Stamping Out Icons: A Legal Analysis on How to Legislate Against Virtual Child Pornography Without Trampling Over the First Amendment

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Both the United States Supreme Court and the United States Congress have struggled on how to eliminate child pornography within the American legal framework. This paper will analyze the legal controversy and examine both judicial precedent and federal legislation that have attempted to address the issue of exploitation of children in pornography.

INTRODUCTION

The Supreme Court has acknowledged that "Child pornography is a social concern that has evaded repeated attempts to stamp it out" (Free Speech Coalition v. Reno, 1999). In 1977, Congress found that "child pornography and prostitution were highly organized, highly profitable, and exploited countless numbers of real children in its production" (Free Speech Coalition v. Reno, 1999, pp. 1087-1091). Since then Congress has struggled to eliminate the child pornography market in the United States.

In a 9-0 decision in *New York v. Ferber*, the Supreme Court ruled that producing child pornography causes irreversible harm to children and, hence, cannot be protected by the First Amendment.[1] New technology complicated the issue by introducing virtual child pornography that appeared to depict actual children.[2] Congress passed legislation that barred virtual child pornography, but in *Ashcroft v. Free Speech Coalition* the Supreme Court struck that ban down because children were not harmed in its production.

In a concurring opinion, Justice Thomas argued that if technology sufficiently confuses actual and virtual child pornography enough to hinder the government's ability to prosecute child pornographers, then the government will have a compelling state interest to ban both forms of child pornography. This paper recounts the history and offers a legal analysis of Ashcroft v. Free Speech Coalition and the cases before it. It concludes that in light of recent cases, technology has fused virtual and actual child pornography to the point where prosecuting child pornographers has become sufficiently difficult to justify a ban on *virtual* child pornography. If technology has in fact blurred the court's ability to distinguish between actual and virtual child pornography, then a compelling state interest exists that would warrant a ban on virtual child pornography. Such a ban would protect the right to free speech safeguarded by the First Amendment, while simultaneously stamping out the child pornography market in America.

Part I of this article briefly reviews the history of obscenity law including a study on the Supreme Court's strict ruling on child pornography in *New York v. Ferber*. Part II examines the details surrounding the decision in *Ashcroft v. Free Speech Coalition* including a detailed analysis of the Child Pornography Protection Act (CPPA) and Free Speech Coalition v. Reno. Part III considers the multiple concurring and dissenting opinions from *Ashcroft v. Free Speech Coalition*, including an analysis of Justice Thomas's solution to the virtual child pornography dilemma. It also briefly considers Congress's reaction to the majority opinion. Part IV discusses the post-*Ashcroft v. Free Speech Coalition* reaction by the court system. It examines the controversial verdict in *United States v. Hilton*, which is a key decision in determining that technology has fused traditional and virtual child pornography. It establishes that *U.S. v. Hilton* shows that technology has advanced to a point where child pornographers can escape prosecution through a "computer-generated images defense." Finally, this section concludes that U.S. v. Hilton, if accepted around the Nation, would justify banning a narrowly tailored category of virtual child pornography.

[1]The First Amendment grants Freedom of Speech.

[2]Virtual Child Pornography: Fictitious, computer-generated images of children engaged in sexual conduct which images are created using digital technology.

Part I: Obscenity and Child Pornography

History of Obscenity Law

In general, the First Amendment restricts the Government from barring what the citizenry may see, read, say, or hear. Justice Kennedy said, "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought" (Ashcroft v. Free Speech Coalition, 2002). Freedom of speech, however, is not absolute. It has limitations. One classic example is Chief Justice Oliver Wendell Holmes's declaration that the First Amendment would not protect a person who yells "fire" in a crowded theatre (Epstein and Walker, 2004). Although several categories of limited speech exist, this discussion focuses on obscenity.[3] The court has always struggled to define what is obscene. Justice Potter Stewart summed up the difficulty of defining obscenity when he said, "I shall not today attempt further to define the kinds of material, but I know it when I see it" (Jacobellis v. Ohio, 1964). Prior to the 1950s, American Courts adopted the British definition of obscenity found in the 1868 case of *Regina v. Hicklin*. The British labeled material obscene if:

> "The tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall" (Epstein and Walker, 2004, p 360).

By and large, the Hicklin test ruled that any material that is unacceptable for a child should be considered obscene. In other words, the Hicklin test established the authority to limit speech to a substantial degree.

In *Roth v. United States* (1957) Justice William Brennan Jr. said, "obscenity is not within the area of constitutionally protected speech or press" (Epstein and Walker, 2004). He opted to replace the Hicklin test with a new one which stated that material was obscene if:

> "To the average person, applying contemporary community standards, the dominant theme of the material taken as a whole, appeals to prurient interest" (Epstein and Walker, 2004).

