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PEDOPHILES IN WONDERLAND: CENSORING THE SINFUL IN CYBERSPACE

GABRIELLE RUSSELL*

No one needs a First Amendment to write about how cute newborn babies are or to publish a recipe for strawberry shortcake. Nobody needs a First Amendment for innocuous or popular points of view. That's point one. Point two is that the majority—you and I—must always protect the right of a minority—even a minority of one—to express the most outrageous and offensive ideas. Only then is total freedom of expression guaranteed.

—Lyle Stuart in his introduction to *The Turner Diaries*¹

The primary allure of virtual worlds, and no doubt a large part of their success, derives from the anonymity they afford their denizens. In the real world, people often tailor their behavior according to what they perceive as their society's norms of what is appropriate for people of their age, appearance, job, social skills, or social status. The physical remove of virtual worlds inspires people to speak and move about freely, uninhibited by a fear of real-world repercussions. Recent developments at the intersection of cyberspace and terrestrial law, however, suggest that not all actions in virtual worlds are consequence-free.

This Comment analyzes the widely publicized issue of ageplay in virtual worlds, and discusses the merits of past and present regulations criminalizing such behavior. Congress has made numerous attempts to prevent the possession and distribution of sexually explicit renderings of minors which involved no actual minors in their production. This Comment points out the logical and constitutional problems with Congress's efforts to render this victimless activity criminal under both child pornography law and obscenity law, and concludes that so far as online ageplay is concerned, adults should be allowed to explore their fantasies with other consenting adults without the interference of terrestrial law.

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¹ Lyle Stuart, *Introduction by the Publisher to ANDREW MACDONALD, THE TURNER DIARIES* (2d ed., Barricade Books 1996) (1978).

I. INTRODUCTION

In September of 1998, police forces across the world banded together to bring down the Wonderland Club, an online child pornography ring spanning twelve countries.² Club membership was contingent on possession of a digital library containing no less than 10,000 indecent images of minors.³ Members would circulate these photographs throughout the network by sending them from computer to computer as encrypted image files.⁴ The network eventually collapsed as the result of a worldwide criminal investigation, code-named Operation Cathedral, when over a hundred men suspected of being members were arrested.⁵ Nearly a decade later, in 2007, two undercover reporters, one German and the other British, independently investigated rumors⁶ that Wonderland had reemerged and was flourishing as an adult theme park.⁷ The reporters confirmed these rumors when they returned with graphic footage of the unsavory activities they had witnessed while undercover.⁸

The new Wonderland, while dedicated to the same cause as the first, was an entirely different beast. It was not a file exchange, but rather a place, with slides and swing sets, schoolrooms and rose-colored bedrooms, and children that moved, spoke, and had sexual relations with adults in real time.⁹ Report Mainz, a German television news program, aired a segment featuring scenes from journalist Nick Schader's investigative report.¹⁰ At one point, the camera captures Schader entering a playground, zooming in

² Richard Barry, *Seven Britons Guilty over Child Porn Ring*, ZDNET, Jan. 10, 2001, <http://news.zdnet.co.uk/internet/0,1000000097,2083614,00.htm>; *Wickedness of Wonderland*, BBC NEWS, Feb. 13, 2001, <http://news.bbc.co.uk/1/hi/uk/1167879.stm>.

³ Barry, *supra* note 2.

⁴ *Id.*

⁵ Lucy Sherriff, *Child Porn Ring Smashed: Seven Plead Guilty*, THE REGISTER, Jan. 10, 2001, http://www.theregister.co.uk/2001/01/10/child_porn_ring_smashed/.

⁶ See, e.g., Posting of William Dobson to Massively, *Second Life "Wonderland" Scandal Hits Mainstream Media*, <http://www.massively.com/2007/10/31/second-life-wonderland-scandal-hits-mainstream-media> (Oct. 31, 2007, 07:00).

⁷ See *Report Mainz* (ARD television broadcast May 4, 2007), available at <http://www.youtube.com/watch?v=Wk8uNWF77gg> (last visited Oct. 22, 2008); *Sky News* (Sky News television broadcast Oct. 30, 2007), available at http://www.youtube.com/watch?v=dN_jr6xjs90 (last visited Oct. 22, 2008). For an English language transcript of the German-language broadcast, see posting of Eloise Pasteur to Second Life Insider, *Transcript of the German Piece About Age Play*, <http://www.secondlifeinsider.com/2007/05/11/transcript-of-the-german-piece-about-ageplay> (May 11, 2007, 17:55).

⁸ *Report Mainz*, *supra* note 7; *Sky News*, *supra* note 7.

⁹ *Report Mainz*, *supra* note 7; *Sky News*, *supra* note 7.

¹⁰ *Report Mainz*, *supra* note 7.

as he approaches a circle of young children seated calmly on the grass. Moments later, he is propositioned by a small girl.¹¹

The taboo nature of the graphically sexual scenes that follow is paralleled only by those featured in Jason Farrell's Wonderland report for British television channel Sky News,¹² During the course of their undercover investigations, Farrell and Schader discovered a dungeon located in a high school basement where children were bound and tortured, came across a club where children spoke of being held against their will and raped repeatedly, and were permitted to enter a room where adults met to watch and participate in the brutal rape of a teenage girl.¹³ Though this new Wonderland disappeared shortly after the German and American footage was aired, a new clone has already taken its place.¹⁴

It is a relief to know that the bleak underworld exposed by Schader and Farrell exists only on the Internet. No real minors were subjected to the violence described above—the sexual partners were little more than high-tech puppets manipulated by adults in an entirely computer-generated environment called Second Life.¹⁵ These online personae, called “avatars,” are three-dimensional characters that computer users create to represent themselves in online environments.¹⁶ While some adults design avatars that look like monsters or celebrities, others prefer to adopt a childlike appearance.¹⁷ And while some adults make innocent use of their youthful avatars, others favor less socially acceptable activities and use their young counterparts accordingly.¹⁸ Indeed, “virtual ageplay”¹⁹—sexual roleplay

¹¹ *Id.*

¹² *Sky News*, *supra* note 7.

¹³ *Report Mainz*, *supra* note 7; *Sky News*, *supra* note 7.

¹⁴ *Five News* (Five News television broadcast Oct. 6, 2008), available at <http://news.five.tv/news.php?news=176> (last visited Oct. 22, 2008); Posting of Tateru Nino to Massively, *Sky News Targets Sexual Ageplay in Second Life Again*, <http://www.massively.com/2008/03/03/sky-news-targets-sexual-ageplay-in-second-life-again> (Mar. 3, 2008, 22:45) [hereinafter *Ageplay in Second Life Again*]; Posting of Tateru Nino to Massively, *Wonderland Creator Promoting New Grid*, <http://www.massively.com/2008/03/06/wonderland-creator-promoting-new-grid> (Mar. 6, 2008, 21:15).

¹⁵ *Report Mainz*, *supra* note 7; *Sky News*, *supra* note 7.

¹⁶ This meaning for the word “avatar” did not come into use until the mid-to-late 1980s, and did not come into common use until popularized by Neal Stephenson in his cyberpunk novel, *Snow Crash*, published in 1992. NEAL STEPHENSON, *SNOW CRASH* 36 (Bantam Books 2000) (1992) (describing avatars as “the audiovisual bodies that people use to communicate with each other in the Metaverse”); Sean P. Egen, *The History of Avatars*, iMEDIA CONNECTION, Jun. 20, 2005, <http://www.imediaconnection.com/content/6165.asp>.

¹⁷ *Report Mainz*, *supra* note 7; *Sky News*, *supra* note 7.

¹⁸ Daniel Terdiman, *Phony Kids, Virtual Sex*, CNET NEWS, Apr. 12, 2006, http://news.cnet.com/Phony-kids,-virtual-sex/2100-1043_3-6060132.html.

occurring in a virtual world²⁰ like Second Life, where one avatar appears to be a child and the other an adult—has become a very popular and newsworthy online pastime.

This Comment describes the constitutional problems with legally proscribing “virtual ageplay”²¹ under either child pornography or obscenity law.²² It will begin with an explanation of virtual ageplay and an overview of the laws that bear on its legal standing, followed by a discussion of why regulation of such activity under child pornography law is inappropriate. The Comment concludes by exploring the potential regulation of virtual ageplay under obscenity law, ultimately rejecting that strategy as an unconstitutional restriction on free speech and individual liberty.

