VIRTUAL CHILD PORNOGRAPHY AS A NEW CATEGORY OF UNPROTECTED SPEECH

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In the '60s and '70s, the nation found itself in the middle of a revolution. Music was changing, equality began to become a reality and sex became an anthem for a generation breaking free of the *Leave it to Beaver* stereotypes. It was during this revolution that the Supreme Court First Amendment jurisprudence began to evolve largely in response to the thousands of individuals speaking out against the Vietnam War. This generation brought about vast changes in society, which included an increasing acceptance of hard-core pornography.\(^1\)

The Supreme Court did not follow the nation’s youth in embracing hard-core pornography. Although the Supreme Court held in *Stanley v. Georgia*\(^2\) that a state could not ban the in-home possession of obscenity,\(^3\) in *Miller v. California*\(^4\) it reaffirmed its previous holdings that obscenity was not protected by the First Amendment.\(^5\)

About ten years later, in *New York v. Ferber*,\(^6\) the Court furthered the state’s ability to regulate sexually explicit material when it upheld a state law proscribing the distribution and production of child pornography.\(^7\) The Court granted states tremendous leeway in regulating child pornography, which allows them the proper tools to protect the nation’s children from sexual abuse.\(^8\) Later, in *Osborne v. Ohio*,\(^9\) the Court held that a statute banning the possession of child pornography was constitutional.\(^10\)

After the Supreme Court’s decision in *Ferber*, the child pornography industry was forced underground\(^11\) and remained there until the Internet provided pedophiles a new medium to trade their pornographic pictures of children.\(^12\) In addition, technological developments in computers have enabled child pornography to be produced solely by a computer.\(^13\) In response to this development, Congress enacted the Child Pornography Prevention Act (“CPPA”) of 1996.\(^14\) The CPPA created a new definition of child pornography that incorporated pictures generated on a computer.\(^15\)

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\(^1\) See United States v. Stevens, 29 F. Supp. 2d 592, 595 n.4 (D. Alaska 1998), vacated by 197 F.3d 1263 (9th Cir. 1999).


\(^3\) Id. at 568.


\(^5\) Id. at 36-37.


\(^7\) Id. at 757.

\(^8\) Id. at 756.


\(^10\) Id. at 111.

\(^11\) See id. at 110; see also Final Report of the Att’y Gen.’s Commission on Pornography 406, 410 (1986) [hereinafter Att’y Gen.’s Commission on Pornography] (concluding that the Supreme Court’s decision in *Ferber* forced the production of child pornography underground where it has become a “cottage industry”).


\(^13\) See id.

\(^14\) Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 121, 110 Stat. 3009 (1996) (codified in scattered sections of 18 U.S.C.). In *United States v. Kimbrough*, the defense argued that the government was required to show that each image purporting to be child pornography actually depicted a minor. Although the defense was not victorious, Congress recognized that advances in technology will make it almost impossible for prosecutors to convict individuals for possessing child pornography because they will not be able to prove beyond a reasonable doubt that the image depicts an actual child. 69 F.3d 723, 733 (5th Cir. 1995).

\(^15\) 18 U.S.C. § 2256(8) (2000). The CPPA defines child pornography as:

- *[A]*ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:
  - \(A\) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
  - \(B\) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
  - \(C\) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
  - \(D\) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is
gress found that these images can cause many of the same harms to children as actual child pornography and that these images further the sexual exploitation of children.\textsuperscript{16} Congress’ actions created uproar among scholars arguing that virtual child pornography\textsuperscript{17} is protected speech.\textsuperscript{18} The majority of courts, however, have disagreed, maintaining that Congress has more power to regulate any form of child pornography because of the importance of protecting the nation’s children from sexual abuse.\textsuperscript{19} The answer to whether virtual child pornography is protected speech begins with the question: What did the Supreme Court intend child pornography to include when it held child pornography was not protected by the First Amendment?\textsuperscript{20}

The U.S. Court of Appeals for the First Circuit in \textit{United States v. Hilton}\textsuperscript{21} stated that regulation of sexually explicit material could be viewed on a continuum when speaking in terms of legal protection.\textsuperscript{21} At one end of the continuum is adult pornography\textsuperscript{22} and at the other end is child pornography. Falling somewhere in between is virtual child pornography.\textsuperscript{23} The question is: To which side does virtual child pornography fall closer? Does it fall closer to the side of adult pornography and thus gain more First Amendment protection? Or, is it just another species of child pornography to which the Supreme Court has already denied protection? Perhaps, the answer is neither because virtual child pornography really is a new category of unprotected speech.

This comment will place virtual child pornography in its proper place on the continuum by establishing that it is a new category of unprotected speech. Specifically, this comment will conclude that virtual child pornography should be placed between obscenity and real child pornography. Part I of this comment will examine the development of case law pertaining to the categories of sexually explicit material that are not protected by the First Amendment. It also will establish a methodology for examining speech under the categorical approach. Particularly, this comment will illustrate the differences between child pornography and obscenity in an attempt to show that virtual child pornography must lie somewhere between both of these unprotected forms of speech in protected speech).

\textsuperscript{20} 167 F.3d 61.
\textsuperscript{21} Id. at 70.
\textsuperscript{22} This comment distinguishes between adult pornography, including “hard-core” pornography, and obscenity for purposes of clarity. Specifically, this comment will refer to adult pornography only when discussing sexually explicit material portraying adults that is protected by the First Amendment. Obscenity, on the other hand, will refer to sexually explicit material that is unprotected by the free speech clause. Obscenity is defined in Part I.B of this comment. Obscenity’s place on the continuum is discussed in Part I.D.
\textsuperscript{23} The third edition of the American Heritage Dictionary defines a continuum as “a continuous extent or whole, no part of which can be distinguished from neighboring parts except by arbitrary division.” \textit{AMERICAN HERITAGE DICTIONARY} 189-90 (3d ed. 1994). The idea of a continuum of sexually explicit material can be seen from varying angles. This comment, however, will focus on the legal protection given to certain types of sexually explicit speech and will rely on the arbitrary boundaries between the varying types of speech.

The idea of a continuum also is a sound approach for analyzing sexually explicit material because it stresses the existence of arbitrary boundaries. For example, the continuum could be used to illustrate the ambiguity and difficulty in placing sexually explicit material into a specific category, i.e. adult pornography versus obscenity. The fact that a type of material reasonably may be concluded to be in two places on the continuum does not significantly affect the continuum’s value. For example, the fact that child pornography also may be obscene does not affect the outcome of this comment in terms of where virtual child pornography should be placed on the continuum.
terms of legal protection. Part I also will lay out Congress’ findings relating to virtual child pornography and the CPPA’s definition of child pornography.

Part II will illustrate the problems with applying the Supreme Court’s present definition of child pornography to virtual child pornography, thus concluding virtual child pornography is its own category of speech. Part III will show that virtual child pornography adds little value to the free expression of ideas. Part IV then examines the common governmental interests in prohibiting both actual and virtual child pornography in order to show that laws regulating virtual child pornography rely on compelling governmental interests. Part V will match the CPPA’s definition of child pornography to the definition the Supreme Court created in Ferber and Osborne as a means to discern what speech will be viewed as virtual child pornography. Finally, Part V, in establishing the limits of this new category of speech, refutes any possible overbreadth arguments against the CPPA by focusing on how courts have interpreted the statute and the intent of Congress.

