

2011

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### Recommended Citation

Paula Bird (2011) "Virtual Child Pornography Laws and the Constraints Imposed by the First Amendment," *Barry Law Review*: Vol. 16: Iss. 1, Article 5.  
Available at: <http://lawpublications.barry.edu/barryrev/vol16/iss1/5>

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## VIRTUAL CHILD PORNOGRAPHY LAWS AND THE CONSTRAINTS IMPOSED BY THE FIRST AMENDMENT

Paula Bird<sup>1</sup>

### I. INTRODUCTION

“If we don’t stand up for children, then we don’t stand for much.”<sup>2</sup> This sentiment is a resounding example of how we, as a society, feel about the protection of our children. Stories of the abuse and exploitation of children strike at our hearts, and move us to safeguard those who are vulnerable. It provokes us to punish those who dare to harm them. It comes as no surprise, then, that lawmakers have crafted stringent laws directed against the production, distribution, and possession of child pornography.<sup>3</sup> Unfortunately, however, the easy accessibility and increasing popularity of the internet has cleared a path for computer crimes, including the distribution, possession, and, with the powers of computer animation, even creation of child pornography.<sup>4</sup>

For well over a decade, legislation has been attempting to crack down on criminals who have used this method to distribute and/or possess child pornography.<sup>5</sup> One of these legislative acts was the Child Pornography Prevention Act of 1996 which considered possession of virtual child pornography-pornography made with morphed computer images and without real children - a crime.<sup>6</sup> Unfortunately, the Supreme Court struck down this Act in 2002, declaring that it was unconstitutional because of its infringement on the First Amendment.<sup>7</sup> Since then, legislation and the courts have continued to battle against virtual child pornography while attempting to adhere to the limitations of the First Amendment.<sup>8</sup>

Recent developments in case law have once again called into question the constitutionality of laws surrounding child pornography.<sup>9</sup> Obviously, reconciling the competing interests of the First Amendment with the prevention of the sexual exploitation of children has proven to be a struggle which has yet to be completely

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1. J.D., Barry University Dwayne O. Andreas School of Law, 2011; B.S. in Psychology, University of Central Florida, 2007.

2. Marian Wright Edelman (The Founder and President of the Children Defense Fund).

3. See generally Child Pornography Prevention Act of 1996, H.R. 3610 [hereinafter CPPA of 1996]; *invalidated* by Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 2003 Stat. 151 (2003) (codified as amended at 18 U.S.C. §§ 2252, 2252A, 2256 (2008) [hereinafter PROTECT Act of 2003].

4. See Chelsea McLean, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL’Y 221 (Fall 2007) [hereinafter McLean].

5. See generally *Id.*

6. CPPA of 1996, *supra* note 3.

7. Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

8. See McLean, *supra* note 4.

9. See generally *United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008).

won by either side.<sup>10</sup> In light of this tension, this article seeks to navigate through the complexities involved with the uncertain future of virtual child pornography laws. First, a brief history of the legislative actions and court rulings regarding unprotected speech and virtual child pornography will be set forth. Then, a discussion of the current standing of child pornography laws will be presented. Entailed in this discussion will be a vigorous inspection of the current statutes and how they simultaneously affect law enforcement, prosecutors, and defendants. Finally, the potential future of laws regarding virtual child pornography will be analyzed. This will necessarily include addressing the issues of how the application and interpretation of the laws are changing and how the Supreme Court might react to the criticisms of current legislation and case law.

## II. HISTORICAL OVERVIEW OF CHILD PORNOGRAPHY

### A. Forbidden Speech: Not all Speech is Protected

The Constitution grants the American people with the freedom of speech.<sup>11</sup> However, it has long been recognized that the right of free speech is not an absolute right devoid of limitations and restrictions.<sup>12</sup> As stated in *Chaplinsky v. New Hampshire*, a ground-breaking First Amendment case for its delineation of what constitutes forbidden speech, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”<sup>13</sup> Included within these punishable classes of speech are the lewd and obscene.<sup>14</sup>

### B. The Initial Reaction to the Burgeoning Industry of Child Pornography

Unfortunately, laws prohibiting obscenity proved ineffective in eradicating the proliferating industry of child pornography because not all child pornography fit under the rubric of obscene materials.<sup>15</sup> For example, in *New York v. Ferber*, the defendant, Ferber, sold two films portraying young boys masturbating.<sup>16</sup> Had Ferber’s prosecution rested solely on laws prohibiting obscenity, he would have managed to evade conviction because the sexual act of masturbation, in and of itself, is not considered legally obscene.<sup>17</sup> As a result, the Federal Government, as well as a majority of the States, began enacting laws that forbade the distribution of child pornography without the additional requirement that the material be legally obscene.<sup>18</sup> The Supreme Court approved of such legislation in *Ferber*, determining

10. See McLean, *supra* note 4.

11. U.S. CONST. amend. I.

12. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

13. *Id.* at 571-72.

14. *Id.* at 572.

15. See S. Rep. No. 95-438 (1977).

16. *New York v. Ferber*, 458 U.S. 747, 752 (1982).

