coalition, the Attorney General\(^{112}\) and several amici\(^{113}\) argued that a ban on virtual pornography is necessary because virtual pornography is

---

\(^{106}\) Jenkins v. Georgia, 418 U.S. 153, 161 (1974), Defendant was convicted of distributing obscene material after showing a film in a movie theater. The state supreme Court ultimately affirmed defendant's conviction. On appeal, the Court concluded that defendant was entitled to receive any benefit available from the Supreme Court's decision in an another obscenity case, which was decided while defendant's case was on direct appeal, and its progeny. The Court concluded that the film shown by defendant was not obscene under the constitutional standards announced in the prior case because the film could not be found to depict sexual conduct in a patently offensive way. Therefore, the Court held that the film fell within the protection of the First and Fourteenth Amendments.

\(^{107}\) Carnal Knowledge is a 1971 American drama film. The film was directed by Mike Nichols and written by Jules Feiffer. The film traces the sexual and emotional confusion of two men from their Amherst College days in the fifties through the Kennedy sixties, up to the Vietnam era. The changes in the morals of American society of the 1960s and 1970s and the general receptiveness to the public to discussion of sexual issues was sometimes at odds with local community standards.

\(^{108}\) See Jenkins, supra note 106.

\(^{109}\) Id. Under O.C.G.A. 26-2105 (1972), it is a crime to exhibit a motion picture portraying acts which would constitute public indecency under O.C.G.A. 26-2011 if performed in a public place.

\(^{110}\) Id.

\(^{111}\) Id. No one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive hard core sexual conduct.

\(^{112}\) See Brief for Petitioner at *21, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795), available at 2001 WL 432538 (using the idea that real and virtual images are "virtually indistinguishable" as a justification for CPPA).
virtually indistinguishable from actual child pornography.\textsuperscript{114} Thus, the government could not reach actual pornography without criminalizing virtual pornography. Justice Kennedy dismissed this argument.\textsuperscript{115}

Virtual images, the Government states, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, that virtual images promote the trafficking in works produced through the exploitation of real children. However this argument is without merit. Isn’t it possible to presume that if virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes? Few pornographers would want to risk prosecution by abusing real children if fictional, computerized images would suffice.\textsuperscript{116}

The government has failed to look at some very important issues. First, the government assumes that they, or anyone, can tell whether the "illegal images [have been] driven from the market."\textsuperscript{117} On the other hand, Congress has appropriately

\begin{flushleft}
\footnotesize
\textsuperscript{113} Most of the amici curiae supporting the government in \textit{Free Speech Coalition}, however, argued that technology has made virtual and real images indistinguishable. See, e.g., Brief of Amici Curiae Sam Brownback et al. at \textasteriskcentered*6, \textit{Ashcroft v. Free Speech Coalition}, 535 U.S. 234 (2002) (No. 00-795), available at 2001 WL 242484 (claiming that virtual and real pornography are indistinguishable but offering no explanation as to why); Brief of Amicus Curiae Morality in Media, Inc. at \textasteriskcentered*15, \textit{Ashcroft v. Free Speech Coalition}, 535 U.S. 234 (2002) (No. 00-795) available at 2001 WL 242486 (explaining that even experts cannot tell the difference between real and virtual images); Brief of Amicus Curiae National Center for Missing and Exploited Children at \textasteriskcentered**15-16, \textit{Ashcroft v. Free Speech Coalition}, 535 U.S. 234 (2002) (No. 00-795), available at 2001 WL 417664 (explaining that virtual images of sexually explicit conduct involving children cause the same psychological damage as real images to non-depicted children who observe such images); Brief of Amici Curiae National Law Center for Children and Families et al. at \textasteriskcentered**12-13, \textit{Ashcroft v. Free Speech Coalition}, 535 U.S. 234 (2002) (No. 00-795), available at 2001 WL 417668 (arguing that virtual and real pornography are "indistinguishable"); Brief of Amici Curiae State of New Jersey et al. at \textasteriskcentered*6, \textit{Ashcroft v. Free Speech Coalition}, 535 U.S. 234 (2002) (No. 00-795), available at 2001 WL 417679 (same). The Court, however, was not persuaded. See \textit{Free Speech Coalition}, 535 U.S. at 255 ("Protected speech does not become unprotected merely because it resembles the latter." (emphasis added)).

