Ashcroft, Virtual Child Pornography and First Amendment Jurisprudence

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I. Introduction

The Supreme Court held in *New York v. Ferber* that child pornography is not entitled to First Amendment protection.[1] The Court declared that child pornography is an unprotected category, similar to obscenity or profanity, as characterized in *Chaplinsky v. New Hampshire*.[2] *Ferber*, however, seemed to limit "child pornography" to actual child pornography: that which uses actual children as subjects of pornographic materials.[3] The Child Pornography Prevention Act of 1996 (the "CPPA" or "Act") explicitly expanded the *Ferber* prohibition on child pornography not only to pornographic materials made by using actual children, but also to what has been known as "virtual child pornography," i.e., materials that "appear to be" or "convey the impression" of a minor "engaging in sexually explicit conduct."[4]

Virtual child pornography can be divided into three general categories: wholly computer-generated child pornography, morphed child pornography, and child pornography made by using youthful-looking adults. Wholly

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[1] New York v. Ferber, 458 U.S. 747, 748 (1982).

[2] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be deprived from them is clearly outweighed by the social interest in order and morality." *Id.* at 571-572.

[3] *Ferber*, 458 U.S. at 758.

[4] 18 U.S.C. § 2256(8) (2006).

computer-generated child pornography is made with computer-generated images, without using any actual children or photos of actual children; morphed child pornography is made with photos of actual children manipulated into an unidentifiable minor. The CPPA banned all three kinds of virtual child pornography.

The constitutionality of the CPPA was challenged by both individuals and groups soon after its enactment. Several federal circuit courts had the opportunity to examine the effects of the CPPA in relation to the First Amendment. The First Circuit in *United States v. Hilton*,[5] the Fourth Circuit in *United States v. Mento*,[6] the Fifth Circuit in *United States v. Fox*,[7] and the Eleventh Circuit in *United States v. Acheson*[8] upheld the constitutionality of the CPPA and held that the CPPA's provisions regarding virtual child pornography were not unconstitutionally overbroad or void for vagueness. On the other hand, the Ninth Circuit in *Free Speech Coalition v. Reno*[9] held that the CPPA was unconstitutionally overbroad and vague. In *Ashcroft v. Free Speech Coalition*,[10] the Supreme Court affirmed the Ninth Circuit's judgment on the unconstitutionality of the CPPA. *Ashcroft* has invited a broad range of reactions from legislators, lower courts, executive branch officials, individuals, and interest groups.[11]

In this article I argue that the Supreme Court's decision in *Ashcroft* is problematic on four grounds. First, the Court failed to recognize that the prevention of indirect harm to children produced by virtual child pornography is a compelling government interest. Second, the Court's opinion

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[5] United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).
[6] United States v. Mento, 231 F.3d 912 (4th Cir. 2000).
[7] United States v. Fox, 248 F.3d 394 (5th Cir. 2001).
[8] United States v. Acheson, 195 F.3d 645 (11th Cir. 1999).
[9] Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999).
[10] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
[11] *See* Karen Weiss, *"But she was only a child. That is obscene!" The Unconstitutionality of Past and Present Attempts to Ban Virtual Child Pornography and the Obscenity Alternative*, 70 GEO. WASH. L. REV. 228, 229 (2002).

is inconsistent with its prior cases and unsupported by First Amendment jurisprudence. For example, *Ashcroft* departed from the substantial overbreadth standard in *Broadrick v. Oklahoma*,[12] from the distinction between direct and indirect harm in *Ferber*,[13] from the proximate cause theory in *Chaplinsky*,[14] and from the differentiation of low-value speech from high-value speech in *Miller v. California*.[15] Third, *Ashcroft* created an unusually heavy burden for the government to prosecute any child pornographer, given that contemporary technology has made virtual child pornography literally indistinguishable from actual child pornography. Lastly, *Ashcroft* created confusion for lower courts in the adjudication of child pornography cases.

This article consists of six parts. Part I is an introduction. In Part II, I argue that *Ferber* considered the prevention of indirect, as well as direct, harm to children caused by child pornography to be a compelling government interest. In Part III, I examine the interpretations of and challenges to the CPPA by several federal circuit courts. In Part IV, I argue that the *Ashcroft* Court's opinion as a whole was not well founded, while recognizing that the Court had a legitimate concern about the scope of the "appears to be" and "conveys the impression" provisions of the CPPA. In Part V, I examine the consequences of *Ashcroft* in post-*Ashcroft* virtual child pornography cases. Finally, in Part VI, I conclude that confusion over the constitutionality of virtual child pornography persists, and *Ashcroft* did not resolve the tension between First Amendment protection and virtual child pornography.

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[12] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).
[13] *Ferber*, 458 U.S. at 758.
[14] *Chaplinsky*, 315 U.S. at 572.
[15] Miller v. California, 413 U.S. 15, 24 (1973).

II. *Ferber*: Child Pornography Is Unprotected

Ferber involved a challenge to a New York statute that prohibited a person from knowingly distributing materials depicting sexual performances by a child under the age of 16.[16] The Supreme Court held that, as applied to the respondent in *Ferber* and others who distribute similar materials, the statute did not violate the First Amendment.[17] Regulations on child pornography are content based. The Supreme Court thus used strict scrutiny in its examination of the New York statute. Under the strict scrutiny standard, a regulation must (1) aim at one or more compelling government interests, and (2) pass the challenges of overbreadth and vagueness[18] or be narrowly tailored. The Supreme Court held in *Ferber* that the government had compelling interests to justify the child pornography statute[19] and that the statute passed the *Broadrick* overbreadth test.[20]

A. Compelling Interests of Banning Child Pornography

The Court offered five compelling government interests in banning child pornography. First, the Court said, "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[21]

> 'A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into maturity as citizens.' Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have

[16] *Ferber*, 458 U.S. at 749.
[17] *Id.* at 772.
[18] *Cf.* Sarah Sternberg, *The Child Pornography Prevention Act of 1996 and The First Amendment: Virtual Antitheses*, 69 FORDHAM L. REV. 2783, 2790 (2001).
[19] New York v. Ferber, 458 U.S. 747, 756-757 (1982).
[20] *Id.* at 771, 773.
[21] *Id.* at 756-57.

> operated in the sensitive area of constitutionally protected rights.[22]

To support its position, the Court referred to its decision in *Prince*.[23] In that case, the Court held that a statute prohibiting the use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity.[24] *Ferber* involved a more sensitive area than *Prince*. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[25] "[T]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[26] The regulation on child pornography "easily passes muster under the First Amendment."[27]

Second, the government had a compelling interest in closing the distribution network and drying up the market for child pornography.[28] The Court held that the distribution of pornographic materials depicting sexual activities by a minor was "intrinsically related" to the sexual abuse of children in at least two ways.[29] First, "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.[30] Second, "the distribution network for child pornography must be closed if the production of material which required the sexual exploitation of children is to be effectively controlled."[31] "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling,

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[22] *Id*. at 757 (citing Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).
[23] *Id.*
[24] *Prince*, 321 U.S. at 168.
[25] New York v. Ferber, 458 U.S. 747, 757 (1982).
[26] *Id*. at 758.
[27] *Id*.
[28] *Id*. at 760.
[29] *Id*. at 759.
[30] *Id.*
[31] New York v. Ferber, 458 U.S. 747, 759 (1982).

advertising, or otherwise promoting the product."[32] The Court compared child pornography with obscenity, an unprotected category.[33]

Given the government's interest in banning obscene materials, the government had a "more compelling interest in prosecuting those who promote the sexual exploitation of children."[34] The Court said that a "work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography,"[35] which could be regulated as child pornography. "It is irrelevant to the child [who has been abused] whether or not the material … has a literary, artistic, political or social value."[36]

Third, the constitutional freedom of speech and press does not protect illegal activities. "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."[37] The Court noted that Texas's House Select Committee on Child Pornography declared the act of selling child pornographic materials "is guaranteeing that there will be additional abuse of children."[38] This justified the government's regulation against child pornography.

Fourth, the Court held that the value of live sexual performances by minors and photographic reproductions of them is "exceedingly modest, if not *de minimis*."[39] The Court did not believe that child pornographic materials "would often

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[32] *Id.*
[33] *Id.* at 764.
[34] *Id.* at 761.
[35] *Id.*
[36] *Id.* (citing Memorandum from Assemblyman Lasher in Support of N.Y. PENAL LAW § 263.15 (McKinney 2006)).
[37] New York v. Ferber, 458 U.S. 747, 761 (1982).
[38] *Id.* at 762. *See* Texas House Select Committee on Child Pornography: Its Related Causes and Control 32 (1978).
[39] New York v. Ferber, 458 U.S. 747, 762 (1982).

constitute an important and necessary part of a literary performance or scientific or educational work."[40]

Fifth, given that child pornography "bears so heavily and pervasively on the welfare of children engaged in its production,"[41] it is "without the protection of the First Amendment."[42] Citing Justice Stevens in *Young v. American Mini Theatres, Inc.*, the Court said, "[t]he question whether speech is, or is not protected by the first Amendment often depends on the content of the speech."[43] Child pornography is content-based. "It is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[44] For child pornography, "the balance of competing interests is clearly struck and … it is permissible to consider"[45] it unprotected.

B. Direct Harm vs. Indirect Harm

In sum, the Court held that the government had compelling interests in protecting children from harms caused by child pornography. The first kind of harm is the injury inflicted on actual children who are the subjects of child pornographic materials. This harm to their physical, physiological, mental, psychological, and emotional well-being is brutish and pervasive. This kind of harm also includes the additional trauma caused to these children when the pornographic materials are advertised, distributed, and circulated. The Court explained that, in the latter scenarios, the materials form a "permanent record of the children's participation and the harm to the child is exacerbated by their

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[40] *Id.* at 763.
[41] *Id.* at 764.
[42] *Id*.
[43] *Id.* at 763 (citing Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 66 (1976)).
[44] *Id.* at 763-64.
[45] New York v. Ferber, 458 U.S. 747, 764 (1982).

circulation."[46] For convenience, I refer to this kind of harm as "direct harm."

