CHILD PORNOGRAPHY AND FIRST AMENDMENT STANDARDS

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This paper explains how the Supreme Court currently applies the First Amendment to laws targeting child pornography. In light of those standards, the paper explores some current areas in child pornography law, principally Congress’s legislative response to the Supreme Court’s decision in Ashcroft v. Free Speech Coalition1 regarding “virtual” child pornography. The purpose of this paper is primarily descriptive, rather than evaluative, but it does offer some criticisms of these judicial and legislative approaches to the continuing and distressing problem of child pornography. Part I explains the Supreme Court’s general approach—known as “categorical balancing”—to defining areas of expression that are withdrawn from the full protection of the First Amendment. Part I then places child pornography within that analytical framework. Part II moves to the most current area of child pornography law—“virtual” child porn—and discusses how the Supreme Court addressed Congress’s efforts to combat that problem in the 2002 Ashcroft decision. It then discusses Congress’s response to Ashcroft in the 2003 amendments to federal child pornography laws. Part III concludes the paper by discussing how the state and lower federal courts have addressed issues posed both by Ashcroft and the amended federal law.

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I. FROM INCITING CRIME TO EXPLOITING CHILDREN: HOW THE SUPREME COURT IDENTIFIES UNPROTECTED EXPRESSION

Because all speech cannot be free, it seems inevitable that the Supreme Court must police the constitutional boundaries of “free speech.” But that practice, in and of itself, presents an irresolvable contradiction. This is not merely the problem that the First Amendment speaks in absolute terms (“Congress shall make no law . . .”), but the deeper problem of content selection. We have been conditioned, correctly, to regard government punishment of particular messages with the darkest suspicion. When the state suppresses certain ideas because of their content—and lets other, “approved” ideas freely circulate—we sense the sinister hand of censorship striking, not merely at our liberties, but at the very sources of self-government, freedom, and personality. And yet the Supreme Court itself not only engages in such a practice, but freely admits it to be the foundation of its Free Speech jurisprudence. When the Court says “this expression is outside First Amendment protection, but this is in,” it is doing nothing other than selectively allowing the suppression of certain expressive messages. To confirm this impression, let us hear the Court speak for itself:

The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations. Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation, and for obscenity, but a limited categorical approach has remained an important part of our
First Amendment jurisprudence.\(^2\)

That the absolutist Free Speech Clause turns out to be non-absolute should neither surprise nor disturb. The Court tells us that all “free but civilized societies” allow such adjustments to free speech. It must be so: anyone claiming free rein for malignant speech like defamation or solicitation of murder would brand himself a lunatic (or a tenured law professor). But not all “free but civilized societies” have decreed that such adjustments be made by courts. Two centuries ago no less a figure than Alexander Hamilton predicted that attempting to liquidate the precise boundaries of phrases such as “liberty of press” was a fool’s errand.\(^3\) In fact, Hamilton suggested heretically (by our modern standards) that the “security” of such expressive liberty, “whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.”\(^4\) The extent of our liberties, therefore, would be sketched out through “legislative discretion, regulated by public opinion.”\(^5\) Hamilton had a point about the difficulty of judicially delineating the boundaries of free speech, but we have nonetheless asked modern courts to try. This is an instructive backdrop to understanding the Court’s attempts to describe “catego-

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\(^2\) R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (citations omitted). Relevant to our purposes here, the Court added, by way of comfort, that “these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government. We recently acknowledged this distinction in Ferber, where, in upholding New York’s child pornography law, we expressly recognized that there was no ‘question here of censoring a particular literary theme . . . .’” Id. at 383-84.

\(^3\) In Federalist 84, Hamilton asked derisively, “What is the liberty of the press? Who can give it any definition that would not leave the utmost latitude for evasion? I hold it to be impracticable. . . .” The FEDERALIST No. 84, at 446 (Alexander Hamilton) (George Wescott Carey et al. eds., 2001).

\(^4\) Id.

\(^5\) Id.
ries” of expression that are outside the central precincts of the First Amendment.

The most celebrated category has been the most difficult of all to nail down. In a series of early-to-mid 20th century decisions made famous by Holmes’s and Brandeis’s dissents, the Court unconvincingly struggled to define a category of speech that was unprotected because of its propensity to encourage law-breaking. This is a kind of speech that lives in the shadows of vivid metaphors—“clear and present danger,” “shouting ‘fire’ in a crowded theater”—but that eludes categorical definition. The Court finally settled on a highly speech-protective formulation in Brandenburg v. Ohio, allowing suppression only when speech incites imminent law-breaking that is also likely to imminently occur. It is, of course, unclear how “imminent” the law-breaking must be, how clear the intent to incite must appear from the speaker’s words (or actions), or even whether the threatened law-breaking must be “serious.” Further, it is quite alarming to imagine the Brandenburg standard applying to the solicitation of murder. In this age of radical Islamist incitement to violence, disguised as religious speech, many harder questions about the scope of Brandenburg likely will arise. But beyond the difficulties of definition, it is important for our purposes to recognize the sensible motivation behind regulating this speech. Incitement to immediate law-breaking short circuits the usual remedies for bad speech, because it eliminates the possibility of counter-speech. Such speech does not seek to exchange ideas or further political consensus. Indeed, such speech is the antithesis of political speech because it seeks to subvert the political process altogether.