\textsuperscript{114} See \textit{Free Speech Coalition}, supra note 97
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 254 (emphasis added)
\textsuperscript{117} See \textit{Free Speech Coalition}, supra note 97
\end{flushleft}
recognized that "[a]n image seized from a collector of child pornography is rarely a first-generation\textsuperscript{118} product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child."\textsuperscript{119} Technically, this statement is inaccurate because it assumes that an expert may be able to tell virtual images from real ones, but it does show that the government has doubts about its assertion that the images in circulation are identifiably real.\textsuperscript{120} Thus, to assume that images in circulation are real without knowing the identities of the actual minors involved is to assume information that would be over reaching.

Congress has not been able to offer any statistics, citation to authority, or empirical evidence to support the assertion that actual child pornography has not, in fact, been driven from the market.\textsuperscript{121} Plus large amounts of child pornography originate in foreign countries.\textsuperscript{122} Consequently, accurate statistics concerning the prevalence of actual versus virtual child pornography would be extremely difficult to gather.

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{118} "first-generation" a first copy of a product (videotape, image, photograph, etc.)
    \item \textsuperscript{119} See H.R. Rep. No. 107-526, at 18.
    \item \textsuperscript{120} States v. Marchand, 308 F.Supp.2d 498, Defendant's employer utilized a sniffing program to monitor employee's internet usage. The employer reported defendant's usage of the company computers for illegal child pornography to the authorities. An investigation revealed that defendant had thousands of images of explicit child pornography. Defendant was charged and he waived a jury trial. The trial Court found defendant had violated the CPPA because the images that defendant possessed had depicted real minors. The government presented evidence that 11 of the images were taken from magazines created prior to the invention of computer technology that might have made it possible to digitally create computerized images of children, and law enforcement agents from the United States, England, and Brazil positively identified, by name, the children in eight of the pictures as children whom they had met in person at a time not distant from the age that the child was when he or she was photographed. Furthermore, the Court found that defendant knew that the images depicted real children, given the level of accurate detail in every picture, such as lighting, detailed background clutter, and visible penile vein engorgement.
    \item \textsuperscript{121} See Free Speech Coalition, supra note 97 at 254 (offering no support for the assumption that real child pornography has not been driven from the market by virtual images).
    \item \textsuperscript{122} See Yaman Akdeniz, Regulation of Child Pornography on the Internet: Cases and Materials, at http://www.cyber-rights.org/reports/interdev.htm (reporting the cases of child pornography worldwide).
\end{itemize}
\end{footnotesize}
Finally, even assuming virtual images have not yet driven actual child pornography from the market, it does not follow that virtual and actual images are distinguishable. Rather, it means that pornographers have not yet recognized that they can create life-like images. Technology is quickly advancing,\textsuperscript{123} bringing new and better computers and software to peoples’ own homes. It will be, at best, a short time before pornography and technology collide and pornographers realize the capabilities these technologies afford them. In short, it is one thing to say that people do not yet create life-like images, but it is quite another to use that fact to declare that they could not.