17. *Id.*

18. *Id.* at 749.

that: 1) the State's interest in ensuring the physical and psychological welfare of children was "compelling;" 2) the distribution of child pornography is inherently intertwined with the sexual abuse of children; 3) the distribution of child pornography supplied an economic incentive and was therefore, a fundamental component of the production of such materials - an activity already recognized as illegal; 4) any value found in materials presenting children performing sexual acts was slight, if not *de minimis*; and 5) distinguishing child pornography as an unprotected class of speech was not "incompatible" with previous decisions.<sup>19</sup> As a result of these findings, the Court held that child pornography involving an "element of scienter" and a visual portrayal of sexual conduct by children, and lacking any serious literary, artistic, political, or scientific value, is not protected speech under the First Amendment.<sup>20</sup>

Criminalizing the production and distribution of child pornography, while a valiant effort, proved insufficient to completely eliminate the market for child pornography.<sup>21</sup> Rather, the market simply went underground to compensate for the attack on production and distribution, making it even more challenging to resolve the child pornography crisis.<sup>22</sup> In response, Congress enacted legislation banning the mere possession, and not just production and distribution, of pornographic images of children.<sup>23</sup> In *Osborne v. Ohio*, the defendant argued that state of Ohio could not constitutionally proscribe possession of child pornography since the Supreme Court had previously stated in *Stanley v. Georgia*,<sup>24</sup> a case involving the possession of obscene materials, that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."<sup>25</sup> The Court responded to Osborne's claims by asserting that the State's prohibition against possessing child pornography was not based on a "paternalistic interest" in controlling Osborne's mind, as it was in *Stanley*, but was instead aimed at wiping out the exploitation of children.<sup>26</sup> Accordingly, the Supreme Court further endorsed the efforts of legislation to stamp out child pornography by ruling that possession, and not just production and distribution, could also be criminalized.<sup>27</sup>

### C. ...But Did Legislation Go Too Far?

Despite these efforts, however, sexual exploitation of children continued to run rampant.<sup>28</sup> In particular, the easy accessibility and increasing popularity of

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19. *Id.* at 756-64.

20. *Id.* at 764-65.

21. *See Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

22. *Id.*

23. *Id.* at 143.

24. *Stanley v. Georgia*, 89 S.Ct. 1243 (1969).

25. *Osborne*, 495 U.S. at 108-09.

26. *Id.* at 109.

27. *Id.* at 111.

28. *See Free Speech Coalition*, 535 U.S. 234 (2002).

computers created a wellspring for crimes, including the distribution, possession, and with the powers of computer animation, even creation of child pornography without actually utilizing children.<sup>29</sup> In order to combat this new avenue made available to pedophiles to exploit children and evade conviction, Congress passed the Child Pornography Prevention Act of 1996 which considered possession of virtual child pornography - pornography made with morphed computer images and without real children - a crime.<sup>30</sup> In its findings, Congress determined that while virtual child pornography may not involve, and therefore, does no actual, physical harm to minors, these images still endanger children in indirect ways.<sup>31</sup> For instance, pedophiles could use this material to convince children to engage in sexual activity by presenting the child with visual images portraying other children participating in sexual acts and enjoying such activity.<sup>32</sup> Congress also found that virtual child pornography has the potential to “whet ... [the] sexual appetites” of pedophiles, thus further fostering the creation and distribution of child pornography and the sexual abuse of real children.<sup>33</sup> Finally, Congress recognized that as technology continued to advance, it would become more difficult to verify that images contain real children, thereby supplying a viable defense which could be used by pedophiles to escape prosecution.<sup>34</sup>

Eventually, opposition to the Child Pornography Prevention Act of 1996 caught the attention of the Supreme Court in *Ashcroft v. Free Speech Coalition*.<sup>35</sup> The Court countered each of Congress’s individual findings.<sup>36</sup> First, while it was conceded that virtual child pornography may indeed be employed by pedophiles to lure children, the Court asserted that there are many other things innocent in themselves, such as cartoons, toys, and candy, which could be used for the same inappropriate purposes and yet it would not be expected for those items to be prohibited.<sup>37</sup> As to virtual child pornography whetting the appetites of pedophiles, the Court contended that the government could not constitutionally base legislation on the “mere tendency” of speech to promote illegal acts.<sup>38</sup> The Court emphasized that laws aimed at controlling the thoughts of individuals are impermissible, specifically stating that “[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”<sup>39</sup> Concerning Congress’s final claim regarding the difficulties imposed on prosecutors to prove that a real child, and not a virtual child, was used, the Court argued that suppressing lawful speech (pornography using a digital image) as a means to suppress unlawful speech (pornography using real children) cannot be

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29. *Id.* at 239-40.

30. CPPA of 1996, *supra* note 3.

31. *Free Speech Coalition*, 535 U.S. at 241.

32. *Id.*

33. *Id.*

34. *Id.* at 242.

35. *Id.* at 239.

36. *See Id.* at 250-58.

37. *Id.* at 251.

38. *Free Speech Coalition*, 535 U.S. at 253.

39. *Id.*

tolerated.<sup>40</sup> All in all, the Court determined that laws proscribing virtual child pornography were overbroad and infringed upon the First Amendment rights of individuals.<sup>41</sup>