The specter of violence also led the Court to define two other areas of unprotected speech: “fighting words” and “true threats.” These are first cousins to Brandenburg speech, but present subtly different dynamics. Fighting words, for instance,
threaten not merely imminent law-breaking but rather violence against the speaker himself. They refer to abusive face-to-face language calculated, or perhaps only likely, to evoke an immediate retaliation against the speaker. The nature and circumstances of the speech make it more like a slap in the face—or as John Hart Ely wrote, an “unambiguous invitation to a brawl”—and less like an invitation to exchange ideas. In other words, fighting words are not looking for counter-speech, but for counter-violence. The Supreme Court has not upheld a conviction based on the fighting words rationale since Chaplinsky in 1947, so it is unclear how this doctrinal category has been influenced by the Court’s subsequent development of the incitement category, or whether this category is entirely separate.

“True threats” are words that are intended to place, and actually do place, someone in fear that force or violence will be used against them. Such expression is outside the First Amendment because it engenders fear in the recipient, altering his behavior and perhaps promoting retaliation. In Virginia v. Black—a case about cross-burning—the Court was willing to disassociate the harm posed by this symbolic threat from the racist ideology historically intertwined with it. On this view, the Court would likely have approved Virginia’s singling out of cross-burning as a “virulent” form of symbolic threat, had the Court not struck down the law for other reasons. This should be contrasted with the Court’s treatment of virulent fighting words in R.A.V. v. City of St. Paul. There, the Court was unwilling to detach the ideology of racist, religious or other epithets from their heightened propensity to cause fights. Unlike in Black, the R.A.V. Court invalidated the law as a form of viewpoint discrimination against certain ideologies. The difference between Black and R.A.V. is hard to justify, although it

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9 JOHN HART ELY, DEMOCRACY AND DISTRUST 114 (1980).
11 See id. at 361-63.
12 See id. at 363-67 (plurality op.).
may turn on the difference between threats and fighting words, or perhaps on the differences between symbols and purely verbal expression.

But looming violence is not the only reason the Court has singled out unprotected areas of speech. The Court's treatment of "obscenity" takes us one step closer to the problem of child pornography, and so it is worth understanding precisely why the Court allows government greater latitude for regulating obscene expression. The Court originally approved the exclusion of obscenity from the First Amendment strictly on the grounds that such limitations were widely embraced by the framing generation. Since then, the Court has had to refine its understanding of what, precisely, constitutes unprotected obscene expression. This has not been easy, evidenced by the fact that, for several years, the Court could not agree on a standard and simply reversed and remanded cases when five justices, applying their own standards, deemed allegedly obscene materials protected. With Miller v. California in 1973, however, the Court finally achieved majority consensus. Under the Miller standard, the government may regulate materials as "obscene" only if a trier of fact, under authoritatively interpreted state law, finds that (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically described by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Unsurprisingly, this Byzantine definition raises as many questions as it answers. The Court has since clarified that (1) local community standards determine prurience and patent offensiveness, as opposed to state or national standards; (2) jury verdicts, however, are subject to

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17 Id. at 25.
judicial review to guard against "constitutionally aberrant" determinations of local community standards; and (3) the presence vel non of serious content is not governed by local community standards, but rather by a reasonable person standard. Finally, in Miller itself, the Court provided a rather embarrassing sampling of the activities state law may deem "patently offensive" sexual depictions—confirming the impression that the Miller Court had in mind pornography of the "hard core" variety.

Why is obscene expression withdrawn from First Amendment protections? The overriding state interest articulated in Miller is avoiding offending the sensibilities of unwilling recipients and exposure to juveniles. But in a companion case, Paris Adult Theater I v. Slaton, the Court articulated a wider range of state interests in combating obscenity. The Court recognized the public's interest in "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." More strikingly, the Court suggested that a state might conclude that "commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior." The Court explicitly rejected the notion that the state's interest was confined to ensuring that the traffic in obscenity was based on the participating adults' consent. It remains to be seen whether

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21 Miller, 413 U.S. at 25. A few additional nuances of obscenity law should be noted. Prior to Miller, the Court had held that the state may not criminalize the private possession of even legally obscene material. Stanley v. Georgia, 394 U.S. 557 (1969). But notwithstanding Stanley, the Court allows states to criminalize the importation and interstate transportation of obscene materials, even if destined for purely private use. See United States v. Twelve 200-Foot Reels of Super 8mm Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); United States v. Riedel, 402 U.S. 351 (1971).

