CARTOONS AREN'T REAL PEOPLE, TOO: DOES THE REGULATION OF VIRTUAL CHILD PORNOGRAPHY VIOLATE THE FIRST AMENDMENT AND CRIMINALIZE SUBVERSIVE THOUGHT?

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"First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected . . . because speech is the beginning of thought."[1] - Justice Kennedy

INTRODUCTION

Child sexual abuse has become a central issue of concern in our culture.[2] We are constantly made aware of it on the radio, in the news, and on the television. From reports of religious officials sexually molesting children, to a friendly neighbor who is revealed to be a wolf in disguise, parents are quickly running out of people to trust. Because of this saliency, we have become "preoccupied with child sexual abuse and child pornography" in a way that we never have before,[3] and this has led to a sense of social panic.[4] This panic—fueled in part by voyeuristic fascination[5]—has transformed even "innocent" images into potential threats so that everything from images of the partially clad "Coppertone girl," to photos of a toddler in a bathtub, carry with them an air of suspicion.[6] Although statistics do not necessarily indicate that instances of child sexual abuse are

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[1] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) (Kennedy, J., dictum).

[2] Bryan Kim-Butler, *Fiction, Culture and Pedophilia: Fantasy and the First Amendment After United States v. Whorley*, 34 COLUM. J.L. & ARTS 545, 547 (2011).

[3] Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 214 (2001) [hereinafter, Adler, *Perverse*].

[4] Kim-Butler, *supra* note 2, at 547.

[5] *See* Adler, *Perverse*, *supra* note 3, at 209 ("[T]he legal tool . . . designed to liberate children from sexual abuse threatens us all, by constructing a world in which we are enthralled—anguished, enticed, bombarded—by the spectacle of the sexual child.").

[6] *See* Chuck Kleinhans, *Virtual Child Porn: The Law and the Semiotics of the Image*, 3 J. VISUAL CULTURE 17, 19, 21 (2004).

currently more abundant than in the past, until child sexual abuse is eradicated it will undoubtedly remain an important social problem.[7]

The social distress regarding the sexual abuse of children has led to shocking court rulings that seem so focused on negating the idea of children as sexual objects that they have ultimately overstepped the bounds of rationality.[8] This "drastic expansion in the surveillance and policing of children and images of children" has had the "unintended consequence" of hyper-focusing attention on the sexuality of children.[9] With cases like *A.H. v. Florida*, in which a 16-year-old girl and her 17-year-old boyfriend were prosecuted and adjudicated for the production and distribution of child pornography after they emailed pictures of themselves engaging in sexual acts to one another,[10] it has become apparent that the term "child pornography" has become so recklessly broadened that its application reaches thoughts and ideas that do little to serve the purpose of stopping those who actually aim to harm children. This idea is further supported when one looks at recent court rulings that have held individuals criminally liable for the possession of "virtual child pornography"—depictions of artificial "children" hand-drawn or created through the use of computers engaged in sexually explicit activity.[11] These cases all featured images that the courts have unequivocally recognized as *not* depicting actual children. Nevertheless, defendants have been held criminally liable for the possession of these images—even when they have been in *cartoon*-form—based upon a belief that the images are obscene. In this way, it is likely that child pornography law is turning into "the new crucible of the First Amendment."[12]

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[7] In the past parents may have been less aware of the frequency of child sexual abuse than they are today, and thus less frightened by the threat of predators. It is impossible to know whether the prevalence of child sexual abuse today reflects an increase in instances of abuse or an increase in *reporting*, since it is generally understood that victims of sexual assault and abuse—especially children—often do not report their assaults. *See generally*, Kurt Conklin, MPH, MCHES, *Child Sexual Abuse I: An Overview*, ADVOCATES FOR YOUTH, *available at* http://www.advocatesforyouth.org/index.php?option=com _content &task=view&id=410&Itemid=336; *but see* Lisa Jones & David Finkelhor, *The Decline in Child Sexual Abuse Cases*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION: JUVENILE JUSTICE BULLETIN (Jan. 2001), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/184741.pdf.

[8] *See* Kleinhans, *supra* note 6, at 20. Our "culture holds to an extreme denial of child sexuality," which may depend on "tastes" that largely reflect differences along class and education lines. *Id.*

[9] *Id.* at 24.

[10] *See* A.H. v. Florida, 949 So.2d 234, 235-39 (Fla. Dist. Ct. App. 2007). While the *act* of sex between a 16-year-old and a 17-year-old—both legal minors—is not illegal in the state of Florida, and although no person other than the two consenting minors saw the pictures, the court held that the petitioners had no "reasonable expectation of privacy." Moreover, the dangers of transmitting the pictures through the Internet and the fact that the pictures could ultimately fall into the wrong hands were state interests compelling enough to hold the two minors criminally liable. The judge decided that the minors were "not mature enough to make rational decisions concerning all the possible negative implications of producing the[images]." *Id.* at 239. *See also* Declan McCullagh, *Police Blotter: Teens Prosecuted for Racy Photos*, CNET (Feb. 9, 2007, 5:45 AM), http://news.cnet.com/Police-blotter-Teens-prosecuted-for-racy-photos/2100-1030_3-6157857.html.

[11] I would suggest that these depictions should not even been called "child pornography," since there is no "child." However, the term has been coined as "virtual child" pornography and thus I will proceed with this usage.

[12] Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 921 (2001) [hereinafter

Similar to the "war on drugs" or the "war on terrorism," the "war" against virtual child pornography places at odds the competing interests of governmental paternalism and individual rights. We have begun to sanction laws that regulate a subjective idea of what is good or moral, rather than what is objectively harmful. These types of laws move us in the direction of criminalizing subversive thought, a move that, under the First Amendment, should generally be repulsive to American ideals. However, "the area of the law where obscenity, pornography and children meet" is the area where society least contests the curtailing of the freedom of expression.[13] Child pornography is a subject so distasteful that few legal scholars would seek to defend it, even on First Amendment grounds.[14] Thus, "[l]eft to its own devices, child pornography law has undergone a dramatic growth spurt, unchecked by critical analysis."[15]

In this way, child pornography law has begun to reverse the fundamental First Amendment notion that speech cannot be banned merely because it has the potential to incite dangerous ideas.[16] While recognizing "virtual" child pornography as a class of speech worthy of First Amendment protection may be unsettling, this discomfort is an insufficient basis to justify the erosion of important constitutional rights. As the law stands, actual child pornography is never—and most likely never will be—acceptable. But virtual child pornography is not "child pornography." The term "virtual" draws an important distinction—none of the images are *real*; thus, they are certainly distinguishable from the morally reprehensible implications of images and videos that depict the real sexual abuse of minors and children. If child pornography law is allowed to extend further, even to policing pornography that clearly does not depict actual children, the government may soon be able to "police the realm of fantasy, a realm supposedly protected under the modern First Amendment."[17] If this is so, it may ultimately have negative results for members of the artistic community, chilling the expression of subversive thought and preventing the production of works of true social value.

This Note argues that prohibiting the production of virtual child pornography, which does not portray any real child actors, infringes upon important First Amendment rights, inaccurately defines the goal of criminal justice in regard to child pornography, and will have negative consequences for artistic expression and those in the artistic community. Part I will provide background information on child pornography law, the constitutional exception for virtual child pornography

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Adler, *Inverting*]. Adler believes "[i]t tests the limits of modern free speech law the way political dissent did in the times of Holmes and Brandeis. It is where popular pressure on courts and legislatures exerts itself most ferociously; it is where the greatest encroachments on free expression are now accepted." *Id.* at 921-22.

[13] Kim-Butler, *supra* note 2, at 548.

[14] *See* Adler, *Inverting*, *supra* note 12, at 926 ("[C]hild pornography law [is] an area of First Amendment jurisprudence that has been virtually ignored by scholars.").

[15] *Id.* at 925.

[16] *Id.* at 926.

[17] *Id.*

laid out in *Ashcroft v. Free Speech Coalition,* and how federal obscenity laws in the PROTECT Act place this exception in jeopardy. Part II will illustrate, through the use of three recent virtual child pornography cases, *United States v. Whorley,*[18] *United States v. Handley,*[19] and *United States v. Kutzner,*[20] how the current legal landscape foreshadows the imminent deterioration of First Amendment protections. Part III will argue that the prohibition of virtual child pornography does not serve a compelling government interest, but instead, through infringing on important First Amendment rights, has a chilling effect on artists and creative expression. It will also argue that the obscenity provision of the PROTECT Act[21] should be overruled as unconstitutionally vague or overbroad. This Note will conclude that the government's interest in protecting children is not properly served by policing virtual child pornography, and that the obscenity statute unduly criminalizes subversive thought.

I. BACKGROUND: CHILD PORNOGRAPHY JURISPRUDENCE, THE FIRST AMENDMENT & "OBSCENITY" IN CARTOON IMAGES

A. The Criminalization of Child Pornography

Undoubtedly, the sexual molestation and exploitation of a child is a serious and abhorrent offense. The government has a compelling interest in safeguarding the nation's children—an interest so important child sexual abuse is one of the few areas of criminal law where it is acceptable to disregard the intent of the perpetrator.[22] As evinced by case law, it is clear that our society adamantly disapproves of the sexual abuse of children and those who perpetrate it, and supports the government's interest in eradicating this problem. In *New York v. Ferber*, the Supreme Court upheld a New York statute outlawing the production of child pornography, finding that the government's interest in preventing the sexual exploitation and abuse of children was of "surpassing importance[,]" and that the use of children in pornographic materials is harmful to the "physiological, emotional, and mental health of the child[.]"[23] Because child pornography is "intrinsically related to the sexual abuse of children[,]" it leaves a "permanent record" of the child's abuse, in addition to motivating a market for its continued production.[24] Thus, "imposing severe criminal penalties on any person selling,

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[18] United States v. Whorley, 550 F.3d 326 (4th Cir. 2008).

[19] United States v. Handley, 564 F.Supp.2d 996 (S.D. Iowa 2008).

[20] Government's Sentencing Memorandum, United States v. Kutzner, Case No. CR-10-0252-S-EJL, *available at* http://reason.com/assets/db/12955634459236.pdf (last visited Nov. 12, 2011).

[21] Obscene Visual Representations of the Sexual Abuse of Children, 18 U.S.C. § 1466A (2011).

[22] One such area in which a perpetrator's knowledge is irrelevant is in the instance of statutory rape. *See, e.g.*, MODEL PENAL CODE § 213.3 (1962).

[23] New York v. Ferber, 458 U.S. 747, 757-58 (1982).