VII. What Government Thinks We Should Think (Public Policy)

The very existence of child pornography is considered 'contraband,' or illegal because the very act of photographing a child in any sexual context is abusive. Child pornography leads to sexual abuse. It also leads children to believe that deviant sexual behavior is acceptable behavior.\textsuperscript{124} Virtual child pornography on the other hand is legal because it does not directly exploit children. Children are not harmed (actually or physically) or molested in the creation process of virtual child pornography. The government makes the unsubstantiated claim that virtual child pornography leads to the physical abuse of children. However what about the potential to keep “possible” perpetrators off the streets? By allowing “possible” perpetrators to watch virtual child

\textsuperscript{123} For example, new computer processors in 1997 ran at 450 megahertz. By 2002, new processors ran at 3060 megahertz. See Intel, Intel Processor Comparisons, at http://www.intel.com/home/compare/index.htm?id=Homepage+Within\&uscore=Home\_compare\& (demonstrating the increases in processor speeds over time).


“Child pornography may also be used to lure children into sexual activity and instruct them, since young children who view such material may be led to believe that this is acceptable behavior. In addition to decreasing inhibitions, this material may cause sexual arousal in some children.”
pornography it may keep them from actually harming children, by satisfying their desires virtually. And this would keep local jails from overcrowding with such arrest. Because virtual child pornography is legal it would give those who produce, distribute, and collect an opportunity to continue in the pornography business and be profitable without causing harm to actual children. With this being the case it would be a short time before pornography and technology combine and pornographers realize the capabilities these technologies afford them.

IX. Correlation Between Those Who Watch and Those Who Act

Is it true that those who collect child pornography also commit acts of child molestation? Some believe that mere possession of such images signifies an attraction to children.125 Those who believe the previous statement justify that belief by stating because penalties for such images are so harsh; those in possession are likely to attempt actual contact.126 However, this belief is incorrect. Should a wife who dresses up in a jumper similar to what a five year old would wear, for husband in a sexual role-play deserve to labeled as a child molester? She nor her husband have even touched a child, so what makes that different from virtual child pornography?

There is no study that shows virtual child pornography is “intrinsically related”127 to the sexual abuse of children. While the Government may claim that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm that could possibly be caused does not necessarily follow from the speech, but depends upon some un-quantified potential for subsequent criminal acts. The government has to make a

125 See Kerr, supra note 13
126 Id.
127 "intrinsically related" Of or relating to the essential nature of a thing; inherent.
huge leap in order to make the statement that virtual child pornography leads to the physical abuse of children. And such a leap of faith is a leap to violation of ones freedom of expression and speech. It is an unsubstantiated violation of one’s imagination, creativity and artistic expression. At what point is such a violation ok? When it harms children, right? But no children have been harmed.

It is hard to rationalize how the possible use of virtual child pornography by pedophiles has more likely potential for subsequent criminal acts than the use of real child pornography by pedophiles. The future harm to additional children established in Osborne also depends upon persons’ subsequent criminal acts. The Court would have done well to reaffirm its conclusions in Paris Adult Theatre.

The government has consistently acted on various improvable assumptions. The correlation between virtual child pornography and the physical abuse of children is just another one of the government’s assumptions. These assumptions are the underlying cause of much state regulation of commercial and business affairs. However there is nothing in the Constitution that prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. Even with this being so that does not make it right.

---

128 See Osborne, supra note 64
129 Paris Adult Theatre I v. Slaton, 413 U.S. 49. After the determination that the theater owners could be enjoined from showing obscene films, the owners sought certiorari. The Court vacated and remanded. As obscene material was not protected by the First Amendment and as the state procedure provided adequate due process, the Court upheld a ruling that obscene materials did not acquire constitutional immunity from regulation simply because they were shown only to consenting adults. As there were legitimate state interests at stake in regulating the films, scientific data demonstrating damage from exposure to the obscene films was unnecessary. The Court rejected the claims that the right to see obscene films was guaranteed by the First Amendment or other constitutional privacy guarantees and that conduct directly involving "consenting adults" had a special constitutional status. As the state had a legitimate interest in regulating commerce in obscene material and in regulating public exhibition of obscene films, nothing precluded the regulation of such materials provided that the applicable state law met the First Amendment standards set forth in Miller v. California.
The government has also argued that unless virtual child pornography is banned, the successful prosecution of real child pornography cases would be in jeopardy, because a defendant can raise a reasonable doubt defense about whether the depictions are of real or virtual children. Even though this may be the case there is no historical showing that in past cases the courts were unable to differentiate between virtual child pornography and real child pornography, for a defendant who raised such a defense.¹³⁰ “Justice Clarence Thomas, in his concurring opinion, dismissed the government’s reasonable doubt argument as a “speculative interest” because the government did not cite any acquittals where such a reasonable doubt was raised.”¹³¹