### III. CURRENT STANDING OF CHILD PORNOGRAPHY

#### A. The PROTECT Act

With the demands placed by *Free Speech Coalition*, Congress rushed to craft legislation which would adhere to the restrictions placed by the First Amendment but would not compromise the objective of the Child Pornography Prevention Act of 1996. They came up with the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), a compilation of statutes aimed at preventing child abuse.<sup>42</sup> The PROTECT Act, encompassing 18 U.S.C. §2252, 18 U.S.C. §2252A, and 18 U.S.C. §2256, prohibits the creation, distribution, and possession of child pornography.<sup>43</sup> Under these statutes, child pornography is described as any visual depiction of sexually explicit conduct that includes: a) a minor, b) a digital or computer image that is “indistinguishable” from that of a real minor, or c) an image which has been created or modified to appear to be that of an “identifiable minor” engaging in sexually explicit conduct.<sup>44</sup> An “identifiable minor” is defined as either a person who was under the age of eighteen at the time the visual image was created or whose image as a minor was employed in creating or modifying the visual image and that person is recognizable as an actual person through the person’s face or some other distinctive characteristic.<sup>45</sup> A digital or computer image that is “indistinguishable” from that of a real minor is described as being “virtually indistinguishable,” in that an ordinary person viewing such image would come to the conclusion that the image is of a real child.<sup>46</sup> It is specifically stated that this definition excludes “depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.”<sup>47</sup>

#### B. An Avenue of Escape for Defendants

These subsequent alterations to child pornography supplied pedophiles with the ammunition to avoid prosecution and, for those who had already been convicted, to appeal their convictions. In *United States v. Ellyson*, the defendant was convicted of possession of child pornography under the provisions of the Child Pornography Prevention Act of 1996 after several computer disks containing sexually explicit images of children of children, as well as other materials, were discovered at his

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40. *Id.* at 255.

41. *Id.* at 258.

42. 18 U.S.C. § 2252; 18 U.S.C. § 2252A; 18 U.S.C. § 2256.

43. *Id.*

44. 18 U.S.C. § 2256(8).

45. 18 U.S.C. § 2256(9).

46. 18 U.S.C. § 2256(11).

47. *Id.*

home.<sup>48</sup> Ellyson appealed his conviction on the basis that the jury instruction defined child pornography as “any visual depiction . . . of sexually explicit conduct, where the production of such visual depiction involves the use of a minor . . . engaging in sexually explicit conduct; or such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct.”<sup>49</sup> With this argument, Ellyson successfully managed to have his conviction vacated and remanded because of the possibility that he was convicted on the basis of possessing “virtual” child pornography not containing an actual child, since the government did not establish that a real child was harmed in making the images.<sup>50</sup>

The current parameters of child pornography laws are further explained by the decision in *United States v. Hilton*.<sup>51</sup> Hilton was convicted for possession of child pornography under the Child Pornography Prevention Act of 1996.<sup>52</sup> He appealed his conviction, maintaining that the prosecution offered no proof that the paraphernalia brought into evidence contained images of “actual” children and, therefore, the images could simply be composed of fictitious, computer-generated children, the possession of which is not illegal.<sup>53</sup> Hilton’s conviction was vacated.<sup>54</sup> The court concluded that in order to maintain a conviction against a defendant, the prosecution has the burden of proving that the image or images contain actual children.<sup>55</sup> It was emphasized that the government is not discharged of its burden of proof merely because a defendant neglects to make an argument or because of a lack of evidence suggesting the possible “artificiality” of the children presented.<sup>56</sup> Providing proof that the visual depictions utilize real children is an element of the crime of possession, as well as production and distribution, of child pornography which must be satisfied by the prosecution and which should not be transferred to the defendant as an affirmative defense.<sup>57</sup>

### C. The Burden on the Prosecution

These new strictures placed on the government had not only legal, but also practical consequences. After all, taking into consideration that Congress itself made a finding that “new photographic and computer imaging technologies make it possible to produce . . . visual depictions of what *appear to be* children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from un-retouched photographic images of actual children,”<sup>58</sup> how can prosecutors prove that an image is abusing a real child versus a computer-generated

48. *United States v. Ellyson*, 326 F.3d 522, 526 (4th Cir. 2003).

49. *Id.*

50. *Id.* at 535.

51. *United States v. Hilton*, 386 F.3d 13 (1st Cir. 2004).

52. *Id.* at 14.

53. *Id.* at 14-19.

54. *Id.* at 14.

55. *Id.* at 18.

56. *Id.*

57. *Id.*

58. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, div. A, tit. I, § 121 (1)(5), 110 Stat. 3009-26. (emphasis added).

creation? This triggered law enforcement to formulate some feasible solution. The National Center for Missing and Exploited Children's (NCMEC) Child Victim Identification Program (CVIP) operates as the "national clearinghouse" for child pornography cases.<sup>59</sup> Law enforcement agencies can submit copies of the seized images to CVIP and the evidence is analyzed.<sup>60</sup> CVIP then returns a child identification report to the law enforcement agency, listing which children have been previously identified as real children.<sup>61</sup> With prosecutors scrambling to verify the actual identity of the children in the images so that there is no doubt as to whether the visual depictions are real or creations, CVIP has performed a vital role in convictions.<sup>62</sup> However, while CVIP has indeed proved to be a great resolution in identifying the realness of the victims, with the continuing advancements in technology, it does not, and cannot, completely solve the problem of proving that an image is not just a computer-generated creation.