[24] *Id.* at 759.

advertising or otherwise promoting" child pornography necessarily serves the purpose of doing away with the market for it.[25]

The Court's stance in *Ferber* was particularly meaningful in relation to First Amendment jurisprudence because pornography is generally given full protection under the First Amendment. Before *Ferber,* states were able to regulate the production of sexually themed materials only when they were deemed "obscene" under the *Miller* obscenity test, which allows a state to regulate or prohibit a work if it, taken as a whole, (1) appeals to the prurient interest, (2) portrays sexual conduct in a patently offensive way, and (3) has no serious literary, artistic, political or scientific value.[26] The obscenity bar is high, however, and otherwise distasteful works could usually escape the *Miller* test if they were deemed to have "social value." The *Ferber* Court determined that the standards involved in *Miller* were irrelevant in reference to child pornography,[27] because the interests served by protecting an abused child far outweigh any claim one could make about a work's social value.[28] The Court believed child pornography was an area clearly and necessarily outside the scope of the First Amendment.[29] However, the Court made sure to note that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performances or photographic or other visual representations of *live* performances, retains First Amendment protection[,]"[30] making an important distinction by seemingly finding an exception to the rule for images not involving real children.

Continuing in the line of anti-child pornography jurisprudence, the Supreme Court decided in *Osborne v. Ohio* that a statute prohibiting the "mere possession" of child pornography was constitutionally sound because possession also fed the market for child pornography and resulted in the same harms to the child-victims.[31] Obscene materials—which were not considered to be the same as actual child pornography—were treated differently, as illustrated in *Stanley v. Georgia,* in

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[25] *Id.* at 760.

[26] Miller v. California, 413 U.S. 15, 24 (1973).

[27] *Ferber*, 458 U.S. at 765 ("The test for child pornography is separate from the obscenity standard enunciated in *Miller*[.]"). The Court in fact dismantles the *Miller* test in relation to child pornography, stating that "a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Id.* at 764.

[28] *Id.* at 761 ("[W]hether a work, taken as a whole, appeals to the prurient interest . . . bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work.").

[29] *Id.* at 763-64. The court states that this decision is not incompatible with their earlier decisions and gives numerous examples of where they have held that whether an expression lies outside of the First Amendment "depends on the content of the speech." *Citing* Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976). Notably, while no justices dissented in this opinion, Justices Blackmun, O'Connor, Brennan, and Stevens each filed separate concurring opinions.

[30] *Id.* at 764-65 (emphasis added).

[31] Osborne v. Ohio, 495 U.S. 103 (1990). The Court recognized that the prohibition would encourage the possessors to destroy the materials that act as records of the child's abuse. They also recognized the need to prohibit this type of material because it was of the type that may be used to entice children into participating in the sexual acts. *Id.*

which the Supreme Court held that a Georgia statute that sought to prohibit the possession of obscene matter, even within the home, violated the First and Fourteenth Amendments.[32] However, *Stanley*'s holding is interpreted narrowly—it only applies to the *possession* of obscene materials in one's home—and did not impact the government's power to regulate obscenity in the flow of commerce.[33]

These four cases lay out the foundation for laws dealing with child pornography.[34] As a general rule, the production and distribution of child pornography is always a crime because of the harm resulting from the sexual abuse of children.[35] Materials that are not produced using actual children may be deemed "obscene," but the government cannot prohibit the mere possession of these types of materials.[36] The government has, however, been able to regulate images that have been deemed obscene by prohibiting them from moving through interstate commerce.[37] Although this may not amount to outright control over a person's ability to use obscene materials, there are very few materials that do not move through interstate commerce. While the Supreme Court has labored to construct clear rules pertaining to what is and is not prohibited when minors are depicted sexually,[38] many of these areas overlap. This became especially apparent as technology advanced and "virtual" child pornography began to be utilized.

B. "Virtual Child Pornography" & Ashcroft v. Free Speech Coalition

The government's right to regulate the production, distribution and possession of child pornography is generally uncontested, but after *Miller* and *Ferber* there was still a gray area as to where "virtual" child pornography stood.[39] "Virtual" child pornography can be described as artificial images, created by computer or by hand, that depict characters intended to appear to be minors engaged in sexually explicit conduct.[40] There are many types of "virtual" child pornography, ranging from images of real adults that have been "morphed" to appear to look more youthful, to 3D and computer generated images ("CGI") that have been made to look lifelike, all the way to traditional paper and pencil drawings.[41] What they all have in common is that no real child was abused or

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[32] Stanley v. Georgia, 394 U.S. 557, 568 (1969). The Court stated that the government's power to regulate obscenity "simply does not extend to mere possession by the individual in the privacy of his own home." *Id.*

[33] *Id.*

[34] *See Ferber*, 458 U.S. 747; Miller v. California, 413 U.S. 24 (1973); *Osborne*, 495 U.S. 103; *Stanley*, 394 U.S. 557.

[35] *See id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See Ferber*, 458 U.S. 747; *Miller*, 413 U.S. 24.

[40] Dannielle Cisneros, *"Virtual" Child Pornography on the Internet: A "Virtual" Victim?*, 19 DUKE L. & TECH. REV. 1 (2002).

[41] Kleinhans, *supra* note 6, at 21.

harmed in the production of the image. In the years following *Miller* and *Ferber,* the Supreme Court had never had opportunity to address this unique issue, and thus producers and consumers of pornography were unsure as to the legal status of this kind of work.

In *Ashcroft v. Free Speech Coalition*, a trade association of businesses involved in the production and distribution of adult material sought declaratory and injunctive relief through a pre-enforcement challenge to certain provisions of 18 U.S.C. Section 2256, the Child Pornography Prevention Act of 1996 ("CPPA").[42] In pertinent part, the Coalition took issue with the fact that the CPPA, which prohibited pornographic images made with actual children, extended the prohibition to "any visual depiction" that "is, or appears to be" of a minor engaging in sexually explicit conduct.[43] This provision, Section 2256(8)(B), banned images that appeared to depict minors but were actually created without using real children.[44] They also objected to Section 2256(8)(D), which stated that child pornography would include "any sexually explicit image" that was promoted in such a way as to "convey the impression" that it depicted a minor.[45] The Coalition filed a preemptive suit because, as members of the adult-entertainment industry, they believed that the "appears to be" and "conveys the impression" language of those sections of the CPPA were vague and overbroad, and would ultimately chill them from producing constitutionally protected works.[46] When the Ninth Circuit held the CPPA to be unconstitutional—resulting in a circuit split after four other circuits had decided contrarily—the Supreme Court granted certiorari.[47]

The Supreme Court recognized that "as a general rule, pornography can be banned only if obscene, but under *Ferber,* pornography showing minors can [always] be proscribed."[48] Thus, the Court needed to determine whether the CPPA could be constitutional if it would "proscribe a significant universe of speech" that was "neither obscene under *Miller* nor child pornography under *Ferber.*"[49] The Court ultimately found Sections 2256(8)(B) ("appears to be") and 2256(8)(D) ("conveys the impression") to be overbroad and unconstitutional.[50] The Court found the CPPA problematic because it prohibited "any visual depiction" of minors engaging in sexually explicit conduct, without considering *how* the image was

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[42] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243 (2002).

[43] *Id.* at 241.

[44] *Id.* The Court provided examples of the types of "virtual child pornography" envisioned by the statute, which would include images of youthful looking adults or those created using computer imaging. *Id.* at 237.

[45] *Id.* at 242.

[46] *Id.* at 243.

[47] *See* United States v. Fox, 248 F.3d 394 (5th Cir. 2002); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

[48] *Ashcroft*, 535 U.S. at 240. The CPPA was not directed at obscene speech. It set out to bypass obscenity and made "no attempt to conform to the *Miller* standard." *Id.*

[49] *Id.*

[50] *Id.* at 258.

produced or the types of works—even those with serious social value—that would fall under the umbrella of "visual depiction."[51] The Court plainly stated that "these images do not involve, let alone harm, any children in the production process,"[52] and thus the "harms" inherent in child pornography did not apply to the images that the CPPA aimed to prohibit. [53]

The Court found that the provisions of the CPPA would infringe on important constitutional rights. The First Amendment of the Constitution mandates that "Congress shall make no law . . . abridging the freedom of speech."[54] While freedom of speech is not limitless,[55] the Court found that a law imposing criminal penalties on protected speech would be a "stark example of speech suppression."[56] Because the penalties of the CPPA were severe, speech would be effectively suppressed because few creative minds would risk producing images that could possibly fall within the scope of this law.[57] The Court took into account the governmental interests in protecting children, but reasoned that while Congress can pass laws to protect children from abuse, the "prospect of crime . . . by itself does not justify laws suppressing protected speech."[58] To uphold the statute as constitutional, the Court would have had to carve out an additional exception to First Amendment protection—a drastic measure the Court was unwilling to take.[59]

Furthermore, the CPPA could not be read to prohibit obscenity because it "lacked the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity" under *Miller*.[60] The CPPA encompassed any and every type of visual depiction of minors engaging in sexual acts, regardless of whether the work had serious social value.[61] The Court used as examples classic literary works like Shakespeare's *Romeo & Juliet* (in which one character is only thirteen), and award-winning movies like *Traffic* and *American Beauty*, to illustrate the types of works that would suffer under suppression as a

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[51] *Id.* at 241. Recognizing that the statute was overbroad, the Court suggested that the statute would cover innocuous images like "Renaissance paintings depicting scene[s] from classical mythology . . . [and] . . . Hollywood movies[] filmed without any child actors." *Id.*

[52] *Id.*

[53] *Id.* at 242. The Court stipulated that the harm to be proscribed must come from the *production*, not merely the content.

[54] *Ashcroft*, 535 U.S. at 244.

[55] *Id.* at 245-46 (stating that certain categories of speech–including defamation, incitement, obscenity, and pornography produced with real children–are not embraced by the First Amendment).

[56] *Id.* at 244.

[57] *Id.*

[58] *Id.* at 245 ("[S]peech may not be prohibited because it concerns subjects offending our sensibilities.").

[59] *Id.* at 246 (noting that none of the areas in which the First Amendment had previously been limited—including obscenity and pornography produced with real children—dealt with the type of speech that the CPPA set out to prohibit).