22 Miller, 413 U.S. at 18-19.


24 Id. at 58.

25 Id. at 63.
this language from *Paris Adult Theater I* survives more recent decisions of the Court that constitutionalize the notion of consenting adults' privacy in both reproductive and non-reproductive sexual matters.26

When turning to the First Amendment law of child pornography, it should be underscored that the Supreme Court has chosen to address this area as doctrinally distinct from the category of obscenity. The Court discerns a conceptually different harm posed by the materials themselves, and consequently recognizes a distinct state interest in regulating the expression. There is much to be said for this approach, but it should be said that there is something artificial about it. Child pornography and hard-core pornography are not distinct categories of expression; they are close neighbors in the same lurid neighborhood. The fact that the Court has elected to treat them as separable doctrinal categories should not obscure the fact that employing children in pornography remains a particularly sickening subgenre of an already diseased field. This becomes relevant later in the paper, for where the doctrinal tools of child pornography law prove inadequate, the government can, and has, turned to the category of obscenity for an alternative mode of attack.

In a 1982 decision, *Ferber v. New York*, the Supreme Court held that a state may criminalize visual depictions of sexual conduct involving minors that would not otherwise meet the *Miller* obscenity standard.27 The state would, of course, have to adequately define the prohibited conduct. In *Ferber*, the Supreme Court approved a New York law that criminalized the "promotion" of a "sexual performance" by a child less than 16 years old.28 It is worth underscoring precisely how the *Ferber*

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28 *Id.* at 750-51. A *performance* was defined as "any play, motion picture, photograph or dance" or "any other visual representation exhibited before an audience." *Id.* at 751 (quoting N.Y. Penal Law § 263.00(4)). A *sexual performance* was defined as "any performance or part thereof which includes sexual conduct by a child less than 16 years of age." *Id.* (quoting § 263.00(1)). In turn, *sexual conduct*
standard departs from the *Miller* obscenity standard. As the Court explained, with regard to child pornography, *Ferber* “adjusts” *Miller* as follows:

[1] A trier of fact need not find that the material appeals to the prurient interest of the average person; [2] it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and [3] the material at issue need not be considered as a whole.\(^{29}\)

What are the distinct reasons for which child pornography is unprotected by the First Amendment? First and foremost, the state has a compelling interest in safeguarding the physical and psychological well-being of minors—more precisely, in safeguarding minors from being “subjects of pornographic materials.”\(^{30}\) By contrast, *Miller* had identified no state interest in the adult performers’ physical, moral, or psychological welfare. Second, the distribution network for child pornography may be closed, both to prevent further harm to the subject children caused by circulation of the “permanent record of [their] participation,” and also to choke off the market for the pornography.\(^{31}\) Third, the state could strike at the economic drivers—advertising and selling—of the pornography.\(^{32}\) Finally, the Court asserted that any serious literary, scientific, or educational value from such depictions is virtually non-existent:

[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized . . . . Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The

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was defined as “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.” *Id.* (quoting § 263.00(3)). Under the New York law, promotion of a child sexual performance means “to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.” *Id.* (quoting § 263.00(5)).

\(^{29}\) *Id.* at 764.

\(^{30}\) *Id.* at 757-59.

\(^{31}\) *Id.* at 759-60.

\(^{32}\) *Id.* at 761-62.
First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.\textsuperscript{33}

Subsequently, the Court held that, unlike garden-variety obscenity, the state may criminalize the private possession of child pornography.\textsuperscript{34}

II. VIRTUAL AND SIMULATED CHILD PORN: THE CONVERSATION BETWEEN CONGRESS AND THE COURT

The standard federal definition of child pornography tracks the boundaries set out in \textit{Ferber}.\textsuperscript{35} In 1996, however, Congress broadened federal law to strike at the phenomena of so-called "virtual" and "simulated" child porn by passing the Child Pornography Prevention Act of 1996 (the "CPPA").\textsuperscript{36} In 2002, the Supreme Court invalidated parts of the CPPA in \textit{Ashcroft v. Free Speech Coalition}.\textsuperscript{37} The paper will discuss the CPPA in terms of the \textit{Ashcroft} decision.

A key provision of the CPPA prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."\textsuperscript{38} As discussed below, this provision was struck down by \textit{Ashcroft}, and has been rewritten by the 2003 amendments to the CPPA.\textsuperscript{39} Another CPPA provision struck down by \textit{Ashcroft} was

\textsuperscript{33} \textit{Id.} at 763 (citation omitted).

\textsuperscript{34} Osborne v. Ohio, 495 U.S. 103 (1990).


\textsuperscript{37} 535 U.S. 234 (2002).


\textsuperscript{39} See § 2256(8)(B) (now defining "visual depiction" as "a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct" (emphasis added)). For the
one prohibiting any sexually explicit image that was “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression” it depicts “a minor engaging in sexually explicit conduct.” This section was dropped from the law in the 2003 revision. The Ashcroft Court did not address (because it was not challenged) the CPPA provision prohibiting child pornography through “computer morphing,” defined as visual depictions that were “created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.” Why did Ashcroft invalidate the “appears to be” and “conveys the impression” provisions of the CPPA? Understanding that will clarify the current limits placed by the First Amendment on child pornography law.