The Court also considered another kind of harm.[47] Child pornography is often a catalyst for pedophiles to exploit and abuse children.[48] For example, the Court noted in *Osborne v. Ohio* that "pedophiles use child pornography to seduce … children into sexual activity."[49] Damage inflicted this way goes beyond direct harm and reaches additional victims because of the "intrinsic" relationship between child pornography and sexual abuse of children.[50] Thus, the advertisement, distribution, and circulation of child pornography promote the infliction of harm on new victims. The market for child pornography is the network that facilitates this type of harm.[51] This is one of the primary reasons why the *Ferber* Court considered "dry[ing] up the market for [child pornographic] material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product"[52] to be a compelling government interest. For convenience, I will refer to such harm as "indirect harm."

The Court held that the government had a compelling interest in preventing children from both direct and indirect harm. Actual child pornography should be restricted because it produces both direct and indirect harm to children; virtual child pornography should also be restricted because it produces indirect harm. For that purpose, the Court stated, "we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children."[53]

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[46] *Id*. at 759.
[47] *See* Sternberg, *supra* note 18, at 2783, 2789.
[48] *See* Vincent McCarthy, *Child Pornography in a Virtual World: The Continued Battle to Preserve the Child Pornography Prevention Act of 1996*, 23 CARDOZO L. REV. 2019, 2023 (2002).
[49] Osborne v. Ohio, 495 U.S. 103, 111 (1990).
[50] *Ferber*, 458 U.S. at 759.
[51] New York v. Ferber, 458 U.S. 747, 758 (1982).
[52] *Id.* at 759.
[53] *Id*. at 756.

Unfortunately, the Court did not consistently hold to its restriction against virtual child pornography. Instead, it seemed to create a loophole through which virtual child pornography could escape the prohibition. At one point, the Court agreed with the New York state court's opinion that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative."[54] At another point, the Court also said that depictions of sexual conduct "which do not involve live performance or photographic or other visual reproduction of live performances, retain First Amendment protection."[55] Indeed, the Supreme Court closed the front door to keep virtual child pornography out; but at the same time, it opened the back door to let it in. This inconsistency triggered the introduction of the CPPA.

C. The New York Statute Is Not Overbroad

A content-based regulation, even if designed to achieve compelling government interests, must be facially valid (i.e., neither overbroad nor vague). A statute is void for vagueness if the forbidden conduct is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application."[56] Vagueness was not an issue in *Ferber*. A regulation is overbroad on its face if, in addition to proscribing activities which may be constitutionally forbidden, it bans speech or conduct which is protected by the guarantees of the First Amendment.[57]

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[54] *Id*. at 763.
[55] *Id*. at 765.
[56] Connally v. General Construction Co., 269 U.S. 385, 391 (1926). *Cf*. Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").
[57] *Cf*. Thornhill v. Alabama, 310 U.S. 88, 98 (1940) (The mere existence of a statute that sweeps too broadly in areas protected by the First

Broadrick sets out an additional requirement: the overbreadth must be "substantial."[58] The *Broadrick* Court said, "we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[59]

The *Ferber* Court affirmed that the *Broadrick* overbreadth standard "is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution."[60] It clarified that "[t]he premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel."[61] The *Ferber* Court also adopted Justice Brennan's view in his dissenting opinion in *Broadrick*: "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine."[62] *Ferber* noted that the substantiality requirement was directly derived from the doctrine's purpose and nature. The Court said, "[w]hile a

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Amendment "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview").

[58] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[59] *Id.* As to how "substantiality" should be measured, *Broadrick* did not provide a specific answer. Scholars have summarized some options. Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1067 (1983) (holding that the "logical question [is] whether [a] more narrowly drawn [law] would inadequately achieve the state's goal"). Richard H. Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 894 (1991) (holding that in deciding when overbreadth is "intolerably substantial," courts should weigh the state's substantive interest in being able to "employ a standard that is broader than less restrictive substitutes" against "the First Amendment interest in avoiding [the] chilling effect on constitutionally protected conduct" – the "farther [the] chilled conduct lies from the central concerns of the First Amendment [the] more [a] court should hesitate about declaring a [statute] void for overbreadth").

[60] New York v. Ferber, 458 U.S. 747, 771 (1982).

[61] *Id.*

[62] *Id.* at 772 (citing *Broadrick*, 413 U.S. at 630).

sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation."[63] The Court also admonished that the overbreadth doctrine is a "strong medicine" that should be used "only as a last resort."[64]

Ferber, applying the principles of overbreadth, held that the New York provision prohibiting child pornography was not overbroad.

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible application. New York … may constitutionally prohibit dissemination of material specified in [the statute in question]. While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the *National Geographic* would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.' Under these circumstances, [the New

[63] *Ferber*, 458 U.S. at 772.
[64] *Id.* at 769 (citing Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

> York statute in question] is 'not substantially overbroad and … whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'[65]

In her concurring opinion, Justice O'Connor further stated, "the Court does not hold that New York must except 'material with serious literary, scientific, or educational value' … from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overbroad to support respondent's facial attack."[66]

III. The CPPA and Challenges to Its Constitutionality in the Federal Courts of Appeal

A. The CPPA

Ferber banned child pornography. The best interpretation of "child pornography" in *Ferber* includes both actual and virtual child pornography. For one thing, virtual child pornography causes the same indirect harm as described in *Ferber* as actual child pornography.[67] Since the prevention of indirect harm caused by actual child pornography is a compelling government interest in banning actual pornography under *Ferber*, virtual child pornography should be banned for the same reason. Unfortunately, the *Ferber* Court *seemed* to suggest that child pornography produced by the utilization of simulations of children or youthful-looking adults passed the constitutional muster.[68] This created a loophole by which child pornographers could procure virtual child pornography and thus became a safe harbor for pornographic materials which only caused indirect harm to

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[65] *Id*. at 773-74.
[66] New York v. Ferber, 458 U.S. 747, 774 (1982).
[67] *Id.* at 758.
[68] *Id*. at 756.

children. The CPPA was enacted in 1996 to ban, *inter alia*, virtual child pornography.

The CPPA imposed criminal penalties on any person who knowingly possessed, produced, sold, transported, shipped, received, mailed, or distributed in interstate or foreign commerce by any means, including by computer, any child pornography.[69] The Act defined "child pornography" as "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct."[70] Congress banned any visual depiction

> where (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct; or (C) such visual depiction 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 or contains a visual depiction of a minor engaging in sexually explicit conduct.[71]

The CPPA ban had a broad scope. It covered actual child pornography, wholly computer-generated virtual child pornography, morphed child pornography and child pornography made by using youthful-looking adults. It also covered the production and promotion of such pornographic materials. With the help of contemporary technology, virtual child pornography images could be made "virtually

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[69] S. REP. NO. 104-358, at 4 (1996).
[70] *Id*. at 2. *See* 18 U.S.C. § 2256(8) (2006).
[71] 18 U.S.C. § 2256(8) (2006) (emphasis added).

indistinguishable" from those of real children.[72] The phrases "appears to be" and "conveys the impression" were added "to close loopholes in our Federal child pornography laws caused by advances in computer technology."[73] The CPPA aimed to reduce the volume of virtual child pornography used by child abusers to "stimulate or whet their own sexual appetites;"[74] to destroy the network of and market for child pornography;[75] to protect the privacy of actual children whose innocent images are altered to create sexually explicit depictions;[76] and to deprive child molesters of a criminal means often used to facilitate the sexual abuse of children.[77]

When made virtually indistinguishable from actual child pornography, virtual child pornography creates a difficulty in prosecution and enforcement of child pornography laws. Congress found that this difficulty "could have the effect of increasing the sexually abusive and exploitive use of children to produce child pornography."[78] The CPPA aimed to eliminate that difficulty. In sum, the CPPA sought to achieve the government's compelling interest in protecting children from indirect, as well as direct, harm produced by actual or virtual child pornography.

B. Challenges to the Constitutionality of the CPPA in the Federal Circuit Courts

Shortly after the passage of the CPPA, several federal circuit courts had the opportunity to adjudicate cases that challenged the constitutionality of the Act. The First Circuit in *Hilton*,[79] the Fourth Circuit in *Mento*,[80] the Fifth Circuit in

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[72] S. REP. NO. 104-358, at 15 (1996).
[73] *Id.* at 28 (Additional Views of Senator Biden).
[74] *Id.* at 17.
[75] *Id.* at 20.
[76] *Id.* at 16.
[77] *Id.* at 2.
[78] S. REP. NO. 104-358, at 20 (1996).
[79] United States v. Hilton, 167 F.3d 61, 61 (1st Cir. 1999).
[80] United States v. Mento, 231 F.3d 912, 912 (4th Cir. 2000).

Fox,[81] and the Eleventh Circuit in *Acheson*[82] all upheld the constitutionality of the CPPA. On the other hand, the Ninth Circuit in *Reno*[83] held that the CPPA was unconstitutionally overbroad and vague.