II. BACKGROUND

A. WHAT IS SECOND LIFE?

Second Life is a popular virtual world created by Linden Research, Incorporated (Linden).²³ While there are many kinds of virtual environments, many of which are text-based, massively multiplayer online game (MMOG) environments are the most like real-world environments, in appearance and in the way that users can interact with their surroundings and with each other.²⁴ A user navigates through these virtual worlds as an

¹⁹ Ageplay is a type of sexual or non-sexual roleplay in which one adult partner takes on the characteristics of a child. When played as a sex game, scenarios range from the more mainstream teacher-student variety to more extreme versions involving diaper changing and mock incest. *See, e.g.*, Kinky-wiki, Age Play, http://www.kinky-wiki.com/index.php?title=Age_Play (last visited Oct. 22, 2008).

²⁰ For the purposes of this Comment, the reader should understand the term “virtual world” to mean a three-dimensional online environment through which one can navigate an avatar much as one moves his or her own body through the real world. I will use the term “in-world” to refer to things or events in a virtual environment and “real-world” to refer to actual, tangible things or events in the real world.

²¹ Terdiman, *supra* note 18.

²² Ageplay has officially been banned by Linden Lab from Second Life under its “Community Standards” policy. Posting of Ken D. Linden to Official Second Life Blog, *Clarification of Policy Disallowing “Ageplay,”* <http://blog.secondlife.com/2007/11/13/clarification-of-policy-disallowing-ageplay> (Nov. 13, 2007, 17:10). However, since incidences of ageplay have been detected in Second Life as recently as March 3, 2008, months after a Linden Lab representative remarked on the impermissibility of in-world ageplay, and since the question of government regulation is distinct from that of regulation by private companies like Linden Lab, the issue is hardly moot. *See* Nino, *Ageplay in Second Life Again*, *supra* note 14.

²³ Second Life, What Is Second Life?, <http://secondlife.com/whatis/> (last visited Oct. 22, 2008).

²⁴ *See, e.g.*, LAWRENCE LESSIG, CODE: VERSION 2.0, at 12 (2006).

avatar that, depending on the MMOG, a user can design to look like anything from a wizard, to Bono from U2,²⁵ to a dominatrix rabbit.

Unlike some online environments that are themed or are specifically tailored to accommodate certain types of roleplay, such as the popular roleplaying games World of Warcraft and Everquest,²⁶ Second Life has no prefabricated motif, and users are not encouraged to perform set tasks or achieve specific goals.²⁷ In Second Life, avatars are free to do whatever their creators please: talk, dance, shop, give and attend rock concerts,²⁸ trade currency, interview for real-world jobs,²⁹ fly, smoke, and have sex—anything a real person can do, and more. What makes Second Life truly unique, however, is the degree to which users themselves are responsible for creating the environment.³⁰ At the outset, Linden created the basic software code for Second Life, which laid down the environment's geographical foundations and set the outermost boundaries for what could and could not occur there.³¹ Beyond that, individual users are left to create their own content.³² In Second Life, empty cyberspace can be turned into night clubs, shopping malls, breathtaking natural landscapes, reproductions of real-world places, scenes from dreams, and everything in between.³³ Anyone with enough time and the ability to write new pieces of code can make her fantasy a reality, and those without sufficient time or technological skill can purchase developed land, property, objects, and even

²⁵ U2 in SL Homepage, <http://www.u2insl.com/index2.html> (last visited Oct. 22, 2008).

²⁶ Everquest Homepage, <http://everquest.station.sony.com/> (last visited Oct. 22, 2008); World of Warcraft, Quests Basics, <http://www.worldofwarcraft.com/info/basics/quests.html> (last visited Oct. 22, 2008).

²⁷ LESSIG, *supra* note 24, at 13; Second Life, *supra* note 23.

²⁸ Posting of Aimee Weber to Second Life Insider, *Susan Vega to Perform Live in Second Life*, <http://www.secondlifeinsider.com/2006/07/17/suzanne-vega-to-perform-live-in-second-life/> (Jul. 17, 2006, 23:47).

²⁹ Anjali Athavaley, *A Job Interview You Don't Have to Show Up For*, WALL ST. J., June 20, 2007, at D1, available at http://online.wsj.com/article/SB118229876637841321.html?mod=hpp_us_editors_picks.

³⁰ Second Life, The Creations, <http://secondlife.com/whatis/creations.php> (last visited Oct. 22, 2008).

³¹ See LESSIG, *supra* note 24, at 15 (explaining how “technology constitutes the environment of the space”); Matthew J. Traum, *Second Life: A Virtual Universe for Real Engineering*, DESIGN NEWS, Oct. 22, 2007, http://www.designnews.com/article/6322-Second_Life_A_Virtual_Universe_for_Real_Engineering.php (“This unrestricted metaverse started as a bare abyss, existing only as lines of code on the Linden Lab servers.”).

³² Traum, *supra* note 31.

³³ Second Life, Create Anything, <http://secondlife.com/whatis/create.php> (last visited Oct. 22, 2008) (giving instructions for creating new content in Second Life); see also Second Life, *supra* note 30 (providing specific examples of user-created content).

complex gestures, such as the ability to French kiss or moonwalk, from someone else.³⁴

Although the future of Second Life and similar virtual worlds is uncertain,³⁵ membership increases daily,³⁶ and it seems likely that the popularity of the social medium of virtual worlds will only increase as technology advances.³⁷ In fact, Second Life's economy is growing steadily, and the prospects for investment and development have attracted many new users as well as the attention of many successful real-world companies.³⁸ Moreover, society is just starting to explore the potential of these forums. For instance, Seventh Circuit federal judge Richard Posner gave an in-world lecture on intellectual property rights to a group of avatars in 2006,³⁹ and leaders in fields as diverse as architecture and neurology have discussed the use of Second Life as a powerful educational and research tool.⁴⁰ For

³⁴ When last visited, items being sold on Xstreet SL for use in Second Life were a private tropical island, click-to-light fireplace logs, a medical exam table loaded with doctor-patient exam animations, a 1938 Carved Panel Hearse, and a wide variety of boots, tattoos, and revealing outfits. Xstreet SL, Second Life Commerce, <http://www.xstreetsl.com> (last visited Oct. 22, 2008) (listing Second Life creations for sale).

³⁵ Real world companies like IBM, Reebok, American Apparel, Starwood Hotels, Scion, and Cisco began advertising campaigns in Second Life in the hopes of expanding their markets. See Joe Haygood, *Companies Start to Pull Out of Second Life*, AEROPAUSE, July 16, 2007, <http://www.aeropause.com/2007/07/companies-start-to-pull-out-of-second-life/>. Some companies have pulled out after their efforts failed to produce significant results, but many remain, like IBM, which has been discussing with Linden the possibility of permitting users to take their Second Life avatars into other virtual realms. See posting of Akela Talamasca to Second Life Insider, *IBM Thinking of Virtual Passports*, <http://www.secondlifeinsider.com/2007/06/15/ibm-thinking-of-virtual-passports/> (June 15, 2007, 02:16).

³⁶ Dwell on It, Second Life Charts, <http://taterunino.net/statistical%20graphs.html> (last visited Oct. 22, 2008) (showing growth of the new user population).

³⁷ One advance that may encourage increased participation in virtual worlds is modification or redesigning of the network. Currently, residents of Second Life complain that response times slow significantly, and many popular areas reach maximum capacity, during peak periods, which can be extremely frustrating. Mitch Wagner, *Inside Second Life's Data Centers*, INFORMATION WEEK, Mar. 5, 2007, <http://www.informationweek.com/news/showArticle.jhtml?articleID=197800179>. According to recent reports, Linden Lab is currently working to increase user capacity from 100,000 simultaneous users to tens of millions. *Id.*

³⁸ See *supra* note 35.

³⁹ Posting of Robert J. Ambrogi to Legal Blog Watch, *Judge Posner's Second Life*, http://legalblogwatch.typepad.com/legal_blog_watch/2006/12/judge_posners_s.html (Dec. 12, 2006, 14:28).