IX. The Future of Child Internet Pornography

Courts will likely continue to re-define the definition of child pornography and what is prohibited under the child pornography laws. Banning "virtual child" pornography might help re-start the actual child pornography market if the penalties are the same. If "virtual child" pornography were allowed, the perpetrators of actual child pornography might think twice about exploiting real children since there would be a legal and victimless alternative that is still extremely profitable. "If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”¹³²

¹³⁰ See Marchand, supra note 120
¹³¹ Jan LaRue, Supreme Court Rules First Amendment Protects “Virtual” Child Porn. www.cwfa.org/articledisplay.asp?id=2044&department=CWA&categoryid=pornography
¹³² See Free Speech Coalition, supra note 97
X. Conclusion

Imagine if all the movies depicting minors in sexually explicit situations were removed from the store shelves.133 What if William Shakespeare was labeled a pedophile and child pornography cynosure? Would some extremely popular movies and works of art suddenly become illegal contraband? This could be possible if the government is allowed to continue possessing the extremely restrictive statutes, in an historical unsuccessful “attempt” to curve the physical abuse of children. The government has failed numerous times to narrowly tailor a child pornography statue. The Supreme Court’s decision in Free Speech Coalition134 indicates that there is a way to tailor the revision of the CPPA135 without violating the First Amendment.136 If the government believes that child abusers will use “virtual child” pornography to convince their victims to participate in sexual activities,137 Congress should narrowly tailor a criminal statute to punish such uses of the materials severely without banning the creation and possession of the work. Banning "virtual child" pornography will not effectively protect the nation's children from perpetrators. It will simply eliminate a victimless alternative that is substantially less repulsive than the actual abuse of a child. The Courts emphasize a goal of prosecuting child pornography is to prevent harm to children, however they did not specifically define "harm."138 Similarly, the Court did not make clear where the line between "virtual" and

---

134 See Free Speech Coalition, supra note 97
135 See Child Pornography Prevention Act of 1996, supra note 46
136 Id.
137 Id.
138 Id.
"real" should be drawn. It did not consider the issue of morphing innocent, non-sexual photographs of real children into pornographic images.

So again I ask, is it right for the government to regulate our fantasies? What about the literary and artistic value presented in some works? Should the government stifle peoples’ creative juices, just because the legislature wants remedy a separate problem? Our natural born freedom should not be restricted on the attempts of the government to remedy a problem that they have proven to be unsuccessful at. A blanket ban on creativity and artistic expression is not the answer to the problem of child pornography. We are given a constitutional right to freedom of speech. Our country is founded on principles of creativity and imagination. How can the government say no to something that does not actually harm another? So, what crime is actually being committed when a person creates images on a computer? The government should not be allowed to encroach upon someones’ private thoughts and say the are illegal, just because the may not fit into some “social norm”140. We are said to have a freedom of expression, that does not mean we can express ourselves as long as it does not involve imaginary sexual situations involving those under the age of eighteen. The punishment for virtual child pornography is an unsubstantiated violation of one’s imagination, creativity and artistic expression. At what point is such a violation ok? When it harms children, right? But again no children have been harmed. Punishment for a persons’ private fantasy? This is a clear violation of ones First Amendment rights and as such it should not be tolerated. What will be next, to ban Romeo and Juliet from library bookshelves?

139 Id.
140 See “social norm,” supra note 72.