I. THE CATEGORICAL APPROACH TO DEFINING UNPROTECTED SEXUALLY EXPLICIT MATERIAL

A. Overview of the Categorical Approach to the First Amendment

Under the categorical approach to the First Amendment, government may regulate freely certain “categories” of speech because they are not protected by the First Amendment. Among these forms of speech are: (1) speech that is directed to inciting or producing imminent lawless action; (2) obscenity; (3) defamation; (4) false or misleading commercial speech; and (5) child pornography. The Supreme Court in Chaplin v. New Hampshire stated that “such utterances are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” The key phrases in Chaplinsky with respect to the categorical approach are “slight social value” and “clearly outweighed by the social interest.” If the state’s interest in proscribing the speech “clearly outweighs” the speech’s value, the speech may be deemed a category of speech which does not deserve First Amendment protection.

B. Obscenity as a Category of Unprotected Speech

In Roth v. United States, the Supreme Court held that the government could regulate the distribution and production of obscene material. In terms of the categorical approach, the Court found that “implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.” In light of obscenity’s low social value and the state’s interest in preserving a moral society, the Court concluded that obscenity was not protected category of speech under the First Amendment. The Court also held that, with the exception of the last requirement, the test for obscenity is.

24 See Chaplin v. New Hampshire, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”); see also Daniel A. Farber & John E. Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1227 (1984) [hereinafter Faber & Nowak].
29 Ferber, 485 U.S. at 764. See generally Farber & Nowak, supra note 24, at 1228 (summarizing the current state of the categorical approach).
30 315 U.S. 568.
31 Id. at 572.
32 Id.
33 Id.
34 345 U.S. 476.
35 Id. at 484.
36 Id.
37 Id. at 485.
38 Miller, 413 U.S. at 24.
viewed from the standpoint of the average person applying contemporary community standards.\textsuperscript{39} In other words, material that is obscene in a small town in Illinois may not be obscene in New York City.

Although the Supreme Court granted state legislatures the ability to regulate obscenity, the Court rejected the possibility of an outright ban on obscenity in \textit{Stanley}.\textsuperscript{40} In \textit{Stanley}, the Court struck down a Georgia statute that banned the possession of obscene material.\textsuperscript{41} The Georgia statute, which banned the possession of obscenity, unconstitutionally infringed on the right to privacy.\textsuperscript{42} The Court held that although a legislature could regulate the production and distribution of obscene material, a ban on its possession infringed on a right "so fundamental to our scheme of individual liberty" that the Court could not justify the statute as a proper exercise of governmental power.\textsuperscript{43} In other words, paternalistic reasons for regulating obscenity could not justify a state entering private homes to control a person's thoughts.\textsuperscript{44}

C. Child Pornography and Establishing Categorical Methodology

Mass production of child pornography did not emerge until the early 1970s when technological advances in photography enabled pornographic images to be produced at little cost.\textsuperscript{45} In \textit{Ferber}, the Supreme Court revisited the categorical approach when it held that child pornography is not protected by the First Amendment. In \textit{Ferber}, the Court upheld a New York statute prohibiting individuals from distributing material depicting children under the age of 16 performing sexual acts.\textsuperscript{46} According to the Court, child pornography, like obscenity, was not protected by the First Amendment; therefore, a state could regulate the production and distribution of child pornography.\textsuperscript{47} Further, states are given greater flexibility to protect children by regulating the pornographic images of children.\textsuperscript{48}

The categorical methodology that the Supreme Court relied on required the Court to examine child pornography's social value and the governmental interests in regulating child pornography. First, with respect to social value, the Court concluded that the value of live performances and photographs of children engaged in sexual activity is "exceedingly modest, if not de minimus."\textsuperscript{49} Further, the Court found that there would be few, if any, situations in which a literary, scientific or educational reason would depend upon a sexually explicit picture of a child.\textsuperscript{50}

The Court noted several key governmental interests that entitle the states "to greater leeway in the regulation of pornographic depictions of children."\textsuperscript{51} The Court found that the state has a compelling interest in "safeguarding the physical and psychological well-being" of its children.\textsuperscript{52} Additionally, the Court noted that it would not second guess the legislature's conclusion that prohibiting the distribution and production of child pornography would reduce the sexual abuse of children.\textsuperscript{53} Further, the Court stated that the distribution of child pornography is "intrinsically related to the sexual abuse of children" because (1) the material permanently records the victim's abuse and (2) the production of child pornography depends upon its distribution.\textsuperscript{54} In other words, the advertising and selling of child pornography provides an economic motive for the production of child pornography.\textsuperscript{55}

After outlining the governmental interests and concluding that child pornography is of low social value, the Court noted that child pornography, as a category of unprotected speech, is consistent

\textsuperscript{39} Id.
\textsuperscript{40} 394 U.S. at 568.
\textsuperscript{41} Id.
\textsuperscript{42} See id.
\textsuperscript{43} Id.
\textsuperscript{44} See id. at 565 (denying that states have the ability to control the "moral content of a person's thoughts"). The Court's holding in \textit{Stanley} has been narrowed significantly in passing years. \textit{E.g.}, \textit{Paris Adult Theatre I}, 413 U.S. at 66-67 (refusing to extend \textit{Stanley}'s privacy protection beyond the home).
\textsuperscript{45} \textit{Ferber}, 458 U.S. at 765. The New York statute at issue in \textit{Ferber} specifically addressed individuals who distributed pornographic pictures of children in order to promote live sexual performances of children. Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id. at 756.
\textsuperscript{48} Id. at 762.
\textsuperscript{49} Id. at 762-63.
\textsuperscript{50} Id. at 756.
\textsuperscript{51} Id. at 756-57.
\textsuperscript{52} Id. at 757.
\textsuperscript{53} Id. at 759.
\textsuperscript{54} Id. at 761.
with its prior case law. To reiterate, a category of speech is unprotected by the First Amendment if the governmental interest outweighs the value of the speech that the government is attempting to regulate.

Upon holding child pornography was unprotected speech, the Ferber Court sought to limit the scope of child pornography. Although child pornography and obscenity appear to be analogous, the Court explicitly rejected the test laid out in Miller, finding that the Miller test was ineffective when examining child pornography. Understanding the Court’s rejection of Miller requires a two-part analysis. First, the Court in Ferber did not rely on the paternalistic interest in regulating child pornography. Second, the Court noted the main governmental interest in regulating child pornography is to protect the child victim.

Specifically, the Court found fault with Miller’s requirement that the work “appeal to the prurient interest of the average person[.]” and its exemption for works with literary, artistic, scientific or political value. For instance, the effect child pornography has on the average person is immaterial when compared to the psychological and physical harm inflicted upon the young victim. Likewise, the fact that the work may have literary, artistic, political or scientific value also is irrelevant because the child already has been abused. Miller’s main fault is that its application to child pornography does not ensure that children will not be abused. Instead, the Miller standard as applied to child pornography would allow some children to be abused if the picture appealed to the average person’s prurient interests, or if the picture possessed some literary, artistic, scientific or political value.

Nevertheless, the Ferber Court used the Miller standard as a framework for defining the scope of its decision. It eliminated the prong in Miller requiring a finding that the work appeals to the prurient interests of the average person; therefore, there is no community standard to be applied to child pornography. Also, it is not necessary to consider whether the work, as a whole, is patently offensive. The only remaining aspect of the Miller standard that the Court applied to child pornography was whether the work portrays sexual conduct as defined by the applicable law.