[60] *Ashcroft*, 535 U.S. at 249. The government did not propose the CPPA as an obscenity law. *Id.*

[61] *Id.* at 247. The Court notes that it is a fact of our society that teenagers engage in sexual activity before they are above the legal age. This is a theme that has inspired numerous important literary works. Even if the work focuses on themes of consensual sexuality or the sexual abuse of children, the Court was unwilling to allow the CPPA to curtail all artistic expression in this area. *Id.*

result of the wide scope of the CPPA.[62] Because we are a society that is fascinated by the "lives and destinies of the young,"[63] suppressing art and literature that seeks to explore this fascination without considering the work's redeeming value would be inconsistent with the interests inherent in the First Amendment. Even though the images would be sexually explicit, the Court found the constitutional implications of suppressing them—without more justification—to be inconsistent with its understanding of the First Amendment. Thus, the CPPA could not find support within the obscenity standard of *Miller*.

Noting this deficiency in the statute, the government argued that, because the speech prohibited by the CPPA is "virtually indistinguishable" from child pornography, the *Ferber* rule—that the work can be banned without consideration of its value—should apply.[64] But the *Ashcroft* Court refused to apply *Ferber* because they deemed that the two goals of *Ferber*—to ban acts that were "intrinsically related to the sexual abuse of children" through eradicating permanent records of a child's abuse, and eradicating the economic motivation for child pornography's production[65]—did not apply to the types of acts that the CPPA set out to prohibit.[66] The Court reasoned that under *Ferber*, the prohibited speech must have had a "proximate link to the crime from which it came."[67] But the CPPA, in contrast to the speech prohibited in *Ferber*—which was, itself, records of sexual abuse—sought to prohibit speech that "record[ed] no crime and create[d] no victims by its production."[68] The Court explicitly stated that "[v]irtual child pornography is not 'intrinsically related' to the sexual abuse of children."[69] In *Ashcroft,* the Court took a clear stand on virtual child pornography—the First Amendment cannot, and must not, tolerate prohibition of creative expression causing no harm and creating no victims.

C. The PROTECT ACT: The Government's Response to Ashcroft v. Free Speech Coalition

Even though *Ashcroft* placed virtual child pornography outside the realm of prohibition and deemed it a type of expression that was entitled to First Amendment protection, the opinion left open one area in which a prohibition on virtual child pornography could be found valid and the government jumped at this opportunity. This area was obscenity law, and Congress retaliated against the

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62 *Id.* at 247-48.

63 *Id.* at 248.

64 *Id.* at 249.

65 New York v. Ferber, 458 U.S. 747, 759 (1982).

66 *Ashcroft*, 535 U.S. at 249-51.

67 *Id.* at 236, 250.

68 *Id.*

69 *Id.* (citing *Ferber*, 458 U.S. at 759). The Court also dismissed the government's argument that these types of images may lead to actual instances of child abuse and concluded that the "causal link is contingent and indirect." *Id.*

ruling in *Ashcroft* by drafting the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003 (the "Act"). The Act, which was put into effect on April 30, 2003—just a year after the *Ashcroft* decision—aims to "prevent child abduction and the sexual exploitation of children."[70] In general, the Act, which is codified in Sections 18, 21, and 42 of the United States Code, suggests many positive and useful methods of curtailing the sexual abuse of children. However, the Act also added a new obscenity offense to Title 18 of the U.S. Code, Section 1466A, entitled "Obscene Visual Representations of the Sexual Abuse of Children" (the "OVR provision"). The OVR provision imposes criminal liability on any person who "knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that . . . depicts a minor engaging in sexually explicit conduct; and . . . is obscene."[71] While the OVR provision specifies that the visual depiction must have moved in the streams of commerce, it also includes transmission via computers in its definition.[72] Thus, the OVR provision sought to curtail the transmission of any and all forms of virtual child pornography.[73]

The Senate Report (the "Report") on the PROTECT Act claimed that the Act was proposed "to restore the government's ability to prosecute child pornography offenses successfully."[74] The Report stated, as the government had argued in *Ashcroft*, that this was a pressing concern because, with the constant advancements in technology used to create virtual child pornography, defendants in child pornography cases have been able to plead that the images in question were virtual.[75] Because of this, the government claimed it was left with the almost impossible job of proving that the child depicted was real in nearly every child pornography prosecution—a task that would hamper the government's goal of eradicating the market for child pornography.[76] The Report claims, without any

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[70] Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2006) (codified as amended in scattered sections of 18, 21, and 42 U.S.C.).

[71] 18 U.S.C. § 1466A(B).

[72] *Id.* § 1466A(d).

[73] It should be noted that this OVR provision does not actually attach criminal liability to the *possession* of virtual child pornography in one's home–thus, it is not held to be similar to child pornography in a way that would be applicable under *Osborne*. However the fact that this statute prohibits the *movement* of these images in commerce is problematic as it virtually suppresses the free exchange of thought, as will be discussed later. *See* 18 U.S.C. § 1466A.

[74] S. REP. NO. 108-2, at 1 (2003). The government raised in *Ashcroft* this concern that the existence of virtual child pornography could make it extremely difficult to prosecute pornographers who do use actual minors; because as imaging technology advances, it will become increasingly difficult to prove an image was produced using actual children. *See* Ashcroft, 535 U.S. 234, 242 (2002).

[75] S. REP. NO. 108-2.

[76] *Id.* at 3. The Report states that "prosecutors typically are unable to identify the children depicted in child pornography. Not surprisingly, these children are abused and victimized in anonymity, even when the child pornography is produced within the United States. Prosecutions therefore rest on the depictions themselves; juries are urged to infer the age and existence of the minor from the sexually explicit depiction itself." *Id.* These statements seem to suggest that the goal is to be able to identify an *actual* child, even if that has been made increasingly difficult through computer-editing. However, this

evidence supporting these assertions, that while producing child pornography that is wholly virtual may not be cost-effective for pornographers, the *Ashcroft* ruling gives pornographers an incentive to slightly alter images of *actual* children so that they would be unidentifiable and would *appear* to be computer-generated.[77]

This may be in some sense a plausible argument, but it is difficult to see the connection between the images the OVR provision specifies—namely cartoons, sculptures, and paintings—and the types of images that would be "virtually indistinguishable" from real children, and thus difficult for prosecutors to prove are "real." These would, in fact, seem to be the types of images that are *most clearly* not created using actual children.[78] The Senate Report was also vague when it came to its justification for the new obscenity offense created in Section 1466A. The Report merely states:

> [The new offense] prohibits any obscene depictions of minors engaged in any form of sexually explicit conduct. It further prohibits a narrow category of "hardcore" pornography involving real or apparent minors, where such depictions lack literary, artistic, political or scientific value. This new offense is subject to the penalties applicable to child pornography, not the lower penalties that apply to obscenity.[79]

The provision serves the same goals as the ones struck down in *Ashcroft* and attaches the same liability as if the individual had possessed *actual* child pornography. However, by framing the issue through the lens of obscenity law, the provision permits prosecution without a showing of any real harm to actual minors. In essence, it was a lucky loophole.

The PROTECT Act has been attacked as constitutionally unsound following its implementation. Notably, Justice Souter, in his dissent in *United States v. Williams*,[80] stated that holding fake pornography and actual pornography as legally

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language is not synonymous with the idea that a prosecutor would be charged with the task of tracking down a child that never existed.

[77] *Id.* at 5. *But cf. Ashcroft*, 535 U.S. at 254. The *Ashcroft* Court recognized this similar concern but adamantly denied it would be a motivation for a child pornographer, stating "if virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes." *Id.* The Senate Report also does not address the equally important fact that even if the physical cost of producing virtual child pornography is less than producing actual child pornography, the severe criminal punishment for creating pornography using real children should be enough to dissuade pornographers if virtual child pornography was legal. *See* S. REP. NO. 108-2.

[78] Arguably, the government is concerned about whether these images were created using actual children as models. However, the OVR provision does not specify this goal, and this goal also seems too broad a theory to justify this strict regulation. In theory, the same concern could be said to arise when someone writes a *book* describing their fantasies of sex with a child—there is no way to know whether that text is fantasy or reality. Thus, applying this theory to artwork that clearly does not depict a real child is arguably unsound.

[79] S. REP. NO. 108-2, at 13 (2003). Note that in the Senate Report, the suggested provision is referred to as §2252B, however this suggested provision is actually incorporated into the U.S. Code as §1466A. *Id.*

[80] United States v. Williams, 553 U.S. 285, 307 (2008) (holding constitutional the "pandering" provision of the PROTECT Act, even though the Secret Service Agent and the defendant exchanged material that was not actual child pornography). The provision reads:

identical would clearly contradict the Court's holding in *Ashcroft*, which granted protection to the category of speech in question.[81] He recognized that the provision was the government's attempt to "get around" the Court's holdings in *Ashcroft*.[82] In contrast to the majority's holding, Justice Souter felt that it would be more sound to hold that

> a transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a *completed series of intended acts that simply do not add up to a crime*, owing to the privileged character of the material the parties were in fact about to deal in.[83]

There is a definite disconnect between what the *Ashcroft* ruling meant to accomplish, and what the government's later legislation actually achieved. Thus, it was unsurprising that the government's attempt to use the OVR provision of the PROTECT Act as a way to outlaw virtual child pornography would create confusion and uncertainty going forward. These problems became apparent in *United States v. Whorley*, *United States v. Handley*, and *United States v. Kutzner*.

II. VIRTUAL CHILD PORNOGRAPHY AFTER THE PROTECT ACT: MAKING CARTOON IMAGES CRIMINAL

Obscenity law, when applied to pornography, is ambiguous in essence. There is a disconnect between a general rule that pornography, unless obscene,[84] is protected by the First Amendment, and statements by the Supreme Court that obscene material is that "which deals with sex in a manner appealing to prurient interests" and has the tendency "to excite lustful thoughts."[85] Under these definitions, it would seem that "obscenity" is exactly the material of which pornography is made. Even though the Court has moved away from such vague moral standards by requiring the prosecution to show, under the *Miller* obscenity test, that the work in question is without any redeeming value,[86] it is likely that pornography may always hang precariously in the balance of obscenity-uncertainty.

[A]ny person who advertises, promotes, presents, distributes, or solicits . . . material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material . . . is, or contains . . . an obscene visual depiction of a minor . . . or . . . a visual depiction of an actual minor engaging in sexually explicit conduct . . . shall be punished[.]

18 U.S.C. § 2252A(a)(3)(B)(i)-(ii) (2006).

[81] *Williams*, 553 U.S. at 320 (Souter, J., dissenting). Justice Souter expressed his concern that this restriction would leave *Ferber* and *Ashcroft* "as empty as if the Court overruled them formally, and when a case as well considered and as recently decided as [*Ashcroft*] is put aside (after a mere six years) there ought to be a very good reason." *Id.*

[82] *Id.* at 321.

[83] *Id.* (emphasis added).