Roth v. United States altered the Hicklin test to declare speech as obscene if the "average adult" would find the material at question to be obscene. This standard also required that the material be viewed as a whole as opposed to being considered obscene due to individual parts. Finally, the new test granted states, and not the federal government, authority to use their individual definitions of obscenity in regulating speech. *Roth v. United States* went a long way towards protecting speech previously defined as obscene under the Hicklin test. However, the Supreme Court soon adapted this standard in an effort to protect the First Amendment. It is important to note that throughout this century the Court has been careful not to allow states too much liberty in prohibiting speech.

Justice Burger further developed this new definition of obscenity in *Miller v. California* (1973) by stating that material was obscene and therefore void of Constitutional protection only if:

> "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value" (Epstein and Walker, 2004).

In *Miller v. California* we find the basic framework for the modern judicial definition of obscenity used today. All speech that falls under this basic definition of obscenity is not protected by the First Amendment and States therefore have authority to prohibit it.

Child Pornography: A New Category of Unprotected Speech

In 1982, the Supreme Court ruled that a new category of speech cannot be protected by the First Amendment even if it is not obscene: child pornography. The decision came in *New York v. Ferber*. Twenty states passed laws prohibiting material that portrayed children engaged in sexual conduct. These laws prohibited such images regardless of whether they were considered legally obscene. They claimed that since the production of child pornography is interconnected to child abuse, the State was entitled to greater leeway in regulating the market. The defense contended that this type of legislation violated the First Amendment by limiting freedom of speech. The issue struck a nerve with the court. All nine justices unanimously agreed that protecting the physical and psychological well being of children was a compelling reason to designate child pornography as prohibited speech. Specifically, they said that States were "entitled to greater leeway in the regulation of pornographic depictions of children" (Epstein and Walker, 2004). The Supreme Court still upholds *New York v. Ferber* today.

In a concurring opinion, Justice Brennan added an exception to the new category. He said that prohibiting any material with depictions of children that had serious literary, artistic, scientific, or medical value *would* violate the First Amendment. Likewise, he noted that "in the absence of exposure, or particular harm, to juveniles or unconsenting adults, the State lacks power to suppress sexually oriented materials" (Epstein and Walker, 2004). Here, Justice Brennan hinted that the First Amendment would have protected this category of speech from regulation by government were it not for the direct harm children suffer in the production of child pornography. This logic would prove to be critical to future rulings.

[3]Other categories of unprotected speech include libel, slander, and defamation.

PART II: FIRST AMENDMENT PROTECTION FOR VIRTUAL CHILD PORNOGRAPHY

PIXELS, DIGITIZATION, AND VIRTUAL PORNOGRAPHY

The Internet and technology have redefined our perception of obscenity and, in particular, child pornography. In 1996, Congress attempted to curtail *virtual child pornography*: a new brand of child pornography that could be created by means other than using real children (these included actual images contorted by computers and fictional images fabricated through digital technology). In 1996, the United States Senate held hearings on how to reform obscenity laws in light of the internet and new digital technology (Senate Comm. on the Judic., 1996). In these hearings, the Senate established that new technology allowed the creation of two types of virtual child pornography. The first of the two types of *virtual child pornography* is digital *child pornography*. This type of virtual image presents sexual activity by children created using only fictitious computer images. The movie *Final Fantasy* demonstrates the quality of digital technology that is available today that can be used to create digital child pornography (Internet Movie Database, Inc., 1990). The second type of virtual child pornography Congress found is called *morphed pornography*. *Morphed pornography* (otherwise known as computer-altered photography) digitally alters a picture of a child to make it appear as if the child were engaging in sexual acts. The latter requires an original photo of a child that can be transformed or modified. Congress hoped to ban both of these groups of virtual child pornography through new legislation.

In 1996, Utah's Senator Orrin Hatch sponsored the passage of the Child Pornography Prevention Act (CPPA) in response to the two new types of virtual child pornography (CPPA, 1996). The hearings on the CPPA highlighted 13 reasons why virtual child pornography was worthy of regulation. Congress claimed that virtual child pornography "whets the appetite" of child molesters and that they could use the same digital images to seduce children into sexual activity. Another finding alleged that technology would advance to the point that actual and virtual child pornography would become almost indistinguishable, making it difficult for the government to prosecute actual child pornographers. It is important to recognize that under the logic of these findings, the damage inflicted on children emanates from the content of the images and not from the *means of their production*[4] (*FCC v. Pacifica Foundation*, 1978).