Addressing the portrayal of sexual conduct issue, the Court also limited the scope of material encompassed in the unprotected category of child pornography. First, the Court in Ferber held that the statute must limit its reach to “works that visually depict sexual conduct by children below a specified stage.” Also, the Court noted that “the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances” remain under the First Amendment’s protection. Finally, the Court noted that sexual conduct also includes a lewd exhibition of a child’s genitals.

The Supreme Court’s method for establishing child pornography as unprotected speech consisted of three steps. First, the court addressed child pornography’s low social value. Next, the Court distilled the governmental interests in regulating child pornography and compared those in-

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56 Id. at 763.
57 Id. at 763–64.
58 Id.
59 Id. at 761. See also Miller, 413 U.S. at 24.
60 Id. The Supreme Court’s decisions holding that obscenity is not protected speech focuses mainly on the state’s interest in preserving a moral society. This interest is mainly paternalistic. In fact, this is one of the reasons the Court struck down the statute in Stanley. The paternalistic interests of the state cannot invade a person’s home. Stanley, 394 U.S. at 565.
61 Ferber, 458 U.S. at 756–62. Specifically, the Court in Ferber found that: (1) states have a compelling interest in protecting the physical and psychological well-being of its children; (2) the distribution of child pornography is "intrinsically related to the sexual abuse of children"; (3) the distribution of such material is an "economic motive" for producing child pornography; and (4) there is little value in child pornography. Id.
62 Id. at 761. Miller, 413 U.S. at 24.
63 See id.
64 Id.
65 Id. at 764.
66 Id.
67 Id. The Court specifically does not give an explanation as to why it eliminated these elements of the Miller standard. Arguably the reason is that the Court found these requirements irrelevant when dealing with child pornography. As the Court stated previously, the harm to the child is done regardless of the works value. Id. at 761.
68 Id. at 765.
69 Id. at 764 (emphasis in original).
70 Id. at 764–65. As the Court defined the term “live performance” in Ferber, only live or visual depictions were prohibited under the New York statute. Id.
71 Id. at 773.
72 See id. at 762.
terests to child pornography's low social value.\textsuperscript{73} Finally, the Court limited the material that constituted child pornography.\textsuperscript{74} This three-step analysis determined that child pornography, as defined in \textit{Ferber}, was not protected under the free speech clause.

\textit{Osborne} stripped child pornography of another constitutional right: the right to privacy. The Court's holding in \textit{Osborne} expanded the state's ability to regulate child pornography in several ways.\textsuperscript{75} First, with respect to the definition of child pornography, \textit{Osborne} reaffirmed part of \textit{Ferber}, which stated that a lewd exhibition of a child's genitals is not protected speech.\textsuperscript{76} Although the Court recognized that a mere picture of naked child is protected speech, it accepted the Ohio Supreme Court's reading of the Ohio statute as a constitutional interpretation.\textsuperscript{77} The Ohio Supreme Court had concluded that the Ohio statute properly could prohibit not only the possession of lewd depictions of a child's genitals but also pictures with a graphic focus on the genitals.\textsuperscript{78} According to this conclusion, it is constitutional to regulate naked pictures of children even if the children are not engaged in sexual "conduct."

In \textit{Osborne}, the Court found prior law dealing with obscenity inadequate.\textsuperscript{79} The Court held that unlike obscenity, a state could ban completely the possession of child pornography.\textsuperscript{80} Contrary to the defendant's belief that \textit{Stanley} required the Court to strike down the statute, the Court distinguished \textit{Stanley} because the governmental interests in proscribing child pornography were not simply paternalistic in nature.\textsuperscript{81} In \textit{Stanley}, the Court held that Georgia's only aim in regulating the in-home possession of obscenity was to control a person's thought.\textsuperscript{82} In contrast, the Court in \textit{Osborne} found Ohio's reasons for regulating the possession of child pornography were aimed mainly at decreasing the exploitive use of children.\textsuperscript{83} In fact, the Court stated that there may even be compelling reasons to prohibit the possession of obscenity.\textsuperscript{84} Nonetheless, the Court found it reasonable for a state to ban the possession of child pornography in hopes of eliminating the market for child pornography and eventually its production.\textsuperscript{85}

\textit{Osborne} also expanded the governmental interests in regulating child pornography. As mentioned previously, the Court acknowledged that states may target the possession of child pornography as a means to stop its production.\textsuperscript{86} A total ban on the possession of child pornography was necessary because, as the Court noted, the existence of the underground market has made laws restricting the production of child pornography hard, if not impossible, to enforce.\textsuperscript{87} The same holds true for laws regulating the distribution of child pornography. Whereas laws eliminating production are largely preventative, laws addressing the distribution of child pornography mainly exist to ease the psychological burden on the victims who must accept that their image may circulate for many years.\textsuperscript{88}

Another compelling governmental interest recognized in \textit{Osborne} dealt directly with the possession of child pornography. The Court found that pedophiles sometimes use child pornography to seduce other children.\textsuperscript{89} Pictures of children performing sexual acts often are used by pedophiles to entice children who are reluctant to participate in the activity.\textsuperscript{90} This was important to the Court's analysis because a law stopping the possession of child pornography would decrease the ability of

\begin{itemize}
  \item See id. at 756–63.
  \item See id. at 765–73.
  \item \textit{Osborne}, 495 U.S. at 106. The statute in \textit{Osborne} regulated the possession of child pornography, but did not apply if the individual possessing the material was the child's parent or ward, or if the individual possessing the material knew that the parent, guardian or custodian consented to the child posing nude. Also, if the material was "for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose..."—provided it was viewed by "a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance"—the statute did not apply. \textit{Id.} at 114.
  \item \textit{Id.} at 113–14.
  \item See id. at 113.
  \item See id. at 108.
  \item \textit{Id.} at 111.
  \item \textit{Id.} at 109.
  \item \textit{Stanley}, 394 U.S. at 565–66.
  \item \textit{Osborne}, 495 U.S. at 109.
  \item \textit{Id.} at 110.
  \item \textit{Id.} at 109–10.
  \item \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} at 110.
  \item See id.; accord \textit{Ferber}, 458 U.S. at 759 (recognizing that government has an interest in stopping the distribution of child pornography because the material is a permanent record of the molestation).
  \item \textit{Osborne}, 495 U.S. at 111.
  \item \textit{Id.} at 111 n.7 (citing ATT'Y GEN.'S COMMISSION ON PORNOGRAPHY, supra note 11, at 649).
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pedophiles to abuse children.\textsuperscript{91} Without access to child pornography, pedophiles would have a harder time coaxing a child into performing sexual acts.\textsuperscript{92}

D. Placing Obscenity and Child Pornography on the Continuum

Although child pornography and obscenity are both forms of sexually explicit material, the two forms of speech are very different. The state’s interest in proscribing child pornography dwarfs the state’s paternalistic reasons for regulating obscenity.\textsuperscript{93} Also, a state may regulate child pornography more heavily than it may regulate obscenity.\textsuperscript{94} If obscenity and child pornography are placed on the continuum of sexually explicit material, obscenity would be placed in the middle with adult pornography and child pornography at the two extremes.\textsuperscript{95} Lastly, obscenity is placed in between because it deserves some protection under the First Amendment because the government cannot infringe on the individual’s right to privacy simply because they view obscene material. The question as to where virtual child pornography fits on the continuum now becomes

more difficult. Does virtual child pornography lie between adult pornography and obscenity, or between obscenity and real child pornography? This distinction is important because if virtual child pornography is more like obscenity, Congress could not ban its possession.