⁴⁰ Posting of Chip Poutine to Virtual Suburbia, *Gathering Refuge*, <http://www.virtualsuburbia.com/2007/06/gathering-refuge.html> (June 12, 2007, 10:33) (critiquing the Second Life design projects of the Royal Institute of Technology Stockholm's LOL Architects and Australia's RMIT University School of Architecture and Design); Jonathan Silverstein, *A*

example, John Lester, a research associate at Harvard Medical School, created an island in Second Life for people with Asperger syndrome and their caregivers.⁴¹ The private island provides a safe place for Asperger patients to develop social skills without the pressure of having to face the real-world consequences of failed interactions.⁴²

Increasing interest and active participation in virtual worlds are good indications that the popularity of online communities like Second Life will continue to grow, attracting a more diverse user base and impacting the lives of active users ever more significantly. But just as there is great potential for these worlds to have a positive influence on the lives of individuals and on society at large, this social experiment also carries with it potential dangers. Users have already begun to complain about the presence of crime in Second Life, and both the academic and practicing legal communities have started to take these concerns more seriously, writing various papers (cited throughout this Comment) and even in some cases filing lawsuits based on incidents that have occurred in-world.⁴³

If the harms arising from participation in virtual worlds only affected people's in-world status, there would be less cause for involvement by real-world legal authorities. However, in-world actions can have real world consequences. For example, the in-world currency of Second Life, called Linden, attained real-world value when users became willing to pay real-world money for virtual property, goods, and services or, indirectly, to pay real-world money for virtual money to buy virtual goods. To facilitate these transactions, Linden Labs set up an online exchange where users can buy or sell Linden dollars. When the LindeX Dollar Exchange closed on February 5, 2008, the Linden traded at 267.7 per U.S. Dollar, and users had spent approximately 1.35 million U.S. Dollars buying virtual goods for use in Second Life since the previous day's closing.⁴⁴ Naturally, a number of enterprising Second Life salesmen have already achieved significant real-world success. Virtual real estate developer Anshe Chung, known in-world as Ailin Graef, made a million dollars (and the cover of *Business Week*) by selling real estate in Second Life.⁴⁵ Kevin Alderman, known in-

World Where Anything Is Possible, ABC NEWS, Aug. 9, 2005, <http://abcnews.go.com/Technology/FutureTech/story?id=1019818>.

⁴¹ Silverstein, *supra* note 40.

⁴² *Id.*

⁴³ See, e.g., Eric Reuters, *SL Business Sues for Copyright Infringement*, SECOND LIFE NEWS CENTER, July 3, 2007, <http://secondlife.reuters.com/stories/2007/07/03/sl-business-sues-for-copyright-infringement/>.

⁴⁴ LindeX Market Data, <http://secondlife.com/whatis/economy-market.php> (last visited Oct. 22, 2008) (showing current rate of exchange between the Linden and USD).

⁴⁵ Robert D. Hof, *My Virtual Life*, BUSINESS WEEK, May 1, 2006, at 72, available at http://www.businessweek.com/magazine/content/06_18/b3982001.htm.

world as Stroker Serpentine, in 2007 sold his virtual reproduction of Amsterdam on eBay to a Dutch media firm for \$50,000.⁴⁶

The backing of the virtual goods market by real-world currency enables users to violate real-world criminal laws without ever leaving the virtual world. On July 3, 2007, Kevin Alderman brought suit against Second Life resident Volkov Catteneo, whose real-world identity was unknown at the time, for copyright infringement.⁴⁷ Alderman, the creator of the SexGen bed, a piece of virtual furniture that enables avatars to engage in a wide range of sexual activities, alleged that Catteneo copied the bed and sold copies of it for one-third of Alderman's asking price of 12,000 Linden (roughly \$45).⁴⁸ Concluding that the in-world "abuse reporting" system would prove inadequate, Alderman turned to the federal court system for assistance.⁴⁹

B. VIRTUAL SEX

Online sexual expression has taken many forms, and continues to evolve in response to technological innovation. During the Internet's early years, the presence of sexual content was necessarily less overt. There were no websites as we now know them, no streaming videos or chat rooms, and avatars were still a thing of science fiction.⁵⁰ In the 1990s, one of the most technologically advanced methods available to groups of Internet users interested in sharing sexually explicit materials was to set up a Bulletin Board System (BBS). A BBS allowed users to share sexually explicit pictures by posting materials to, and retrieving materials from, a centralized location, accessible by dial-up modem.⁵¹ Currently, while the content of messages and nature of materials transmitted may not be fundamentally different than they were ten years ago, the manner in which information,

⁴⁶ Regina Lynn, *Stroker Serpentine, Second Life's Porn Mogul, Speaks*, WIRED, Mar. 30, 2007, http://www.wired.com/culture/lifestyle/commentary/sexdrive/2007/03/sex_drive0330.

⁴⁷ Reuters, *supra* note 43.

⁴⁸ *Id.*

⁴⁹ Users can file complaints against other users who violate Second Life's Terms of Service or Community Standards. However, the greatest penalty Linden Labs can impose for a violation is termination of a user's account. For a video tutorial on abuse reporting in Second Life, see Second Life, Video Tutorial/How to Report Abuse and Handle Griefing, http://wiki.secondlife.com/wiki/Video_Tutorial/How_to_report_abuse_and_handle_griefing (last visited Oct. 22, 2008).

⁵⁰ For a chronological overview of the major developments in Internet history, see Robert H. Zakon, Zakon Group LLC, Hobbes' Internet Timeline v8.2, <http://www.zakon.org/robert/internet/timeline> (last visited Oct. 22, 2008).

⁵¹ See, e.g., *United States v. Thomas*, 74 F.3d 701, 705 (6th Cir. 1996) (convicting couple of transporting obscene materials in interstate commerce for facilitating the transmission of those materials via BBS).

including sexually explicit information, is disseminated has evolved dramatically. With the creation of email, people can now exchange long, complex messages almost instantaneously. Chat rooms allow users to respond to the comments of others, who are potentially seated in front of computers halfway around the world, within seconds. Individuals can now reach a global audience simply by creating a website. And the existence of virtual worlds allows people to interact as avatars, not only through language, but through graphical displays, gestures, and pseudophysical contact.

The fact that all of this can be done anonymously, or pseudonymously, allows people to voice thoughts and feelings, and explore parts of themselves, that real-world norms compel them to suppress.⁵² Because the Internet offers a forum for every viewpoint and a safe corner for every fantasy, it is easy to see why sex has such a major presence there. The advent of chat rooms and instant messaging created a means for people to use explicit language to experiment sexually. Once the technology became available, some bold users, comfortable shedding a layer of anonymity, began to incorporate Internet-linked cameras, or webcams, into their online sex lives.⁵³ Those more comfortable off camera, or just interested in a different type of interaction, explored their fantasies with the help of avatars in MMOGs.

That sex is at least as popular a pastime in virtual environments as it is in the real world makes sense, given the unique opportunity for consequence-free experimentation that virtual environments provide. Worlds like Second Life afford even the most inhibited, risk-averse individuals the chance to explore their sexuality and toy with taboos like sadomasochism, prostitution, ageplay, and group sex.⁵⁴ However, despite the spirit of freedom that reigns in places like Second Life, there are certain behaviors governments will not tolerate in any space, real or virtual.⁵⁵ Thus, while heated debates rage over how the Internet should be regulated,⁵⁶ governments continue to extend the long arm of terrestrial law

⁵² Center for Internet Addiction Recovery, Cybersex/Cyberporn Addiction, http://www.netaddiction.com/cybersexual_addiction.htm (last visited Oct. 22, 2008) (noting that people “use this anonymity to experiment and secretly begin to explore things online that they would never do in real life”).

⁵³ *How to Use a Webcam for Virtual Sex*, EHOW.COM, http://www.ehow.com/how_2027078_use-cam-sex.html (last visited Oct. 22, 2008) (stating that “[w]ebcams and cybersex have become parts of modern sexuality”).

⁵⁴ *Having Sex*, WIRED, Oct. 2006, <http://www.wired.com/wired/archive/14.10/slentertainment.html>.

⁵⁵ See, e.g., *Thomas*, 74 F.3d at 701.

⁵⁶ LESSIG, *supra* note 24.

into cyberspace, as they have done since its inception.⁵⁷ While the branches of the United States government are still laboring to articulate the constitutionally permissible scope of legislative control over the availability of sexual content on the Internet,⁵⁸ Congress's actions over the past ten years suggest that virtual worlds may not remain free-love zones for much longer.

In the past, Congress has created laws to curtail the distribution of child pornography and to prevent minors from accessing age-inappropriate content.⁵⁹ More recently, Congress has expressed an interest in regulating sexually explicit communication between consenting adults that involves the mere *idea* of minors, namely, virtual ageplay.⁶⁰ Regulations of this variety grew out of child pornography jurisprudence, with Congress attempting to expand the scope of child pornography law to cover images of "virtual children"⁶¹ as well.

⁵⁷ See, e.g., *Thomas*, 74 F.3d at 701 (holding that the federal statute governing the transmission of obscene materials, 18 U.S.C. §§ 1462, applies to transmission of scanned pornographic images via dial-up modem because the Internet transmissions begin as tangible obscene objects and are received as tangible obscene objects, either as images on a computer screen or as a printouts). For more recent regulations, see, e.g., Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (codified as amended at 15 U.S.C. § 7701-7713 (2006)); 18 U.S.C. § 1037 (2006) (establishing national standards for the sending of commercial e-mail in the U.S.).