1. *The Constitutionality of the CPPA:* Hilton, Mento, Fox, *and* Acheson

a. The First Circuit and *Hilton*

In *Hilton*, the defendant was charged with possession of child pornography that appeared to depict a minor engaging in sexually explicit conduct.[84] The defendant moved to dismiss on the ground that the CPPA was unconstitutionally overbroad and vague.[85] The First Circuit applied strict scrutiny to review the CPPA on the ground that it was a content-based regulation.[86] The *Hilton* Court held that the government had a compelling interest in protecting children from both direct and indirect harm.[87] The court said that the CPPA extended only to a narrow description of virtual child pornographic materials: those that were "virtually indistinguishable" from actual child pornography.[88] *Hilton* held that, like actual child pornography, virtual child pornography had "little, if any, social value," yet "[t]he government's interest in addressing these forms of child pornography is no less powerful than in instances where an actual child is actually used and abused during the production process."[89]

In examining whether the CPPA was unconstitutionally overbroad, the *Hilton* Court admitted that

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[81] United States v. Fox, 248 F.3d 394, 394 (5th Cir. 2001).
[82] United States v. Acheson, 195 F.3d 645, 646 (11th Cir. 1999).
[83] Free Speech Coalition v. Reno, 198 F.3d 1083, 1083 (9th Cir. 1999).
[84] *Hilton*, 167 F.3d at 66.
[85] United States v. Hilton, 167 F.3d 61, 66 (1st Cir. 1999).
[86] *Id.* at 68.
[87] *Id.* at 69.
[88] *Id.* at 72.
[89] *Id.* at 73.

there might be some illegitimate applications of the CPPA,[90] but

> [t]he existence of a few possibly impermissible applications of the Act does not warrant its condemnation. As the Court has repeatedly made plain, even if a statute at its margins infringes on protected activity, the solution is not invalidation of the entire scheme. Whatever overbreadth may exist at the edges are more appropriately cured through a more precise case-by-case evaluation of the facts in a given case.[91]

The *Hilton* Court also noted that an affirmative First Amendment defense was available in scenarios where impermissible application of the Act might exist. For example, if the use of a youthful-looking adult "to simulate the sexual behavior of a child might be necessary for scientific research,"[92] since the work would be far from the hardest core of child pornography, an affirmative defense would be consistent with Congress's general view that the Act "does not, and is not intended to, apply to a depiction produced using adults engaging in sexually explicit conduct, even where a depicted individual may appear to be a minor."[93] The court concluded that the CPPA was not substantially overbroad.[94]

Hilton also held that the CPPA was not unconstitutionally vague. Under *Kolender*, a statute is not vague unless it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement."[95]

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[90] *Id.*
[91] United States v. Hilton, 167 F.3d 61, 74 (1st Cir. 1999) (internal citations omitted).
[92] *Id.*
[93] *Id. See* S. REP. NO. 104-358, at 20 (1996).
[94] *Hilton*, 167 F.3d at 74.
[95] *Id*. at 74. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).

Denying that the "appears to be" standard is purely subjective,[96] the *Hilton* Court held that it was instead an objective standard: "[a] jury must decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity."[97]

Moreover, there was an additional safeguard for the non-arbitrary and non-discriminatory enforcement of the Act. That is, "[t]he element of *scienter* … must be satisfied by the prosecution before a valid conviction may be obtained – for instance, the government must prove beyond a reasonable doubt that an individual 'knowingly' possessed the child pornography."[98] The *Hilton* Court concluded that "the statute's provisions 'suitably limit' the reach of the Act so that a person of ordinary intelligence can easily discern likely unlawful conduct and conform his or her conduct appropriately."[99]

b. The Fourth Circuit and *Mento*

In *Mento*, the defendant was charged under the CPPA for knowingly possessing child pornography.[100] The defendant did not contest that he knowingly possessed images of actual minors engaging in sexual explicit conduct.[101] Instead, he argued that the CPPA could not survive the exacting standards of strict scrutiny review[102] because it was "impermissibly overbroad and vague insofar as it criminalizes any visual depiction that 'appears to be' child pornography, or that is transmitted in such a way as to 'convey the impression' of being child pornography."[103]

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[96] *Hilton*, 167 F.3d at 74.
[97] United States v. Hilton, 167 F.3d 61, 75 (1st Cir. 1999).
[98] *Id*. *See* 18 U.S.C. § 2252A(a)(5)(B) (2000).
[99] *Hilton*, 167 F.3d at 76.
[100] United States v. Mento, 231 F.3d 912, 915 (4th Cir. 2000).
[101] *Id*. at 917.
[102] *Id.*
[103] *Id.*

Like the First Circuit, the Fourth Circuit found that the CPPA, "in prohibiting child pornography, banned [an] entire category of expression based on its content,"[104] and, as such, was subject to strict scrutiny.[105] *Mento* held that the government had a compelling interest in protecting children from sexual exploitation resulting from child pornography[106] because the court recognized that virtual child pornography produced "the same negative effects on minors"[107] as actual child pornography.

The *Mento* Court also found that the Act's reach to virtual pornography was narrowly tailored to achieve the articulated compelling government interest in protecting children from harm[108] and that the Act was the "least restrictive means" available.[109]

> The ban on material that 'appears to be' child pornography or 'conveys the impression' thereof may indeed affect some pornography where adults pose in a manner designed to simulate children. The government, however, has the same compelling interest in banning this material because it satisfies the audience for child pornography, resulting in the same negative effects on minors generally. In sum, we conclude that the CPPA represents the least restrictive means of advancing the vitally important government interest of effectively protecting minors from sexual exploitation and abuse.[110]

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[104] *Id.* at 918.
[105] *Id.*
[106] United States v. Mento, 231 F.3d 912, 918 (4th Cir. 2000).
[107] *Id.* at 921.
[108] *Id.*
[109] *Id.* at 920.
[110] *Id.* at 921.

The Fourth Circuit also insisted the CPPA was not constitutionally overbroad.[111] Agreeing with the *Hilton* Court, *Mento* held that the "appears to be" language in the Act prohibited only those images that were virtually indistinguishable from real child pornography[112] and "does not outlaw items such as drawings, cartoons, or paintings."[113] The CPPA criminalizes "images that resemble true photographs, but are in fact altered from various innocent and unrelated sources, and thus produced in a manner that did not harm any child."[114] The court held that "artificial depictions of child pornography that cannot be easily distinguished from the real thing do not deserve the protections of the First Amendment, because 'like sexually explicit material produced with actual children, there is little, if any social value in this type of expression.'"[115] The possibility of banning something impermissibly was not substantial, according to the court. Therefore, under the *Broadrick* standard of substantial overbreadth, the CPPA was not overbroad.[116]

The *Mento* Court also found that the CPPA was not unconstitutionally vague. Noting that the Act explicitly stated the elements of child pornography, specifically defined the term "minor," and carefully supplied an affirmative defense,[117] the *Mento* Court held that the CPPA "provides clear and adequate notice of the activity it regulates, such that ordinary citizens and those charged with enforcing the law may readily understand what is prohibited. Because it meets the Constitution's specificity requirements, the Act is not void for vagueness."[118]

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[111] *Id.* at 922.
[112] United States v. Mento, 231 F.3d 912, 921 (4th Cir. 2000).
[113] *Id.*
[114] *Id. See* United States v. Hilton, 167 F.3d 61, 73 (1st Cir. 1999).
[115] *Id. See Hilton*, 167 F.3d at 73.
[116] *Id.* at 922.
[117] *Id.*
[118] United States v. Mento, 231 F.3d 912, 922 (4th Cir. 2000).

c. The Fifth Circuit and *Fox*

In *Fox*, an internet child pornographer, convicted under the CPPA of knowingly receiving child pornography via computer,[119] sought reversal of his conviction on the ground that the Act prohibited speech protected by the First Amendment.[120] The Fifth Circuit upheld the constitutionality of the Act and affirmed the conviction.[121]

The Fifth Circuit first found that the government had a compelling interest in banning virtual child pornography.[122] The court held that indirect harm to children justified regulation of virtual child pornography.[123] The *Fox* Court referred to both *Osborne v. Ohio*, 495 U.S. 103 (1990), and *Ferber* to support its holding.[124]

> [I]n *Osborne*, the Supreme Court expressly invoked not only the harm caused to minors actually used in the production of pornography but also the danger posed to children when such pornography is used to seduce or coerce them into sexual activity. It makes no difference to the children coerced by such materials, or to the adult who employs them to lure children into sexual activity, whether the subjects depicted are actual children or computer simulations of children.[125]

"[T]he *Ferber* Court expressly endorsed the destruction of the entire child pornography market as a justification for banning sexually explicit images of children."[126]

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[119] United States v. Fox, 248 F.3d 394, 398 (5th Cir. 2001).
[120] *Id.* at 399.
[121] *Id.* at 411.
[122] *Id.* at 402.
[123] *Id.* at 401-402.
[124] *Id.*
[125] United States v. Fox, 248 F.3d 394, 401-402 (5th Cir. 2001).
[126] *Id.* at 402.