#### **D. Combining Obscenity Prohibitions with the PROTECT Act**

The legislative branches have made further attempts to combat the use of these defenses used by pedophiles by delving into the idea of including obscenity statutes in the PROTECT Act.<sup>63</sup> Created in the PROTECT Act is a new statute, 18 U.S.C. §1466A, which employs the *Miller* standard for obscenity in cases involving sexually explicit images of children.<sup>64</sup> Section 1466A prohibits images of minors that are "obscene," regardless of whether the children are real and regardless of what form of media, whether it be drawings, paintings, sculptures, etcetera, and punishes those who violate the statute as if they had been convicted of a child pornography crime.<sup>65</sup> Correspondingly, 18 U.S.C. §1462 prohibits the transportation of such materials as described in §1466A.<sup>66</sup>

### **IV. THE FUTURE OF VIRTUAL CHILD PORNOGRAPHY: COULD THE APPLICATION AND INTERPRETATION OF THE LAWS BE CHANGING?**

#### **A. The First Signs of Leniency from the Courts**

Although *Free Speech Coalition* certainly limits the abilities of Congress and of law enforcement to convict creators, distributors, and possessors of child pornography, courts actually seem almost unwilling to allow those indicted with

59. Michelle K. Collins, *Child Pornography: A Closer Look*, POLICE CHIEF, Mar. 2007, available at [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=1139&issue\\_id=32007](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=1139&issue_id=32007).

60. *Id.*

61. *Id.*

62. *Id.*

63. Brian G. Slocum, VIRTUAL CHILD PORNOGRAPHY: DOES IT MEAN THE END OF THE CHILD PORNOGRAPHY EXCEPTION TO THE FIRST AMENDMENT?, 14 ALB. L.J. SCI. & TECH. 637, 693 (2004).

64. See 18 U.S.C. §1466A (2003); See also *Miller v. California*, 413 U.S. 15, 26 (1973) (stating that "[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection").

65. *Id.*

66. 18 U.S.C. §1462 (1996).



these charges to escape conviction based upon the defense that the child or children are not real.<sup>67</sup> *United States v. Irving*, decided by the Second Circuit, is one such recent case demonstrating the slackening restrictions that courts are imposing on the government in establishing its case against pedophiles.<sup>68</sup> The defendant was a school physician convicted under the PROTECT Act for possession of seventy-six video files of child pornography, as well as several other heinous child sexual abuse charges.<sup>69</sup> He appealed his conviction, insisting that the holding in *Free Speech Coalition* essentially created a “bright-line rule” which requires the prosecution to offer evidence, other than just the images themselves, to prove beyond a reasonable doubt that real children were abused in the images.<sup>70</sup> The Second Circuit rejected this argument, stating, “[a]lthough the Supreme Court noted the possible evidentiary difficulty of distinguishing virtual and actual child pornography, it did not establish a bright-line rule requiring that the government proffer a specific type of proof to show the use of an actual child.”<sup>71</sup> In effect, the court essentially upheld a jury verdict convicting the defendant of possession of child pornography based on videos where the government offered no proof beyond the videos themselves that the images were of real children.<sup>72</sup>

Other Circuits have followed suit in relaxing the constraints placed on prosecutors to establish that an actual child exists. In the First Circuit case, *United States v. Rodriguez-Pacheco*, the defendant, Rodriguez-Pacheco, was sentenced to thirty months imprisonment, followed by a three year supervised release after he pleaded guilty to possession of child pornography as governed under the PROTECT Act.<sup>73</sup> In appealing the length of his sentence, Rodriguez-Pacheco urged the court to conclude that the prosecution must be required to produce expert testimony regarding the realness of a child in each image brought into evidence before the government is deemed to have met its burden of proof.<sup>74</sup> The court decided that the premise of the defendant’s argument was erroneous.<sup>75</sup> The court reasoned that the issue of whether or not an image was created with a non-virtual child is a question to be determined by the trier of fact, and as long as the Government presents enough of a showing – this could simply be the images themselves – to sway the trier of fact, then expert testimony is not an absolute requirement.<sup>76</sup>

67. See generally *United States v. Irving*, 452 F.3d 110 (2d Cir. 2006); *United States v. Rodriguez-Pacheco*, 475 F.3d 434 (1st Cir. 2007); *United States v. Hoey*, 508 F.3d 687 (1st Cir. 2007).

68. *Irving*, 452 F.3d 110 (2d Cir. 2006).

69. *Id.*

70. *Id.* at 121.

71. *Id.*

72. *Id.* at 120-22.

73. *Rodriguez-Pacheco*, 475 F.3d 434 at 436 (1st Cir. 2007).

74. *Id.*

75. *Id.* at 437.

76. *Id.* at 438; See *Hoey*, 508 F.3d 687 (1st Cir. 2007).

### B. *United States v. Whorley: The First Case of its Kind*

The lenient stance that several lower courts have taken in these cases, however, does not compare to the glaring disregard of the Supreme Court's rationale in *Free Speech Coalition*, as does the case of *United States v. Whorley*.<sup>77</sup> In this case, a federal appeals panel affirmed the holding that child pornography is unlawful even if the pictures are simply drawn, in the first conviction since the passing of the 2003 federal statute against such cartoons.<sup>78</sup> Whorley was sentenced to twenty years imprisonment after being found guilty of knowingly receiving twenty Japanese anime-style cartoons portraying children engaging in sexually explicit acts, receiving fourteen digital photographs with minors engaging in sexually explicit acts, and sending, as well as receiving, twenty explicit emails about fantasies of child molestation.<sup>79</sup> To be precise, he was charged for being in violation of the PROTECT Act, specifically under sections 1462, 2252(a)(2), and 1466A(a)(1), respectively, of the Act.<sup>80</sup> On his appeal, Whorley made several contentions, namely that §1462 and §1466A(a)(1) are facially unconstitutional.<sup>81</sup> As previously mentioned, §1462 is the prohibition of importing and transporting, including knowingly receiving, obscene items through the use of "any express company or other common carrier or interactive computer service for carriage in interstate or foreign commerce."<sup>82</sup> Likewise, §1466A proscribes obscene visual depictions showing the sexual abuse of children, expressly including *drawings, cartoons, sculptures, and paintings* which *appear to be* of a child, as viable forms of media covered under the statute.<sup>83</sup> Section 1466A also proceeds to specifically state that it is "not a required element . . . that the minor depicted actually exist[s]."<sup>84</sup> Whorley contended that based on the opinion of the Supreme Court in *Free Speech Coalition*, although defamation, incitement, obscenity, and pornography produced with actual children are not protected under the First Amendment, a proscription against non-obscene items which do not use real children is "impermissibly overbroad."<sup>85</sup> The Fourth Circuit responded by concluding that in spite of the fact that §1466A(a)(1) does not require an actual child, the inclusion of the requirement in the statute that the image be obscene is sufficient to make it constitutional because the statute is then technically geared to