⁵⁸ For an overview of the arguments regarding the permissible use of content filters, compare *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (1993), with *Reno v. ACLU*, 521 U.S. 844 (1997).

⁵⁹ See, e.g., Child Protection and Obscenity Enforcement Act of 1998, 18 U.S.C. § 2257 (2006); Communications Decency Act (CDA) of 1996, 47 U.S.C. § 223 (2000 & Supp. V 2005); Child Online Protection Act (COPA) of 1998, 47 U.S.C.A. § 231 (2000). Because both laws prohibited obscene material as well as constitutionally protected, non-obscene sexually explicit material, these laws were challenged on First Amendment grounds. The CDA was struck down in *Reno v. ACLU*, 521 U.S. 844. Likewise, challenges to COPA are pending in the Third Circuit on appeal, and before the Supreme Court remanded the case to the District Court for the Eastern District of Pennsylvania, it predicted that the law would be found unconstitutional. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

⁶⁰ Consider, in particular, Congress's efforts to ban virtual child pornography under the Child Pornography Prevention Act of 1996 and the PROTECT Act of 2003. Child Pornography Prevention Act (CPPA) of 1996, Pub. L. No. 104-208, div. A, Title I, § 121, 110 Stat. 3009-26 (codified as amended in scattered section of U.S.C. (2006)); Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C. (2006)).

⁶¹ In CPPA, Congress included in the definition of child pornography "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." 18 U.S.C. § 2256(8) (2000), *invalidated by* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002), *amended by* Pub. L. No. 108-21, § 502, 117 Stat. 650, 678 (2003) (codified as amended at 18 U.S.C. § 2256(8) (2006)). A pornographic image that

C. OBSCENITY

Although child pornography law grew out of obscenity law precedents, the two areas of law are distinct.⁶² Obscenity law deals with sexual content featuring adults, whereas child pornography law deals with content featuring minors. Because the government has claimed a special interest in protecting minors from the harms incident to their involvement in pornography, a separate jurisprudence has evolved to regulate child pornography.⁶³ Child pornography law imposes stricter controls on sexual materials which involve children, and operates according to a different standard.

Obscenity law plays a strange and contentious regulatory role in the United States. While the Supreme Court has interpreted the First Amendment to deny the federal government the “power to restrict expression because of its message, its ideas, its subject matter, or its content,”⁶⁴ it has also acknowledged a number of exceptions to this rule. For example, speech which is used to commit fraud,⁶⁵ incite unlawful conduct,⁶⁶ or otherwise seriously threaten or harm third parties, falls outside the First Amendment’s scope. As a category of unprotected speech, obscenity is unique because it is excluded from First Amendment protection despite the lack of a definite link between it and any unlawful conduct or specific harm.⁶⁷ It is also anomalous in that its roots are grounded less

merely “appears to be” of a minor, but really is not, falls under the broad category of “virtual child pornography.” This category encompasses (1) images created using young-looking adults to intentionally give the impression that the subject is a minor; (2) images created by digitally modifying adult pornography to make the subject look like minors; and (3) images rendered on the computer “from scratch.” The virtual children involved in virtual ageplay, while never explicitly mentioned by Congress or any court, would fit into the last category.

⁶² See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 234-37 (2001).

⁶³ *New York v. Ferber*, 458 U.S. 747 (1982).

⁶⁴ *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

⁶⁵ See, e.g., *Schneider v. State*, 308 U.S. 147 (1939); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 233 F.3d 981 (7th Cir. 2000) (“Laws directly punishing fraudulent speech survive constitutional scrutiny even where applied to pure, fully protected speech.”).

⁶⁶ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (declaring that speech can be prohibited if it is (1) “directed at inciting or producing imminent lawless action,” and (2) is “likely to incite or produce such action”); see also *Hess v. Indiana*, 414 U.S. 105 (1973) (applying the same two-prong test as the *Brandenburg* Court).

⁶⁷ See Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 391 (1963) (“[D]espite common assumptions and occasional rationalizations . . . obscenity laws are not principally motivated by any conviction that obscene materials inspire sexual offenses.”); First Amendment Center, *Speech FAQs*, <http://www.firstamendmentcenter.org/Speech/faqs.aspx?id=15822&> (last visited Oct. 22, 2008) (listing the nine basic categories of unprotected speech: obscenity, fighting words,

firmly in the soil tread upon by our nation's Founders than in that of Victorian England.⁶⁸

Obscenity laws are aimed at completely suppressing any speech deemed offensive by a particular majority. The first obscenity regulations were developed in response to concerns about the corruption of individual morals and the maintenance of decency norms.⁶⁹ Despite modern justifications offered to the contrary, obscenity laws were actually created to prevent the formation of certain thoughts by banning the materials that were thought to inspire them.⁷⁰ However, no single, coherent rationale for the continued existence of obscenity law dominates pro-obscenity scholarship or relevant case law. Some scholars subscribe to the view that speech banned as obscene contributes so little to society politically or otherwise on account of its purely sexual content that it does not embody any of the values the First Amendment was adopted to protect, and is thus unprotected and suppressible by the government at will.⁷¹ This seems to be the view taken by the Supreme Court, though it has never explicitly settled on any one theory.⁷²

Courts nationwide currently use the three-part test introduced by the Supreme Court in the 1973 case of *Miller v. California* to determine whether contentious materials qualify as obscene.⁷³ In *Miller*, the Court

defamation, child pornography, perjury, blackmail, incitement to imminent lawless action, true threats, and solicitations to commit crimes).

⁶⁸ The Supreme Court developed its test for obscenity from the test laid out by the Queen's Bench in *Regina v. Hicklin*, an English case from 1868. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1639 (2005); see also *Roth v. United States*, 354 U.S. 476, 488-89 (1957) (citing *Hicklin* as "the early leading standard of obscenity").

⁶⁹ Before the development of modern obscenity law, materials could be banned under common law as obscene if they had a "tendency . . . to deprave and corrupt those whose minds are open to such immoral influences . . ." Koppelman, *supra* note 68, at 1639, quoting *R. v. Hicklin*, (1868) 3 Q.B. 360, 371.

⁷⁰ Koppelman, *supra* note 68, at 1637.

⁷¹ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 605.

⁷² In 1942, the Supreme Court announced that "certain well-defined and narrowly limited classes of speech," including obscenity, are not protected by the First Amendment because they are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁷³ 413 U.S. 15 (1973). The *Miller* test has been incorporated more or less wholesale by most states into their individual obscenity statutes. According to the Supreme Court in *Ferber*, ten years after *Miller* thirty-seven states and the District of Columbia had

declared that federal and state courts may find a particular work obscene if it satisfies each of the following three elements:

- (a) [W]hether “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;⁷⁴ and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷⁵

The *Miller* court also reaffirmed the validity of obscenity prohibitions in general, announcing that “the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”⁷⁶

B. CHILD PORNOGRAPHY

While all pornography was originally regulated under obscenity law, in *New York v. Ferber*, the Supreme Court recognized a new, distinct category of speech not subject to First Amendment protection: child pornography.⁷⁷ In *Ferber*, the Court held that the state interest in protecting minors from physical and psychological harm warranted the creation of a set of laws specifically tailored to address the use of minors in the production of sexually explicit materials.⁷⁸ Since the Court found there was no viable way to attack the problem at its source, the “industry of pornography production” being prohibitively “low-profile” and “clandestine,” it approved state legislation aimed at bringing down the market for child pornography.⁷⁹ The Court reasoned that “dry[ing] up the market” for the material by imposing sanctions on consumers might be the only way to stop the abuse of children by pornographers.⁸⁰

Motivated by this mission and rationale, the Supreme Court decided that even pornographic materials that did not satisfy the *Miller* test could be

“legislatively adopted or judicially incorporated the *Miller* test for obscenity.” *New York v. Ferber*, 458 U.S. 747, 755 n.7 (1982).

⁷⁴ Whether a work appeals to prurient interests and whether it is “patently offensive” are questions left for each jury to decide according to “local” standards, with the state defining what sexual conduct may be proscribed under state obscenity law. *Miller*, 413 U.S. at 30-34.

⁷⁵ *Id.* at 24.

⁷⁶ *Id.* at 18-19.

⁷⁷ 458 U.S. 747.

⁷⁸ *Id.* at 757-58.

⁷⁹ *Id.* at 759-60.