Relying on the *Broadrick* standard of substantial overbreadth, the Fifth Circuit then held that a regulation is unconstitutional only if its overbreadth is substantial in relation to the regulation's plainly legitimate sweep.[127] The *Fox* Court held that the Act might reach some individual cases where the involved materials were protected, but the problem did not rise to the level of substantiality.[128] Not only did the Congressional ban require virtual indistinguishability between virtual and real child pornography,[129] but those marginal infringements on protected expression could be properly handled on a case-by-case basis.[130]

Lastly, the *Fox* Court held that the Act was not unconstitutionally vague because "the statute's *scienter* requirement and affirmative defenses provide sufficient protection against improper prosecution. In this vein, we also agree that the 'appears to be' language is not so subjective as to fail to put a reasonable person on notice of what it is that the statute prohibits."[131]

d. The Eleventh Circuit and *Acheson*

In *Acheson*, the appellant pled guilty to violating the CPPA for knowingly receiving visual depictions of minors engaged in sexually explicit conduct.[132] He then challenged the CPPA as unconstitutionally overbroad and vague on its face.[133] Recognizing that "content-based restrictions must be narrowly drawn to serve a compelling governmental interest,"[134] the Eleventh Circuit applied the *Broadrick* substantiality standard of overbreadth. It held that "the CPPA's overbreadth is minimal when viewed in light of its plainly legitimate sweep,"[135] and that the 'appears to be'

[127] *Id.* at 404.
[128] *Id.* at 406.
[129] *Id.* at 405.
[130] *Id.* at 406.
[131] United States v. Fox, 248 F.3d 394, 407 (5th Cir. 2001).
[132] *Id*. at 648.
[133] United States v. Acheson, 195 F.3d 646, 650 (11th Cir. 1999).
[134] *Id. See* Boos v. Barry, 485 U.S. 312, 321 (1988).
[135] *Acheson*, 195 F.3d at 650.

language does not impermissibly expand "the scope of the CPPA to the point where it captures so much constitutionally protected conduct as to render the statute invalid."[136] The *Acheson* Court held that the CPPA "appears to be" language targeted only those images that were "virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in explicitly sexual conduct."[137]

Noting that the *Ferber* Court had suggested that the use of youthful-looking adults or simulations to make an otherwise illegal image might be permissible,[138] the *Acheson* Court warned that too much weight should not be given to this suggestion.[139] The Eleventh Circuit did not find this suggestion persuasive because the *Ferber* Court also held that virtual child pornography is of "exceedingly modest, if not *de minimis*," value and it is unlikely to "constitute an important and necessary part of a literary performance or scientific or educational work."[140] The *Acheson* Court concluded that since no substantial overbreadth could be established, the CPPA survived the constitutionality test,[141] and that "[a]ny potential overbreadth that may remain … should be 'cured through case-by-case analysis.'"[142]

The *Acheson* Court also held that the CPPA was not impermissibly vague.[143] The court claimed that "[t]he CPPA defines the criminal offense with enough certainty to put an ordinary person on notice of what conduct is prohibited. A reasonable person is on notice that possessing images appearing to be children engaged in sexually explicit conduct

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[136] *Id.*
[137] *Id.* at 651. *See* S. REP. NO. 104-358, at 3 (1996).
[138] *Acheson*, 195 F.3d at 651. *See* New York v. Ferber, 458 U.S. 747, 763 (1982).
[139] United States v. Acheson, 195 F.3d 646, 651 (11th Cir. 1999).
[140] *Id.*
[141] *Id.* at 652.
[142] *Id. See* Broadrick v. Oklahoma, 413 U.S. 601, 615-616 (1973).
[143] *Acheson*, 195 F.3d at 652.

is illegal."[144] The court held that the challenged provisions did not promote arbitrary or discriminatory enforcement. Moreover, the *scienter* requirement was a crucial protection against unscrupulous enforcement.[145] If the government could not prove beyond reasonable doubt that the charged person "knowingly receives or distributes" or "knowingly possesses" materials prohibited by the Act, then the statute did not apply. Agreeing with the *Hilton* Court, the *Acheson* Court concluded that the CPPA passed the void-for-vagueness test.[146]

e. Summary

The majority of the federal courts of appeal which have heard matters regarding the CPPA have upheld the constitutionality of the Act. Recognizing that the Act is content-based, these courts adopted strict scrutiny. First, these courts held that the prevention of indirect, as well as direct, harm was a compelling government interest. Second, the courts held that the statute, in particular the "appears to be" and the "conveys the impression" provisions, was not unconstitutionally overbroad. The courts applied the *Broadrick* standard for substantial overbreadth: a statute is unconstitutional only if its overbreadth is substantial in relation to its plainly legitimate sweep. The courts also held that the Congressional requirement of indistinguishability could limit the outreach of the Act and that whatever overbreadth might exist could be cured on a case-by-case analysis. Third, the courts held that virtual child pornography had little, if any, social value. Fourth, the courts held that the Act was not unconstitutionally vague. This was because the Act provided a *scienter* requirement and affirmative defenses. The government could prosecute only those who knowingly possess, receive, and distribute the prohibited materials.

2. *The Unconstitutionality of the CPPA:* Reno

a. The Ninth Circuit's Decision in *Reno*

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[144] *Id.*
[145] United States v. Acheson, 195 F.3d 646, 652 (11th Cir. 1999).
[146] *Id.* at 653. *See* United States v. Hilton, 167 F.3d 61, 75 (1st Cir. 1999).

The Ninth Circuit split with the First, Fourth, and Eleventh Circuits on the constitutionality of the CPPA in *Reno*.[147] The appellant Free Speech Coalition, a trade association involved in the production and distribution of "adult-oriented materials," sought declaratory and injunctive relief by a pre-enforcement challenge to the CPPA in a district court.[148] After losing its case, Free Speech Coalition challenged the constitutionality of the Act and in particular its "appears to be" and "conveys the impression" provisions in the Ninth Circuit.[149] The *Reno* Court determined that the CPPA was not content neutral,[150] and thus adopted strict scrutiny.[151] However, unlike the other circuit courts, the *Reno* Court found the Act to be unconstitutional on three separate grounds. First, the *Reno* Court held that there was no compelling government interest in banning virtual child pornography.[152] Second, the court held that the Act was unconstitutionally overbroad.[153] Finally, the court held that the Act was unconstitutionally vague.[154]

The Ninth Circuit insisted that the *Ferber* Court legitimatized only one kind of compelling government interest – the prevention of harm inflicted on actual children depicted in pornographic materials.[155] Put differently, the only compelling government interest found under *Ferber* was the prevention of direct harm to children from sexually explicit materials. The *Reno* Court did not accept the claim that the dissemination of virtual child pornography caused "additional acts of sexual abuse."[156] Instead, the court said, "factual studies that established the link between computer-generated child pornography and the subsequent sexual abuse of children

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[147] Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999).
[148] *Id*. at 1086.
[149] *Id.*
[150] *Id.* at 1090.
[151] *Id.* at 1091.
[152] *Id.* at 1092.
[153] Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999).
[154] *Id.*
[155] *Id.* at 1092.
[156] *Id.* at 1093.

apparently do not exist."[157] The court concluded that "the case law demonstrates that Congress has no compelling interest in regulating sexually explicit materials that do not contain visual images of actual children."[158] The *Reno* Court declined to determine whether or not the regulation in question was narrowly tailored.[159]

b. Problems with *Reno*

First, the *Reno* Court misinterpreted Congress's definition of "virtual child pornography." Congress carefully used the term "virtual child pornography," which referred to only those pornographic materials "virtually indistinguishable" from real child pornography.[160] The *Reno* Court said that the CPPA definition of child pornography would extend to "drawings" that "appear" to be a minor engaged in sexually explicit conduct.[161] The court exaggerated. No rationally capable person would ever confuse a "drawing" of a child engaged in sexual conduct with the depiction of a real child engaged in sexual conduct. As the Fourth Circuit held, the CPPA "does not outlaw items such as drawings, cartoons, or paintings."[162]

Second, the *Reno* Court wrongly denied that the government has a compelling interest in banning virtual child pornography. As discussed *supra*, the *Ferber* Court might have sent out mixed messages as to whether or not the prevention of indirect harm was a compelling government interest. Nevertheless, the *Ferber* Court held that "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children."[163] Furthermore, in *Osborne* the Court specifically

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[157] *Id*.
[158] *Id.*
[159] Free Speech Coalition v. Reno, 198 F.3d 1083, 1095 (9th Cir. 1999) ("because we find that Congress has not provided a compelling interest, we do not address the 'narrow tailoring' requirement").
[160] S. REP. NO. 104-358, at 3 (1996).
[161] *Reno*, 198 F.3d at 1092.
[162] United States v. Mento, 231 F.3d 912, 921 (4th Cir. 2000).
[163] New York v. Ferber, 458 U.S. 747, 759 (1982).

said, "pedophiles use child pornography to seduce … children into sexual activity."[164] *Ferber* is not inconsistent with *Osborne*. As Judge Ferguson said in his dissent in *Reno*, in upholding a law banning possession of child pornography "the [*Osborne*] Court relied not only on the harm caused to the children who are used in its production, but also on the harm that children suffer when child pornography is used to seduce or coerce them into sexual activity."[165]

Ferber said that harm on new victims is promoted through advertising, distributing, and circulating child pornography, and that the market for child pornography is the network that facilitates this harm.[166] The *Ferber* Court offered the government's interest to "dry up the market" [167] as one of five compelling government interests in banning child pornography. In this regard, *Ferber* is consistent with the Congress's findings that led to the enactment of the CPPA: "the danger to actual children who are seduced and molested with the aid of child sex pictures is as great when the child pornographer or child molester uses [computer simulations], as when the material consists of unretouched images of actual children engaging in sexually explicit conduct."[168]

Congress listed the following justifications for the Act: (1) preventing the use of virtual child pornography to seduce children; (2) protecting all children from the harmful effects of child pornography, including the myriad minors not actually depicted or used in its production; (3) eliminating pornographic images that whet the appetites of pedophiles to abuse children sexually; (4) destroying the child pornography market; and (5) prosecutorial necessity.[169] However, the *Reno* Court failed to address any of the concerns raised by Congress.

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[164] Osborne v. Ohio, 495 U.S. 103, 111 (1990).
[165] Free Speech Coalition v. Reno, 198 F.3d 1083, 1099 (9th Cir. 1999).
[166] *Ferber*, 458 U.S. at 758.
[167] *Id.* at 760.
[168] S. REP. NO. 104-358, at 18 (1996).
[169] *Id.* at 12-20.