E. The Child Pornography Prevention Act

Congress enacted the CPPA largely in response to the technological advances, which occurred in the late twentieth century. Congress found that the new technology has made computer-generated child pornography “virtually indistinguishable” from real child pornography.\textsuperscript{99} Subsequent to that finding, Congress concluded that computer-generated child pornography has many of the same effects on children as does child pornography that uses actual children.\textsuperscript{100} For instance, virtual child pornography (like actual child pornography) can be used by pedophiles to seduce young children because a child may not be able to distinguish between a real child and a computer-generated child.\textsuperscript{101} Also, Congress found that technology has enabled producers of child pornography to alter innocent pictures of chil-

\textsuperscript{91} Id. at 109–10.
\textsuperscript{92} The Supreme Court also requires a state to include a scienter element in its child pornography laws. Ferber, 458 U.S. at 765; see also Osborne, 495 U.S. at 114 (holding that recklessness is an appropriate scienter with respect to viewers and possessors of child pornography); United States v. X-Citement Video, 573 U.S. 64, 78 (1994) (holding that the scienter of knowing applied to the whole statute). Although some critics rely on the holding in X-Citement Video to strike down the CPPA, their arguments do not affect this comment’s contention that virtual child pornography is not protected speech. Friel, supra note 18, at 220; see also Free Speech Coalition, 198 F.3d at 1093; Geating, supra note 18, at 402–03. Furthermore, these arguments are flawed because they misread X-Citement Video as requiring the scienter of knowledge. The Court, however, allowed the government to prove that the individual recklessly viewed or possessed child pornography. Osborne, 495 U.S. at 114. See generally Chad R. Fears, Note, Shifting the Paradigm in Child Pornography Criminalization: United States v. Maxwell, 1998 BYU L. Rev. 835 (1998) (arguing recklessness is an appropriate mens rea for child pornography crimes.).
\textsuperscript{93} See Osborne, 495 U.S. at 109 (differentiating Ohio’s law banning the possession of child pornography from Stanley because protecting the victims of child pornography is more compelling than the state’s paternalistic reasons for regulating obscenity).
\textsuperscript{94} Id. at 111 (holding a state may prohibit the possession of child pornography); see also Ferber, 458 U.S. at 756 (stating that states are allowed more flexibility when regulating child pornography).
\textsuperscript{95} Placing obscenity in the middle of the continuum does not mean that obscenity is located at the exact center. It simply means that obscenity is in between the two extremes. How close obscenity falls to the center line is not yet clear. Arguably, it falls closer to adult pornography than child pornography because it has some protection under the First Amendment. The exact placement of obscenity, however, is not important for this comment.
\textsuperscript{96} Adult pornography is placed at one end because it enjoys the Constitution’s full protection. In contrast, child pornography lacks any constitutional protection, and therefore, it is placed at the other end of the continuum.
\textsuperscript{98} The CPPA did not define computer-generated child pornography separate from its definition of child pornography. See supra note 15 and accompanying text, quoting the definition of child pornography.
\textsuperscript{101} S. Rep. No. 104-358, at 2. Congress also found that virtual child pornography: (1) whets the sexual appetite of child molesters and pedophiles; and (2) "creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral, and emotional development of children." Id. These interests are largely paternalistic in nature and thus ancillary to the primary reason the government is concerned with regulating child pornography. Id.
In addressing virtual child pornography, Congress also created a new definition of child pornography in the CPPA. The CPPA defines child pornography as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture . . . of sexually explicit conduct." The term "visual depiction" includes images that appear to be minors, and images that are "advertised, promoted, presented, described, or distributed in such a way that conveys the impression" that the material is of a minor. This comment's primary focus will be on the definition's inclusion of computer-generated images. The CPPA also provides an affirmative defense for individuals charged with selling, distributing or receiving child pornography. The affirmative defense provides that individuals charged with distributing, reproducing or selling child pornography must prove that the images "w[ere] produced using an actual person or persons," as long as the persons were adults and that the material was not promoted as child pornography. This defense does not apply when individuals are charged with possession of child pornography without the intent to sell the material. Congress wanted to ensure that adult pornography would not be caught in the statute's grasp while also ensuring that individuals possessing material they believe is child pornography would be punished. Indeed, the main purpose of the affirmative defense is to strike down any overbreadth challenges to the CPPA's "appears to be" provision. Otherwise, the provision inadvertently may illegalize pornographic images of adults who look under the age of 18.

II. VIRTUAL CHILD PORNOGRAPHY AS A SEPARATE CATEGORY OF UNPROTECTED SPEECH

At the time Ferber was decided, its definition of child pornography seemed suitable to address the problems associated with child pornography. Recent technological advances, however, have made the exact definition of child pornography hard to discern. This poses a problem in cases where the prosecution cannot prove beyond a reasonable doubt that the image depicts a real child. Does Ferber require the government to prove that the images depict real children? The short answer is it all depends on whether Ferber is read literally or not.

From a literal standpoint, some critics of the CPPA have argued that the term "visually" only applies to an actual child and that the definition's inclusion of "live performance" lends itself to the conclusion that only child pornography that portrays actual children is without First Amendment protection. On the other hand, it also could be argued that the Court only included the term "live performance" in Ferber because the statute at issue focused on the distribution of child pornography as a way to promote "live performances" of sexual conduct. The latter argument recog-

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  \item S. Rep. No. 104-358, at 15. For instance, an individual could take a picture of a child model out of a clothing catalogue and make the child appear to be engaged in sexual conduct.
  \item 18 U.S.C. § 2256 (8).
  \item Id. at § 2256 (8)(a).
  \item Id. at § 2256 (8)(d).
  \item The "appears to be of a minor" provision actually presents some overlap in Congress' definition. Hilton, 167 F.3d at 66. Essentially, any computer-generated picture of a child would also classify as an image that "appears to be of a minor." Id.
  \item 18 U.S.C. § 2252A(c) (1996). Section 2252A(c) states: It shall be an affirmative defense . . . that—(1) the allegedly child pornography was produced using an actual person or persons engaging in sexually explicit conduct; (2) each such person was an adult at the time the material was produced; and (3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.
  \item Id. at § 2252A(c).
  \item Id. at 2252A(c).
  \item Id. at 2252A(c)(3), 2252(d). Whereas both § 2252A(a)(4) and § 2252A(a)(5) address possession, the sections distinguish individuals who intend to sell the material from individuals who possess the material for personal satisfaction.
  \item Id.
  \item Ferber, 458 U.S. at 764 (categorizing child pornography as "works that visually depict sexual conduct by children").
  \item See supra text accompanying note 14.
  \item Geating, supra note 18, at 395 (arguing Ferber's definition of child pornography only applies to images involving real children).
  \item One author defines child pornography as "photographs of actual children engaged in some sort of sexual activity either with adults or with other children." Friel, supra note 18, at 217. This definition is flawed because it places too much emphasis on the participation of two or more individuals. In fact, it bears a closer resemblance to the definition of obscenity than child pornography. Material is obscene only if
\end{itemize}
Virtual Child Pornography

There is sexual conduct performed by two or more individuals. Child pornography is not under a similar restriction. In contrast, the Supreme Court has held that a graphic focus of a child’s genitals is not protected speech. Osborne, 495 U.S. at 113.