The Ashcroft majority (Kennedy, with Stevens, Souter, Ginsburg and Breyer) focused most of its analysis on the “appears to be” provision. In striking it down, the majority emphasized that the CPPA went well beyond the Miller obscenity standards because it banned materials without regard to whether they appealed to the prurient interest, whether they depicted sexual activity in a patently offensive manner, whether they had any serious value, and (implicitly) whether the works were considered “as a whole.” The majority also reasoned that the provision detached the CPPA from the unique state interests at stake in Ferber—which targeted “speech that itself is the record of sexual abuse”—because the CPPA “prohibits speech that records no crime and creates no victims by its production.” The majority was concerned that, because the “appears to be” provision was divorced from both Miller and Ferber, it could sweep into its coverage genuine literary works that depict “an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme


§ 2256(8)(D) (repealed 2003) (emphasis added).

§ 2256(8)(C).

Ashcroft, 535 U.S. at 240

Id. at 250 (emphasis added).
in art and literature throughout the ages."\textsuperscript{44} The Court was particularly exercised over the prospect of the CPPA criminalizing Baz Luhrmann's film version of \textit{Romeo and Juliet}, and the Academy Award-winning films \textit{Traffic} and \textit{American Beauty}..\textsuperscript{45}

The majority was not receptive to the government's arguments that the CPPA properly banned "virtual" child pornography because such material provided tools for pedophiles to seduce children, or because they "whet people's appetite" for actual child pornography. The majority reasoned that "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."\textsuperscript{46} Exploiting a connection between virtual child pornography and actual child sexual abuse would require, in the majority's view, a much closer link (one presumably on the order of \textit{Brandenburg}-type "incitement").\textsuperscript{47} Nor did the majority accept the argument that, because the virtual images were "indistinguishable" from real images, the two kinds of images were part of the same "market" and thus required a blanket ban. The majority called this argument "somewhat implausible" because, it thought, "[i]f virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes."\textsuperscript{48} No one would risk producing real child pornography, the majority reasoned, if "fictional, computerized images would suffice."\textsuperscript{49}

Finally, the majority rejected the argument that indistinguishable virtual images made prosecution of genuine child pornography difficult because "[e]xperts . . . may have difficulty in saying whether the pictures were made by using real children or by using computer imaging."\textsuperscript{50} The majority thought this argument "turn[ed] the First Amendment upside down" by

\textsuperscript{44} \textit{Id.} at 246.
\textsuperscript{45} \textit{Id.} at 247-48.
\textsuperscript{46} \textit{Id.} at 253.
\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.} at 254.
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} \textit{Id.}
calling for the banning of protected speech to further the suppression of unprotected speech.\footnote{Id. at 255.} A premise of Free Speech doctrine, said the Court (pointing to the overbreadth doctrine as an example), was that even unprotected speech could not be banned if a substantial amount of protected speech were thereby censored.\footnote{Id.}

Concurring, Justice Thomas was more receptive to this “prosecution thwarting” argument than the majority. Thomas believed the government’s fears here were speculative because it had not identified any cases of a defendant successfully raising such a defense, but he allowed that “technology may evolve 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.”\footnote{Id. at 259 (Thomas, J., concurring).} Contrary to the majority’s overbreadth point, Thomas reasoned that the government “may well have a compelling interest in barring or otherwise regulating some narrow category of ‘lawful speech’ in order to enforce effectively laws against pornography made through the abuse of real children.”\footnote{Id. (Thomas, J., concurring).}

In partial concurrence, Justice O’Connor (joined by Chief Justice Rehnquist and Justice Scalia) also lent support to this rationale. With respect to images that are computer-generated and “virtually indistinguishable” from real images (i.e., “virtual child pornography”), O’Connor had real concern that “defendants indicted for the production, distribution, or possession of actual child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated.”\footnote{Id. at 263-64 (O’Connor, J., concurring).} She worried that the “rapid pace of advances in computer-graphics technology” could soon make this danger real.\footnote{Id. at 264 (O’Connor, J., concurring).} O’Connor would therefore have struck down the “appears to be” provision only as to “the subset of cases involving youthful adult pornography” (i.e., pornography involving adults who
looked like minors). Rehnquist and Scalia disagreed with her on that last point, finding limiting constructions of the provision as applied to "youthful adult pornography" that would make it applicable only to the "hard core of child pornography" already proscribable under Ferber (without explaining, however, how Ferber applies to "youthful-looking adult actors").