Third, the majority of the *Reno* Court wrongly denied that the dissemination of virtual child pornography does indeed produce indirect harm.[170] Since the prevention of indirect harm is a compelling government interest under *Osborne* and *Ferber*, admitting that virtual child pornography produces indirect harm is admitting that banning of virtual child pornography is a compelling government interest. In order to hold a consistent position that government does not have a compelling interest in banning virtual child pornography, the *Reno* Court had no choice but to deny the positive connection between virtual child pornography and indirect harm.[171] However, Congress's judgment that virtual child pornography causes indirect harm was based on extensive expert testimony.[172] One of the expert witnesses testified before Congress, "[i]n the case of pedophiles, the overwhelming majority, in my clinical experience, use child pornography."[173]

> Some also use it to seduce children into engaging in sexual acts with themselves. When they introduce it to children, the suggestion is that this is normal behavior, and many other young people like themselves also use it and do these things. Pedophiles often trade, lend, or sell the pictures they make of young people nude having sex through an informal network.[174]

As Judge Ferguson wrote in his dissent, the majority of the *Reno* Court ignored that Congress, in enacting the CPPA,

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[170] *Reno*, 198 F.3d. at 1096.
[171] Free Speech Coalition v. Reno, 198 F.3d 1083, 1093 (9th Cir. 1999).
[172] S. REP. NO. 104-358, at 10.
[173] *Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the United States S. Judicial Comm.*, 104th Cong. (1996) (testimony of Dr. Victor Cline, Emeritus Professor in Psychology, University of Utah).
[174] *Id.*

established the validity of the compelling government interest in protecting children from both indirect and direct harm.[175]

c. Vagueness and Overbreadth

The *Reno* Court held that the "CPPA's criminalizing of material that 'appears to be a minor' and 'conveys the impression' that the material is a minor engaged in explicitly sexual activity, is void for vagueness."[176] The court used the *Kolender* standard of vagueness, under which a statute is void for vagueness unless it defines "'the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.'"[177] *Reno* held that the two phrases in question, "appears to be" and "conveys the impression," were "highly subjective,"[178] and that "they provide[d] no measure to guide an ordinarily intelligent person about prohibited conduct and any such person could not be reasonably certain about whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution."[179]

The *Reno* Court's position is untenable for two reasons. First, the CPPA clearly qualified the "appears to be" and "conveys the impression" language; the language meant nothing more than "virtually indistinguishable." [180] A person of ordinary intelligence generally should be able to distinguish a cartoon or drawing of a child from an actual image of a child. Second, as the *Hilton* Court held, the CPPA's "appears to be" standard may not be intolerably subjective when put in context.[181] "A jury must decide, based on the totality of the circumstances, whether a reasonable unsuspecting viewer

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[175] Free Speech Coalition v. Reno, 198 F.3d 1083, 1099 (9th Cir. 1999).
[176] *Id.* at 1095.
[177] *Id. See* Kolender v. Lawson, 461 U.S. 352, 357 (1983).
[178] *Id.*
[179] *Id.*
[180] S. REP. NO. 104-358, at 15 (1996).
[181] United States v. Hilton, 167 F.3d 61, 74 (1st Cir. 1999).

would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity."[182] In addition, as Judge Ferguson said, "[w]ith regard to the apparent age of the depicted individuals, the government can use the same type of objective evidence that it relied on before the CPPA went into effect."[183]

The Ninth Circuit held that the CPPA was unconstitutionally overbroad. Under the *Broadrick* substantiality standard,[184] only substantial impermissible applications will warrant a statute's invalidation. True, the CPPA may have some impermissible applications, but, as the majority of the federal circuit courts of appeal have held, the overbreadth is non-substantial.[185] However, the *Reno* Court stated, "on its face, the CPPA prohibits material that has been accorded First Amendment protection. That is, non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment."[186] Additionally, the *Reno* Court held

> [t]he government's interest in prohibiting computer-generated child pornographic depictions is not the same as its interest in prohibiting child pornography produced by using actual children. In the latter instance there may be direct and indirect harm to a child. In the former instance there is no harm, and there can be none, to an actual child, if no real human is used in the production of the images.[187]

The *Reno* Court's argument that the CPPA's overbreadth was substantial because it might apply to

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[182] *Id.* at 75.
[183] Free Speech Coalition v. Reno, 198 F.3d 1083, 1103 (9th Cir. 1999).
[184] Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973). *Cf.* New York v. Ferber, 458 U.S. 747, 769 (1982).
[185] *Cf. Hilton*, 167 F.3d at 74.
[186] *Reno*, 198 F.3d at 1096.
[187] *Id.*

protected expression like virtual child pornography[188] is problematic. The problem is twofold: logical and legal. Logically, the conclusion that the CPPA was substantially overbroad was based on the premise that virtual pornography is protected under the First Amendment. The court's rationale begged the question, because whether or not virtual child pornography is protected under the First Amendment is the very issue the court was called on to resolve. Legally, the U.S. Supreme Court's cases are contrary to *Reno*'s judgment. In *Ferber*, a New York statute prohibiting child pornography reaches "some protected expression, ranging from medical textbooks to pictorials in the *National Geographic*."[189] The court held that the statute was not unconstitutionally overbroad.[190] Therefore, it is not true that a statute is automatically deemed unconstitutionally overbroad simply because it may prohibit some protected expression.[191]

The Ninth Circuit's judgment that real child pornography caused direct and indirect harm but virtual pornography produced no harm to an actual child[192] was unsupported. True, virtual child pornography does not produce direct harm *in its production process*. But that does not mean it does not produce indirect harm. The *Reno* Court admitted that real child pornography produces indirect harm.[193] Since virtual child pornography is nearly indistinguishable from real child pornography, virtual child pornography produces the same indirect harm as real child pornography.

d. Summary

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[188] *Id.*
[189] *Ferber*, 458 U.S. at 773.
[190] New York v. Ferber, 458 U.S. 747, 773 (1982).
[191] *Id.* at 774 (O'Connor, J., concurring).
[192] Free Speech Coalition v. Reno, 198 F.3d 1083, 1096 (9th Cir. 1999).
[193] *Id.*

Reno challenged the CPPA on three grounds. First, the court found that there was no compelling government interest in banning virtual child pornography.[194] Second, the court held the Act unconstitutionally overbroad.[195] Finally, the court held the Act unconstitutionally vague.[196] None of these challenges were well founded. As Judge Ferguson said in his dissenting opinion,

> Congress has provided compelling evidence that virtual child pornography causes real harm to real children. As a result, virtual child pornography should join the ranks of real child pornography as a class of speech outside the protection of the First Amendment. In addition, I do not believe that the statutory terms 'appears to be' or 'conveys the impression' are substantially overbroad or void for vagueness.[197]

IV. *Ashcroft*: The Unconstitutionality of the CPPA

The Supreme Court in *Ashcroft* sided with the Ninth Circuit by holding that the CPPA was unconstitutional.[198] The court noted that the

> CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging.[199]

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[194] *Id.* at 1092.
[195] *Id.* at 1097.
[196] *Id.*
[197] *Id.* at 1098.
[198] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).
[199] *Id.* at 239-40.

This, according to the Court, "goes beyond [*Ferber*], which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process."[200] Relying on strict scrutiny, the Court specifically challenged the constitutionality of § 2256(8)(B) and § 2256(8)(D) of the CPPA (the "appears to be" and "conveys the impression" provisions), holding that they did not serve a compelling government interest and were unconstitutionally overbroad.[201]

A. Does the CPPA Serve Any Compelling Government Interest?

1. *Causal Link and Child Pornography*

The *Ashcroft* Court recognized a significant difference between *Ferber*'s ban on real child pornography and the CPPA's ban on virtual child pornography. In *Ferber*, the Court held that real children are harmed in the production of child pornographic material, and as such real child pornography has "a proximate link" to an actual crime.[202] "In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*."[203] Therefore, the Court held that "[w]hile the government asserts that images can lead to actual instances of child abuse … the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unqualified potential for subsequent criminal acts."[204]

Two points made by the Court deserve special attention. First, the Court distinguished between direct harm and indirect harm, holding that the prevention of direct harm

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[200] *Id.* at 240.
[201] *Id.* at 241-42.
[202] *Id.* at 250.
[203] *Id.*
[204] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250 (2002).

justifies the *Ferber* decision, but the prevention of indirect harm does not justify the CPPA.[205] Second, the Court held that in order for a speech to be recognized as an unprotected category under the First Amendment, that speech must have a "a proximate causal link" to a crime.[206] In other words, child pornography in *Ferber* is an unprotected category of speech because a causal link exists between pornographic material depicting children and a crime.

The Court then rejected the government's argument that indirect harm was sufficient to justify the CPPA.[207] Note the difference between the Court's position and the Ninth Circuit's: the Ninth Circuit admitted that indirect harm was sufficient to justify the banning of virtual child pornography, but it denied that virtual child pornography caused indirect harm to children. However, in *Ashcroft* the Court did not deny that virtual child pornography causes indirect harm, but instead denied that the prevention of indirect harm was sufficient to justify the banning of virtual child pornography.