Ferber, 458 U.S. at 761 (noting that the various exceptions to the obscenity test do not apply in situations where a child is sexually exploited).

116 Id. at 1092; see also Ferber, 458 U.S. at 763.

119 See Ferber, 458 U.S. at 762–63.

120 Rodney A. Smolla & Melville B. Nimmer, Smolla and Nimmer on Freedom of Speech: A Treatise on the First Amendment § 2.09 (1994) (hereinafter Smolla & Nimmer) (describing several key theories on the First Amendment). Among these theories are the heightened scrutiny, the ad hoc balancing approach and absolutism). With the exception of absolutism, all of these theories allow for certain types of speech to be proscribed. Under absolutism the government can never restrict an individual’s right to free speech. Id. at § 2.10.

about by technological advances in the late 20th century. Determining whether virtual child pornography is a new category of unprotected speech requires an examination of its value and harm to society. As will be shown, the evils that virtual pornography perpetuates in society outweigh its low social value, placing it outside the First Amendment.

III. VIRTUAL CHILD PORNOGRAPHY AS LOW-VALUE SPEECH

Any debate about the First Amendment begins with a discussion about what the Framers of the Constitution intended to protect.120 The Supreme Court has held that government cannot prohibit speech simply because it does not agree with the idea behind the speech.121 On the other hand, the Supreme Court has held that speech may be proscribed if it is directed at inciting illegal conduct,122 is libelous123 or obscene.124 One of the most popular theories describing the First Amendment’s purpose is the marketplace theory. John Milton eloquently stated the heart of this theory when he wrote, “[T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licens- ing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?”125 Proponents of this theory argue that freedom of speech is necessary because only in an unfettered marketplace of ideas can truth ultimately be discovered.126

121 See, e.g., Texas v. Johnson, 491 U.S. 397, 416–18 (1989) (holding Texas law forbidding the burning of the flag was unconstitutional); see also Termiello v. Chicago, 337 U.S. 1, 4 (1949) (holding a function of speech is to invite dispute). See generally Daniel A. Farrer, The First Amendment 2-3 (1998) (briefly discussing the Supreme Court’s desire to protect free speech regardless of the unpleasantness surrounding the message that the speech purports).

122 Brandenburg, 395 U.S. at 487 (stating that a government can punish speech if it is directed at inciting an imminent serious harm and that result is likely to occur).

123 Gertz, 418 U.S. at 348 (holding that states could enact laws to protect private individuals from libel).

124 Roth, 354 U.S. at 484 (refusing to grant obscenity First Amendment protection).

125 Smolla & Nimmer, supra note 120, at § 2.15.

126 Oliver Wendell Holmes, John Milton and John Stuart Mills are all supporters of this theory. Id.
Justice Holmes, a supporter of marketplace theory, did not believe in absolute truth. Rather, Holmes recognized that if the speech "threaten[ed] immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," such speech may be constrained by government. In other words, marketplace theory benefits society not necessarily because absolute truth is realized but because its greatest asset is its ability to provide the best test of truth. Melville Nimmer and Rodney Smolla in their treatise on the First Amendment stated that a better way to view marketplace theory is "not as a guarantor of the final conquest of truth, but rather as a defense of the process of an open marketplace." Essentially, marketplace theory operates not to ensure that only one viewpoint survives, but that the process has shown that only one viewpoint has value.

When applying the theory to virtual child pornography, it becomes clear that virtual child pornography is not necessary to reach any ultimate truth. First, child pornography has little value according to the Supreme Court in Ferber. Just as pictures depicting the sexual conduct of actual children lack any social value, virtual child pornography also has little or no value. Simply because the children depicted in virtual child pornography are entirely fictitious does not increase the idea's value to society. Virtual child pornography is not necessary for the "exposition of ideas." Thus, if the idea behind real child pornography—the sexual exploitation of children—is not afforded any protection by the First Amendment, the idea behind virtual child pornography should be unprotected as well.

In Free Speech Coalition, the Ninth Circuit held that absent some nexus showing that computer-generated images cause the same harm to children as real child pornography, the fact that virtual child pornography lacks social value is not enough to label it as unprotected speech. There are, however, two significant problems with the Ninth Circuit's analysis. First, the Supreme Court has recognized in past decisions that speech with little social value can be denied First Amendment protection. For example, because obscenity lacked social value, it was not necessary to protect it to ensure that truth could be recognized in the marketplace of ideas. If the Supreme Court labeled obscenity as unprotected speech, certainly virtual child pornography (which, unlike obscenity, has the possibility of harming children) also should be considered unprotected speech. Second, as this comment will discuss later, there is a nexus between the harm caused by using real children and the harm caused by images of computer-generated children. Therefore, even under the more relaxed standard applied by the Ninth Circuit in Free Speech Coalition, virtual child pornography also does not qualify for First Amendment protection.

Just as virtual child pornography's lack of social value can be compared to the social value of actual child pornography, the governmental interests in banning virtual child pornography mimic the interests laid out by the Supreme Court in Ferber and Osborne.

Marx's remarks to explain the philosophical underpinnings of marketplace theory.

128 Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40, 40 (1918).
130 SMOLLA & NIMMER, supra note 120, at § 2:19.
131 Id.
132 Ferber, 458 U.S. at 762.
133 Free Speech Coalition, 198 F.3d at 1100 (Ferguson, J., dissenting).
134 Chaplinsky, 315 U.S. at 572.
135 Free Speech Coalition, 198 F.3d at 1094.
136 This, in essence, is the underlying philosophy behind the categorical approach to the First Amendment and marketplace theory. Although marketplace theory does not explicitly state what "categories" of speech should be denied protection, its application results in the exclusion of certain categories of speech from the First Amendment. See, e.g., Chaplinsky, supra, at 572. For example, because obscenity lacked social value, it was not necessary to protect it to ensure that truth could be recognized in the marketplace of ideas. If the Supreme Court labeled obscenity as unprotected speech, certainly virtual child pornography (which, unlike obscenity, has the possibility of harming children) also should be considered unprotected speech. Second, as this comment will discuss later, there is a nexus between the harm caused by using real children and the harm caused by images of computer-generated children. Therefore, even under the more relaxed standard applied by the Ninth Circuit in Free Speech Coalition, virtual child pornography also does not qualify for First Amendment protection.

137 Roth, 354 U.S. at 484; see also Miller, 413 U.S. at 23.
138 Even opponents of the CPPA have recognized the potential for harm. Burke, supra note 18, at 461; see also, Friel, supra note 18, at 229.
IV. VIRTUAL CHILD PORNOGRAPHY AND ITS HARM TO SOCIETY

There is no question that virtual child pornography, which relies on computer-generated images, is different from real child pornography because no child is harmed in the production of virtual child pornography. This distinction, however, does not change the argument that virtual child pornography is not protected under the First Amendment. Although the regulation of virtual child pornography encompasses a handful of compelling governmental interests,\(^{139}\) among the most compelling are its ability to be utilized to seduce children and to hinder the law enforcement of child pornography.\(^{140}\)

A. Seduction Argument

Congress found,\(^{141}\) and many scholars and courts have agreed, that technology has made computer-generated images "virtually indistinguishable" from images of real people.\(^{142}\) This finding, coupled with the fact that child pornography is used to seduce children into performing illegal sexual acts,\(^{143}\) leads to the conclusion that virtual child pornography also can be used to seduce children.\(^{144}\) A young child who is reluctant to participate in sexual conduct may be persuaded to do so upon seeing a picture of another child engaged in the same activity.\(^{145}\) If adults cannot decipher the difference between actual and computer-generated children, a young child in a vulnerable situation also will not be able to make the distinction.\(^{146}\) The result is that while virtual child pornography may not harm a child when it is created, it still may lead to the sexual abuse of children.