The majority spent very little time in striking down the provision prohibiting material that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." Focused not so much on the content of material as on how it is presented, this provision appeared to be a "pandering" provision. While pandering may have some bearing on whether material is legally obscene, the CPPA provision went well beyond the parameters the Court had marked out in the past, and was therefore, the majority concluded, substantially overbroad. For instance, the provision would have made all possessors of "pandered" material liable for prosecution, whether or not they themselves pandered the materials.

Responding to Ashcroft, in 2003 Congress passed the PROTECT Act, amending federal child pornography law. The definition of child pornography in § 2256(8)(B) (the "appears to be" provision invalidated by Ashcroft) was changed to "any visual depiction . . . where . . . such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." The House Conference Report explains that

[t]his section narrows the definition of child pornography under 18 U.S.C. § 2256(8)(B) to depictions that are "digital images" (e.g., picture or video taken with a digital camera),

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57 Id. at 266 (O'Connor, J., concurring).
58 Id. at 269 (Rehnquist, C.J., concurring).
61 Ashcroft, 535 U.S. at 258.
“computer images” (e.g., pictures scanned into a computer), or “computer-generated images” (e.g., images created or altered with the use of a computer). The Supreme Court was concerned in [Ashcroft] that the breadth of the language would prohibit legitimate movies like Traffic or plays like Romeo and Juliet. Limiting the definition to digital, computer, or computer-generated images will help to exclude ordinary motion pictures from the coverage of “virtual child pornography.”

The House commentary further explains that the amended section

further narrows the definition by replacing the phrase “appears to be” with the phrase “is indistinguishable from.” That new phrase addresses the Court’s concern that cartoon-sketches would be banned under the statute. “The substitution of ‘is indistinguishable from’ in lieu of ‘appears to be’ more precisely reflects what Congress intended to cover in the first instance, and eliminates an ambiguity that infected the current version of the definition and that enabled those challenging the statute to argue that it ‘capture[d] even cartoon-sketches and statues of children that were sexually suggestive.’”

Buttressing that line of thought, the amended law now defines “indistinguishable” as “virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct.” It also includes the caveat that “[t]his definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.”

Furthermore, the definition of child pornography itself in § 2256(8)(B) (the revised “is, or indistinguishable from” provi-

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64 Id.
65 § 2256(11).
66 Id.
sion) was narrowed by clarifying that any "simulated" sexually explicit conduct must be "lascivious," in addition to the other requirements of (8)(B) and (2)(B). The House commentary explains that this narrowing of the definition of child pornography "require[s] a simulated image to be lascivious to constitute child pornography under the new definition in 18 U.S.C. § 2256(8)(B)," and therefore, "child pornography that simulates sexually explicit conduct must be lascivious as well as meet the other requirement of the definition." Under the version struck down by Ashcroft, the combination of (2)(A) and (8)(B) would have permitted finding child pornography from a visual depiction that "appeared to be" of a minor engaging in "simulated" sexual intercourse, whether or not the simulated image was "lascivious." Additionally, "sexually explicit conduct" under (2)(B) was redefined, not only as "lascivious simulated sexual intercourse," but also as "graphic sexual intercourse." Under the amended law, "graphic" means "that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted." This is intended to clarify further the types of images proscribed as "virtual" child pornography under (8)(B). For reference purposes, the entirety of amended § 2256 appears below. |

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67 § 2256(2)(B).
69 § 2256(2)(B) (emphasis added).
70 § 2256(10).
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(1) "minor" means any person under the age of eighteen years;

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or
(v) lascivious exhibition of the genitals or pubic area of any person;

(B) For purposes of subsection 8(B) of this section, “sexually explicit conduct” means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

(3) “producing” means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) “organization” means a person other than an individual;

(5) “visual depiction” includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) “computer” has the meaning given that term in section 1030 of this title;

(7) “custody or control” includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) “child pornography” means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that 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.

The 2003 amendments also include a “new and comprehensive” affirmative defense to distribution or possession of child pornography. The amended law provides that subsections (1), (2), (3)(A), (4) and (5) of § 2252 are subject to the affirmative defenses that:

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and (B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

None of the affirmative defenses, however, are available for

(9) “identifiable minor”—
(A) means a person—
(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or
(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
(ii) who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and
(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) “graphic”, when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term “indistinguishable” used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

72 See § 2252A(c).
73 § 2252A(c)(1)-(2). The affirmative defenses are additionally subject to certain notice requirements.
offenses described under the so-called “morphing” provision.\textsuperscript{74} The House commentary explains that the Court in \textit{Ashcroft} seemed to leave open the possibility that a “more complete affirmative defense” provision could have contributed to saving the law’s constitutionality.\textsuperscript{75} In \textit{Ashcroft}, the Court had read the previous affirmative defense provisions as affording defenses to distributors, but not possessors, of materials, and also as affording no affirmative defense to those who produce materials through computer imaging or other means that “do not involve the use of adult actors who appear to be minors.”\textsuperscript{76} The expanded affirmative defense provisions are designed to remedy those deficiencies.