The government had interpreted *Ferber* as holding that child pornography can rarely be valuable speech.[208] If speech is of low value, this condition may help to justify categorizing that speech as unprotected under the First Amendment.[209] *Ferber* held that the value of child pornography "is exceedingly modest, if not *de minimis*."[210] Yet the *Ashcroft* Court denied that it had ever held such a general position in *Ferber*,[211] saying that its "judgment about child pornography was based upon how it was made, not on what it communicated."[212] *Ashcroft* further held that in *Ferber* it

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[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] Miller v. California, 413 U.S. 15, 24 (1973).
[210] New York v. Ferber, 458 U.S. 747, 762 (1982).
[211] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 251 (2002).
[212] *Id.*

actually recognized that "some works in this category [of child pornography] might have significant value."[213]

The causal link requirement explicated in *Ashcroft* was intended to be a powerful weapon, and it was used to eliminate the government's theories of compelling interest of banning virtual child pornography. First, the causal link requirement eliminated the seduction theory, which says that virtual child pornography should be banned because it is used to seduce children.[214] The Court said that the government "argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused."[215] The Court reasoned that virtual child pornography itself does not necessarily lead to a crime, and thus has no causal link to one.

Second, the causal link requirement eliminated the tendency theory, which states that child abusers use virtual child pornography to "whet" their desires. The Court said, "[t]he Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech

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[213] *Id*. According to a note in the *Harvard Law Review*, "Free Speech Coalition fits into a larger trend in the court's First Amendment jurisprudence over the past several decades. Whereas the Court once regularly distinguished between high-, low-, and no-value speech, holding political speech at the First Amendment's core and the exceptions – obscenity, fighting words, defamation, commercial speech, and child pornography – at its periphery, the Court has increasingly blurred and limited these distinctions, resisting judgments as to the importance or moral quality of the speech at issue." Note, *Freedom of Speech and Expression*, 116 HARV. L. REV. 262, 270 (2002). This observation, while interesting, oversimplified the constitutional complexity in the current case.

[214] *Cf.* Osborne v. Ohio, 495 U.S. 103, 111 (1990).

[215] *Ashcroft*, 535 U.S. at 251.

to encourage unlawful acts is not a sufficient reason for banning it."[216]

Third, the causal link requirement eliminated the market deterrence theory. The Court said,

> [t]he Government … argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice. In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive.[217]

2. *Problems with* Ashcroft

Ashcroft was inconsistent with *Osborne* and *Ferber* on the government's interest in preventing indirect harm of child pornography. As discussed *supra*, *Ferber* and *Osborne* explicitly admitted that there is an "intrinsic relationship" between child pornography and indirect harm to children. The *Ferber* Court said, "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to

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[216] *Id.* at 253.
[217] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 254 (2002).

the sexual abuse of children."[218] In *Osborne*, the Court said, "pedophiles use child pornography to seduce … children into sexual activity."[219] *Ferber* listed the prevention of indirect harm as one of the five compelling government interests.[220]

By definition virtual child pornography is virtually indistinguishable from actual child pornography. Thus, if the prevention of child pornography's indirect harm suffices to be a compelling government interest, the prevention of the indirect harm caused by virtual child pornography also suffices. The *Ashcroft* Court denied it ever held that the protection of children from indirect harm of child pornography was a compelling interest in *Ferber*, consequentially denying that the protection of children from virtual child pornography is a compelling interest.[221] In order to serve its purpose of invalidating the CPPA, the Court changed its position from *Ferber* and *Osborne* to *Ashcroft* without admitting the change.

Furthermore, *Ashcroft's* causal link theory is inadequate and unsupported by the Court's prior cases. This theory requires that speech be restricted only if it records a crime, and this is not consistent with First Amendment jurisprudence. For example, fighting words can be regulated, not because they "record" or have "caused" an independent crime, but because doing so is necessary to prevent a crime.[222] The *Ashcroft* Court's causal link theory cannot adequately explain why fighting words should be regulated. First Amendment jurisprudence contains two kinds of causal links: actual and potential. According to the actual causal link approach, speech cannot be regulated unless it records a crime. For example, actual child pornography records a crime and as such it can be regulated.

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[218] New York v. Ferber, 458 U.S. 747, 759 (1982).
[219] *Osborne*, 495 U.S. at 111.
[220] *Ferber*, 458 U.S. at 759.
[221] *Ashcroft*, 535, U.S. at 251.
[222] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

Potential causal link stems from Justice Holmes' clear and present danger test.[223] It is the constitutional foundation for regulating speech which tends "to incite an immediate breach of peace"[224] or speech "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[225] Potential causal link serves a preventive purpose. Speech can be regulated under this theory to prevent the potential crime associated with that speech from happening. For example, *Chaplinsky* affirmed regulation against profanity and fighting words.[226]

Ashcroft relied entirely on the actual causal link theory and neglected the potential causal link theory. Joined by Chief Justice Rehnquist and Justice Scalia, Justice O'Connor said in her dissenting opinion in *Ashcroft*, "this Court's cases do not require Congress to wait for harm to occur before it can legislate against it."[227] Indeed, the Court has permitted a Congressional preventive act regulating cable television programs,[228] an issue much less urgent than protection of children from child abusers. Justice Kennedy, who opined in *Ashcroft*, said in that case, "[a] fundamental principle of legislation is that Congress is under no obligation to wait until the entire harm occurs but may act to prevent it. [For example,] '[a]n industry need not be in its death throes before

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[223] Schenck v. United States, 249 U.S. 47, 52 (1919). "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words are used in such circumstances and are of such a nature so as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

[224] *Id.* at 572.

[225] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[226] *Chaplinsky*, 315 U.S. at 572.

[227] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 254 (2002).

[228] Turner Broadcasting Sys., Inc. v. FCC, 520 U.S. 180, 212 (1997).

Congress may act to protect it from economic harm threatened by a monopoly.'"[229]

Third, *Ashcroft*'s view that "[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice,"[230] relied on a false assumption of pragmatic rationality. The opinion assumes that child pornographers are pragmatically rational. But this assumption is false, because if child pornographers were pragmatically rational, they would not use or create child pornography in the first place.

Fourth, the Court's false assumption of pragmatic rationality led to a highly problematic theory: the desirability theory. Under this theory espoused by the Court, virtual child pornography is in fact desirable because it drives illegal child pornography from the market. "[T]he best defense against child pornography may be to embrace virtual pornography."[231] According to the Court, a commercial market for virtual child pornography is the solution for actual child pornography because if virtual pornography is available, "[f]ew pornographers would risk prosecution by abusing real children."[232] However, the desirability theory wrongly assumes, again, that child pornographers are pragmatically rational.

> Unfortunately, many experts on child molesters explain that these individuals derive sexual gratification from the pain inflicted on actual children, and the recording of it. These producers of child pornography would not be

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[229] *Id.*
[230] *Ashcroft*, 535 U.S. at 254.
[231] Audrey Rogers, *Playing Hide and Seek: How to Protect Virtual Pornographers and Actual Children on the Internet*, 50 VILL. L. REV. 87, 111 (2005). *Cf.* Timothy J. Perla, *Attempting to End the Cycle of Virtual Pornography Prohibitions*, 83 B.U. L. REV. 1209, 1217 (2005).
[232] *Ashcroft*, 535 U.S. at 254.

> interested in virtual pornography. Concomitantly, some purveyors of child pornography would also not have their appetites satiated if they knew they were viewing images of virtual pornography.[233]

Moreover, permitting and protecting a commercial market for virtual child pornography positively promotes indirect harm to children as a result of the use and production of virtual child pornography. This is highly problematic, regardless of whether or not regulation against virtual child pornography is constitutional. Lastly, the desirability theory does not sufficiently outweigh the low value placed on virtual child pornography.

B. Obscenity and the CPPA

According to the *Ashcroft* Court, since the government had no compelling interest in banning virtual child pornography under *Ferber*, there was only one other theory on which the government might ban virtual pornography: obscenity as defined in *Miller*.[234] The Court then speculated that the government might argue that because child pornography was obscene to most people, the obscenity standard under *Miller* sufficed to encompass an act criminalizing virtual child pornography.[235] The Court then went on to distinguish *Ferber* and *Miller*[236] in finding that the CPPA was unconstitutional.

The *Ashcroft* Court did not need to make this speculative point because the government never argued that obscenity was a theory that justified banning child pornography, real or virtual. Since the government relied on *Ferber*, it would not have been able to rely on *Miller*. This is

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[233] Rogers, *supra* note 231, at 102.
[234] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240 (2002). *See* Miller v. California, 413 U.S. 15, 24-25 (1973).
[235] *Id.*
[236] *Id.*

because the *Ferber* Court itself had already clearly distinguished *Ferber* from *Miller*, holding that the *Ferber* standard was mostly irrelevant to the *Miller* standard. *Ferber* said

> [t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be 'patently offensive' in order to have acquired the sexual exploitation of a child for its production.[237]

There are two additional differences between obscenity regulation under *Miller* and child pornography regulation under *Ferber*. First, the possession of child pornography is a crime under *Ferber* regardless of location of possession, but there is no parallel regulation against possessing *obscene* materials in one's private home.[238] Second, *Ferber* adopted a universal standard to judge the material in question, but *Miller* used a "contemporary community standard" of an average person.[239] The *Ferber* standard is national, while the *Miller* standard is local.[240] The Court noted in *Miller* that "our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation."[241] The *Miller* Court added "[w]hen

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[237] New York v. Ferber, 458 U.S. 747, 761 (1982).
[238] *See* Stanley v. Georgia, 394 U.S. 557, 559 (1969).
[239] Miller v. California, 413 U.S. 15, 24 (1973).
[240] *Id.* at 30.
[241] *Id.*

triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation."[242]

C. Is the Act Unconstitutionally Overbroad?

1. *The 'Appears to Be' and 'Conveys the Impression' Provisions*

The *Ashcroft* Court held that the "appears to be" provision, § 2256(8)(B) of the CPPA, was unconstitutionally overbroad.[243] Following the Court's logic, since the provision banned materials not banned by either *Ferber* or *Miller*, and since the government had no compelling interest to ban such materials, the prohibitive statute was unconstitutionally overbroad.