[84] See Justice Stewart's well-known phrase identifying obscenity, "I know it when I see it," in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[85] Roth v. United States, 354 U.S. 476, 486-87 (1957). "[T]he test that suppresses a cheap tract today can suppress a literary gem tomorrow." *Id.* at 514 (Douglas, J., dissenting).

[86] Miller v. California, 413 U.S. 15 (1973).

This is so because a determination of obscenity is ultimately dependent on subjective views.[87]

Under the *Miller* test, it is up to a jury to determine if the items at issue are "obscene"—in other words, if they "appeal to the prurient interest," are "patently offensive," and have no social value.[88] However, while *Ashcroft* indicates that virtual child pornography cannot be prohibited unless it is deemed obscene, it is difficult to imagine a jury that would *not* find depictions of children engaged in sexually explicit acts—actual or virtual—offensive.[89] This subjectivity becomes especially apparent, and problematic, when applied to virtual child pornography created *specifically* in a cartoon or animated form. One would imagine that most people would *objectively* agree that cartoons do not depict real children, but when asked to apply the OVR provision, juries and courts have on a number of occasions found that these materials qualify as "obscene."[90]

A. United States v. Whorley

In *United States v. Whorley,* Dwight Whorley was convicted in Virginia for the "knowing" receipt and possession of twenty obscene "anime-style" cartoon images of prepubescent children engaged in "graphic sexual acts with adults[,]"[91] in violation of 18 U.S.C. Section 1462 and 18 U.S.C. Section 1466A(a)(1), the OVR provision.[92] Additional counts included the knowing sending or receipt of 20 obscene text-only emails, in violation of 18 U.S.C. Section 1462 and for the knowing receipt of 14 digital photographs of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. Section 2252(a)(2).[93] Whorley was sentenced to 240 months imprisonment.[94]

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[87] *See* United States v. Whorley, 550 F.3d 326, 346 (4th Cir. 2008) (Gregory, J., dissenting) ("[A] material's obscenity, or lack thereof, ultimately depends on the subjective view of at least five individuals."); *see also* United States v. 12 200-Foot Reels of Super 8mm Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting).

[88] *See Miller*, 413 U.S. at 24.

[89] Paula Bird, *Virtual Child Pornography Laws and the Constraints Imposed by the First Amendment*, 16 BARRY L. REV. 161, 175 (2011).

[90] *Infra* Part II.A-C.

[91] United States v. Whorley, 550 F.3d 326, 331 (4th Cir. 2008) (describing "graphic sexual acts" as "actual intercourse, masturbation, and oral sex, some of it coerced."). The facts in *Whorley* are as follows: a woman informed an employee at a public resource room that Dwight Edwin Whorley was viewing what "appeared to be child pornography" on one of the computers. Supervisors responded and found Whorley holding Japanese cartoons of "children engaged in explicit sexual conduct with adults," which he had printed. The managers escorted Whorley off the premises, then returned to the computer, finding additional copies of anime-style cartoons in his email, which had been left open. They printed the images and contacted the state police. The FBI later became involved, was able to gain access to Whorley's email account and filed charges. *Whorley*, 550 F.3d 326.

[92] *Id.* The entire indictment read as follows: "Knowingly receiving on a computer 20 obscene Japanese anime cartoons depicting minors engaging in sexually explicit conduct," in violation of 18 U.S.C. § 1462; "of knowingly receiving obscene visual depictions of minors engaging in sexually explicit conduct[,]" in violation of 18 U.S.C. § 1466A(a)(1); the knowing sending or receipt of 20 obscene text-only emails, in violation of 18 U.S.C. § 1462; and for the knowing receipt of 14 digital photographs of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(2).

[93] As indicated, 14 of the 75 counts against Whorley were for the possession of actual child

Whorley challenged his convictions under U.S.C. Sections 1462 & 1466A, arguing that the statutes were "unconstitutionally vague."[95] A statute is considered "unconstitutionally vague" if it either: (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) authorizes or even encourages arbitrary and discriminatory enforcement.[96] Whorley argued that subsection (a)(1) of the OVR provision was unconstitutionally vague under the First Amendment, as applied to cartoons, because "cartoons do not depict actual minors,"[97] and thus he had "no notice that viewing the cartoon images on [a] computer screen was [an] unlawful [act]."[98] He set out that subsection (a)(1) could not apply because the cartoon-images in question were not of actual people, and that the statute would be unconstitutional on its face under *Ferber,* which only prohibited depictions of actual children, and under *Ashcroft*, which overruled language that prohibited virtual images of minors that did not involve actual children.[99]

The Court, as all courts have, conceded that "there is, of course, no suggestion that the cartoons in this case depict actual children; they were cartoons."[100] But the Court justified its decision to hold the statute constitutional by pointing out specific statutory language in the OVR provision which criminalized the receipt of *any* obscene visual depiction, whether "drawing, cartoon, sculpture, or painting,"[101] and language which unambiguously provides that it is "not a required element" that the minor depicted "actually exist."[102] It did not dispute the fact that *Ashcroft* rejected the prohibition of virtual child pornography that was not obscene. But the Court stressed that Whorley's argument fails precisely because subsection (a)(1) of the OVR provision *only* regulates virtual child pornography that has been deemed "obscene," and obscenity, in any form, is not protected by the First Amendment.[103] The Court found that, regardless

pornography. Moreover, Whorley had been previously convicted in 1999 for the possession of actual child pornography. At the time of *United States v. Whorley*, Whorley was released from prison on probation. However, this Note does not address the receipt, possession, production or distribution of actual child pornography. Later, this Note does discuss why or why not a defendant's prior convictions should matter when one is found in possession of virtual child pornography.

94 *Whorley*, 550 F.3d at 332. In explaining the sentence imposed, the Court reasoned that Whorley's inability "to make a good faith effort to control his sexual deviance" and the "increasingly sadistic and violent" nature of the prepubescent erotica that he viewed, indicated Whorley's increased danger to the community. *Id.*

95 *Id.* at 330.

96 *Id.* at 333.

97 *Id.* at 330.

98 *Id.* at 334.

99 *Id.* at 336.

100 *Whorley*, 550 F.3d at 336.

101 18 U.S.C. § 1466A(a).

102 *Id.* § 1466A(c).

103 *Whorley*, 550 F.3d at 337.

of whether the OVR provision requires an actual child, it is a valid restriction on obscene speech under *Miller*.[104]

Instead of analyzing whether it should matter that a statute like the OVR provision imparts the same criminal liability for virtual child pornography in the form of clearly fictional cartoons as it does for images created using *real* children, or the implication these restrictions impose on the freedom of expression in practice, the Court merely concluded that because the language of the statute applied to Whorley's actions, the statute was constitutional. While this was the Court's holding in *Whorley*, it should be noted that Judge Gregory interpreted the statute differently and dissented from the opinion, stating that "because the Japanese anime cartoons did not portray actual children," an element that he felt was a requirement of the statute, he would reverse the decision as to those counts.[105] Gregory expressed his concern for the implications of Whorley's verdict stating that "[t]oday, under the guise of suppressing obscenity—whatever meaning that term may encompass—we have provided the government with the power to roll back our previously inviolable right to use our imaginations to create fantasies."[106] He argued that even obscenity must be granted a "safe harbor" when the only articulable justification for suppression is the fear of the expression of certain distasteful thoughts.[107]

Additionally, Whorley's convictions on the counts for the possession/receipt of text-only emails describing sexual fantasies involving minors, which were deemed to be "obscene," are similarly shocking because one would assume that, under the First Amendment, pure speech, as opposed to visual depictions, would objectively be considered *protected* speech.[108] However, on appeal, the Court dismissed this contention, concluding that that the *Miller* obscenity test "never depended on the form or medium of expression."[109] This portion of the decision raises the alarming possibility that courts may be falling prey to the "panic" and ruling in glaring opposition to the requirements of the First Amendment.[110]

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[104] *Id.*

[105] *Id.* at 347 (Gregory, J., dissenting) (claiming that Whorley could have "possessed hard copies of the cartoons and emails in his home without fear of conviction . . . because the materials only portrayed and discussed fictional children.").

[106] *Id.* at 353 (Gregory, J., dissenting).

[107] United States v. Whorley (Whorley II), 569 F.3d 211, 213 (en banc), *reh'g denied* (2009) (Gregory, J., dissenting) ("[W]hen the government's only interest in regulating obscenity is to protect people from their own thoughts or to censor thoughts that have an unquantifiable potential to induce future bad acts, the First Amendment shelters individuals from this kind of state intrusion on their personal privacy.").

[108] *See id.*

[109] *Whorley*, 550 F.3d at 335 (finding Whorley's claim to be without merit because he did not properly plead *why* text, standing alone, could not constitutionally be prohibited). *See also* Kaplan v. California, 413 U.S. 115, 119 (1973).

[110] *See Whorley*, 550 F.3d at 348 (Gregory, J., dissenting) ("[T]he e-mails were clearly pure speech protected by the First Amendment."). While this proposition states more than this Note aims to focus on, I hope it is clear that the First Amendment should at least protect written speech. If not, then how could we rationalize the existence of important literary works like Vladimir Nabokov's *Lolita* or other

However, the reluctance of courts to challenge the OVR provision was not an occurrence unique to *Whorley*.

B. United States v. Handley

In the Southern District of Iowa, Chris Handley was convicted under the OVR provision for the receipt and possession of obscene materials—imported Japanese comic books—depicting the sexual abuse of children.[111] All of the images were of fictional characters that were produced either by hand or by computer, and the drawings did not refer to any actual person, but were "purely a product of the artist's imagination."[112] While Handley argued that he could not be charged for the mere possession of obscene materials,[113] the court rejected this assertion claiming that the OVR provision criminalizes the receipt and possession of obscene materials that have traveled through interstate commerce.[114] The key factor, the court claimed, was that Handley had imported obscene materials and it did not matter whether he intended to keep them solely for his own personal use, finding that such a distinction would be akin to allowing a drug-user to import illegal drugs for private consumption as long as he was not distributing them.[115] The court found that *Stanley*, while affording a right to possess obscene materials in one's home, does not extend to a right to "receive, transport, or distribute obscene materials."[116]

As in *Whorley*, the court found that there was no disagreement that the "images at issue do not [involve actual] children but instead merely cartoon depictions of children[.]"[117] Furthermore, since no real children were depicted, obscenity law would have to apply for criminal liability to attach. Handley argued that *Ashcroft* gave "constitutional legitimacy to pornography in which no real children are used."[118] This was not a problem for the court, however, which

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controversial works that push the limits in similar veins? More broadly, many judges, including Justice Kennedy in *Ashcroft v. Free Speech Coalition*, argue that regulating this very vague area would prevent classic works like *Romeo & Juliet* from even appearing on bookshelves. Additionally, many websites exist on the open-web that express beliefs in support of consensual sexual relations with minors. While we may not believe that these are morally acceptable works or beliefs, the First Amendment still affords people the right to disseminate this kind of information openly—at least in *print* form.