A new pandering provision punishes any person who knowingly

advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.\textsuperscript{77}

The House Commentary explains that

\[\text{(t)his provision bans the offer to transact in unprotected material, coupled with proof of the offender’s specific intent. Thus, for example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography. The provision makes clear that no actual materials need exist; the government establishes a violation with proof of the}\]

\textsuperscript{74} See § 2256(8)(C).
\textsuperscript{76} See \textit{Ashcroft v. Free Speech Coalition}, 535 U.S. 234, 255-56.
\textsuperscript{77} § 2252A(a)(3)(B).
communication and requisite specific intent. Indeed, even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material. 78

This new pandering provision seems designed to remedy the overbreadth of the pandering provision struck down in Ashcroft. 79 As discussed below, however, this provision has already been invalidated by one federal circuit court as facially overbroad and vague. 80

Finally, the amended law creates two new offenses related to child pornography but attacking the problem through different avenues. Section 2252A(a)(6) “creates a new offense that criminalizes the act of using any type of real or apparent child pornography to induce a child to commit a crime.” 81 Section 1466A creates new offenses that target actual or simulated depictions of minors that meet the obscenity standards of Miller. 82 As the House Commentary explains, “[t]his section prohibits any obscene depictions of minors engaged in any form of sexually explicit conduct and prohibits a narrow category of ‘hardcore’ pornography involving real or apparent minors, where such depictions lack literary, artistic, political, or scientific value.” 83

III. SELECTED ISSUES ADDRESSED BY LOWER COURTS

A. The Limits of Ashcroft

Several federal circuit courts have reached the seemingly obvious conclusion that Ashcroft was strictly limited to overrul-

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80 See infra Part III.D.
82 See id.
83 Id. The commentary goes on to explain that the offense in § 1466A is “subject to the penalties applicable to child pornography, not the lower penalties that apply to obscenity, and it also contains a directive to the U.S. Sentencing Commission requiring the Commission to ensure that the U.S. Sentencing Guidelines are consistent with this fact.” Id.
ing the “appears to be” provision of previous § 2256(8)(B) and the expanded “pandering” provision of previous § 2256(8)(D). Consequently, the decision did not touch other provisions in § 2256 or other federal child pornography laws. Therefore, the decision did not touch other provisions in § 2256 or other federal child pornography laws. In a similar vein, federal courts have concluded that a conviction under § 2422(b) (attempting to “coerce and entice” a minor to engage in sexual activity) is not called into question by Ashcroft, where a government agent posed as a minor in an internet chat room. Thus, notwithstanding Ashcroft, an actual minor is not constitutionally necessary for an attempt conviction under § 2242(b).

In United States v. Bach, the Eighth Circuit upheld a conviction under § 2256(8)(C) (the “morphing” provision) where a nude, sexually explicit photo of a 16-year-old boy had been altered to have the face of the actual boy replaced by the face of a “well-known child entertainer.” The image still fell within Ferber because it involved the image of an actual minor. The Bach court seemed to focus on the harm to the “child entertainer” from having the altered image distributed, as opposed to the harm to the unidentified minor from making the photo to begin with. Finally, Bach left open the possibility that certain applications of § 2256(8)(C) might be unconstitutional under Ashcroft, without specifying what kind of applications.

The Bach court also addressed, and rejected, the argument that the right to privacy recognized by the Supreme Court in Lawrence v. Texas calls into question this particular conviction under federal child pornography laws. In Bach, a 40-year-old

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84 See, e.g., United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003); accord United States v. Deaton, 328 F.3d 454 (8th Cir. 2003); United States v. Kelly, 314 F.3d 908, 911 (7th Cir. 2003); United States v. Richardson, 304 F.3d 1061, 1063-64 (11th Cir. 2002).
85 United States v. Davis, 2006 WL 226038 (10th Cir. 2006), cert. denied, 126 S. Ct. 2918 (2006); accord United States v. Thomas, 410 F.3d 1235 (10th Cir. 2005); United States v. Meek, 366 F.3d 705 (9th Cir. 2004); United States v. Root, 296 F.3d 1222 (11th Cir. 2002).
87 See id. at 631-32.
88 See id. at 628-29; see also Lawrence v. Texas, 539 U.S. 558 (2003).
man took and transmitted pictures of a 16-year-old boy masturbating and engaging in oral sex (apparently different photos than the one at issue in the “morphing” discussion, supra). Notably, in this case, the relevant state age of consent (Minnesota) was 16, whereas federal law defined “minor” as under 18. The court reasoned that the federal government’s definition of “minor” as “under 18” was rationally related to its interest in enforcing child pornography laws, notwithstanding the divergence from the Minnesota age of consent.