Several opponents have criticized Congress’ argument that virtual child pornography leads to seduction as too speculative.\(^{147}\) Brenda M. Simon compares this seduction argument to the assertion that pornography causes men to rape women.\(^{148}\) Further, she suggests that using this rationale punishes pedophiles before they commit a crime.\(^{149}\) In other words, banning virtual child pornography “punish[es] thought rather than action.”\(^{150}\) Her comparison to rape is flawed for two reasons. First, the rape analogy does not rest on the same premise as the contention that child pornography is used to seduce children. Second, her arguments ignore the Supreme Court’s finding in Osborne that child pornography is used to seduce children.\(^{152}\)

Analyzing the effects that pornography has on films are taken of sexual activity; and (7) this new child pornographic material is used to attract and seduce yet more child victims.

\(^{139}\) S. Rep. No. 104-358, at 2. Specifically, Congress found: (1) computer-generated images depicting an identifiable minor intrudes on the child’s privacy and reputational interests; (2) computer-generated images whet the sexual appetites of pedophile and child molesters; and (3) virtual child pornography also can be used to seduce a child unable to distinguish the real from the imaginary.

\(^{140}\) Id. at 2, 20.

\(^{141}\) Id. at 2.

\(^{142}\) Id.

\(^{143}\) Osborne, 495 U.S. at 111 (finding that pedophiles use child pornography to seduce reluctant children); see also Wendy L. Pursel, Comment, Computer-Generated Child Pornography: A Legal Alternative?, 22 Seattle U. L. Rev. 643, 661 (1998) (commenting that other authors are incorrect and that a real material danger may ensue, including inducing children to engage in sexual acts).


\(^{145}\) Osborne, 495 U.S. at 111 n.7 (citing Att’y Gen.’s Commission on Pornography, supra note 11, at 649).

Dr. Shirley O’Brien described the seduction process in the following steps summarized in the Senate’s Report:

1. Child pornographic material is shown to a child for 'educational purposes';
2. An attempt is made to convince a child that explicit sex is acceptable, even desirable;
3. The child is convinced that other children are sexually active and that such conduct is okay;
4. Child pornography desensitizes the child, lowering the child’s inhibitions;
5. Some of these sessions progress to sexual activity involving the child;
6. Photographs or


\(^{147}\) E.g., Simon, supra note 18, at 394; see also, Friel, supra note 18, at 228.

\(^{148}\) The secondary effects argument is essentially the same as the seduction argument. The main gist is that no child is affected directly in the production but children are hurt indirectly.

\(^{149}\) Simon, supra note 18, at 394. Simon also mentions that no current statute bans the use of adult pornography for that reason. See infra text accompanying note 153.

\(^{150}\) Simon, supra note 18, at 395. In fact, Simon suggests only punishing those who actually commit the crime. Id. The thought of waiting until a child molester actually hurts a child, however, is problematic and contrary to Supreme Court rulings. Ferber denied child pornography protection largely because of the harm it causes the victim. Essentially, a state’s ability to regulate child pornography stems from the belief that a state’s interest in protecting children is so great that the legislature should be able to employ preventive measures. Ferber, 458 U.S. at 763-64.

\(^{151}\) Simon, supra note 18, at 395.

\(^{152}\) Simon’s rape analogy does not address the use of child pornography to seduce children. She does not assert that pornography is used by men to seduce unconsenting wo-
the perpetrators of both rape and child molestation, in an effort to give computer-generated pornography first amendment protection, is illogical. The activity depicted in pictures of nude adults engaging in sexual activity is not illegal; pictures of children engaging in sexual acts represents illegal conduct a child can never knowingly consent to perform.

Moreover, adult pornography is not used to seduce unwilling adults into performing sexual acts in the same way that child pornography is used to seduce children. Pornography may increase an adult's sexual desire and therefore increase their likelihood of fulfilling those desires with a certain individual. That, however, is vastly different from a child molester enticing a child into performing illegal sexual acts. In the latter instance, child molesters can use the computer-generated material to convince the child that other children have fun when engaged in what is illegal sexual conduct. The difference is that an adult has the mental awareness to say no, whereas a child lacks the ability to consent.158

The argument that it is too speculative to assert that virtual child pornography will be used to seduce children also fails because the supreme court already has recognized that possibility as a valid reason to outlaw child pornography. In Osborne, the court took considerable evidence that showed child pornography may be used to seduce children and relied on this finding as a reason to outlaw the possession of child pornography.154 Therefore, the argument that Congress cannot regulate speech based on speculation fails, partly because the Supreme Court,155 the Congress156 and the Justice Department157 all have recognized this possibility as a reality in child pornography cases.

Finally, the connection between computer-generated images and pictures of actual children performing illegal sexual acts has been attacked by some critics on the grounds that society should be conscious of the fact that the camera can lie.158 The chief problem with this theory is that it forces children to accept facts that even the adult population has not realized. While it is noble to suggest that adults in today's society must learn to accept that technology has destroyed the meaning behind the phrase "the camera does not lie,"159 the fact remains that a child may not be able to distinguish images presented as real or computer-generated. This is especially true when considering that this child most likely will not have entered puberty160 and is possibly in a situation where a trusted adult may attempt to molest him or her.

B. Law Enforcement

The scales tip further in favor of denying virtual child pornography first amendment protection because to hold otherwise would frustrate the proper enforcement of laws that prohibit the possession of child pornography. It would be difficult for police officers to distinguish between child pornography that involves actual children and that which is computer generated and involves no children.161 Although it may seem drastic to eliminate virtual child pornography completely in order to help law enforcement, the harm experienced by the child victim of sexual molestation dwarfs the slight value of the material. Congress has stated that "[t]he Government's inability to

153 See generally Simon, supra note 18, at 394 (stressing that adult pornography can also be used to seduce children); cf. Lydia W. Lee, Note, Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality, 8 S. CAL. INTERDISC. L.J. 639, 656-57 (1999) (examining a study by Rueben Lang and Roy Frenzel, which showed that 6-15% of the pedophiles they studied used adult pornography to seduce children (citing Rueben A. Lang & Roy R. Frenzel, How Sex Offenders Lure Children, 1 ANNALS SEX RES. 303, 309 (1988))). Lee relied on this study as support for the proposition that virtual child pornography can be used to seduce children. She justified the small percentage by stating that in terms of the number of children molested by pedophiles in the study, that percentage represented the sexual abuse of five to eight children. See Lee, this note, at 657.

154 Osborne, 495 U.S. at 111.

155 Id. One author differentiates Osborne because he finds virtual child pornography to be unprotected speech. See Geating, supra note 18, at 400. This argument does not apply when attempting to define virtual child pornography as a new category of unprotected speech because the correct analysis is to balance the harm the speech has on society with its value.