77. See generally *Whorley*, 550 F.3d 326 (4th Cir. 2008).

78. The Associated Press, 4th Circuit upholds law against cartoon child porn, Dec. 22, 2008, available at <http://www.firstamendmentcenter.org/news.aspx?id=21040> (last visited Jan. 15, 2010).

79. *Whorley*, 550 F.3d at 330.

80. See generally 18 U.S.C. §1462, 18 USC §2252(a)(2), 18 USC §1466A(a)(1).

81. *Whorley*, 550 F.3d at 330.

82. 18 U.S.C. §1462.

83. 18 U.S.C. §1466A ("Any person who . . . knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that-- (1)(A) depicts a minor engaging in sexually explicit conduct; and (B) is obscene; or (2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and (B) lacks serious literary, artistic, political, or scientific value . . . shall be subject to the penalties provided in section 2252A(b)(1) . . .").

84. 18 U.S.C. §1466A(c).

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

prohibit obscene speech, rather than child pornography.<sup>86</sup> Thus, §1466A(a)(1) escapes the requirement set out by the Supreme Court that there be an actual child victim in the image by posing as a restriction on obscene speech, rather than a restriction on child pornography.<sup>87</sup>

However, not all the judges in this case were of the same opinion that §1466A retained its validity by shifting the focus from child pornography to obscenity.<sup>88</sup> In fact, Circuit Judge Gregory, in his dissent, was of the strong opinion that Whorley had a valid argument.<sup>89</sup> He led off his robust support for Whorley's claim of the unconstitutionality of the statutes, stating that, "freedom of speech is 'the highest aspiration of the common people.' Indeed, '[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds,' and simply because 'society may find speech offensive is not a sufficient reason for suppressing it.'"<sup>90</sup> Judge Gregory did concede that even with the Supreme Court's refusal to impose a complete ban on virtual child pornography, it is still possible for an individual to be convicted on the ability of a jury to make a finding that cartoons of fictitious children are obscene.<sup>91</sup> Nevertheless, he wrote at length about the difficulties inherent with determining what is actually obscene.<sup>92</sup> He expressed his concern that the amorphous qualities of obscenity requirements make it a near impossibility to meet the level of proof required in the criminal sector.<sup>93</sup> He averred that, as it stands, the Government is required to prove not only that the "material appeal[s] to the prurient interest and that it . . . [is] patently offensive, but also 'call[s] on the prosecution to prove a negative, i.e., that the material was utterly without redeeming social value--a burden virtually impossible to discharge under our criminal standards of proof.'"<sup>94</sup>

Additionally, Judge Gregory had a significantly different understanding of the language of §1466A compared to the majority.<sup>95</sup> Disagreeing with the majority's contention that the statute covers pornographic articles of both real and fictitious children, he insisted that a clear reading of §1466A(a)(1) demands that the pornographic image include an *actual* minor engaging in sexually explicit acts, for an individual to be charged with violating the statute.<sup>96</sup> He denied the majority's line of reasoning by first alleging that 18 U.S.C. §2232 describes a minor as any person under eighteen years old.<sup>97</sup> A person, according to Black's Law Dictionary, is characterized as a "living human being" and as "a human being . . . with legal

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86. *Id.* at 337.

87. *Id.*

88. *See Id.* at 343-53 (Gregory, Cir. Judge, dissenting and concurring).

89. *See Id.*

90. *Id.* at 343.

91. *Id.* at 347.

92. *See Whorley*, 550 F.3d at 343-53.

93. *Id.* at 344.

94. *Whorley*, 550 F.3d at 344 (Gregory, J., dissenting) (quoting *Miller*, 413 U.S. at 22).

95. *Id.* at 351.

96. *Id.*

97. *Id.*

rights and duties.”<sup>98</sup> As such, “[a] child that is a figment of an illustrator’s imagination is not living, is not a human being with legal rights, and is certainly not natural in the legal sense of the word.”<sup>99</sup> Therefore, following this line of thought, an individual’s conviction for receiving obscene, sexually explicit caricatures of actual persons under eighteen years old would be entirely appropriate, but a conviction for receiving obscene, sexually explicit drawings of completely fictitious children would be a wholly different matter.<sup>100</sup> Moreover, Judge Gregory disputed the majority’s conclusion that §1466A(c), which states, “[i]t is not a required element of any offense under this section that the minor depicted actually exist,”<sup>101</sup> indicates that the government is not required to prove that the child shown in the image actually exists.<sup>102</sup> Rather, he stressed the intent of subsection §1466A(c), that the evidentiary proof necessary for an individual to be found guilty be loosened by releasing the government from the insurmountable task of identifying and locating the child or children used in the production of the pornography and maintained that this did not mean that the child depicted could be entirely fictitious.<sup>103</sup> Instead, for example, it was meant to prevent an individual from eluding conviction simply because a child did not “actually exist” in the sense that the child had passed away, or the child simply could not be identified even after an exhaustive search by law enforcement.<sup>104</sup>