In general, the CPPA extended the ban on child pornography to include any sexually explicit depiction that "is or appears to be" of a minor (Section 2256(8) (B)). It also gave Congress authority to prohibit and prosecute the producer of any image "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" of a "minor engaging in sexually explicit conduct"[5] (Section 2256 (8)(D)). The statute defines "sexually explicit conduct" as "actual or simulated… sexual intercourse… bestiality… masturbation… sadistic or masochistic abuse... or lascivious exhibition of the genitals or pubic area of any person" (18 U.S.C. Section 2256 (2)).

A CHALLENGE TO THE CPPA

The CPPA did not pass Constitutional muster because the Supreme Court, preceded by the Ninth Circuit Court, struck it down for vagueness and over-breadth. Soon after Congress passed the CPPA, plaintiffs contended in the First and Eleventh Circuit Courts that the Act was overbroad in that it prohibited lawful speech without offering a compelling State interest (U.S. v. Acheson, 1999) (U.S. v. Hilton, 1999). Those courts ultimately found the claims to be unsubstantiated in light of the Supreme Court's decision in *New York v. Ferber*. The judges in the First and Eleventh Circuit Courts decided that the government successfully proved a direct link existed between child abuse and virtual child pornography.

In 2000, the Ninth Circuit Court agreed to hear *Free Speech Coalition v. Reno*: a challenge to the CPPA on appeal from the US District Court for the Northern District of California. In this case the Free Speech Coalition sought "declaratory and injunctive relief by a pre-enforcement" challenge to the CPPA[6] (Free Speech Coalition v. Reno, 1999). The Plaintiffs admitted that some of the material they sold on the market would be considered virtual child pornography under the definitions of the CPPA.

The government based its defense on the congressional findings of the CPPA. First, they said that pedophiles use traditional and virtual child pornography to seduce children by persuading them that sexual activities are normal. Second, Congress declared that both real and virtual child pornography "whets the appetite" of child molesters, inciting child abuse. Next, Congress stated that new advances in technology allowed the creation of visual depictions that "appear to be children" engaged in sexual activity but are "virtually indistinguishable to the unsuspecting viewer" from actual child pornography. They predicted that in the near future further advances in digital technology would make it increasingly difficult to distinguish actual and virtual child pornography. This, they calculated, would make prosecutions in actual child pornography cases progressively more complex[7] (CPPA, 1996).

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[4]This is important because in FCC v. Pacifica Foundation the Supreme Court ruled that "The fact that society may find speech offensive is not a sufficient reason for suppressing it." (FCC v. Pacifica Foundation, 1978)

[5]The CPPA included an affirmative defence which allowed defendants the chance to prove their innocence by showing that the material at question was produced using adult actors instead of children. Section 2256A(c)

[6]The Free Speech Coalition: A California trade association of business involved in the production and distribution of materials marketable to the adult-entertainment industry.

[7]The findings of the CPPA state 13 reasons virtual child pornography should be banned. We will not discuss all of them in this article.

In a 2-1 ruling, Judge Donald W. Molloy delivered the court's opinion that "the First Amendment prohibits Congress from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct" because "the phrases 'appears to be' and 'conveys the impression'…are vague and overbroad" (Free Speech Coalition v. Reno, 1999). The majority felt that the defendants failed to show a legitimate compelling interest strong enough to expand a curb on speech to include virtual child pornography. Judge Molloy quoted *U.S. v. Hilton* when he said; "Blanket suppression of an entire type of speech is by its very nature a content-discriminating act" (Free Speech Coalition v. Reno, 1999). He likewise said that the government's argument was flawed because Congress' motivation to ban virtual child pornography was based on the secondary, indirect effects attributed to the content of the images (as opposed to the direct harm caused to children in the production of real child pornography). In a dissenting opinion, Judge Ferguson maintained that the defendants "provided compelling evidence that virtual child pornography causes real harm to real children" (Free Speech Coalition v. Reno, 1999).

Stepping back to analyze the cases up to this point, one can see that the constitutionality of the CPPA hinged on whether the judges felt virtual child pornography caused direct harm to children. Judges Molloy and Thomas reasoned that no harm to real children stemmed from the content of virtual child pornography, whereas Judge Ferguson and the District Court felt the opposite. This would prove to be a pivotal assumption of the case. Ultimately, the Supreme Court would agree with the District court.

Ashcroft v. Free Speech Coalition

In 2001, the Supreme Court agreed to hear *Ashcroft v. Free Speech Coalition* to settle the dispute between the Ninth Circuit and the First and Eleventh Circuits. Since both the plaintiff and defendant's arguments remained the same, this paper will not revisit those details of the case here. Instead, this article will analyze the majority opinion.