Moreover, the Court held that the "appears to be" language reached out to protected materials. For example, if a film depicting a child's life contains "a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value."[244] "[T]he literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a 'picture' that 'appears to be, of a minor engaging in sexually explicit conduct.'"[245] The Court concluded that the "appears to be" provision "abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional."[246]

The Court similarly held that the "conveys the impression" provision, § 2256(8)(D) of the CPPA, was unconstitutionally overbroad. For example, under this provision a film which contains no sexually explicit scenes

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[242] *Id*.
[243] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256 (2002).
[244] *Id.* at 248.
[245] *Id.* at 241.
[246] *Id.* at 256.

involving minors "could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie."[247] This was because "[t]the determination turns on how the speech is presented, not on what is depicted."[248] The provision banned depictions of sexually explicit conduct that were "advertised, promoted, presented, described or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[249] The Court held that, on its face, this provision "requires little judgment about the content of the image" in question,[250] unlike the "appears to be" provision which was content dependent. Thus a substantial amount of lawful speech was abridged.

The CPPA contained an affirmative defense provision which allowed defendants to avoid convictions by showing that the child pornographic material in question was produced by using only adults, and that the defendant did not "advertise, promote, present, describe, or distribute the material in such a way as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct."[251] This provision allowed the government to say that the CPPA was not a measure suppressing speech but a law shifting the burden of proof to the defendant to prove that the material was not unlawful. The Court said, "[t]he government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense."[252] The Court, however, did not flatly declare the affirmative defense unconstitutional. Instead, it held "[e]ven

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[247] *Id.* at 257.
[248] *Id.*
[249] 18 U.S.C. § 2256(8)(D) (2000) (repealed 2003).
[250] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 257 (2002).
[251] 18 U.S.C. § 2252A(c) (2000) (amended 2003).
[252] *Ashcroft*, 535 U.S. at 255.

if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms."[253] What the Court meant was that the defense extended only to a defendant who produced the material in question by using youthful-looking adults but not to one who produced the material by using wholly computer – generated figures.

2. *Reconsidering the 'Appears to Be' Provision*

The "appears to be" provision reached virtual child pornography, and the *Ashcroft* Court held that this provision was overbroad. The examples of overbreadth that the Court offered, however, did not support its holding. The provision reached only "visual depictions" of "actual or simulated … sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; … bestiality; masturbation; … sadistic or masochistic abuse; or … lascivious exhibition of the genitals or private area of any person."[254] It did not reach a film depicting a child's life containing "a single graphic depiction of sexual activity." [255] Nor did it reach "a Renaissance painting depicting a scene from classical mythology, a 'picture' that 'appears to be, of a minor engaging in sexually explicit conduct.'" [256]

As Chief Justice Rehnquist and Justice Scalia said in their partially dissenting opinion, "the definition reaches only the sort of 'hard core of child pornography' that we found without protection in *Ferber*."[257] In addition, the CPPA has a *scienter* requirement. Being so cautiously defined, the "appears to be" provision could not easily reach the film described by the Court. As Justices Rehnquist and Scalia wrote, "had 'sexually explicit conduct' been thought to reach the sort of material the Court says it does, then films such as

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[253] *Id.* at 256.
[254] 18 U.S.C. § 2256(2) (2000) (amended 2003).
[255] *Ashcroft*, 535 U.S. at 248.
[256] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241 (2002).
[257] *Ashcroft*, 535 U.S. at 269.

Traffic and *American Beauty* would not have been made the way they were."[258] With regard to the Renaissance painting, the CPPA had a "virtually indistinguishable" requirement. The painting can neither be seen as "hard core" sexual activity, nor is it virtually indistinguishable from real children engaging in sexually explicit conduct. The provision could not possibly reach the painting. Justices Rehnquist and Scalia wrote that, when properly constructed, the provision is not substantially overbroad.[259]

The CPPA treated wholly computer-generated child pornography slightly differently from the child pornography made by using youthful-looking adults. The CPPA had offered no affirmative defense for the former, but a limited affirmative defense for the latter: it extended only to a defendant who showed that the pornographic material in question was produced by using young-looking adults and that the defendant did not "advertise, promote, present, describe, or distribute the material in such a way as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct."[260]

There is a policy reason for the limitation on the affirmative defense. Whether or not an affirmative defense should be made available to a speech in the context of child pornography depends on whether or not that speech causes direct or indirect harm to children. If pornographic material was made by using youthful-looking adults, it produced no harm to actual children. If that material was not advertised or distributed as containing explicitly child sexual conduct, then it was not used as child pornography. Thus, it produced neither direct nor indirect harm to children. This is why an affirmative defense was available to pornographic materials made using young-looking adults and not advertised or distributed as containing underage sexual activity.

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[258] *Id.* at 271.
[259] *Id.* at 269-70.
[260] 18 U.S.C. § 2252A(c) (2000) (amended 2003).

On the other hand, if a material, although made by using youthful-looking adults, is advertised or distributed as containing explicit child sexual conduct, it will be used as child pornography and thus produces indirect harm. This is why an affirmative defense is not available for that material.

As for wholly computer-generated child pornography, since it is virtually indistinguishable from real child pornography and is advertised and distributed as child pornography, it does cause indirect harm to children. This is why computer-generated child pornography does not have an affirmative defense.

In criticizing that the affirmative defense was incomplete, the *Ashcroft* Court neglected the rationales behind the prohibition of different kinds of virtual child pornography. The affirmative defense was complete in that it was available for those pornographic materials which do not cause either direct or indirect harm to children. However, this affirmative defense was not available for child pornographic materials causing direct or indirect harm to children; nor should it be.[261]

The Court struck down the "appears to be" provision on the ground that the provision was unconstitutionally overbroad. This ruling was not consistent with the precedent set by *Broadrick*. Under the *Broadrick* substantial overbreadth standard, a regulation is unconstitutionally overbroad only if it substantially reaches protected speech. Neither the Court's examples nor its reasoning adequately showed why the provision was *substantially* overbroad. Moreover, if the Act infringes on protected speech, the problem should be cured through a case-by-case analysis. The *Broadrick* Court warned that the overbreadth doctrine is "strong medicine" which should be used "sparingly and only as a last resort."[262] Thus, *Broadrick* did not support overruling the "appears to be" provision altogether.

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[261] *Ashcroft*, 535 U.S. at 269.
[262] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

When the "appears to be" provision is understood in the context of the entire CPPA framework, taking into consideration the definition of child pornography, the *scienter* requirement, and the available affirmative defense, it does not raise any substantial overbreadth problem. Even if the Court still had any concerns about the "appears to be" language, Justice O'Connor's suggestion of substituting the occurrences of the phrase "appears to be" with "virtually indistinguishable"[263] would be a solution. There was no need to strike down the provision entirely. Justice O'Connor said,

> [t]he Court concludes that the CPPA's ban on virtual child pornography is overbroad. The basis for this holding is unclear. Although a content-based regulation may serve a compelling state interest, and be as narrowly tailored as possible while substantially serving that interest, the regulation may unintentionally ensnare speech that has serious literary, artistic, political, or scientific value or that does not threaten the harms sought to be combated by the Government. If so, litigants may challenge the regulation on its face as overbroad, but in doing so they bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech. Respondents [in this case] have not made such a demonstration … Their overbreadth challenge therefore fails.[264]

3. *Reconsidering the 'Conveys the Impression' Provision*

The *Ashcroft* Court struck down the "conveys the impression" provision. Justice O'Connor supported the decision in her partially dissenting opinion. She concluded that the government failed to explain how this ban served any

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[263] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 264 (2002).
[264] *Id.* at 265-66.

compelling state interest.[265] Moreover, she implied that the statute might be redundant. "Any speech covered by § 2256(8)(D) that is obscene, actual child pornography, or otherwise indecent is prohibited by other federal statutes."[266]

Justice O'Connor's judgment may be unfair. The provision indeed covers speech that has not been covered by other federal statutes. For example, it covers the pornographic materials made by using youthful-looking adults that are advertised and distributed *not as adult pornography but as child pornography*. Those materials produce indirect harm to children as much as actual child pornography does, but they are not actual child pornography. Thus, the law regulating actual child pornography cannot reach them. Likewise, the laws of obscenity and indecency may or may not reach them, but these laws do not ban materials the way child pornography is banned. For example, obscenity laws do not prohibit possession of obscene materials in one's private home,[267] but child pornography law bans possession of child pornography anywhere.

Justices Rehnquist and Scalia suggested an interpretation of the provision which they believed could survive the *Ashcroft* Court's challenge. While discussing obscenity and First Amendment protection, the Court in *Ginzburg* stated that conduct, when deliberately emphasizing "the sexually provocative aspects of the work … in order to catch the salaciously disposed," could lose First Amendment protection.[268] Justices Rehnquist and Scalia thus believed that the government's intention was for the "conveys the impression" provision to be read under the *Ginzburg* regime. Justice Rehnquist wrote

> [t]he First Amendment may protect the video shopowner or film distributor who promotes material as 'entertaining' or 'acclaimed'

[265] *Id.* at 262.
[266] *Id.*
[267] Stanley v. Georgia, 394 U.S. 557, 559 (1969).
[268] Ginzburg v. United States, 383 U.S. 463, 472 (1966).