B. Ashcroft and Evidentiary Standards

Several federal courts have concluded that Ashcroft did not establish a categorical rule of evidence requiring expert testimony to prove that an unlawful image is of a real child. In many cases, juries can distinguish between real and virtual images. Under federal child pornography laws, however, the government does bear the burden of proving that children depicted in allegedly unlawful images are real children. Thus, the First Circuit found that the defendant had a right to have a fact-finder (in this case, the trial court) decide whether the depicted children were real. Reversing the conviction, the First Circuit found this was not done, even where the trial court had accepted expert testimony that the images satisfied the “Tanner Scale” (which categorizes the physical characteristics of children). The court reasoned that the Tanner Scale findings would have also been consistent with youthful-looking adults. Consistent with this, however, other courts have concluded that the government need not necessarily produce evi-

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89 Id. at 622.
90 See id. at 629.
91 United States v. Kimler, 335 F.3d 1132 (10th Cir. 2003); accord United States v. Irving, 432 F.3d 401 (2d Cir. 2005), withdrawn & superseded on reheg, 432 F.3d 401 (2d Cir. 2006); United States v. Deaton, 328 F.3d 454 (8th Cir. 2003); United States v. Hall, 312 F.3d 1250 (11th Cir. 2003).
92 See, e.g., United States v. Hilton, 386 F.3d 13 (1st Cir. 2004).
93 Id. at 18-19.
94 Id.
95 Id.
dence in addition to the computer images to prove that real children are depicted in the computer images. The Illinois Supreme Court’s reasoning in People v. Normand is illustrative:

If child pornographers had easy access to the technology to produce virtual child images that are indistinguishable from images using real children, no reason would exist to use real children. The risk of prosecution and prison sentences for using real children contrasts sharply with the legality of using virtual child images. Few pornographers would be willing to take that risk if a legal means of producing the same type of images existed. Yet, if virtual child pornography exists, it has not been well publicized. Given the substantial market for child pornography on the Internet, it stands to reason that such a radical development would not go unnoticed, especially in legal and law enforcement circles. Therefore, we are not convinced that this technology is so widely available that the State must be required as a matter of law to produce evidence in addition to the images themselves to carry its burden of proof.

C. “Unit of Prosecution” in Child Pornography Cases

A few courts have addressed the difficult issue of the appropriate “unit of prosecution” in child pornography cases—that is, whether counts against defendants should be grouped by individual images, by websites, or by some other grouping. In United States v. Reedy, the Fifth Circuit decided that, given the ambiguity of § 2252 on this question, the “rule of lenity” required that counts against a defendant be grouped by website, as opposed to individual image. Recently, in a case of apparent first impression, State v. Kujawa, the Louisiana First Circuit Court of Appeals approved the imposition, under state law,

94 See People v. Normand, 831 N.E.2d 587 (Ill. 2005); accord United States v. Slanina, 359 F.3d 356 (5th Cir.), cert. denied, 543 U.S. 845 (2004); Kimler, 335 F.3d 1132; Hall, 312 F.3d 1250.
95 Normand, 831 N.E.2d at 595.
96 304 F.3d 398 (5th Cir. 2002).
of fifteen counts of child porn possession for fifteen separate images. The Kujawa court reasoned that the question was essentially one of statutory construction, concluding that “[a] careful reading of the entire statute reveals that the legislative intent was to proscribe possession of any single image. The use of the plural form was clearly a matter of grammatical style and not suggestive of an intent to establish a unit of prosecution based upon a broad course of conduct involving multiple contraband images.” The relevant Louisiana law defined child pornography as “[t]he photographing, videotaping, filming, or otherwise reproducing visually of any sexual performance involving a child under the age of seventeen,” and in turn defined “sexual performance” as “any performance or part thereof that includes sexual conduct involving a child under the age of seventeen.”

D. Review of the 2003 Amendments

No federal or state appellate decisions have yet addressed the constitutionality of the new “indistinguishable from” provision in § 2256(8)(B). One is thus left to speculate whether the change from “appears to be” to “indistinguishable from” will really make a difference to the amended law’s adherence to First Amendment standards. Congress seems to be betting on the strength of the “prosecution thwarting” rationale of Justices like Thomas and O’Connor (who partially concurred in Ashcroft). But the five-justice majority that rather forcefully repudiated that rationale is still on the Court. The replacement


100 Kujawa, 929 So.2d at 111 .


102 See supra notes 62, 64-66 and accompanying text.
of Chief Justice Rehnquist by John Roberts, and Justice O'Connor by Samuel Alito, does not disturb that balance. While doctrinal alteration is certainly possible in this area, it seems unlikely that the “indistinguishable from” provision will be upheld under Ashcroft.