Justice Kennedy held that the evidence supporting harm to real children was secondary, indirect, and unsatisfactory. He said that,

> "Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in Ferber. While the Government asserts that the 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 unquantified potential for subsequent criminal acts" (Ashcroft v. Free Speech Coalition, 2001).

In other words, Justice Kennedy echoed the opinion of Judge Molloy by repeating that child pornography can only be denied if *real harm exists in the production*, as opposed to the content of the disputed material. The majority used this logic to refute the government's claim that virtual child pornography can be used to seduce children. They alleged that cartoons, video games, and candy could be used for similar purposes, but it would be irrational to prohibit these items.

The majority opinion rejected the government's basic premise in supporting the CPPA. All of the government's arguments were based on the assumption that virtual images of child pornography are indistinguishable from real child pornography. However, Justice Kennedy refused to accept this logic, alleging that "if virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes." He argued that, "few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice" (Ashcroft v. Free Speech Coalition, 2001). Those who have studied the psyche of child pornographers find this logic to be flawed. They argue that most users derive satisfaction from witnessing the abuse of a child (Lanning, 2001) (Klain, Davies, & Hicks, 2001). If Justice Kennedy's assumption that child pornographers would rarely risk prosecution by viewing actual child pornography is accurate, then a practical solution to virtual child pornography would be to embrace it[8] (Rogers, 2005). However, if child pornographers derive sexual gratification from the recording of child abuse, then accepting virtual child pornography would only complicate prosecution of actual child pornography. If so, the government would have a stronger case in support of a ban on virtual child pornography.

Later, the majority declared section 2256(8)(B) (the "appears to be" clause) to be unconstitutional. Justice Kennedy based his opinion on a broad interpretation of the language in the CPPA, disregarding the intent of the statute to limit "sexually explicit" images. Specifically, he stated that the CPPA proscribes speech "despite its serious literary, artistic, political, or scientific value." He alleged that works such as *Romeo and Juliet*, and movies such as "Traffic" or "American Beauty" would be illegal under the perimeters of the CPPA[9] (Ashcroft v. Free Speech Coalition, 2001). Justice Kennedy's opinion repeatedly mentions the need to protect the visual depiction of teenagers engaged in sexual activity because it is,

[8]Audrey Rogers offers a solution to child pornography that embraces virtual child pornography. He suggests that if Congress bolstered a regulated virtual child pornography market, then pornographers' demand for actual child pornography would be supplied and the need to create it through unmonitored means. If child pornographers' motivation were based on deriving sexual satisfaction from the image, then this would be the best way to regulate the market. However, professionals have expressed time and time again that their motivation flows from the recording of abuse of children. If this assumption is true, then Roger's proposal would be counterproductive.

[9]According to Justice Kennedy, the CPPA would ban the common literary theme of teenagers engaging in sex. He reasoned that the CPPA was not eligible to be an extension of either *New York v. Ferber* or *Miller v. California*. If true, *Romeo and Juliet* would be illegal. He notes that Juliet was only 13 years old in the timeless classic.

and always has been, a valuable theme in expression of the arts. While this speech is undoubtedly worth protecting, it should not be held to be indistinguishable from lewd depictions of children engaged in sexual activity geared to appeal to the prurient interest. Congress' stated intent was to extend child pornography laws to virtual child depictions of the prurient interest and not to ban virtual productions of *Romeo and Juliet*.

Finally, the Supreme Court rejected the government's claim that the ability to produce computer-generated images would make prosecuting real child pornographers difficult, if not impossible. The government suggested that fusing virtual and actual child pornography into the same category of unprotected speech would make prosecutions plausible. The majority pronounced that "the government may not suppress lawful speech as the means to suppress unlawful speech" and that doing so "turns the First Amendment upside down" (Ashcroft v. Free Speech Coalition, 2001). The CPPA included an affirmative defense that would allow the accused to prove that images were produced using adult actors, and therefore establish their innocence. Although Justice Kennedy accepted that a properly tailored "affirmative defense can save a statute from a First Amendment challenge," he refused the CPPA's affirmative defense as incomplete and insufficient (Ashcroft v. Free Speech Coalition, 2001). This is one of the reasons that four Justices signed concurring or dissenting opinions. It is to this collection of varied opinion that we now turn.