> regardless of whether the material contains depictions of youthful looking adult actors engaged in nonobscene but sexually suggestive conduct. The First Amendment does not, however, protect the panderer. Thus materials promoted as conveying the impression that they depict actual minors engaged in sexually explicit conduct do not escape regulation merely because they might warrant First Amendment protection if promoted in a different manner.[269]

The majority of the *Ashcroft* Court did not object to such an interpretation. The majority's concern was that the "conveys the impression" provision went way beyond the *Ginzburg* limitation. For example, "an individual who merely possesses protected materials [which convey the impression of explicit child sexual conduct] … might offend the CPPA regardless of whether the individual actually intended to possess materials containing unprotected images."[270] To resolve the difficulty, Justice Rehnquist suggested interpreting the CPPA's "knowingly" requirement as applying to not only "possess" but also the content of the material in question. This way

> the CPPA can be construed to prohibit only the knowing possession of materials actually containing visual depiction of minors engaged in sexually explicit conduct, or computer-generated images virtually indistinguishable from real minors engaged in sexually explicit conduct. The mere possession of materials containing only suggestive depictions of youthful looking adult actors need not be so included.[271]

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[269] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 272 (2002).
[270] *Id.*
[271] *Id.* at 273.

The majority of the *Ashcroft* Court had a legitimate concern, which was that the "conveys the impression" provision could apply to speech that merely *conveys* the impression of prohibited speech but does not contain prohibited speech in content. The CPPA is a content-based regulation, and should not have such application. Having admitted this, Justice Rehnquist's suggestion of interpreting the CPPA's "knowingly" requirement as applying to not only "possess" but also the content of the material in question can effectively resolve the problem. Again, *Broadrick* warned that the overbreadth doctrine is a strong medicine, and should be used sparingly and only as a last resort.[272] To strike down an entire scheme is not a proper response when a less destructive solution exists, as is the case with the "conveys the impression" provision.

V. In the Aftermath of *Ashcroft*

The Supreme Court decided *Ashcroft* at a time when federal courts of appeal had very divided views on the constitutionality of regulation of virtual child pornography. The Court's review of the case from the Ninth Circuit was partially aimed at making the analysis of child pornography laws consistent. Unfortunately, that aim was far from achieved. The U.S. Congress has quickly responded to the *Ashcroft* opinion with two potentially controversial pieces of legislation: The Child Obscenity and Pornography Prevention Act of 2002[273] and The Prosecutorial Remedies and Tools

[272] Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

[273] H.R. REP. NO. 107-526 (2002). "[T]he 'Child Obscenity and Pornography Prevention Act of 2002' addresses the April 16, 2002, Supreme Court decision in Ashcroft v. the Free Speech Coalition to ensure the continued protection of children from sexual exploitation." H. R. REP, No. 107-526 at 8. Insisting that the government has a compelling interest to regulate virtual child pornography, the Act "narrows the definition of child pornography, strengthens the existing affirmative defense, amends the obscenity laws to address virtual and real child pornography that involves visual depictions of pre-pubescent children, creates new offenses against

Against the Exploitation of Children Today (PROTECT) Act.[274] Federal courts are still issuing divided opinions regarding virtual child pornography.[275]

Ashcroft has produced a significant impact on the legal community and on First Amendment jurisprudence. One immediate consequence is that *Ashcroft* has created an unusually heavy burden for the government to prosecute any illegal child pornographers, given that technology has made virtual child pornography and actual child pornography effectively indistinguishable.[276] Under *Ashcroft*, the government cannot prosecute a child pornographer unless it proves that the pornographic image is of an actual child.[277] Congress noted that "The Free Speech decision has placed prosecutors in a difficult position.[278] Daniel Collins, a Department of Justice official, stated that in the Ninth Circuit, where the *Ashcroft* case originated, prosecutors "have not brought cases where they are unable to prove that the children depicted in the images are real, and that is now the case

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pandering visual depictions as child pornography, and creates new offenses against providing children obscene or pornographic material." *Id*.

[274] S. REP. NO. 108-2 (2003). "[T]he Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act or 'PROTECT Act of 2003' is to restore the government's ability to prosecute child pornography offenses successfully." S. REP. NO. 108-2 at 1. "It is important that we respond to the Supreme Court's decision [in *Ashcroft*]. We must do all we can to end the victimization of children by child pornographers, but we must also ensure that any new law will withstand First Amendment scrutiny." *Id.* at 16.

[275] For recent cases, *see* U.S. v. Khan, 325 F.Supp.2d 218 (E.D.N.Y. 2004), Free Speech Coalition v. Gonzales, 406 F.Supp.2d 1196 (D. Colo. 2005), and U.S. v. Kandirakis, 441 F.Supp.2d 282 (D. Mass. 2006).

[276] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 259 (2002). Justice Thomas had anticipated the problem. *See* also S. REP. NO. 108-2 at 5-6 ("The steady advance of technology makes certain that life-like images of children can be created on a computer, thereby providing a potent basis to doubt that a particular depiction is that of a an actual minor. Whether real or life-like (but virtual), child pornography fuels the fantasies of pedophiles, often leading to the actual abuse of real children").

[277] *See* Rogers, *supra* note 231, at 111.

[278] S. REP. NO. 108-2 at 5.

throughout the country" [279] since the Supreme Court affirmed the Ninth Circuit in *Ashcroft*.

Ashcroft has also caused confusion in the lower courts in adjudicating child pornography cases because the lower courts have adopted different evidentiary principles in order to meet the *Ashcroft* requirement. In *United States v. Kimler*, the Tenth Circuit held that, despite the *Ashcroft* decision, "[j]uries are still capable of distinguishing between real and virtual images."[280] In *United States v. Deaton*, the Eighth Circuit held that it was not unreasonable to accept "a jury's conclusion that real children were depicted even where the images themselves were the only evidence the government presented on the subject."[281] In *United States v. Hall*, the Eleventh Circuit affirmed a pre-*Ashcroft* conviction on the ground that "no reasonable jury could have found that the images were virtual children created by computer technology as opposed to actual children."[282]

In *United States v. Slanina*, the Fifth Circuit held that the "Government was not required to present any additional evidence or expert testimony to meet the burden of proof to show that the images downloaded by [the defendant] depicted real children and not virtual children,"[283] and that the trier of fact "was capable of reviewing the evidence to determine whether the Government met its burden to show that the images depicted real children."[284] In *United States v. Farrelly*, the Sixth Circuit held that a jury could determine whether an image was of actual children based on the image itself and that no additional evidence such as real identity or expert testimony was necessary.[285] These courts adopt the principle

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[279] *See* Robert M. Sieg, *Attempted Possession of Child Pornography: A Proposed Approach for Criminalizing Possession of Child Pornographic Images of Unknown Origin*, 36 U. TOL. L. REV. 263, 264 (2005).
[280] United States v. Kimler, 335 F.3d 1132, 1142 (10th Cir. 2003).
[281] United States v. Deaton, 328 F.3d 454, 455 (8th Cir. 2003).
[282] United States v. Hall, 312 F.3d 1250, 1260 (11th Cir. 2002).
[283] United States v. Slanina, 359 F.3d 356, 357 (5th Cir. 2004).
[284] *Id.*
[285] United States v. Farrelly, 389 F.3d 649, 655 (6th Cir. 2004).

that a jury can distinguish a depiction of an actual child from a depiction of a virtual child, even where the images themselves are the only evidence.

On the other hand, in an opinion that was subsequently withdrawn, the First Circuit held that conviction of child pornography under *Ashcroft* "requires the government to present evidence proving that the child in the image is not confabulated, but real."[286] Different from the other circuit courts of appeal discussed above, the First Circuit held "[w]hile the images form essential evidence without which a conviction could not be sustained … the government must introduce relevant evidence *in addition to* the images to prove the children are real."[287] The additional evidence refers to either the actual identity of a child or expert testimony. This is a much stronger evidentiary requirement.

VI. Conclusion

Protecting our children from sexual abuse is a compelling government interest. For that reason, child pornography is regulated. Nevertheless, the means selected to achieve that interest must pass constitutional muster under the First Amendment. *Ferber* provided a firm ground on which actual child pornography is outlawed. But *Ferber* took a somewhat ambivalent position on virtual child pornography by, on the one hand, holding the prevention of indirect harm is a compelling government interest, but, on the other hand, permitting wholly computer-generated child pornography and child pornography made by using youthful-looking adults. This created a loophole for virtual child pornographers. The CPPA was enacted to criminalize virtual, as well as actual, child pornography, and to close the loophole left open in *Ferber*. However, in *Ashcroft* the Supreme Court declared the Act's "appears to be" and "conveys the impression"

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[286] United States v. Hilton, 363 F.3d 58, 64 (1st Cir. 2004).

[287] *Id.* The First Circuit withdrew this opinion and reheard the case, but in its new opinion the First Circuit did not renounce this evidentiary principle. *See* United States v. Hilton, 386 F.3d 13 (1st Cir. 2004).

provisions facially invalid. This reopened the loophole and created a safe harbor for child pornographers.

I have argued in this article that *Ashcroft* is problematic on four grounds. First, the Court failed to recognize that the prevention of indirect harm to children produced by virtual child pornography is a compelling government interest. Second, the Court's opinion is inconsistent with its prior cases and unsupported by First Amendment jurisprudence. For example, *Ashcroft* departed from the substantive overbreadth standard in *Broadrick*,[288] the harm theory in *Osborne* and *Ferber*,[289] the proximate cause theory in *Chaplinsky*,[290] and the constitutional differentiation between high- and low-value speech in *Miller*.[291] Third, *Ashcroft* created an unusually heavy burden for government to prosecute any child pornographer. Lastly, *Ashcroft* created confusion for lower courts in the adjudication of child pornography cases. The loophole created by *Ashcroft* must be closed in order to remove the safe harbor for child pornographers.

[288] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).
[289] Osborne v. Ohio, 495 U.S. 103, 111 (1990); New York v. Ferber, 458 U.S. 747, 759 (1982).
[290] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
[291] Miller v. California, 413 U.S. 15, 24 (1973).