Judge Gregory concluded his championing of Whorley’s claims by expressing his deep concerns about the infringements placed on individuals’ First Amendment rights, declaring:

Today, under the guise of suppressing obscenity -- whatever meaning that term may encompass -- we have provided the government with the power to roll back our previously inviolable right to use our imaginations to create fantasies. It is precisely this unencumbered ability to fantasize that has allowed this nation to reap the benefits of great literary insight and scientific invention. The Constitution’s inviolable promise to us is its guarantee to defend thought, imagination and fantasy from unlawful governmental interference regardless of whether such thoughts, imaginings, or fantasies are popular with the masses. It is in these moments that our grip on the rule of law and our fidelity to constitutional values is tested.<sup>105</sup>

98. *Whorley*, 550 F.3d at 351 (Gregory, J., dissenting) (quoting WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 877 (1994); *See also* BLACK’S LAW DICTIONARY 1178 (8th ed. 2004) (defining a person as “a human being”).

99. *Whorley*, 550 F.3d at 351 (Gregory, J., dissenting).

100. *Id.*

101. 18 USC §1466A(c).

102. *Whorley*, 550 F.3d at 351.

103. *Id.*

104. *Id.*

105. *Id.* at 353.

Despite the support Whorley had from Judge Gregory, on December 18, 2008 his convictions were affirmed.<sup>106</sup> Whorley then filed a petition for rehearing en banc which was also firmly denied on June 15, 2009.<sup>107</sup> Once again, however, he received further encouragement by Judge Gregory who urged Whorley to seek a grant of certiorari from the Supreme Court.<sup>108</sup> Whorley took his advice and petitioned the Supreme Court to review his case.<sup>109</sup> On January 11, 2010, the Supreme Court denied Whorley's petition for writ of certiorari.<sup>110</sup>

### C. Others Question the Constitutionality of §1462 & §1466A of the PROTECT Act

Although Whorley may have been the first to be convicted under 18 U.S.C. §1462 and 18 U.S.C. §1466A, sections enacted as a way to avoid the limitations forced on 18 U.S.C. §2252 and 18 U.S.C. §2252A by the finding in *Free Speech Coalition*,<sup>111</sup> other convictions, and as a result, a string of appeals, have sprung up in the wake of *Whorley*. In *United States v. Ryan*, a Second Circuit case, the defendant appealed his conviction on the basis of the unconstitutionality of 18 U.S.C. §1466A because the statute is overbroad.<sup>112</sup> "Under the *First Amendment's* overbreadth doctrine, 'a statute is facially invalid if it prohibits a substantial amount of protected speech.'"<sup>113</sup> Ryan attacked the validity of the statute by highlighting the fact that the statute extends to the mere possession of materials which do not involve real children and as such, there is no actual victim and therefore, no crime.<sup>114</sup> The court, however, disagreed, citing that the fact that 18 U.S.C. §1466A requires that the material be obscene is sufficient to protect it from being considered overbroad.<sup>115</sup>

Likewise, in *United States v. Mees*, defendant Matthew Mees posed a similar argument to the Eighth Circuit challenging the constitutionality of 14 U.S.C. §1466A.<sup>116</sup> Mees maintained that proscribing images depicting fictional characters cannot be enforced since characters in drawings have no age and, thus, it is not feasible to make an accurate determination of the definite age of a non-existent individual.<sup>117</sup> As such, it is impractical to expect a jury to make a legitimate finding of fact concerning this issue at trial.<sup>118</sup> The court responded by emphasizing that the issue of age is an element that the Government must prove

106. *Id.* at 343.

107. *United States v. Whorley*, 569 F.3d 211 (4th Cir. 2009), *denying reh'g* to 550 F.3d 326 (4th Cir. 2008).

108. *Id.* at 214 (Gregory, J., dissenting).

109. *Whorley v. United States*, 30 S.Ct. 1052 (2010), *denying cert.* to 550 F.3d 326 (4th Cir. 2008).

110. *Id.*

111. *Free Speech Coalition*, 535 U.S. at 258.

112. *United States v. Ryan*, No. 2:07-CR-35, 2009 U.S. Dist. LEXIS 53644, at \*23(D. Vt. May 26, 2009).

113. *Id.* at 23-24 (citing *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008)).

114. *Id.* at 23.

115. *Id.* at 24.

116. *United States v. Mees*, No. 4:09CR00145 ERW, 2009 U.S. Dist. LEXIS 48801, at \*3 (E.D. Mo. June 10, 2009).