PART III: THE REACTION TO *Ashcroft v. Free Speech Coalition*

A DIVIDED DISSENT

Justices Rehnquist and Scalia interpreted the text of the CPPA narrowly. They opined that Congress intended to reach "computer generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct" and that the statute should not "be read to do any more than precisely this" (Ashcroft v. Free Speech Coalition, 2001). Justices Rehnquist and Scalia fully agreed with Congress's motives regardless of the vague nature of the Act. Although, in their judgment, the CPPA seemed plain, the phrase "appears to be" *was* truly open to a wide range of interpretation. This is clear because seven of their peers agreed on this point.

Justice O'Connor (joined in part by Justice Scalia) concurred in part and dissented in part. She agreed with the Court that Section 2256(8)(C) (which extends the ban to depictions that "convey the impression" of child pornography) prohibited speech that she interpreted to be protected by the First Amendment. She maintained that this particular idiom would proscribe depictions of adult actors posing as children. Doing so, she felt, exceeded Congress' intent to protect children from the child pornography market (Ashcroft v. Free Speech Coalition, 2001).

Justice O'Connor also disagreed with the Court in part. She felt that the CPPA's prohibition was effectively tailored to curtail hard-core virtual child pornography. In addition, she professed that "any speech that has serious literary, artistic, political, or scientific value" that is "unintentionally (ensnared)" by the CPPA would be protected by the affirmative defense clause (Ashcroft v. Free Speech Coalition, 2001). She indicated that defendants in such a hypothetical would be able to challenge prosecutors by showing that the material challenged by the CPPA contains "a substantial amount of valuable or harmless speech" (Ashcroft v. Free Speech Coalition, 2001). The defendants never presented any "examples of films or other materials that are wholly computer-generated *and* that contain images that" fall under the definitions of virtual child pornography under the CPPA (Ashcroft v. Free Speech Coalition, 2001). Justice O'Connor hinted that virtual child pornography (defined narrowly by the CPPA) with serious value might not exist at all. If true, this analysis would throw a wrench in the majority's opinion that the prohibition on virtual child pornography is overbroad because it limits valuable speech. Works of art such as *Romeo and Juliet* would retain a solid defense on the basis of their serious political, artistic, literary, or scientific value.

Finally, O'Connor recommended that substituting "appears to be" with the phrase "virtually indistinguishable from" would help clarify the language of the CPPA, thereby making it constitutionally viable. She acknowledged Congress's extensive effort to purge the nation of child abuse. Plaintiffs successfully convinced O'Connor that a compelling state interest existed in curbing virtual child pornography (contrary to the majority of her peers). She noted that evidence presented by the National Law Center for Children and Families (NLCCF) convinced her to agree with the government.[10] With the evidence that the NLCCF presented, she expressed concern that technology would soon advance to a point that prosecutors would be unable to distinguish between the two categories of child pornography and that defendants would escape punishment.

Justice Thomas delivered the final concurring opinion of *Ashcroft v. Free Speech Coalition*. Here, as we will soon see, he sponsored a rationale that could potentially reverse the majority opinion.[11] Justice Thomas' greatest concern echoed Justice O'Connor's and the government's concern. He said "that persons who possess and disseminate pornographic images of real children may escape conviction by claiming

[10]As Amice Curiae to the Court, the National Law Center for Children and Families entered virtual child pornography evidence (in the form of images) into the brief. The images were difficult enough to distinguish from real images of child pornography that they aided in convincing Justice O'Connor that Congress had a righteous intent in passing the CPPA.

[11]This is the same solution that could potentially rescind the ruling in Ashcroft v. Free Speech Coalition.

that the images are computer-generated, thereby raising a reasonable doubt as to their guilt"[12] (Ashcroft v. Free Speech Coalition, 2001). He appropriately asserted that if "technology evolve(s) to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children" then "the Government should not be foreclosed from enacting a regulation of virtual child pornography" (Ashcroft v. Free Speech Coalition, 20019).

This logic is the antithesis of the majority's statement that "the Government may not suppress lawful speech as the means to suppress unlawful speech." Justice Thomas responded that prosecuting actual child pornography satisfies a compelling Government interest and justifies suppressing a narrowly defined category of protected speech. In other words, if technology reaches a point where actual and virtual child pornography are almost impossible to distinguish (rendering the government unable to take legal action against violators of the former) then both brands of child pornography could be fused into one category and defined as unprotected speech. This, Justice Thomas warned, would require a narrowly tailored definition of virtual child pornography. This cautionary note suggests that at some future date the language of the CPPA would be too vague to pass constitutional muster.[13]

Justice Thomas left open a line of reasoning that could potentially reverse *Ashcroft v. Free Speech Coalition*. Congress should take strict heed of the counsel Justice Thomas provides here. It is apparent that Congress paid close attention to the multiple concurring and dissenting opinions offered by Justices Rehnquist, Scalia, O'Connor, and Thomas. This paper will now review Congress' reaction to *Ashcroft v. Free Speech Coalition* and will touch on the broad opinions for and against the PROTECT Act does not fall within the scope of this paper.