157 ATTY GEN.'S COMMISSION ON PORNOGRAPHY, supra note 11, at 649.

158 Friel, supra note 18, at 236-37.

159 Id.

160 See S. REP. No. 104-358, at Parts IV.A, C.

detect or prove the use of real children in the production of child pornography . . . could have the effect of increasing the sexually abusive and exploitative use of children to produce child pornography." In other words, the true reason for denying virtual child pornography First Amendment protection is not to help the government convict pedophiles, but to help police stop pedophiles before they harm young children.

The First Circuit in Hilton found that where individuals can create an image that looks like a real child, the same technology can make a picture of a real child appear computer generated. Thus, if virtual child pornography is considered protected speech, prosecutors would be faced with a dilemma in prosecuting people who possess child pornography: they might not be able to prove that the image depicts an actual child. This inability to distinguish real children from computer-generated children would create a reasonable doubt as to the origin of the picture. Individuals might escape not only conviction but also arrest because law enforcement would not know whether the images are of real or computer-generated children.

One critic argues that there should be a rebuttable presumption that the image depicts an actual child. Although there are several problems with this proposal, the most important may be the failure of the proposal to recognize the harm that virtual child pornography inflicts on children. Some opponents of denying First Amendment protection to virtual child pornography refuse to recognize the connection between virtual child pornography and child molestation. As this comment has demonstrated, there is a strong link between virtual child pornography and the sexual abuse of children.

Professor Debra Burke, an opponent of the CPPA, recognizes the possibility that virtual child pornography may cause harm to children. Nevertheless, Burke maintains that the Constitution requires that the danger to children posed by virtual child pornography be imminent. This argument is disturbing, especially because Burke herself admits virtual child pornography may not only provoke pedophiles to molest children but also validate and aid their actions. Under her argument, children would continue to fall victim to sexual molestation and the government would be unable to stop the abuse because pedophiles did not act promptly after viewing virtual child pornography.

Moreover, Burke's argument also fails because, as the First Circuit stated in Hilton, the Supreme Court has given the government considerable leeway in dealing with child pornography because of the severe effects that it has on the nation's children. In light of the need to protect the nation's children from sexual abuse, law enforcement cannot afford to guess whether an image seized as evidence is real or computer generated. Law enforcement must be given the power to arrest individuals who possess child pornography whether or not the images they possess are real or computer generated. Because the government did not commit a crime. Lastly, as this comment will illustrate, this proposal ignores the harms caused by virtual child pornography.

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162 Id. at 20.
163 Hilton, 167 F.3d at 73.
164 Friel, supra note 18, at 209 (shifting the burden to the defendant to prove that the image did not involve an actual minor); see S. Rep. No. 104-358, at 17 (recognizing that some critics believe that images that do not portray real children should not be protected).
165 In the criminal arena, it is always the government and not the defendant who must prove the elements of the crime. Mullaney v. Wilbur, 421 U.S. 684, 702 n. 31 (1975) (explaining that generally the prosecution bears the burden of proof unless aided by a presumption or a permissible inference). However, with a rebuttable presumption that the image depicts an actual child, there is a possibility that the innocent will be convicted because they cannot disprove the presumption. It is almost impossible to prove that the images are computer generated. Individuals will be arrested for possessing child pornography even though the image does not depict an actual child. Assuming these individuals actually can prove the image was created on a computer, they still will be forced to deal with the social stigma associated with pedophilia. In essence, the individuals will be punished even though they
has flexibility in regulating child pornography and because the value of such material is slight, the need for effective law enforcement trumps the right of an individual to possess virtual child pornography.

The ability for government to outlaw child pornography in order to assist law enforcement is not a new concept. The Supreme Court endorsed this notion in both Ferber and Osborne when it accepted that Congress may proscribe certain activities with the ultimate purpose of abolishing the production of and market for child pornography. In Ferber, the Court found that prohibiting the advertising and selling of child pornography was a reasonable means for stopping its production. Likewise, the Court in Osborne accepted that a complete ban on the possession of child pornography is a necessary means to expel the market for child pornography. It would be almost impossible for government to address the problem of child molestation simply by attempting to stop only the production of child pornography that uses real children.

When faced with the task of eliminating the sexual abuse of children in today's technology-driven society, government must be given the ability to outlaw virtual child pornography. Although virtual child pornography is different from the situations that the Court addressed in Ferber and Osborne, it is similar in the sense that one of the main reasons for proscribing the advertising, selling and possession of child pornography is to help government reduce the problem of child molestation. Similarly, allowing government the ability to freely regulate virtual child pornography should decrease the number of children victimized by sexual abuse.

Critics of the CPPA argues that allowing virtual child pornography will decrease the number of sexually abused children because pedophiles will use computer-generated images rather than images of actual children. Further, they argue that those who produce child pornography only for the money will refrain from abusing children because they can use a computer to create pornographic images of children. Both of these assertions fail for several reasons. First, neither argument is supported by studies showing the ability to generate child pornography on a computer will significantly reduce the number of children abused in the production of child pornography or that a pedophile actually will be satisfied if he knows the image is not of a real child. Second, these arguments fail to address the fact that law enforcement must have the ability to eliminate certain tools, such as virtual child pornography, that could be used by child molesters to seduce a child. Finally, the assertion that pedophiles would begin to look at virtual child pornography rather than pornography using real children is based on the unfounded premise that all child pornography portraying actual children could be eliminated. This assertion also incorrectly assumes that future child pornography will be entirely computer generated. Effective enforcement of child pornography laws only can be accomplished if government has the ability to monitor both the virtual and actual pornography.

V. THE LIMITS OF VIRTUAL CHILD PORNOGRAPHY AND THE CPPA’S OVERBREADTH

Although virtual child pornography is not included in Ferber's definition of child pornography, applying the Ferber standards will help define the

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171 Ferber, 458 U.S. at 761–62.

172 Osborne, 495 U.S. at 109–10 ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."); see also Ferber, 458 U.S. at 761–62. The Ferber Court stated: The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.

173 See Friel, supra note 18, at 225.

174 Id. at 227 (noting that financially motivated child pornographers will see virtual child pornography as a more economical and legal alternative).

175 See Ferber, 458 U.S. at 756 (“States are entitled to greater leeway in the regulation of pornographic depictions of children."); see also Osborne, 495 U.S. at 109–10 (recognizing that states need the ability to ban the possession of child pornography in order to decrease demand and, in turn, production).

176 As the Court found in Ferber, one of the reasons to prohibit the distribution of child pornography is to prevent a child from going through life knowing that his or her image is circulating among pedophiles. Ferber, 458 U.S. at 759 n.10. The Ferber Court further stated that the only means of stopping the sexual exploitation of children is to halt the distribution of child pornography. Id. at 759–60.
limits of virtual child pornography as a category of speech unprotected by the First Amendment. In Ferber, the Court defined child pornography as "works that visually depict sexual conduct by children." The term "conduct" included lewd exhibitions of a child's genitals as not protected by the First Amendment. This definition of child pornography can apply equally to virtual child pornography so long as "visually" is read as limiting the type of medium used to display child pornography rather than the nature of the child depicted. In other words, the term "visually" only should require that a picture be involved and should not restrict the subject depicted in the picture only to an actual child.