117. *Id.*

118. *Id.* at 3-4.

beyond a reasonable doubt, and simply because a jury may find it difficult to ascertain the age of a fictional character does not, by itself, make the statute unconstitutional.<sup>119</sup> Still, Mees continued his defense by then asserting that an individual has a constitutional right to merely possess obscene materials.<sup>120</sup> He delineated this claim by pointing to the fact that the Supreme Court has previously concluded that the First and Fourteenth Amendments entitle individuals to be free from prohibitions against the mere private possession of obscene materials.<sup>121</sup> The court countered his claim, stating that the statute which the defendant is charged with and is currently challenging “does not make mere possession of obscene material a crime; rather, the statute requires some connection to interstate commerce.”<sup>122</sup> Thus, the defendant is not simply being charged with the mere possession of obscene material.<sup>123</sup> Instead, he has been charged with “possessing obscene material that was produced using materials that traveled in interstate commerce.”<sup>124</sup>

#### D. The Plausibility of the Supreme Court Reviewing the Issue

As it currently stands, these defendants have failed in their arguments to adequately contest the constitutionality of the §1466A portion of the PROTECT Act. Nonetheless, with the fairly recent influx of cases, such as *Whorley*, *Ryan*, and *Mees*, which use §1466A as a way around the mandates of *Free Speech Coalition*, it is entirely plausible that the Supreme Court would want to review the issue. It is also important to point out that even though there has been nearly a decade since the enactment of the PROTECT Act, there was a six-year span between the Child Pornography Prevention Act and the Supreme Court’s decision that it was unconstitutional in *Free Speech Coalition*. In fact, individuals in the forefront of the battle against the sexual exploitation of children suggest that the recent achievements of the prosecution of these pedophiles may not be as triumphant as it first seems.<sup>125</sup> Justin Fitzsimmons, a former prosecutor and senior attorney with the National Center for the Prosecution of Child Abuse, disclosed reservations about the actual success or failure of these prosecutions since the cases have just begun to be challenged.<sup>126</sup> Ernie Allen, the President of the National Center for Missing and Exploited Children, also expressed the uncertainty of the future of child pornography laws and the prosecution of those violating them.<sup>127</sup> After all, while these prosecutorial and legislative efforts have proved triumphant so far in attaining convictions, many of these cases are still in the appellate

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119. *Id.* at 9.

120. *Id.* at 11-12.

121. *Mees*, 2009 U.S. Dist. LEXIS 48801, at \*12; see *Stanley*, 89 S. Ct. at 1249.

122. *Id.*

123. *Id.*

124. *Id.*

125. See Ashley Broughten, *Tennessee Man Charged in ‘Virtual Pornography’ Case*, June 25, 2009, available at <http://edition.cnn.com/2009/CRIME/06/24/virtual.child.porn>.

126. *Id.*

127. *Id.*

process.<sup>128</sup> With the continued perseverance of these defendants appealing their convictions by consistently disclaiming the constitutionality of the PROTECT Act, their arguments are bound to capture the attention of the Supreme Court.

### **E. Should the Supreme Court Review the Issue?**

As pointed out above, it is certainly plausible that with the recent arrival of cases prosecuted under §1466A of the PROTECT Act, the Supreme Court may want to review the constitutionality of the Act. However, simply because it is a possibility that the Court may want to assess the situation, does not necessarily mean that the Court should, in fact, do so. Therefore, the question must be asked, should the Supreme Court review the issue? Clearly, there is a clash in the interpretation of the laws regarding virtual child pornography. The Supreme Court previously made it clear in *Free Speech Coalition* that the First Amendment interests of individuals prevents a complete ban on child pornography which did not include real children.<sup>129</sup> However, the moral reprehensibility inherent in the production and possession of such material, even though there is no real victim, makes it impossible for society to simply let it go unpunished. As a result, legislation, as well as the lower courts, has found ways around the mandates set forth in the Supreme Court's original ruling in *Free Speech Coalition*.<sup>130</sup> The issues which have been introduced thus far indicate the vital need for the Supreme Court to re-evaluate how virtual child pornography should be dealt with, if for no other reason than to clear up the confusion and alleviate the frustration currently running rampant amongst law enforcement, prosecutors, and defendants. A balance must be struck between our constitutional rights and our desire to protect our children. And as such, it is imperative that the Supreme Court review the constitutionality of section 1466A of the PROTECT Act in order to guide how legislation and the lower courts should respond to virtual child pornography.

### **F. If Reviewed, How Would the Supreme Court Resolve the Issue?**

If the Supreme Court does reanalyze this issue, will the PROTECT Act pass constitutional muster? Does cloaking portions of this Act under the guise of obscenity laws protect it from being deemed unconstitutional, as the Child Pornography Prevention Act of 1996 was inevitably judged to be? Because of the amorphous quality of what obscenity is composed of, it is impossible to predict. As Justice Brennan formerly noted, “[t]he problem is . . . that one cannot say with

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128. *Id.*

129. *Free Speech Coalition*, 535 U.S. at 244.

130. See 18 USC §1466A; 18 USC §1462; *Irving*, 452 F.3d at 110 (2006); *Rodriguez-Pacheco*, 475 F.3d at 434 (2007); *Hoey*, 508 F.3d at 687 (2007); *Whorley*, 550 F.3d at 326 (2008); *Ryan*, 2009 U.S. Dist. LEXIS 53644, at \*1 (2009); and *Mees*, 2009 U.S. Dist. LEXIS 48801, at \*1 (2009).

certainty that material is obscene until at least five members of [the Supreme] Court, applying inevitably obscure standards, have pronounced it so.”<sup>131</sup>

The Supreme Court has addressed the issue of what materials are obscene by delineating which elements must be met in order for a material to be lawfully deemed obscene in *Miller v. California*.<sup>132</sup> The three-part *Miller* test asks:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>133</sup>

The chances that a jury would determine any visual representation of the sexual abuse of a child, whether the child be real or fictitious, to not meet the standards of obscenity is definitely slim. After all, few other acts raise the same degree of condemnation than the abuse of children, especially the sexual abuse of children. And, without a doubt, the fierceness with which we guard our nation’s children is something to be commended.