The PROTECT Act: Congress' Reaction to *Ashcroft v. Free Speech Coalition*

In response to the ruling in *Ashcroft v. Free Speech Coalition*, Republican Senator Orrin Hatch (who initiated the CPPA) put forth the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act, 2003).

Congress reformed several key aspects of the CPPA in an attempt to tailor the PROTECT Act in such a way that it would pass constitutional muster in light of *Ashcroft v. Free Speech Coalition*. The first reform to the CPPA came as a result of the congressional findings. The new findings stated three distinctly new conclusions. First, Congress stated that "there is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children" (PROTECT Act, 2003). This means that most child pornography is either actual child pornography or *morphed* child pornography.[14] Next, Congress declared that technology exists "to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated." This technology would bolster a *"computer-generated images" defense*. Finally, the findings asserted that "technology will soon exist, if it does not already, to computer generate realistic images of children." The findings in the *CPPA* claimed that direct harm to children increased as a result of virtual child pornography. The new findings concluded that the existence of virtual child pornography is not as problematic as the prosecutorial obstacles that arise when defendants manipulate images to appear to be virtual depictions (PROTECT Act, 2003).

Next, Congress reformed the definition of virtual child pornography. In the *CPPA*, Congress defined virtual child pornography to be any visual depiction that *"is or appears to be*, of a minor engaging in sexually explicit conduct." Accepting Justice O'Connor's recommendation, Congress modified the definition to images that are *"virtually indistinguishable* from a minor engaging in sexually explicit conduct," *excluding* "drawings, cartoons, sculptures, or paintings depicting minors or adults." Congress later defined "indistinguishable" to mean that "an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct." There is no doubt that Congress heavily relied on Justice O'Connor's concurring-dissenting opinion in *Ashcroft v. Free Speech Coalition* to reform the CPPA.

The final difference between the CPPA and the PROTECT Act is the expansion of the affirmative defense. In the CPPA, the affirmative defense allowed producers of virtual child pornography to prove their innocence by showing that adult actors were used in the place of minors. The PROTECT Act expanded the affirmative defense to apply to distributors and viewers (as well as producers).

Clearly, some day the PROTECT Act will be challenged in the Courts. It is unclear, however, whether the PROTECT Act with its new revisions will pass constitutional muster. Even though the new language undoubtedly focuses the definition of virtual child pornography, the Act still has its fair share of critics. Some argue that the "virtually indistinguishable" is just as vague as the "appears to be" language of the CPPA (Bernstein, 2005; Rogers, 2005; Watanabe, 2005). Expanding the definition to include works with serious value is a step in the right direction; however, the PROTECT Act still fails to link virtual child pornography to the obscenity standard established in *Miller v. California*. Even though Congress expanded the affirmative defense to distributors and consumers of virtual child pornography, others critique the

[12]For the purposes of this paper, we will refer to this reasoning as either "the prosecution rational" or the "computer-generated images defence."

[13]Justice Thomas felt that the language of the CPPA would have to be reformed in order for a future Act to pass constitutional muster. He agreed with the majority that the CPPA was too vague.

[14]The image's architect must use an actual picture of a child in the production of an image for it to be considered morphed pornography.

new affirmative defense clauses as being inadequate. Regardless of whether or not the PROTECT Act will survive a challenge in the court system, it is important to see how Congress has responded to *Ashcroft v. Free Speech Coalition*. It is also important to recognize that Congress used Justice O'Connor's opinion as a framework for new legislation against virtual child pornography.

PART IV: THE REACTION IN THE COURTS, U.S. V. HILTON, AND THE END OF ASHCROFT

POST-ASHCROFT V. FREE SPEECH COALITION

Since the ruling in *Ashcroft v. Free Speech Coalition* the Government's fears of difficult child pornography prosecutions have materialized. Defendants have appealed to courts for retrial in direct response to *Ashcroft v. Free Speech Coalition*. The courts have established that "the government must prove that an image depicts actual children to sustain a conviction" of child pornography (United States v. Hilton, 2004). In other words, the government must establish that the images presented in each case were actual depictions of children. If any aspect of the depiction includes an actual child, then the picture is illegal under the PROTECT Act. The government customarily used the Tanner Scale to determine whether or not a depiction involved actual minors. The *Tanner Scale* (U.S. v. Hilton, 2004) is a scale used for measuring stages of physical development in children, adolescents, and adults based on external developments. Almost every court has accepted this scale to gauge whether images were made using actual children.