[111] United States v. Handley, 564 F.Supp.2d 996, 999 (S.D. Iowa, 2008). The facts of the case are as follows: in May of 2006, customs officials intercepted a package addressed to Christopher Handley that had been ordered online and shipped from Japan. The package contained seven books of Japanese *manga* (comic books) that depicted drawings of minors engaged in sexually explicit conduct. The government executed a federal search warrant at Handley's house, discovering numerous other "obscene materials." The images were described as drawings and cartoons "that depicted graphic bestiality, including sexual intercourse, between human beings and animals such as pigs, monkeys and others." *See Handley*, 564 F.Supp.2d 996.

[112] *Id.*

[113] *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969).

[114] *Handley*, 564 F.Supp.2d at 1001.

[115] *Id.*

[116] *Id.* (citing United States v. Orito, 413 U.S. 139, 141 (1973)).

[117] *Id.*

[118] *Id.* at 1002.

concluded that subsections (a)(1) and (b)(1) of the OVR provision were obscenity provisions and did not "suffer from the same defects found in the CPPA."[119] The court did not engage in any analysis as to whether the types of material at issue in the OVR provision *should* fall within the purview of obscenity, but merely concluded that because the statute provides for an obscenity analysis, prohibiting these types of images would not violate the First Amendment.[120]

Handley also argued that the terms "appears to be" and "minor" as applied in the statute to fictional characters were inherently vague.[121] He claimed that "because cartoons are a product of one's imagination, the characters portrayed have no age," and that the estimations of the characters' ages can vary depending on the observer.[122] However, the court held that the Constitution does not require language to be perfectly clear, but only to give sufficient warning.[123] The court noted that giving the term "minor" its "plain meaning," as used in the PROTECT Act, to mean "a person who has not yet reached 18 years of age," provided adequate notice and would not lend itself to arbitrary enforcement.[124] Although Handley argued that the language in subsection (c) of the statute, stating that "it is not a required element . . . that the minor depicted actually exist,"[125] was vague, the court stated that a statute is not rendered vague merely because it would be difficult to determine if the fact has been proved; rather, a statute is vague when there is discrepancy as to what that fact is.[126] According to the court, the term "minor" is not a term that would fall into this category.[127] The court's reasoning here is unsettling because it dismisses the contention that artwork can be construed subjectively, and that an artist's *intent* also plays a role in how a piece of art is construed.

Handley also contested subsections (a)(2) and (b)(2) of the OVR provision, which impose liability on a person who receives or possesses material that: "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] lacks serious literary, artistic, political, or scientific value."[128] While the court decided that subsections (a)(1) and (b)(1) require the material in question to

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119 *Id.*

120 *See Handley*, 564 F.Supp.2d 996.

121 *Id.* at 1003. Handley believed the language did not clearly define the conduct that the statute sought to prohibit. *Id.*

122 *Id.*

123 *Id.* Surprisingly, the Court admonished Handley for "imprecisely blend[ing] the law of child pornography with the law of obscenity." Only child pornography law requires the depiction of an actual minor. In obscenity law, this is not required. *Id.*

124 *Id.*

125 18 U.S.C. § 1466A(c).

126 *Handley*, 564 F.Supp.2d at 1004.

127 *Id.*

128 18 U.S.C. § 1466A(a)(2), (b)(2).

be "obscene," subsections (a)(2) and (b)(2) only require the material to lack "serious literary, artistic, political, or scientific value," without determining whether the work is, as a whole, obscene.[129] The court thus concluded that subsections (a)(2) and (b)(2) were overbroad and unconstitutional, but ultimately decided that that conclusion had "minimal impact on this case given the almost complete redundancy of the conduct criminalized" by them.[130] Because subsections (a)(1) and (b)(1) incorporated the three-prong *Miller* test, the Court concluded that those elements of the statute were not overbroad.[131]

The decision in *Handley* to overrule at least some parts of the OVR provision was a small move in the right direction, but it did not do much to help Chris Handley, who agreed to plead guilty on the possession counts and was ultimately sentenced to six-months' imprisonment.[132] Handley was also required to "forfeit all interests in his computer and all obscene visual depictions seized by the government[.]"[133] The terms of Handley's sentencing required that once allowed "supervised release" and probation, he would also have to "participate in a treatment program, to include psychological testing and a polygraph examination, as directed by the U. S. Probation Officer," which is intended to provide him with diagnosis and treatment for sexuality, gender identity, and/or mental health issues.[134] As a result of his conviction, Handley, a man who had collected and consumed comic books that contained no images of real children, would be required to live a life similar to that of a convicted child-molester.[135] The court dismissed Handley's contentions that he had no notice that a cartoon—something clearly fictional—could carry criminal liability, and Handley had no choice but to take a plea to save himself from a lengthy sentence.[136] Handley's experience, and the court's reasoning, makes it clear that there would be very little hope for petitioners intending to contest the OVR provision.

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[129] *Handley*, 564 F.Supp.2d at 1005. Although the government claimed that these provisions prohibited "obscenity per se"—a narrow class of items that Congress has determined to be so "hard core" that they would always satisfy *Miller*—the Court rejected this assertion stating that a jury must determine whether an image appealed to the prurient interest or was patently offensive; it could not be legislatively defined. *Id.* at 1006.

[130] *Id.* at 1007.

[131] *Id.*

[132] Sentencing Documents–Judgment at 1, United States v. Handley, 584 F. Supp. 2d 996 (2010) (1:07-cr00030-JEG-RAW) (Doc. 102) [hereinafter *Judgment*]; *see also Christopher Handley Sentenced to 6 Months for Obscene Manga*, ANIME NEWS NETWORK (Feb. 11, 2010, 2:39 PM), http://www.animenewsnetwork.com/news/2010-02-11/christopher-handley-sentenced-to-6-months-for-obscene-manga.

[133] *Judgment*, *supra* note 132, at 5.

[134] *Id.* at 3.

[135] Sentencing Documents at 3, United States v. Handley, 584 F. Supp. 2d 996 (2010) (1:07-cr00030) (Doc. 102). Handley was not required to register as a "sex offender," however the restrictions placed on him were similar to those that would be placed on an individual who had actually assaulted a child. *Id.*

[136] *Judgment*, *supra* note 132.

C. United States v. Kutzner

United States v. Kutzner did not proceed to trial, but the outcomes of this case are in line with the recent developments in virtual child pornography jurisprudence and exemplify the futility that petitioners who challenge the provision face. The government found hundreds of pornographic images on Steven Kutzner's computer, seventy of which were "animated images graphically depicting minors engaging in sex acts."[137] Many of these images portrayed the "child" characters, Bart, Lisa and Maggie, from the popular American cartoon, *The Simpsons*. Kutzner pled guilty to the possession of obscene material under the OVR provision for the cartoon images and was sentenced to fifteen months' imprisonment.[138]

Kutzner's case is particularly unsettling because, like *Handley*, the prosecutor used the mandatory minimum sentence associated with the greater offense of "receipt" to convince the defendant to agree to a plea to the lesser offense of possession.[139] By pleading guilty to the "possession" of the cartoon images, Kutzner was able to avoid the five-year mandatory minimum sentence that would have applied if he was convicted of "receipt."[140] Kutzner's attorney, D.C. Carr, stated that he and the prosecutor, Jim Peters, discussed at length the constitutional implications of the statute.[141] While Carr felt that the statute "put[] the government in places it shouldn't be[,]" the government ultimately "had the leverage" in the case.[142] Kutzner's case, however, also involved thousands of images of "child erotica"—images that are not themselves "pornography," but depict children in "sexually suggestive poses" and are thought to "fuel the sexual fantasies of pedophiles[.]"[143] If there had not been additional "complicated circumstances," Carr stated, he would have taken this case "all the way" because it was a statute that needed to be challenged.[144] Peters, however, felt that Kutzner's possession of the material indicated that the defendant was someone who was "sexually interested in children;" if not, he claimed he would not have brought the case.[145] However, this kind of reasoning would tend to support the conclusion that Kutzner was prosecuted and convicted not for the content of the images he

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[137] Government's Sentencing Memorandum at 2, United States v. Kutzner, Case No. CR-10-0252-S-EJL, *available at* http://reason.com/assets/db/12955634459236.pdf (last visited Nov. 12, 2011).

[138] *Id.* at 1. It should also be noted that Kutzner had admitted to searching for, downloading, and possessing actual child pornography, child erotica, and obscene depictions of children involved in sexual conduct. However, he deleted these images and wiped them from his computer, and thus the government was unable to charge him for the actual pornography. *Id.* at 8.

[139] *Id.*

[140] Sean Michael Robinson, *Criminal Contexts: The Simpsons "Child" Pornography Case and Its Implications*, THE COMICS JOURNAL (Jan. 28, 2011, 2:58 PM), http://classic.tcj.com/news/sean-michael-robinson-criminal-contexts-the-simpsons-child-pornography-case-and-its-implications/ [hereinafter, Robinson, *Criminal Contexts*].

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

possessed, but for what those images said about the content of his *mind*.[146] The prosecution of distasteful thoughts, rather than criminal actions, is exactly the danger the country faces by continuing to allow the statutory prohibition of images that do not depict real people or create any actual victims.

III: WHY VIRTUAL CHILD PORNOGRAPHY SHOULD BE CONSTITUTIONALLY PROTECTED

These three recent decisions have incensed attorneys and comic-book aficionados alike who are shocked and flabbergasted by courts' seeming departure from the essence of the First Amendment. The OVR provision was enacted for the sole purpose of getting around the Supreme Court's ruling in *Ashcroft*.[147] It allows the government to maintain the constitutionally necessary legal distinction between actual and virtual child pornography, while treating the two concepts as statutorily similar, by cross-referencing the penalties for obscene materials with those for actual child pornography.[148] Additionally, like Handley and Kutzner, who pled guilty to avoid the severe sentences for the greater offense of receipt, the OVR provision may be unethically coercive for defendants faced with choosing between bringing suits to argue the constitutionality of the statute and taking a higher sentence if they lose, or quietly agreeing to a lesser plea. Similarly, while we are only seeing the beginning of cases dealing with virtual child pornography in cartoon form, one can only imagine the breadth of this statute when applied to other art forms like sculpture and paintings. In essence, the OVR provision has the potential to discourage numerous artists from venturing into more daring art because it is difficult to know what works will qualify as "obscene" and which will not.