But can it really be this simple to preclude pedophiles from finding refuge in the safeguards of First Amendment rights? The answer is doubtful for multiple reasons. First, if it was this simple, then what was the whole point of categorizing child pornography as a completely distinct class of unprotected speech apart from obscenity? Why not stick with the original classes of unprotected speech - the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words - if it is sufficient to combat the sexual exploitation of children just by obscenity laws?<sup>134</sup> One reason is because of the demanding impositions that the Supreme Court has previously placed on obscenity laws as compared to child pornography laws.<sup>135</sup> For example, when it comes to obscene materials, the government is required to use “rigorous procedural safeguards” prior to seizing any material which it deems to be obscene.<sup>136</sup> In fact, obscene material may not be removed from circulation until an adversarial hearing concerning the material is made and an official determination that the material is obscene has been declared.<sup>137</sup> Just the contrary is true with child pornography.<sup>138</sup> Since child pornography is provided less constitutional protection than obscenity, a prior adversarial hearing is not

131. Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628 (1973) (Brennan J. dissenting); see also *Miller*, 413 U.S. at 29 (agreeing with Justice Brennan’s assessment and noting that the absence of a single standard for testing obscenity has strained both the federal and state courts).

132. *Miller*, 413 U.S. at 24.

133. *Id.*

134. See *Chaplinsky*, 315 U.S. at 572.

135. Slocum, *supra* note 63, at 695.

136. *Id.*

137. *Id.*

138. *Id.*



required before the government is allowed to seize all copies of the suspected child pornography.<sup>139</sup>

Additionally, while the Supreme Court has previously determined that an individual can be convicted for the mere possession of child pornography in *Osborne*,<sup>140</sup> the Court has chosen the alternate when it comes to obscenity.<sup>141</sup> In *Stanley*, the appellant was charged and convicted for “knowingly hav[ing] possession of . . . obscene matter.”<sup>142</sup> The Supreme Court ruled that the First and Fourteenth Amendments proscribe lawmakers from making the mere private possession of obscene materials illegal.<sup>143</sup> The Supreme Court’s perspective on possession of obscene materials is perhaps most succinctly expressed by the Court when it quoted Judge Herbert of the Supreme Court of Ohio:

I cannot agree that mere private possession of . . . [obscene] literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual.<sup>144</sup>

Therefore, under the reasoning in *Stanley*, using obscenity laws as a guise to prohibit virtual child pornography is insufficient due to the inability of lawmakers to proscribe simple possession of obscene materials.<sup>145</sup>

As of yet, the implications of *Stanley* have been ignored as it concerns §1466A. The constitutionality of §1466A has, at least so far with the district and appellate courts, not been determined to be inadequate because it technically proscribes obscene child pornography from traveling through interstate or foreign commerce. Section 1466A(a) forbids any person from knowingly producing, distributing, receiving, or possessing with the intent to distribute obscene child pornography, whether a real or fictitious child exists.<sup>146</sup> Each of these actions is deeply connected with commerce.<sup>147</sup> However, §1466A(b) states that any person who knowingly possesses, even without an intent to later distribute, obscene pornographic material of children can also be charged with violating the PROTECT Act.<sup>148</sup> All that is required by §1466A(b) is that the visual depiction acquired had travelled by any means of interstate or foreign commerce, including

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139. *Id.*

140. *Osborne*, 495 U.S. at 112.

141. *See Stanley*, 394 U.S. at 568.

142. *Id.* at 558.

143. *Id.* at 568.

144. *Id.* at 562 n.7 (quoting *State v. Map*, 166 N.E.2d 387, 393 (Ohio 1960) (Herbert, J. dissenting)).

145. McLean, *supra* note 4, at 243.

146. 18 U.S.C. §1466A(a).

147. *See* 18 U.S.C. §1466A(d).

148. 18 U.S.C. §1466A(b).

through the computer.<sup>149</sup> This is actually how charges were imposed on Whorley.<sup>150</sup> He received the cartoons through an email.<sup>151</sup> To say the least, this connection to commerce seems tenuous at best. Does a personal email really have any effect on interstate or foreign commerce? Furthermore, with our current dependence on technology and with the ease of communicating information over state borders, is it truly even feasible to possess materials which have absolutely no connection to interstate or foreign commerce? It is certainly plausible that the Supreme Court would side with the arguments that these recent appellants have made, that a right to possess inherently includes a right to receive since it is nearly impossible to acquire a material without some connection to interstate or foreign travel.

## V. CONCLUSION

In conclusion, with the Supreme Court having previously decided that the language in the Child Pornography Prevention Act of 1996, which simply conveyed that an individual could be prohibited from producing, distributing, or possessing child pornography depicting an image which *appeared to be* that of a minor, the future of these portions of the PROTECT Act is uncertain at best.<sup>152</sup> The conduct portrayed in virtual child pornography is despicable and it is certainly hard to fathom any redeeming quality in such materials. Nonetheless, as the Supreme Court originally noted in *Free Speech Coalition*, the original purpose of categorizing child pornography as a separate class of unprotected speech was the compelling government interest in protecting children.<sup>153</sup> And since there are no actual victims in drawings or computer-generated images, then a statute proscribing such images sweeps too broadly and oversteps the Constitution's bounds.

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149. 18 U.S.C. §1466A(d).

150. *Whorley*, 550 F.3d at 331.

151. *Id.*

152. *See generally Free Speech Coalition*, 535 U.S. at 234.

153. *Id.* at 241.