In the wake of *Ashcroft v. Free Speech Coalition*, most courts required the government to prove that an actual child was used in the creation of images considered in cases. In 1994 the Supreme Court ruled in *U.S. v. X-citement Video* that in child pornography cases the government had the burden of proving that a defendant "knowingly" possessed depictions of actual child pornography in order to find the defendant guilty (U.S. v. X-citement Video, 1994). In *U.S. v. Reilly*, the defendant had previously pleaded guilty to having "knowingly received… several images of child pornography" (2002). After the Supreme Court overturned the CPPA in *Ashcroft v. Free Speech Coalition*, the U.S. District Court for the Southern District of New York reversed the defendant's guilty plea. Judge Patterson ruled that "the allocution of Reilly was insufficient in that he did not acknowledge that he knew that the images he received were of actual children" (U.S. v. Reilly, 2002).

This ruling merged the "knowingly" standard of *U.S. v. X-citement Video* with *Ashcroft v. Free Speech Coalition*. The two decisions need to be bonded together to protect defendants such as Reilly. However, this bond means that not only must the government prove that an image is of an actual child, it must prove that the defendant knew it was not of a virtual child. This places a heavy burden on the government that will severely cripple its ability to prosecute.

Courts have further developed the details of procedure in child pornography cases. *Ashcroft v. Free Speech Coalition* demands an answer to a critical question in trial procedure: Does the verdict "require either direct evidence of the identity of the children in the proscribed images or expert testimony that the images depicted are those of real children rather than computer-generated 'virtual' children?" (U.S. v. Hilton, 2004) A number of Circuit Courts have offered an answer to this question. Almost all[15] of these have agreed that "pornographic images themselves should suffice to prove the use of actual children in production" and that "a jury can (still) distinguish a depiction of an actual child from a depiction of a virtual child even where the images themselves were the only evidence" presented[16] (U.S. v. Hilton, 2004). Most judges agree that,

> "After Free Speech Coalition, defendants will certainly argue that the government has failed to prove beyond a reasonable doubt that the pictures are of real children. And, in light of evolving technology, triers of fact may be more inclined to accept such arguments if the government relies on only the pictures as evidence" (U.S. v. Hilton, 2004, p. 68).

The introduction of images to juries has proven to be a deciding factor in the judgment of actual and virtual child pornography cases. Since *Ashcroft v. Free Speech Coalition* "no jury has acquitted a defendant on the basis that he was ignorant that the pornographic images were of real children" (Rogers, 2005). This is probably a result of the effects that the evidence has on the jury, regardless of whether the images are actual or virtual child pornography. Even though *juries* have ruled in favor of the government in every case thus far, we have seen that the government's fears of the difficulties in prosecuting actual child pornographers have become reality. This burden will probably become even more difficult with time. We will now consider *U.S. v. Hilton*; the outcome of which may lead to more stringent guidelines for prosecutors of child pornography cases.

U.S. V. HILTON

In 2004, the First Circuit granted post-conviction relief to defendant David Hilton on appeal in light of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition* (U.S. v. Hilton, 2004). The defendant contended that "the government may not criminalize possession of non-obscene, sexually explicit images that appear to, but do not in fact, depict actual children" (U.S. v. Hilton, 2004, p. 59). Plaintiffs contested that the images were of actual child pornography based on testimony by an expert witness, Dr. Lawrence Ricci. Dr. Ricci used the *Tanner Scale* to prove that images at question depicted real minors.[17] Prior to the hearing, the d*istrict court*

[15]U.S. v. Hilton is the one exception. That's the one major reason why it is such a controversial decision.

[16]See also (U.S. v. Kimler, 2003) (U.S. v. Deaton, 2003) (U.S. v. Hall, 2003) (U.S. v. Rearden, 2003)

had concluded that Dr. Ricci's evidence was insufficient, granting Mr. Hilton post-conviction relief.

In *U.S. v. Hilton*, the court rejected the claims that "pornographic images themselves… suffice to prove the use of actual children in production." In doing so they also found that juries can no longer "distinguish a depiction of an actual child from a depiction of a virtual child even where the images themselves were the only evidence" (U.S. v. Hilton, 2004). Instead, in the majority opinion, Judge Torruella of the First Circuit declared that "while the images form essential evidence without which a conviction could not be sustained, we hold that the government must introduce relevant evidence in addition to the images to prove the children are real." The majority alleged that pornographers successfully manipulate images of real children to be amenable to expert analysis under the *Tanner Scale*. They said that the "parameters of body proportion and growth" will be mimicked by virtual pornographers and that "a finding of guilt beyond a reasonable doubt demands…relevant evidence in addition to the images themselves" (U.S. v. Hilton, 2004).