A. Banning Virtual Child Pornography Does Not Actually Serve the Government's Interests

It is uncontested that the government has a compelling interest in safeguarding children.[149] However, banning virtual child pornography would not actually serve to achieve the government's goal. First, the argument that virtual child pornography will, in some way, worsen the "problem" of pedophiles in American society is flawed. The terms pedophile and child molester should not be used interchangeably—pedophilia is the psychological state (or "disorder") of having sexual thoughts and desires involving children; child molestation is the *act* of sexually abusing a child.[150] But in our society, we immediately link the

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[146] Robinson, *Criminal Contexts*, *supra*, note 140.

[147] *See supra* Part I.C.

[148] 18 U.S.C. § 1466A(B); *see also* Robinson, *Criminal Contexts*, *supra* note 140.

[149] *See* New York v. Ferber, 458 U.S. 747, 757-58. (1982).

[150] *See Chapter 11. Sexual and Gender Identity Disorders*, PSYCHIATRYONLINE, http://dsm.psychiatryonline.org/content.aspx?bookid=22&sectionid=1891601#10252. Not all

thoughts of these individuals with the crimes we think they will ultimately commit, even though it is not a crime to have pedophiliac thoughts. The government's professed goal is not to outlaw a person's deviant thoughts; it is only to protect children from sexual predators.[151] If the government were to openly state that its goal also included outlawing pedophiliac thoughts, this goal would clearly stand in opposition to the First Amendment.[152] The government does, however—through legislation like the OVR provision—attempt to covertly curtail deviant thoughts by claiming that the only way to effectively abolish actual child pornography is to do away with virtual child pornography as well, since the two are indistinguishable. However, this argument holds little weight.[153]

For the government to efficiently achieve its compelling interest of protecting children without also stripping its citizens of their individual rights, the government must set out to stop only those actions that are intrinsically related to the abuse of children. It is clear that virtual child pornography utilizes—and thus harms—no children. Instead, the government hopes to justify the prohibition of virtual child pornography merely because it may serve the same deviant or antisocial sexual *desires* as real child pornography. In essence, the government, like much of American society, seems to hold the incorrect assumption that harboring pedophiliac thoughts makes someone a danger to society's children. However, the major flaw in the CPPA, and why the Court refused to defer to Congress' "fact-finding" in *Ashcroft*,[154] is that the government provides no evidentiary proof to support its contention that virtual child pornography leads to the actual abuse of children.

There is no definitive evidence that viewing child pornography increases the likelihood that someone will assault a child. In fact, many scientific studies have suggested that the availability of pornography may actually *decrease* the likelihood and frequency of rapes and sexual assaults. A 1999 study conducted in Japan, for instance, found that sexual assault rates were much higher in Japan when

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pedophiles act on their impulses, and not all people who ultimately end up sexually abusing children fall under the diagnostic requirements to be labeled as a pedophile. *Id. See also* Ryan C.W. Hall & Richard C. W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82(4) MAYO CLIN. PROC. 457 (2007).

151 *See* S. REP. NO. 108-2 (2003).

152 This goal would be similarly problematic under the Robinson doctrine, which stipulates that one cannot be punished for one's "status." *See* Robinson v. California, 370 U.S. 660, 666-67 (1962). Child pornography was addressed in the context of the Robinson doctrine in the case of *United States v. Black*; however, the Seventh Circuit distinguished Black's conviction because the conduct that was criminalized was the *possession* of child pornography, not merely because Black was a pedophile. *See* United States v. Black, 116 F.3d 198, 201 (7th Cir. 1997).

153 While this may have been a more plausible argument with images that are morphed and use a real child's face, this argument loses much of its vigor when applied to cartoons, sculptures and paintings. Take for example the fact that we allow pornography that depicts "rape-fantasy." ven though rape is a similarly despicable crime, the rape portrayed in pornography is at least understood to be fictional and the expression of it is allowed as free speech.

154 *See* The Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256; Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

pornography was outlawed, but decreased drastically once Japan's restrictions on the sex trade—ranging from prostitution to sex shops to pornographic *manga* ("comics")—were lifted.[155] This study's findings are of particular relevance because they illustrate that the most dramatic decrease in sex crime rates were in those committed by and *against* juveniles.[156] The study also compared results from Denmark, Sweden, and Germany, Western countries that also gradually decriminalized pornography over time, and found that sex offenses against minors similarly decreased.[157] Additionally, a 2006 American research paper concluded that there was a negative correlational relationship between access to pornography and rape-rates.[158] As access to pornography has become freely available to adults and teenagers over the last twenty-five years, rates of rape have declined by eighty-five percent.[159]

Even if the government could show scientific studies in support of its contentions, fundamental American notions of equality counsel against discriminating on the basis of a person's mental disorder or disability. It should not matter *who*—whether pedophile or avid comic book collector—is consuming the virtual child pornography. Of course, any state can make a convicted sex offender submit to certain stipulations for his release as part of the terms of probation.[160] It is plausible that a state could prohibit a convicted child molester from retaining pornography, and this, as a broad category, could include virtual child pornography. However, if whether or not the possessor of virtual child pornography is a convicted sex offender or a comic book collector *is* what really matters to American obscenity jurisprudence, it would appear that the legislation aims to regulate the person who consumes the work and not the content of the work itself. Regardless, the *person* who consumes it does not make the work obscene; the work must be obscene in and of itself. The government, nevertheless, argues

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[155] *See* Milton Diamond & Ayako Uchiyama, *Pornography, Rape and Sex Crimes in Japan*, 22 INT'L J.L. & PSYCHIATRY 1, 8 (1999).

[156] *Id.* at 9. While the researchers hypothesized that the group most negatively affected by an increased exposure to pornography would be children, the results actually showed that the number of juvenile offenders dropped 85% between 1972 and 1995. The number of victims, particularly among females younger than 13, decreased from 8.3% of overall victims in 1972 to 4% in 1995. *Id.*

[157] *Id.* at 10. Sex offenses against minors under 14 decreased about 10% between 1972 and 1980. However sex offenses against children under 6 decreased more than 50%. *Id.*

[158] Anthony D'Amato, *Porn Up, Rape Down*, PUB. LAW AND LEGAL THEORY RESEARCH PAPER SERIES 1, 3-5 (Nw. Univ. Sch. of Law 2006), *available at* http://anthonydamato.law.northwestern.edu/Adobefiles/porn.pdf

[159] *Id.*; *see also* Michael Castleman, *Does Pornography Cause Social Harm*, PSYCHOLOGY TODAY, Apr. 27, 2009, *available at*
http://www.psychologytoday.com/blog/all-about-sex/200904/does-pornography-cause-social-harm;
Steve Chapman, *Is Pornography a Catalyst for Sexual Violence,* REASON MAGAZINE, Nov. 5, 2007, *available at*
http://reason.com/archives/2007/11/05/is-pornography-a-catalyst-of-s (providing additional examples of how negative sexual habits have changed since the heightened availability of pornography).

[160] These may range, including punishments like giving up the right to own a computer, use the internet, live near schools or parks, or be alone with children, including one's relatives. *See, e.g.*, Rule 11 Plea Agreement at 14-16, United States v. Kutzner (2010) (CR-10-0252-S-EJL).

that the OVR provision will allow them to catch child molesters.[161] If this is truly the government's motivation for enactment and enforcement of the OVR provision, this confirms that the provision equates the act of viewing virtual child pornography with the act of assaulting children. The government cannot regulate pedophiles and sex offenders by assuming that anyone who possesses virtual child pornography is by default a child molester, and criminally liable.

Additionally, the government makes a tenuous argument that virtual child pornography can be utilized by pedophiles to entice children to engage in sexual acts with adults. Similarly without any proof of support, this argument also holds no weight because it is easy to replace a term like virtual child pornography with candy, money, games, or toys. The government cannot ban an item simply because someone may utilize that item to later commit a crime. Instead, that item must, inherently, cause harm itself. Although pornography, which is sexual in nature, can be differentiated from other more innocuous items like candy, this quality alone does not suffice as a justification for banning virtual child pornography. Under this reasoning, the government would also have justification to ban any and all pornography—merely because it depicts sex, and a pedophile could utilize pornography to desensitize a child to sexual acts in general. The government could use this justification to widen the scope and effectively ban movies depicting non-obscene sexual relationships between minors and adults. Furthermore, the government would also be able to make the argument that they should ban any *written*, non-visual material that features sex between adults and minors. The possibilities are endless, and make clear that this "enticing children" argument is shallow.

Since it is apparent the government has no convincing scientific basis for their prohibition of the creation, possession, or distribution of virtual child pornography, it appears that the true motivations behind the anti-virtual child pornography law are akin to a moral crusade. Proscribing the expression of thought on purely moral grounds raises a multitude of concerns. The question must be asked who and what would be at stake if the OVR provision were allowed to stand. Attorneys defending individuals charged under this provision have been confounded by the fact that courts have upheld the statute in light of its restrictions on individual rights. The Comic Book Legal Defense Fund described this legislation as "misunderstand[ing] the nature of avant-garde art in its historical perspective and . . . pervert[ing] anti-obscenity laws."[162] It allows prosecutors to essentially go on a "witch hunt" aimed at criminalizing deviancy.[163] As the OVR

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[161] *See* S. REP. NO. 108-2 (2003).

[162] *CBLDF to Serve as Special Consultant in PROTECT Act Manga Case*, ANIME NEWS NETWORK, Oct. 9, 2008, *available at* http://www.animenewsnetwork.com/press-release/2008-10-09/cbldf-to-serve-as-special-consultant-in-protect-act-manga-case.

[163] Peter van Bruen was the attorney for John McEwen who was convicted in 2009 to a two-year sentence for possessing images depicting cartoon children engaged in sexual acts. He compares the campaign against virtual pornography to anti-miscegenation. Darrick Lim, *Cartoon Kid Porn: Evil*

provision fails to serve a valid governmental purpose, it unduly restricts the right to freely express our ideas, and the right to exchange those ideas with others.