One federal circuit court has recently addressed the amended pandering provision in § 2252A(a)(3)(B), which was intended to remedy the pandering provision struck down by Ashcroft.\(^{103}\) In a thorough opinion, the Eleventh Circuit in United States v. Williams said essentially that Congress had provided a partial and inadequate fix to the former provision's defects. Williams struck down the new pandering provision as both unconstitutionally overbroad and vague.\(^{104}\) William's possession of child pornography under § 2252A(a)(5)(B) was upheld, but an additional pandering conviction was overturned. In an internet chat room, Williams had told an undercover federal agent that he had sexually explicit photos of his own four-year-old daughter. A subsequent search of Williams’ computer revealed at least twenty-two images of actual child pornography. Williams was convicted, not only of possession of child pornography, but also with “promoting . . . material ‘in a manner that reflects the belief, or that is intended to cause another to believe,’ that the material contains illegal child pornography.”\(^{105}\)

The court provided a detailed and helpful summary both of the problem of child pornography and of Congress's efforts to combat it. The court was refreshingly candid about how the online world exacerbates the problem of stamping out the disease:

The anonymity and availability of the online world draws those who view children in sexually deviant ways to websites and chat rooms where they may communicate and exchange images with other like-minded individuals. The result has been the development of a dangerous cottage industry for the production of child pornography as well as the accretion of

\(^{103}\) See supra note 40 and accompanying text.

\(^{104}\) United States v. Williams, 444 F.3d 1286 (11th Cir. 2006).

\(^{105}\) Id. at 1288-89; see also 18 U.S.C. § 2252A(a)(3)(B) (Supp. 2003).
ever-widening child pornography distribution rings. Our concern is not confined to the immediate abuse of the children depicted in these images, but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children. Regulation is made difficult, not only by the vast and sheltering landscape of cyberspace, but also by the fact that mainstream and otherwise innocuous images of children are viewed and traded by pedophiles as sexually stimulating.\footnote{Williams, 444 F.3d at 1290 (footnote omitted).}

Unhappily for the government’s case, however, the court was equally clear-eyed about the limits on its efforts imposed by the First Amendment and the Supreme Court’s approach in \textit{Ashcroft.}

The \textit{Williams} court did recognize that the amended pandering provision had cleared up some of the prior law’s defects. The law no longer criminalized pandered materials “for all purposes in the hands of any possessor based on how they were originally pandered.”\footnote{Id. at 1295.} Instead, the focus now shifted from “regulation of the underlying material to regulation of the speech related to the material.”\footnote{Id.} Furthermore, Congress had evidently abandoned the “secondary effects and market deterrence justifications” disapproved in \textit{Ashcroft}, in favor of a renewed emphasis on the “prosecution thwarting” problem posed by computer generated child porn.\footnote{Id. at 1298.} But these improvements to the law were insufficient to overcome the problems of overbreadth and vagueness.

The court focused on the amended provision’s de-coupling of pandering words from the nature of the material pandered. No actual or even simulated child pornography need exist, since the provision embraces “purported” material. According to the court, this means that pandering speech is “criminalized even when the touted materials are clean or non-existent.”\footnote{Id. at 1298. The court explained that “any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography mate-}
Essentially, since there was no requirement of any illegal or potentially illegal materials associated with the pandering, the amended provision would criminalize speech amounting to the advocacy of future illegal conduct. The law, of course, may not constitutionally forbid even speech advocating illegal conduct unless it rises to the level of Brandenburg-type incitement or other unprotected categories.\textsuperscript{111} Furthermore, the law’s criminalization of speech that merely “reflects the belief” that material is real or simulated child porn—when the material may not actually be anything of the kind—raises the specter that the law could penalize the “deluded” pandering of innocuous materials or, worse, “the thoughts conjured up by . . . legal materials.”\textsuperscript{112} The court simply rejected additional congressional findings that the pandering provision was necessary to drying up the market for child porn, observing that “Congress has again failed to articulate specifically how the pandering and solicitation of legal images, even if they are promoted or believed to be otherwise, fuels the market for illegal images of real children engaging in sexually explicit conduct.”\textsuperscript{113} Finally, the court also found that the “purported” and “reflects the belief” aspects of the amended provision were unconstitutionally vague, “fail[ing] to convey the contours of its restriction with sufficient clarity to permit law-abiding persons to conform to its requirements.”\textsuperscript{114}

\begin{footnotes}
\item\textsuperscript{111} \textit{Id.}; see supra notes 7-9 and accompanying text.
\item\textsuperscript{112} \textit{Williams}, 444 F.3d at 1299-1300. The court also found inapposite the government’s attempt to categorize the amended provision as the kind of pandering law approved by the Supreme Court in \textit{Ginzburg v. United States}: that case had merely allowed evidence of pandering as probative of the Miller obscenity standard. \textit{Id.} at 1300-1302; see \textit{Ginzburg v.United States}, 383 U.S. 463 (1966). The court also suggested that \textit{Ginzburg} may also no longer be good law after the Supreme Court’s decision in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.}, that afforded commercial speech greater First Amendment protection. See 425 U.S. 748 (1976); \textit{Williams}, 444 U.S. at 1301-02.
\item\textsuperscript{113} \textit{Williams}, 444 F.3d at 1303-04.
\item\textsuperscript{114} \textit{Id.} at 1305-07.
\end{footnotes}