⁸⁰ *Id.*

regulated if those materials featured minors.⁸¹ In particular, the Supreme Court saw no need to include the third prong of *Miller* in its new test on the grounds that the question of whether a form of speech has value “bears no connection to the issue of whether or not a child has been physically or psychologically harmed in the production of the work.”⁸² At this prompting, Congress passed the Child Protection Act of 1984, which expanded the definition of child pornography to include sexually suggestive, non-obscene images; raised the age of protection to eighteen; increased penalties; and removed the requirement that for images to be criminalized, there must be proof that they were created for commercial purposes.⁸³

In 1988, Congress made its first attempt to neutralize the Internet’s influence on the child pornography market by passing the Child Protection and Obscenity Enforcement Act, which prohibited the use of computers as vehicles for the transportation, distribution, and receipt of child pornography.⁸⁴ Two years later, the Supreme Court added another weapon to the government’s arsenal for the war against child pornography with its holding in *Osborne v. Ohio* that mere possession of child pornography could be criminalized.⁸⁵ Earlier the Court had declared in *Stanley v. Georgia* that in the absence of a proven intent to sell or distribute obscene materials, the right to privacy protects a person from being convicted for simple possession.⁸⁶ In *Osborne*, however, the Court made it clear that in the case of child pornography personal privacy rights are outweighed by the state’s interest in preventing harm to children.⁸⁷ In other words, a person found to possess a sexually explicit image of a minor may be subject to criminal charges because the severity of the inherent third party harm—that is, the abuse of the child photographed—outweighs any right the possessor may have to privacy.

In sum, the government has justified the First Amendment liberties taken by child pornography law as necessary to protect a particular class of victims, while obscenity law suppresses a category of speech without any clearly identified victim or rational interest. The Court sanctioned a

⁸¹ *Id.* at 761 (“The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.”).

⁸² *Id.*

⁸³ Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251-55 (2006)).

⁸⁴ Pub. L. No. 100-690, Title VII, Subtitle N, 102 Stat. 4485-4503 (codified as amended at 18 U.S.C. § 2251 (2006)).

⁸⁵ 495 U.S. 103 (1990).

⁸⁶ 394 U.S. 557 (1969).

⁸⁷ *Osborne*, 495 U.S. at 109-11.

relaxation of the *Miller* standard for materials depicting minors because it feared that the traditional obscenity standard was incapable of preventing the sexual abuse of children by pornographers. Thus, while the Court's justification for suppressing "obscenity" is questionable at best, it has more plainly laid out its reasons for enforcing child pornography laws; its method of regulating that area is backed by reasonable concerns regarding third-party harm.⁸⁸

C. VIRTUAL CHILD PORNOGRAPHY

Just as pornographers and pedophiles quickly discovered the benefits of using the Internet as a vehicle for distribution and acquisition, they also incorporated computers into the child pornography production process. As digital imaging and editing technologies became more readily accessible, technologically savvy individuals interested in child pornography discovered a way around child pornography laws. Adults in photographs could be digitally modified to look like children, making it possible to create what appeared to be sexually explicit images of children without involving actual minors.⁸⁹

In an attempt to counteract the threats posed by "virtual" child pornography, Congress passed the Child Pornography Prevention Act (CPPA) in 1996.⁹⁰ Though the rationales proffered in support of prior child pornography regulations had focused on harms to actual minors, Congress now reasoned that sufficient harms existed to justify expanding the ban on child pornography to include virtual images of child pornography as well.⁹¹

⁸⁸ This is not to say that there has been less criticism of the Supreme Court's decision in *Ferber* and of child pornography law generally than there has been of obscenity law. Scholars continue to debate the soundness of both obscenity and child pornography law with great passion and thoroughness. For a particularly well-formed critique of child pornography law, see Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001).

⁸⁹ One common technique is called "morphing," which involves modifying an image or combining two images into one. For example, the features and genitalia of an adult can be adjusted digitally to appear more childlike, or a child's face can be copied from one photo and pasted onto the nude body of an adult in another.

⁹⁰ Child Pornography Prevention Act (CPPA) of 1996, Pub. L. No. 104-208, div. A, Title I, § 121, 110 Stat. 3009-26 (codified as amended in scattered section of U.S.C. (2006)).

⁹¹ Congress offered the following findings in support of the ban on *real* child pornography: (1) the use of children in the production of pornography could cause them physical and psychological harm; (2) child pornography is a permanent document of a child's abuse, which can haunt them into adulthood; (3) child pornography is often used to lure or seduce children; and (4) pedophiles use child pornography to whet their appetites for abuse and can desensitize the viewer. *Id.* Congress offered the following findings in support of a ban on *virtual* child pornography: (1) the minor's privacy is invaded and the child may be haunted by the resulting image when recognizable portions of a minor are used in

The definition of child pornography was thus broadened to include any image that “is, or appears to be, of a minor engaging in sexually explicit conduct”⁹² or has been promoted in a way that “conveys the impression” that it depicts minors engaging in sexually explicit conduct.⁹³

Once CPPA’s expanded definition of child pornography took effect, courts began to issue opinions in support of Congress’s rationale for passing it.⁹⁴ For example, in *United States v. Fox*, the Fifth Circuit Court of Appeals defended the government’s interest as sufficient to sustain a ban on visual depictions that merely “appear to be” or “convey the impression of” minors engaging in sexually explicit conduct in the face of First Amendment challenges.⁹⁵ Citing the Supreme Court’s opinion in *Osborne v. Ohio*⁹⁶ and congressional findings collected in support of CPPA,⁹⁷ the Fifth Circuit upheld the ban at issue on the grounds that virtual child pornography contributed to the creation of an “unwholesome environment,” and that “the danger to actual children who are seduced and molested with the aid of child sex pictures is just as great when the child pornographer or child molester uses [computer simulations] as when the material consists of unretouched images of actual children.”⁹⁸ Evidently, the Fifth Circuit shared Congress’s concern that child molesters might use real or virtual images of child pornography to convince actual children that performing the depicted acts would be acceptable or even enjoyable,⁹⁹ and agreed that this possibility justified banning materials that could be used in this way.¹⁰⁰

In 2002, the Supreme Court in *Ashcroft v. Free Speech Coalition* struck down two provisions of CPPA dealing with virtual child pornography.¹⁰¹ The CPPA section that broadened the definition of child pornography to include virtual images was deemed overbroad because it

morphing; (2) the appetites of a pedophile are just as excited by virtual images as real images; (3) virtual images can also be used to effectively seduce minors; and (4) the sexualization of children through the dissemination of child pornography, real or virtual, can lead to a harmful change in societal perception of them by turning them into sex objects, (5) virtual child pornography helps sustain the market for both real and virtual images. *Id.*

⁹² 18 U.S.C. § 2256(8)(B) (2000), *invalidated by* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002), *amended by* Pub. L. No. 108-21, § 502, 117 Stat. 650, 678 (2003) (codified as amended at 18 U.S.C. § 2256(8)(B) (2006)).

⁹³ *Id.* § 2256(8)(D).

⁹⁴ *United States v. Fox*, 248 F.3d 394, 401-02 (5th Cir. 2001).

⁹⁵ *Id.*

⁹⁶ 495 U.S. 103, 111 (1990).

⁹⁷ S. Rep. 104-358, at 2-3 (1996).

⁹⁸ *Fox*, 248 F.3d at 402 (citing S. Rep. 104-358, at 18).

⁹⁹ S. Rep. 104-358, at 2.

¹⁰⁰ *Fox*, 248 F.3d at 401-2.

¹⁰¹ 535 U.S. 234.

would have suppressed speech—including valuable artistic works such as productions of *Romeo and Juliet*, Renaissance paintings, and mainstream movies like *Traffic* and *American Beauty*—that was neither obscene nor injured any minor in its production or dissemination.¹⁰² The second section of CPPA, which dealt with “pandering,” was declared overbroad as it criminalized materials if they had once been advertised as involving minors, regardless of whether they actually did so.¹⁰³

The Court found the government’s arguments for upholding CPPA’s new definition of child pornography inadequate. The Court determined that the harms the government claimed grew from virtual child pornography were “not ‘intrinsically related’ to the sexual abuse of children,” and, therefore, could not serve as a sufficient basis for suppression.¹⁰⁴ The government’s first argument, that virtual child pornography could be used just as effectively as real child pornography by pedophiles to seduce children, was rejected because things innocent in themselves cannot be outlawed simply because they are sometimes used to achieve an “immoral” goal.¹⁰⁵ The second argument, that virtual images were just as good at “whet[ing] the appetites” of pedophiles and thereby encouraging them to abuse actual children, was dismissed because the First Amendment forbids the government to suppress speech that might encourage illegal acts unless it is “directed to inciting or advocating imminent lawless action and is likely to incite or produce such action.”¹⁰⁶

The government also offered a market deterrence theory in support of the contested CPPA provisions, claiming that keeping virtual child pornography on the market sustains the market for “real” child pornography, since the two types of material can be indistinguishable.¹⁰⁷ The Court responded that eliminating the child pornography market was only a valid goal insofar as the images themselves reflected underlying crimes, such as statutory rape or child abuse.¹⁰⁸ Preexisting regulations targeting the market were valid for preventing actual injury to minors, but

¹⁰² *Id.* at 241-48.