The justification for limiting the category of unprotected speech to pictures addresses the concern among critics of the CPPA that drawings, paintings and sculptures still should be protected by the First Amendment. Although these critics would exempt all virtual child pornography—arguing that a computer-generated image is more like a drawing or painting than a picture of a real child—that argument is not persuasive when comparing the significant societal harm of virtual child pornography to its nonexistent social value. Although a computer-generated image is created from a vision in a person's mind just like a drawing or painting, it is the reality of the image that connects a virtual picture to a picture depicting a real child. It is this reality that makes virtual child pornography more like real child pornography because it is "virtually indistinguishable" from the real child pornography, which is already illegal. While a child can look at a painting or a drawing and conclude that the picture is not real, a child cannot easily distinguish a computer-generated picture from reality. The result is that virtual child pornography can be used just like pornographic images depicting real children to seduce an unwilling child, thus removing virtual child pornography from the First Amendment's scope.

Further, because the harm that virtual child pornography inflicts depends upon its likeness to actual child pornography, virtual child pornography can be classified as unprotected speech only if it is virtually indistinguishable from actual child pornography. The legislative history of the CPPA illustrates that Congress intended to regulate only computer-generated images that are "virtually indistinguishable" from pictures portraying real children. Congress' main concern when enacting the CPPA was that the effect of computer-generated child pornography would be the same as pornographic material that depicts real children because it is almost impossible to tell the difference between the two types of pictures. Therefore, the only computer-generated child pornography images that should be outside the First Amendment are those "virtually indistinguishable" from real child pornography.

In Hilton, the First Circuit recognized that if virtual child pornography possesses any literary, artistic, scientific or political value, it should retain First Amendment protection. The Supreme Court in Ferber refused to exempt images with literary, artistic, scientific or political value from the definition of child pornography because the value of the image is immaterial to the child abused during the production of actual child pornography. Virtual child pornography, however, does not pose the same threat because a real child is not harmed during the production of the material. Further, the Supreme Court explicitly stated that when there existed a reason to display a pornographic image of a child, the producers of that image could use an adult who looked like a child. This logic suggests that virtual child pornography may be an acceptable means for individuals to produce child pornography for literary or

177 Id. at 764.
178 Id. at 765.
179 See Simon, supra note 18, at 400 (citing Ferber, 458 U.S. at 762-63); Friel, supra note 18, at 242 n.240.
180 See Simon, supra note 18, at 400; see also Friel, supra note 18, at 242 (exemplifying the arguments criticizing the CPPA).
181 See generally Acheson, 195 F.3d at 651 (holding "appears to be" language only applies to images virtually indistinguishable from the actual child pornography). See also S. Rep. No. 104-358 at 7.
183 Hilton, 167 F.3d at 74. The First Circuit did not address any details with regard to an exception for material with literary, artistic, political or scientific value. It simply noted that in light of Ferber's suggestion that an individual above the legal age could be used if necessary for literary or artistic purposes, the "appears to be provision" of the CPPA may unconstitutionally restrict speech. Id. Nevertheless, the Court opined that the limited incidences in which the exception would apply did not require holding the CPPA unconstitutional. Id.
184 Ferber, 458 U.S. at 761.
185 See id. at 763.
artistic purposes. In light of Ferber’s reasoning, computer-generated images should not be seen as unprotected speech if the images possess discernable literary, artistic, scientific or political value.

The appropriate scope of virtual child pornography that is outside the First Amendment’s protection should include only images that visually depict either a child engaged in sexual conduct or a lewd exhibition of a child’s genitals. Further, this category of unprotected virtual child pornography should be limited to images that are virtually indistinguishable from actual child pornography. Finally, if the image does not involve a real child, and if the image possesses some literary, artistic, scientific or political value, it should be protected by the First Amendment. In applying this definition to the CPPA, it is clear that the CPPA does not define virtual child pornography in a manner consistent with this proposed definition.

This inconsistency in the CPPA presents possible overbreadth problems.186 The overbreadth doctrine exists primarily to ensure that laws do not chill free speech by stopping individuals from exercising their First Amendment rights out of fear of criminal prosecution. In Broadrick v. Oklahoma,187 the Supreme Court held that the overbreadth doctrine only should be used when the alleged legislative overbreadth is “substantial . . . in relation to the statute’s plainly legitimate sweep.”188 This rule is “strong medicine” and should be used “sparingly and only as a last resort.”189 If it is at all possible for a court to apply a limiting construction to the statute, the statute will not be held as overbroad.190

Applying this standard, it is easy to view the CPPA as constitutional. First, the legislative history clearly indicates Congress sought only to ban computer-generated images that are virtually indistinguishable from actual child pornography.191 Second, the main problem with the CPPA is that it does not exempt images with literary, artistic, scientific or political value. The First Circuit in Hilton noted that “even if a statute at its margins

 infringes on protected activity, the solution is not invalidation of the entire scheme.”192 A case-by-case analysis of any computer-generated image that falls into one of the above categories should be sufficient to cure that part of the statute’s potential overbreadth. The Supreme Court’s opinion in Ferber supports the case-by-case approach, especially where the statute’s “legitimate reach dwarfs its arguably impermissible applications.”193

Finally, the CPPA’s affirmative defense provides for the possibility that its phrase “appears to be” in its definition of child pornography may catch some adult pornography in the statute’s grasp. Although the defense does not address virtual images of adults, it does provide a defense for those individuals marketing adult pornography that also depicts a person who does not look over the age of eighteen, so long as the image is not marketed as child pornography.194 This allows producers of adult pornography to continue to produce and sell pictures of actual adults engaged in sexual activity. The only burden imposed by the CPPA is that the producers of adult pornography should confirm an individual’s age before any pictures are taken.195 Checking someone’s identification is a small price to pay to protect the nation’s children from the harm posed by virtual child pornography.

VI. CONCLUSION

The proper place for virtual child pornography on the continuum of sexually explicit material is next to actual child pornography, which are both outside First Amendment protection as impermissible speech. Virtual child pornography and actual child pornography are nearly identical in appearance, value and harm. The only difference between these two types of pornography is that one directly abuses children in its production and the other indirectly harms children. In both cases, however, children are harmed. The sexual harms that virtual child pornography inflicts on children

186 Before beginning the overbreadth analysis, it is important to note briefly two parts of the CPPA’s definition of child pornography related to virtual images. The definition includes (1) images created on a computer and (2) images that generally appear to be of a minor. Both of these provisions encompass virtual child pornography. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009-27-28 (1996).
188 Id. at 615.
189 Id. at 613.
190 See id.
192 458 U.S. at 773.
194 See id.
195 See id.
far outweigh any alleged social value. For this rea-
son, virtual child pornography should be catego-
rized as unprotected speech outside the First
Amendment.

Because there are differences between virtual
and actual child pornography, virtual child por-
nography must be considered a new category of
 unprotected speech for First Amendment pur-
poses. This new category of unprotected speech
should be limited to pictures that visually depict
children engaging in sexual conduct or that por-
tray a lewd exhibition of a child's genitals. Fur-
thermore, this new category of unprotected
speech does not permit government to regulate
drawings or paintings of children, and it does not
permit government to proscribe computer-gen-
erated images of children that have literary, artistic,
scientific or political value. Although the CPPA
does not set out a definition of virtual child por-
nography similar to what is proposed here, it is a
valid attempt to regulate child pornography. The
Supreme Court has given the government flexibil-
ity to enact laws aimed at stopping the sexual
abuse of children. The CPPA is simply the next
logical step in eradicating the sexual abuse of chil-
dren—conduct that is not contemplated as free-
dom of speech in the First Amendment.