This decision is in direct contrast to every other child pornography case to date. The central question of *U.S. v. Hilton* reverses the central question discussed in *Ashcroft v. Free Speech Coalition*. There, the justices needed to determine if *virtual child pornography resembled actual child pornography* enough that it damaged society. In U.S. v. Hilton, the court asks if *actual pornography can be manipulated to resemble virtual child pornography* enough that the two categories of speech are almost impossible to distinguish. *U.S. v Hilton* accepts that technology has advanced to a level that justifies a new perspective on child pornography cases.

If one accepts the premise that technology has advanced to a point where juries cannot distinguish between the two categories of speech, then it would be necessary for the government to provide extra evidence, apart from the images themselves, to prove guilt. *Extra evidence* could include testimony by experts on computer graphics with respect to how the images were created. Another option could include finding the identity of the real children used in pictures that have been morphed to be child pornography.[18] Providing this additional evidence will be expensive and time consuming for the government. As technology continues to advance, expert witnesses will find it progressively more complex to prove beyond a reasonable doubt that defendants were cognizant of the fact that the images they were looking at were in their possession and that they were aware that the images were of actual and not virtual child pornography. This places a heavy burden on the government.

U.S. v. Hilton ended in a more divisively different result than any other trial considering virtual child pornography since *Ashcroft v. Free Speech Coalition*. Respondents attacked the verdict and there was no shortage of criticism (Wisconsin v. Holze, 2004). For the purposes of this article we will set aside the widespread disapproval of the verdict and analyze the potential consequences of the judgment.

U.S. v. Hilton: The Beginning of the End for Ashcroft?

The verdict in *U.S. v. Hilton* could hold serious consequences for the outcome of virtual child pornography law in America. Justice Thomas feared the time would come when "persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer-generated, thereby raising a reasonable doubt as to their guilt." Thomas said that during *Ashcroft v. Free Speech Coalition* the government failed to provide a case where "a defendant has been acquitted based on a 'computer-generated images' defense." *U.S. v. Hilton* is the first case where an individual who possessed actual child pornography[19] has escaped conviction. Justice Thomas added,

> "in the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction" that "(bars) or otherwise (regulates) some narrow category of 'lawful speech in order to enforce effectively laws against pornography made through the abuse of real children" (Ashcroft v. Free Speech Coalition, 2001).

If Hilton were to become the norm, then the government would have too much of a burden placed upon it to prove child pornographers are guilty beyond a reasonable doubt. An increased financial burden would slow down child pornography cases. The courts would be forced to spend time, energy, and money to prove how individual pictures were produced. Pornographers would regularly escape prosecution.

Justice Thomas's concurring opinion would justify an Act, be it the PROTECT Act or an amended version of it, which would ban a narrowly tailored category of virtual child pornography. If Hilton were to become the norm, then courts would in effect agree that technology has advanced to a level that compelling state interest exists for the sake of banning a well defined category of virtual child pornography. Doing so would be an effective way to protect the First Amendment and enable the government to effectively curb child pornography: a social concern that creates a market of organized crime that exploits countless numbers of children (Free Speech Coalition v. Reno, 1999).

[17]Reader, be reminded that "the government must prove that an image depicts actual children to sustain a conviction" and that the *Tanner Scale* has been sufficient to prove so in almost every court since *Ashcroft v. Free Speech Coalition*. (U.S. v. Hilton, 2004, p.63)

[18]Remember that many of these depictions are *morphed pornographic images* that combine an actual picture and fictional body parts.

[19]This claim is based on Dr. Ricci's testimony using the Tanner Scale.

CONCLUSION

Child pornography has been found to be a social concern that should be strictly regulated. We must be careful to understand the history of child pornography in order to curb its harmful effects on society while simultaneously protecting our First Amendment rights. Today, virtual child pornography is a category of speech that is protected by the First Amendment and that cannot be banned without a compelling state interest. However, *U.S. v. Hilton* demonstrates that modern technology has fused actual and virtual child pornography together to the point that prosecuting actual child pornographers has become unfeasible. Justice Thomas's concurring opinion in *Ashcroft v. Free Speech Coalition* provides a legal justification to ban a narrowly tailored category of virtual child pornography in order to enable the government to prosecute actual child pornographers. Applying this logic would assist Congress in curbing an industry that abuses countless children.

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