¹⁰³ *Id.* at 246-48. “Pandering” is “the act or offense of selling or distributing textual or visual material (such as magazines or videotapes) openly advertised to appeal to the recipient’s sexual interest.” BLACK’S LAW DICTIONARY 1142 (8th ed. 2004).

¹⁰⁴ *Free Speech Coal.*, 535 U.S. at 250.

¹⁰⁵ *Id.* at 251-52.

¹⁰⁶ *Id.* at 253 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

¹⁰⁷ *Id.* at 254.

¹⁰⁸ *Id.*

no corresponding harm results from the market for virtual child pornography.¹⁰⁹

In its final argument, the government argued that advances in technology would eventually render the task of distinguishing between virtual and real child pornography impossible, making prosecution of individuals likewise impossible if the burden were on the government to prove the involvement of actual minors in the production of suspect materials.¹¹⁰ The Court rejected this argument because the idea that “protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down.”¹¹¹ As the Court had warned nearly fifty years before, speech regulations which would “burn the house to roast the pig” must be invalidated.¹¹²

Ashcroft v. Free Speech Coalition emphasized the boundaries of child pornography law by underscoring the importance of the rationale behind it. The *Ferber* Court was justified in truncating the *Miller* standard for materials containing minors because the state has a special interest in preventing child abuse, and sexually explicit photographs of minors are part and parcel of that abuse. Such photographs document the abuse; contribute to the abuse; and are the purpose of the abuse. The fact that child pornography causes irrevocable harm to minors justifies a stricter law. When an actual child is depicted, there is a crime. However, in the case of virtual child pornography, where no actual child is depicted, there is no underlying crime, and, therefore, no justification for the application of a standard stricter than that which governs obscenity in general.

Shortly after the Supreme Court’s decision regarding CPPA in *Free Speech Coalition*, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act.¹¹³ The PROTECT Act, which was signed into law by President George W. Bush in 2003 and remains in effect today,¹¹⁴ modifies both child pornography law and obscenity law in important ways. The new act contains revised versions of provisions which failed under CPPA, modified to withstand the

¹⁰⁹ *Id.* (“Even where there is an underlying crime . . . the Court has not allowed the suppression of speech in all cases We need not consider where to strike the balance in this case, because here, there is no underlying crime at all. Even if the Government’s market deterrence theory were persuasive in some contexts, it would not justify this statute.” (citation omitted)).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 255.

¹¹² *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

¹¹³ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C. (2006)).

¹¹⁴ *Id.*

challenges to constitutionality raised in *Free Speech Coalition*. For example, instead of permanently attaching criminal liability to materials advertised as child pornography further up the distribution chain,¹¹⁵ the new pandering provision criminalizes the speech used in pandering alone, without permanently marking the materials.¹¹⁶ Congress's hope was that by tailoring the language of the pandering provision in this manner, the law would resist attacks to its constitutionality while allowing the government to successfully prosecute defendants who had pandered materials in a way that sustained the child pornography market.¹¹⁷

This particular provision did not prove impervious to First Amendment criticism, and was declared overbroad by the Eleventh Circuit in *United States v. Williams*.¹¹⁸ Williams was charged with possessing and pandering child pornography, and while he pleaded guilty to possession, he challenged the pandering provision as overbroad and vague.¹¹⁹ The Eleventh Circuit found the market deterrence rationale that Congress had offered in support of the PROTECT Act's pandering provision unconvincing, since Congress failed to show how simply permitting people to advertise that certain materials are child pornography sustains the market for actual child pornography.¹²⁰ However, a majority of the Supreme Court disagreed with the Eleventh Circuit.¹²¹ In May 2008, the Court overturned *Williams* and declared the pandering provision of the PROTECT Act constitutional under the First and Fifth Amendments.¹²² Writing for the majority, Justice Scalia distinguished the Act's pandering provision from that declared overbroad in

¹¹⁵ Even if the materials did not contain children or were not pornographic, once one person advertised the materials as child pornography, anyone who dealt with them further down the distribution chain was subject to criminal sanction under CPPA. For example, the Court in *Free Speech Coalition* noted that under CPPA's pandering provision, "[e]ven if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that such scenes will be found in the movie. The determination turns on how the speech is presented, not on what is depicted." *Free Speech Coal.*, 535 U.S. at 257.

¹¹⁶ 18 U.S.C. § 2252A(a)(3)(B) (2006) (providing that any person who knowingly "(B) 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" commits a criminal offense).

¹¹⁷ Stephen T. Fairchild, *Protecting the Least of These: A New Approach to Child Pornography Pandering Provisions*, 57 DUKE L.J. 163, 182 (2007).

¹¹⁸ 444 F.3d 1286 (2006).

¹¹⁹ *Id.* at 1289.

¹²⁰ *Id.* at 1303.

¹²¹ *United States v. Williams*, 128 S. Ct. 1830 (2008).

¹²² *Id.*

Free Speech Coalition, arguing that the key difference is that the PROTECT Act does not criminalize materials which themselves could not be constitutionally proscribed merely because they had once been pandered as child pornography, but rather criminalizes the act of pandering itself.¹²³

Another provision of the PROTECT Act with roots in CPPA modifies child pornography law by expanding the definition of child pornography.¹²⁴ This new definition brings into its purview any digital or computer-generated image that is “indistinguishable from . . . that of a minor engaging in sexually explicit conduct” or any image that has been created or modified to make it appear that an “identifiable minor is engaging in sexually explicit conduct.”¹²⁵

Finally, in addition to modifying the pandering provision and the preexisting definition of child pornography, the PROTECT Act also substantively revised the general obscenity statute.¹²⁶ As a result of this revision, the law now prohibits possession, production, distribution, or receipt of “a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting,”¹²⁷ that depicts sexually explicit conduct by a minor and which is either obscene or “hard-core,”¹²⁸ and that “lacks serious literary, artistic, political, or scientific value.”¹²⁹ This component of the PROTECT Act has basically reinstated the ban on virtual child pornography struck down under the child pornography provision of CPPA, but has refashioned it as an obscenity law to avoid having to prove actual harm to minors. Though written as an obscenity law rather than a child pornography law, this standard allows materials containing images of virtual minors to be banned without passing *Miller*’s standard test for

¹²³ *Id.* at 1842.

¹²⁴ Pub. L. No. 108-21, § 502, 117 Stat. 650, 678 (2003) (codified as amended at 18 U.S.C. § 2256(8) (2006)).

¹²⁵ *Id.*

¹²⁶ 18 U.S.C. § 1466A(a)-(d) (2006).

¹²⁷ *Id.* § 1466(a).

¹²⁸ See *Miller v. California*, 413 U.S. 15, 25 (1973) (proclaiming that only “hard-core” materials would be prosecuted, though the federal statute as written could conceivably support the banning of less offensive pornography). Though ultimately the development of individualized regulation schemes must be left to the states, the Court offered some examples of what may be banned:

(a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;

(b) patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals

Id.

¹²⁹ 18 U.S.C. § 1466A(b)(2)(B).

obscenity.¹³⁰ No official justification has been offered for why images do not need to pass the full three-prong *Miller* test to qualify as obscene when only virtual children are depicted. The Supreme Court has yet to test the constitutionality of this new obscenity provision, but some legal scholars predict that it would fail under challenges similar to those which prevailed in *Free Speech Coalition*.¹³¹

III. ARGUMENT

A. COULD VIRTUAL AGEPLAY BE BANNED UNDER CHILD PORNOGRAPHY LAW?

What types of behavior should the government regulate in a fantasy world?¹³² Various scientists, artists, and programmers are involved in efforts to make the virtual reality experience more interactive—consider the Holodeck from *Star Trek* or the training sequence from *The Matrix*. Virtual worlds will eventually be fully immersive, with cliffs so realistic one would not dare step off the side,¹³³ and people so realistic they may be indistinguishable from real human beings.¹³⁴ Yet, no matter how immersed

¹³⁰ 413 U.S. at 24.

¹³¹ James Nicholas Kornegay, *Protecting Our Children and the Constitution: An Analysis of the "Virtual" Child Pornography Provisions of the Protect Act of 2003*, 47 WM. & MARY L. REV. 2129, 2164 (2006).