B. Because It Does Not Serve a Compelling Government Interest, Banning Virtual Child Pornography Places an Undue Burden on a Valid Form of Expression and Impinges on Freedom of Expression

One of the First Amendment's core elements is the distinction between one's thoughts and speech, and his or her actions.[164] Individuals who use virtual child pornography are being held criminally liable for viewing virtual depictions of minors engaged in sexual activity, when they have not committed the crime of sexual assault against a child, or even the crime of purchasing or possessing actual child pornography. It is difficult enough to ask people to look past the "deviancy" of images depicting children engaged in sexually explicit conduct. If someone attempts to defend the images on artistic grounds, or even to start a discussion about the constitutional rights in jeopardy, it is possible that that person will be faced with the contempt of their community.[165] The tendency to believe that these types of images have no conceivable social value[166] places defendants at a disadvantage from the outset. If the jury will always find the images obscene, what chance does a defendant have if he chooses to go to trial? D.C. Carr, Chris Handley's attorney, expressed the futility of a jury trial: "[W]hen projected on an 8 x 8 screen on a courtroom wall . . . any jury . . . would likely have agreed they do not want that in their community."[167] But legislation that incentivizes people to plead guilty out of futility and shame, or makes the topic so distasteful that attorneys and legal scholars would rather have nothing to do with it,[168] is not what the justice system is about.

Pedophilia or Victimless Crime?, THE ATTEMPTS (Nov. 28, 2009), http://the-attempts.blogspot.com/2009/11/cartoon-kid-porn-evil-pedophilia-or.html ("[N]ot even five decades ago . . . if a black man so much as looked at a white woman with desire he'd be . . . abused by white folks[.] . . . [T]hat same kind of vitriol being thrown at people like John McEwen is just unwarranted. Viewing sexual images of fictional, non-existent cartoon kids is the new miscegenation.").

[164] Kim-Butler, *supra* note 2, at 582 ("Adler notes, the distinction between thought/speech and action is a core element of first amendment law.") (citing Adler, *Inverting*, *supra* note 12, at 972-73).

[165] *See id.* at 548; *see also* Adler, *Perverse*, *supra* note 3, at 210 ("[I]f you mention the First Amendment in this context, someone might accuse you of being a pedophile.").

[166] *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250-51 (2002). The government relied on *Ferber* as support for assertion that child pornography is seldom valuable speech, yet the Court concluded that this was unavailing because the statute at issue in *Ferber* was about how the image was produced, not the content of the work and that the court in *Ferber* never held that child pornography is inherently without value. *Id. See also* United States v. Handley, 564 F.Supp.2d 996, 1006 (S.D. Iowa, 2008).

[167] Robinson, *Criminal Contexts*, *supra* note 140.

[168] *Id.*

1. The Intersection of Comics, Sexuality and the Focus on Children in the Comic Art Form

In the past, comics have been considered by society to be solely entertainment for children. Today, however, comics are viewed more broadly as a valid art form—often referred to as "graphic novels"—and are considered by many to carry serious literary and artistic merit. In fact, dedicated comic book fans tend to be adults who collect them and who attend conventions and conferences to discuss them. "Comics" are no longer meant to construct worlds where superheroes ensure that we are safe and sleep easy at night—they can be dark, complex, daring, disturbing, and even controversial. In this way, it is clear that not all comics are made for children. Part of what fuels the disapproval of virtual child pornography is the concern that, in addition to possibly motivating pedophiles to attack children, children may be deceived into participating in sexual acts because the comic art form is inherently appealing to them. Moving away from the assumption that comics are only consumed by children allows us to understand that these works are a medium through which serious and valuable ideas can be promulgated and helps us begin to lay to rest the idea that comics that depict visual representations of children engaging in sexual acts can only be utilized by pedophiles as a tool to harm children. As with any type of pornography, items that are not meant for children should be clearly marked with disclaimers like "Adults only" or "18+." Just because an item may be attractive to a child does not mean that that item should not—or cannot—exist.

However, one of the reasons why it is difficult to conceive of the artistic merit behind drawings or comics that depict child sexuality is the moral belief that sexuality and children should be kept stringently separate. The inability to accept this concept may reflect cultural standards. It is no surprise that in two of the virtual child pornography cases discussed, *Whorley* and *Handley*, the comics at issue were Japanese *manga*.[169] Explicit pornographic images in Japan are treated similarly to American pornographic material in that they are clearly marked "adult" and thus not intended for children, but there is a very large and fairly mainstream sex industry in Japan. Pornographic *manga* that features young children[170] is as common as any other type of pornography,[171] and because it is in fictional form, it is not regulated or prohibited like its American counterparts. Undoubtedly, not all

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169 *See Handley*, 564 F.Supp.2d 996; United States v. Whorley, 550 F.3d 326, 331 (4th Cir. 2008).

170 There is a fairly large market in Japan for *lolicon*—a Japanese portmanteau for the words "Lolita" and "Complex" —and *shotacon*—a Japanese portmanteau of the word "Shōtarō," a popular Japanese boys' name, and "Complex" anime and *manga*. *Lolicon* and *shotacon* feature, respectively, young male and female characters, often engaged in sexual acts. *Lolicon* and *shotacon* is less about a sexual affinity towards young children, and more about the youthful qualities and "cuteness" of the characters. *See* Setsu Shigematsu, *Dimensions of Desire: Sex, Fantasy and Fetish in Japanese Comics*, THEMES AND ISSUES IN ASIAN CARTOONING: CUTE, CHEAP, MAD AND SEXY, 129-30 (John A. Lent ed., 1999).

171 *See* David Kravets, *U.S. Manga Obscenity Conviction Roils Comics World*, WIRED, May 28, 2009, http://www.wired.com/threatlevel/2009/05/manga-porn/.

members of Japanese society accept the existence of this type of pornography, but it is at least a mainstream sexual preference to which Japanese society has exposure.[172]

2. The "Social Value" of the Freedom to Depict Child Sexuality in Comic Art

Addressing child sexuality through the comic art form is an especially unique mode of expression. The comic art form may be a way of taking the edge off of otherwise too painful material, and may allow an artist to bring to life images, feelings, and memories they would not want to express in a non-fictional form. Authors and artists may also use the comic form to solidify the idea that the images portrayed are *purely* fictional, and as such, they may feel free to give life to images and ideas that only exist in a world of fantasy. Comic-expression may also be necessary at times to portray disturbing imagery in a way that would lose its impact in live-action form. Thus, comic books can be a valid outlet for artists who have either gone through traumatizing experiences or who would like to explore the topic of child sexuality. The OVR provision, however, forces artists to choose between achieving their creative potential and avoiding criminal liability. Legislation prohibiting the treatment of child sexuality in the comic form negatively impacts the artistic community, because it snuffs out an entire area of art with potential social value and leaves producers and consumers unsure of the types of works that would fall within its scope.

3. The Provision's Subjectivity & Vagueness Burdens Artists, Consumers and Retailers

Artists who challenge themselves by addressing these difficult topics have the potential to create important socially provocative works, but the glaring difficulty inherent in the OVR provision is its vagueness and rampant subjectivity. Although judicial opinions have asserted that the term "minor" when used in reference to visual depictions in comics is clear and unambiguous, it is not uncommon for artists to create characters in comics whom the artists have explicitly stated are adult-age but who, for all intents and purposes, *look* exactly like a child.[173] The OVR provision does not allow for this possibility, even though

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[172] This "sexual preference" may have less to do with "pedophilia" and more to do with an overall fetishization of the "cute" (*kawaii*). These fetishes involve the idea of young, docile women catering to the needs of older men. It is not necessarily motivated by the age of the individual, but more about her character—the "cuteness"' comes from the female actor's willingness to act sweet, submissive, and placating. Thus, even though our culture may construe a "youthful-looking" character in a pornographic setting as objectionable, this does not necessarily mean that all cultures view it that way. *See* Sharon Kinsella, *Cuties in Japan*, WOMEN, MEDIA, AND CONSUMPTION IN JAPAN, 220, 222 (Lise Skov & Brian Moeran, eds., 1995).

[173] This is especially common in Japanese *manga*. For example, the characters Aisaka Taiga in *Toradora*, Kisa Shoutarou in *Sekaiichi Hatsukoi*, Hanamoto Hagumi in *Honey & Clover* and Momiji Sohma in *Fruits Basket* may look pre-pubescent, but they are all high-school age or older. On the other hand, it cannot be denied that much of the virtual child pornography found in *manga* actually *does* portray child characters who the author intended to be pre-pubescent or school-age children–for

this is inconsistent with how we approach pornography featuring "youthful-looking adults."[174] The "appears to be" language, which judges have found to be unambiguous, constrains creativity and expression on the part of the artists, and is counterintuitive to many consumers. Because the provision does not require an actual child, artists are not even allowed to draw images of characters whose ages are ambiguous, such as individuals who have just entered "adulthood."[175] The rulings in *Handley* and *Whorley* indicate that judges are not asking whether or not the artist intended the child depicted in the image to be an actual *child.*[176] They are instead making assumptions—subjective determinations—based on what *they* perceive to be a depiction of a "child." When analyzing this issue, especially in reference to imported material, judges should look at the material from a culturally objective viewpoint and consider the artist's intent before deciding whether any actual child would be harmed by a fictional depiction of a fictional "child."

The language in the OVR provision is inherently vague because it leaves artists with very little understanding of what will lead to prosecution and what will not.[177] Artists will never be able to tell just how much they can show before they have gone too far. As a result, artists become afraid to continue producing images that fall into the gray areas or even to risk looking up the images that have been held to violate the law.[178] Because obscenity is so subjective, there is no way of telling how a jury will feel about depictions of child sexuality and there is no incentive to "push" the boundaries of the law since even attorneys are left baffled as to how to handle cases when their clients are being prosecuted.[179] Comic-book retailers face similar issues, especially those who provide imported material whose context and potential literary, artistic, political, or scientific merit are uncertain because they might be in another language.[180] Thus, the only option left to artists is to err on the side of caution and simply ignore a topic of discussion that could have contributed to social discussion and awareness raising.

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example, the *Lolicon* and *Shotacon* genres.

[174] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 267 (2002).

[175] *See* Obscene Visual Representations of the Sexual Abuse of Children, 18 U.S.C. § 1466A (2011).

[176] *See* Handley, 564 F.Supp.2d 996 (S.D. Iowa, 2008); United States v. Whorley, 550 F.3d 326, 331 (4th Cir. 2008).

[177] "A statute is impermissibly vague if it either: (1) 'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'authorizes or even encourages arbitrary and discriminatory enforcement.'" *Whorley*, 550 F.3d at 333 (quoting Giovani Carandola, Ltd. v. Fox, F.3d 1074, 1079 (4th Cir. 2006)).

[178] Sean Michael Robinson, *Illustrating This Article Might Make Me a Criminal*, THE HOODED UTILITARIAN (Nov. 17, 2010, 5:00 AM), http://hoodedutilitarian.com/2010/11/illustrating-this-article-might-make-me-a-criminal/ [hereinafter Robinson, *Illustrating*].