¹³² This Comment will not explore the arguments of those who believe that terrestrial governments should take no part in the government of virtual worlds. See, e.g., John Perry Barlow, *A Declaration of the Independence of Cyberspace*, Feb. 8, 1996, <http://homes.eff.org/~barlow/Declaration-Final.html>. As Internet crimes such as fraud, defamation, and cyberterrorism become more commonplace and dangerous, the view that the Internet should operate independently, free from outside interference, is becoming less popular, and less defensible. See LESSIG, *supra* note 24. Furthermore, this Comment will only address this question insofar as it relates to the applicability of child pornography and obscenity laws to virtual ageplay.

¹³³ See Michael J. Tarr & William H. Warren, *Virtual Reality in Behavioral Neuroscience and Beyond*, 5 NATURE NEUROSCIENCE 1089 (2002), available at <http://www.nature.com/neuro/journal/v5/n11s/pdf/nn948.pdf> (explaining that Brown University's Virtual Environment Navigation Laboratory (VenLab) provides a virtual experience so realistic "some subjects absolutely refuse to approach the edge of a cliff, let alone walk across one of the plank bridges provided for them"); Joe Brown, *Mind Games*, WIRED, Oct. 2008, at 67 (profiling the Emotiv EPOC, a headset equipped with brain signal sensors that enables wearers to control video games with their minds).

¹³⁴ See, e.g., Tolga K. Capin et al., *Realistic Avatars and Autonomous Virtual Humans in VLNET Networked Virtual Environments*, in VIRTUAL WORLDS ON THE INTERNET 157 (Rae A. Earnshaw & John Vince eds., 1998), available at <http://citeseer.ist.psu.edu/capin98realistic.html>; L. Itti et al., *Realistic Avatar Eye and Head Animation Using a Neurobiological Model of Visual Attention*, 5200 PROCEEDINGS OF SPIE 64 (2004), available at http://www.ict.usc.edu/publications/Itti_etal03spienn.pdf.

one becomes in a virtual world, how emotionally affected one is by the events that occur there, or how real the virtual world starts to feel, the entire realm is only computer-generated. If one did step off a virtual cliff or stick a virtual knife through the heart of a computer-generated person, no one would suffer actual injury.

Though real and virtual goods may, on a monetary level, be valued similarly, the non-monetary values of things virtual and real are not neatly aligned. The way some interactions impact one's bank account may be the same whether they occur in the real world or a virtual one, but other interactions have fundamentally different effects and consequences depending on the world in which they are conducted. It follows, then, that consequences for criminal actions in virtual worlds should often be different from those attaching to the same type of action in the real world.

How should the law deal with this disconnect? Determining how virtual events affect people's real lives is the first step. For example, rape committed in a virtual world cannot be prosecuted as the crime of rape in terrestrial courts, for there was no physical assault.¹³⁵ Some legal scholars have argued that an act like rape, when carried out in a virtual setting, may be more sensibly viewed as a tort akin to intentional infliction of emotional distress¹³⁶ or even as a crime akin to theft.¹³⁷ They argue that, while it may make sense for a woman to sue a man who forced her avatar to have sex with his avatar against her will for harassment or intentional infliction of emotional distress, this fact scenario would not support a claim of rape. The real-world individual may be distressed by the in-world event, conceivably to an actionable extent, but she has not been physically violated. Conversely, if an adult avatar were using the virtual medium as a means of connecting with minors and inducing them into real-world meetings, a child or a child's guardian may have a viable cause of action under a state child luring statute.¹³⁸ In that case, the in-world event—

¹³⁵ Susan W. Brenner, *Is There Such a Thing as "Virtual Crime"?*, 4 CAL. CRIM. L. REV. 1, ¶¶ 102-29 (2001), <http://www.boalt.org/bjcl/v4/v4brenner.htm> (discussing the potential real-world legal consequences for the actions of the notorious "Mr. Bungle," an avatar whose rape of another avatar in 1993 prompted legal debate over the connection between virtual crimes and their real-world analogues); see also Richard MacKinnon, *Virtual Rape*, 2 J. COMPUTER-MEDIATED COMM. 4 (1997), <http://jcmc.indiana.edu/vol2/issue4/mackinnon.html> (discussing meaning of rape in the context of virtual worlds).

¹³⁶ Brenner, *supra* note 135, at 114.

¹³⁷ Posting of Corey Rayburn Yung to Sex Crimes, *Virtual Rape*, http://sexcrimes.typepad.com/sex_crimes/2007/05/virtual_rape.html (May 4, 2007, 16:01).

¹³⁸ See *State v. Backlund*, 672 N.W.2d 431 (N.D. 2003) (citing *People v. Foley*, 94 N.Y.2d 688, 679 (N.Y. 2000)). The *Foley* court distinguished the regulation of speech from that of conduct, and upheld a New York statute which launched "a preemptive strike against sexual abuse of children by creating criminal liability for *conduct* directed towards the ultimate acts of abuse." *Foley*, 94 N.Y.2d at 679 (emphasis added). In *Backlund*, an adult

solicitation of a minor—more closely mirrors its real-world instantiation, as this act is fundamentally the same in substance and result whether conducted online or on terra firma.

Virtual sex between two consenting adults, however, whether those adults choose to represent themselves virtually as fairies, cows, pulsating orbs, or child and adult, is not a crime committed on either of the consensual participants. What may be a crime, however, is the image produced on the computer screen as a result of the participants' actions. The graphic that appears on the monitor—of a child avatar having sex with an adult avatar—is viewed by the participants themselves, and also may appear on the screens of other participants in the vicinity should their avatar encounter the copulating couple, and can even be saved as a screenshot and distributed to others.

Surely, while the graphics in virtual worlds like Second Life are still far from realistic, avatar sex is often stimulating for the participants, and quite possibly for spectators as well. Japanese *manga*, sexually explicit cartoons sometimes referred to as *hentai*, are wildly popular both there and here, and have excited viewers since at least the nineteenth century.¹³⁹ And as some indication that there is a more mainstream following for virtual pornography than one might think, *Playboy's* October 2004 issue featured several computer illustrations of popular video game characters in various states of undress.¹⁴⁰ Further, the popularity of virtual sex has spawned an entire industry focused on making virtual sexual experiences more realistic.¹⁴¹ “Teledildonics” designers and engineers are in the process of developing a wide range of computer attachments that, when strapped to the

was convicted for luring a virtual minor, who was actually a police officer posing as a minor. 672 N.W.2d 431. That court held that state law preventing luring of minors did not violate free speech provisions of federal or state constitutions. *Id.*; see also *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) (finding no violation of First Amendment where statute criminalized the act of persuading a minor to engage in sexual activity); *United States v. Powell*, 1 F. Supp. 2d 1419, 1422 (N.D. Ala. 1998) (dismissing “impossibility” argument where defendant tried to persuade someone he believed to be a minor to engage in sexual activity, despite person contacted by defendant actually being a special agent).

¹³⁹ Mark McLelland, *A Short History of 'Hentai,'* 12 INTERSECTIONS: GENDER, HIST. & CULTURE IN THE ASIAN CONTEXT (2006), <http://www.sshe.murdoch.edu.au/intersections/issue12/mccllland.html>.

¹⁴⁰ *Playboy Goes Digital—With its Models*, ASSOCIATED PRESS, Sept. 7, 2004, available at <http://www.msnbc.msn.com/id/5933462/>.

¹⁴¹ See, e.g., Slashedong Homepage, <http://www.slashedong.org> (last visited Oct. 22, 2008).

customer and connected to a printer port, allow a virtual accomplice to control the sexual pleasure of the user.¹⁴²

Still, just because some might find sex between avatars involving a childlike character arousing does not make it “child pornography.” Though the actions portrayed are overtly sexual, they do not involve actual children. The Supreme Court justified creating a new, stricter standard for child pornography law on the grounds that it would protect children from being harmed in the production of those materials.¹⁴³ Because the government’s interest in preventing the harms inherent in child pornography outweighs any interest the public might have in that speech, the test for suppressing it is less rigorous than when there is no similarly compelling governmental interest. Thus, it stands to reason that materials that do not directly harm children should not be held to this heightened standard and should instead be subject only to the *Miller* test.

If the CPPA standard were still operable, avatar ageplay could be outlawed on the theory that an image of an avatar could “appear[] to be[] of a minor engaging in sexually explicit conduct”¹⁴⁴ even though it “records no crime and creates no victims.”¹⁴⁵ But CPPA was overturned shortly after its inception because it would have suppressed speech that was not inherently harmful and, therefore, not subject to the strict controls placed on real child pornography.¹⁴⁶ However, the fact that CPPA was overturned does not mean ageplay is immune from legal attack under child pornography law.