[179] *See* Kravets, *supra* note 171. Eric Chase, Chris Handley's attorney is quoted as stating, "It's probably the only law I'm aware of, if a client shows me a book or magazine or movie, and asks me if this image is illegal, I can't tell them[.]" *See also* Bird, *supra* note 89, at 174 ("[T]he Supreme Court [should revisit this issue, if only to] clear up the confusion and alleviate the frustration . . . amongst law enforcement, prosecutors, and defendants.").

[180] Robinson, *Illustrating*, *supra* note 178.

C. Banning Virtual Child Pornography May Lead to More Harm

Since the images banned by the OVR provision are not inherently related to the harms occasioned by actual child pornography, it does not serve the government's goal of protecting children, and unduly burdens the artistic community. Because the provision is morally motivated, its existence does little to help the problem of child sexual abuse and the government's attempt to eradicate the problem by punishing pedophiles for their fantasies may actually lead to more harm. One suggested solution to this problem is to allow the existence of virtual child pornography as it may redirect the desire of pedophiles from actual children on to "virtual children," thus "shield[ing] children from abuse."[181] In the Netherlands, leading neuroscientist Dr. Dick Swaab suggested that pedophilia can be managed through the use of electronic child pornography, namely in "comic strip" form.[182] Swaab argues that making child pornography available will "steer paedophiles' impulses in the right direction" which should ultimately "reduce child abuse."[183] This plan has even garnered support from the Dutch anti-pedophile group *Stopkinderpornonu* (Stop Child Pornography Now), who are willing to consider the proposal because it would prevent real children from being harmed.[184] Swaab's approach realizes that while the issues of child pornography and pedophilia are difficult to address, it is still necessary to "apply ourselves to finding ways to reduce the risks, because there will always be people who are born paedophiles."[185]

Since America is also facing a crisis of child sexual abuse, it would be sensible for the government to consider something like the Netherlands' programs as a possible response to the problem. Instead of punishing pedophiles for their uncontrollable thoughts and desires, the government could utilize virtual child pornography as a way to redirect these antisocial impulses without harming children.[186] Additionally, because not all people who attack children are

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[181] Cisneros, *supra* note 40, at 9 (arguing that the most "logical" solution to child sexual abuse is to eliminate the illegal market, which can be achieved through "virtual child" pornography). Similar to Justice Kennedy's majority opinion in *Ashcroft*, this author emphasizes that the producers of child pornography would not risk the criminal repercussions of using real children if using virtual children carried no criminal liability. *Id.*

[182] *Can Cartoon Child Pornography Help Paedophiles?*, RADIO NETHERLANDS WORLDWIDE (Jan. 20, 2011, 3:43 PM), http://www.rnw.nl/english/article/can-cartoon-child-pornography-help-paedophiles. Dr. Swaab, of the Netherlands Institute of Neuroscience (NIN), notes that pedophilia is a sexual orientation that can neither be cured nor changed. The best we can do to counteract the effects is to try to find alternative outlets to manage pedophiles' impulses. *Id.*

[183] *Id.*

[184] *Id.* ("[E]very method should be studied carefully. If fake pornographic images, such as in cartoons, can lead to stopping child abuse, we support that.").

[185] *Id.*

[186] While it is clear that pedophilia is not a mental disorder that can ever be "cured"—similar to antisocial personality disorder—the argument is that since pedophiles or convicted child sex offenders may have an almost uncontrollable urge to reoffend, providing them with virtual child pornography may allow a harmless–no *child* has been harmed–outlet for their frustration, rather than preventing them from expressing their desires which may ultimately lead to them acting out in antisocial and dangerous ways.

pedophiles, allowing the existence of virtual child pornography may reduce the taboo factor inherent in prohibition and may reduce the fetishization of sex with children. One argument is that "erotic stories, even in comics, serve as a means of relaxation for adults who feel suffocated" by controlled society.[187] Open access to pornography allows people to get their desires "out of their system[s,]" thus reducing the motivation to go out and try to make these fantasies a reality.[188]

The government should give great consideration to the preventative purposes virtual child pornography may serve because banning it does nothing to lessen or eradicate the problem of sexual abuse against children. Since this legislation does not do away with the demand for child pornography, making all forms illegal will give producers no incentive to stop using real children. The statute applies the same punishments for virtual child pornography as it does for actual child pornography.[189] While the use of real children to produce pornography may come with more risks for a producer, it is also possible that the financial cost involved with producing virtual child pornography may outweigh the costs of using real children.[190] Thus, it is plausible that a pornographer, who is faced with using either real children or utilizing costly equipment to create images that look like real children, and who knows that the punishment for either method is similar, may choose to use real children as an "easier" and less-costly alternative. If virtual child pornography were legalized, however, pornographers would have an incentive to stop using real children as a means to avoid criminal liability. The obscenity provision provides no solution because it sets out to tackle the wrong problem. The problem with virtual child pornography is not that pedophiles exist; the problem is that there are people who are harming children.

D. The Statute Prohibiting the "Obscene Visual Representation of the Sexual Abuse of Children," U.S.C. Section 1466A, Should Be Overruled or Redrafted

The OVR provision, like the overruled CPPA before it, should be overruled as unconstitutionally vague and overbroad. Effective laws are those that are clear as to the required elements of the offense and put offenders on sufficient "notice" that their activity is criminal, but the OVR provision fails in this regard. In essence, what the law hopes to regulate is nonsensical. Even though obscenity is used as a justification for the prohibition of virtual child pornography, the "appears to be a minor" language is vague and provides a cartoon depiction of a child with

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The idea sounds similar to the rationale behind a methadone clinic.

187 Diamond, *supra* note 155, at 13.

188 D'Amato, *supra* note 158, at 6.

189 *See* Obscene Visual Representations of the Sexual Abuse of Children, 18 U.S.C. § 1466A (2011).

190 The children used in child pornography often are the children or relatives of the pornographers, or children who have been abducted or trafficked. *See, e.g.*, Kleinhans, *supra* note 6, at 29. These are likely children who are too afraid to speak out against their abusers or who may be imprisoned or held against their will. In these types of scenarios, the likelihood of the pornographer being detected is low.

the same legal protection as that of an actual human being.[191] Cartoon "people" are not persons—not "human beings"—and it is irrational to think they may have an "age."[192] Exactly because drawings are fictional, it is possible that an artist could draw an "adult" character to look younger or a juvenile character to look older. In real life, as well, a consenting adult may *appear* to be a minor, but sex with that individual is not made illegal as a function of his or her appearance. It is incorrect to assume a character's age can be determined merely by looking, and unreasonable to require individuals to inquire about the age of fictional characters. Language like "appears to be" has no place in a law that prevents no crime from being committed and ultimately sets out to condemn one's thoughts.

If the law will not be overruled, then it must be narrowed and redrafted. It should be revised to require that, when the only indicia of criminality is the possession of virtual images, prosecutors may only bring charges against individuals who have been previously convicted for production or distribution of child pornography or for the sexual abuse of a child.[193] When it has already been established that a person has previously attacked a child or has produced material that documents actual child abuse, it would not be unreasonable to prevent this person from viewing materials that fan their desires if the likelihood of reoffending is high.[194] While this type of regulation would still not solve the problem of policing an art form that harms no child, it serves at least a clearer purpose than the law as it currently stands. Individuals who have committed past crimes should expect that certain rights and freedoms afforded to non-criminals will not be afforded to them. However, imposing criminal liability on individuals who have never committed a crime oversteps the boundaries of the government's power.

CONCLUSION

The concerns surrounding the issue of virtual child pornography are certainly great. The government is interested in protecting children and prosecuting those

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[191] *See* Obscene Visual Representations of the Sexual Abuse of Children, 18 U.S.C. § 1466A (2011).

[192] Breaking the terms down to their most basic meaning, a minor is a "*person* who has not reached full legal age." BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis added). A "person" is defined as a "human being." *Id.*

[193] In other words, if a person's computer is raided and a folder is found containing 50 images of a childlike anime character engaging in graphic sex, but no other images depicting real children are found, the government should not prosecute that individual. This is a realistic possibility as it is exactly in line with the facts of *Handley*. *See generally* United States v. Handley, 564 F.Supp.2d 996 (S.D. Iowa 2008).

[194] A 2007 scientific study analyzed whether a legally cognizable link between the use of virtual child pornography and child molestation could be established. The study focused less on the qualities of virtual child pornography, but rather on whether viewing child pornography in general led to offending. The study could only conclude that viewing child pornography led to a higher rate of *convicted* sex offenders re-offending and thus concluded that legislation should be narrowed to prevent only *convicted* offenders from possessing virtual child pornography. *See* Neil Malamuth, Ph.D. & Mark Huppin, J.D., Ph.D., *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 820 (2007).

who seek to harm them. However, virtual child pornography harms no one. The government's regulation of virtual child pornography is statistically and practically unrelated to its goal, and tramples on inviolable rights. The rulings in *Whorley*, *Handley*, and *Kutzner*, and the language of the OVR provision, illustrate that the government is attempting to regulate thoughts—not actions—in glaring violation of the First Amendment. Generally, American law does not sanction the silencing of expression by shaming individuals through moral reproach. However, because of the moral panic inherent in the epidemic of child sexual abuse, we, as a society, have wholeheartedly jumped on the bandwagon without devoting the time and energy necessary to seriously consider what is at stake. Prohibiting virtual child pornography—even while knowing that it occasions no harm—smothers creative expression and makes a mockery of our commitment to the protection afforded by the First Amendment. This law cannot be allowed to stand because the lines are far too blurry, the motivations far too subjective, and the definitions and requirements for prosecution far too vague.

Ultimately, defending the right to own and produce virtual child pornography is about something greater than merely saying we should be free to enjoy whatever we choose to behind closed doors. Defending images that harm no one and that are being attacked merely because they are morally distasteful to certain members of the public is an issue that goes to the heart of the First Amendment. Without fighting for these types of gray-area problems, we are consenting to the weakening, and eventual destruction, of the freedom of expression. Regardless of whether someone has a vested interest in virtual child pornography, it is important to defend even the things we may not like if we hope to protect all other types of expression that may someday be viewed as distasteful.[195] The First Amendment is not about what is "right" for us to think. It is about having the freedom to think and believe without government interference. Too much is at stake to turn a blind eye merely because we may find the topics at issue "icky."[196]

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[195] Neil Gaimin, *Why Defend Freedom of Icky Speech*? (Dec. 1, 2008, 11:11 AM), http://journal.neilgaiman.com/2008/12/why-defend-freedom-of-icky-speech.html. *See also* Michael H. v. Gerald D., 491 U.S. 119, 141 (1989) (Brennan, J., dissent) ("We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies.").

[196] Gaimin, *supra* note 195.