Like CPPA before it, the PROTECT Act criminalizes pandering materials as child pornography and modifies the definition of child pornography.¹⁴⁷ Ageplayers are probably safe under the pandering provision, as long as no one involved holds the “belief, or intend[s] to cause another to believe” that images of real children are used in the roleplay.¹⁴⁸ The new definition of child pornography created by the PROTECT Act also

¹⁴² For an overview, see Teledildonics Homepage, <http://www.teledildonics.com> (last visited Oct. 22, 2008). For examples of teledildonics devices, see Gizmodo, Teledildonics, <http://gizmodo.com/tag/teledildonics/> (last visited Oct. 22, 2008).

¹⁴³ *New York v. Ferber*, 458 U.S. 747 (1982).

¹⁴⁴ 18 U.S.C. § 2256(8)(B) (2000), *invalidated by Free Speech Coal.*, 535 U.S. 234 (2002), *amended by* Pub. L. No. 108-21, § 502, 117 Stat. 650, 678 (2003) (codified as amended at 18 U.S.C. § 2256(8)(B) (2006)).

¹⁴⁵ *Free Speech Coal.*, 535 U.S. at 250.

¹⁴⁶ *Id.*

¹⁴⁷ See Dep’t of Justice, PROTECT Act Fact Sheet (Apr. 30, 2003), http://www.usdoj.gov/opa/pr/2003/April/03_ag_266.htm (noting that, in part, the PROTECT Act was created to “revise and strengthen the prohibition on ‘virtual’ child pornography,” to “prohibit any obscene materials that depict children,” and to provide “tougher penalties compared to existing obscenity law”).

¹⁴⁸ See 18 U.S.C. § 2252A(3)(B) (2006).

does not immediately threaten the activities of ageplayers, as it now encompasses only computer-generated images that are “indistinguishable from that of a minor engaging in sexually explicit conduct,”¹⁴⁹ or images that have been created or modified to look like an “identifiable” minor.¹⁵⁰ This definition does not currently apply to ageplaying avatars, as avatars are still more cartoonish than realistic, and therefore, far from being “indistinguishable” from a photo of a minor. There have also been no reported cases of anyone modeling their child avatar after a real-world, “identifiable” minor. However, once technology exists which allows computer users to create truly lifelike avatars, ageplayers could theoretically be charged with possessing or distributing child pornography for engaging in virtual ageplay.

B. COULD VIRTUAL AGEPLAY BE BANNED UNDER OBSCENITY LAW?

Though the new child pornography rules pose a distant threat to ageplayers, the most serious and immediate threat lurks in the PROTECT Act’s addition to the obscenity statute—the section titled “Obscene visual representations of the sexual abuse of children.”¹⁵¹ The statute explicitly applies to drawings and cartoons, and, thus, brings all virtual child pornography under its umbrella.¹⁵² This law ensures that even unrealistic images may be suppressed if they contain childlike figures. Therefore, two adult users of Second Life—one of whom created an avatar of an adult and the other of whom created an avatar of a child—who engaged in virtual sexual intercourse could be prosecuted under the Act for either producing, distributing, receiving, or possessing criminally obscene materials.¹⁵³ Whether this action would most appropriately qualify as production, distribution, receipt, or possession is debatable, and the outcome would perhaps depend on a legal determination of where the images technically

¹⁴⁹ See 18 U.S.C. § 2256(11) (2006) (clarifying that “indistinguishable” in this case does not simply mean that the image must be identifiable as a minor in the general sense, the way that a drawing of Little Orphan Annie is identifiable as a minor, but rather means “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”).

¹⁵⁰ *Id.* § 2256(8)(C).

¹⁵¹ 18 U.S.C. § 1466A(a)-(d) (2006).

¹⁵² See *id.* (allowing the prohibition of a “visual depiction” of any kind, whether it be “a drawing, cartoon, sculpture, or painting”).

¹⁵³ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C. (2006)).

reside.¹⁵⁴ Regardless, both participants in this exchange could be held to fall under one or more of these categories.

The two new offenses created by PROTECT through modification of the obscenity statute deal with (1) production, distribution, or possession with intent to distribute; and (2) mere possession.¹⁵⁵ This two-part provision raises two distinct constitutional issues with regard to its application to virtual children. First, can the statute constitutionally proscribe the materials it describes without requiring satisfaction of all three prongs of the *Miller* test? Second, can mere possession of sexually explicit images of virtual children be criminalized?

Section 1466A of the PROTECT Act allows for the criminalization of images depicting children engaged in hardcore acts¹⁵⁶ as long as they lack “serious literary, artistic, political, or scientific value.”¹⁵⁷ The provision leaves out the community standards test included in *Miller*.¹⁵⁸ In *Free Speech Coalition*, the Supreme Court commented that “CPPA [could not] be read to prohibit obscenity because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.”¹⁵⁹ Section 1466A lacks this link, which suggests that it, like CPPA, should be declared unconstitutional.¹⁶⁰

The “possession” prohibition in § 1466A is also vulnerable to constitutional attack. In *Stanley v. Georgia*, the Court passionately rejected the idea that the government could ban mere possession of adult pornography under obscenity law, stating “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”¹⁶¹ Meanwhile, the Court in *Osborne v. Ohio* explained that given the special interests of the government with respect to child pornography, and the inherent evil of the material itself, the government

¹⁵⁴ See, e.g., *Cable News Network L.P. v. CNNews.com*, 162 F. Supp. 2d 484 (E.D. Va. 2001), *aff’d in relevant part*, 56 F. App’x 599 (4th Cir. 2003) (holding that defendant, a Chinese company charged with infringing plaintiff’s trademark by operating a website with an infringing domain name, was required to defend itself in the Eastern District of Virginia, despite having no contacts with that forum, on the grounds that the domain name was listed by a registrar in an online registry, both of which happened to be located in Virginia).

¹⁵⁵ 18 U.S.C. § 1466A.

¹⁵⁶ See *id.* § 1466A(b)(2)(A) (noting that, for the purposes of this provision, hardcore acts include “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”).

¹⁵⁷ *Id.* § 1466A(a)-(d).

¹⁵⁸ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁵⁹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002).

¹⁶⁰ *Kornegay*, *supra* note 131, at 2064.

¹⁶¹ 394 U.S. 557, 565 (1969).

could ban mere possession under child pornography law.¹⁶² This does not mean, however, that the government may ban possession of virtual child pornography. Here, the government is not entitled to the leniency it had in regulating real child pornography, because the special circumstances that justified that leniency do not exist in the case of virtual child pornography. The point of banning possession of real child pornography is to further discourage people from supporting the market for it because the market requires the abuse of children—the ultimate harm that child pornography legislation is intended to prevent.¹⁶³ Virtual child pornography does not similarly necessitate the abuse of children. Thus, the Supreme Court could find just cause to reject the PROTECT Act’s criminalization of the private possession of pornographic materials that feature only virtual children.

Even assuming that the parts of the PROTECT Act that threaten virtual ageplay will be overturned before gaining enough momentum to affect activities in virtual worlds, one avenue remains open for those who wish to prosecute ageplayers. If the Supreme Court were to declare portions of the PROTECT Act unconstitutional for unjustifiably truncating the *Miller* standard, virtual ageplay could nevertheless probably be banned as obscene under the full *Miller* standard should the government choose to devote energy to prosecuting virtual child pornography under that theory. Though private possession of obscene materials cannot be criminalized, sexual interaction in a virtual world could be seen as not entirely private, since there is always at least one other person—the sex partner—viewing the onscreen activity. Indeed, the Supreme Court has good precedent for denying consenting adults access to such sights under *Paris Adult Theatre I v. Slaton*.¹⁶⁴

There are two reasonable arguments against the suppression of ageplay under *Miller*. The first argument would be to challenge the constitutionality of obscenity law in general. That argument acknowledges that the suppression of sexual images of children is justified when those images are incident to the abuse of an actual child, but proposes that sexual images that produce no real victims, such as virtual child pornography, should not be suppressed. Unfortunately, that argument would likely be futile given the long history of obscenity suppression in the United States and the solid

¹⁶² 495 U.S. 103 (1990).

¹⁶³ *Id.* (noting that Ohio did not aim to regulate Osborne’s thoughts, but rather to protect minors by damaging the child pornography market through the punishment of the consumers of child pornography).

¹⁶⁴ 413 U.S. 49, 57 (1973) (holding that two adult movie theatres were not entitled to First Amendment protection, stating “[W]e hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce safeguards against exposure to juveniles and to passersby”).

standing of the *Miller* test in our legal system. The second argument distinguishes virtual child pornography from virtual ageplay, and compares virtual ageplay to the type of sexual activity protected under *Lawrence v. Texas*.¹⁶⁵ It concludes that the Due Process Clauses of the Fifth and Fourteenth Amendments guarantee that online ageplay cannot be suppressed. That argument has two compelling characteristics: it is less earth-shattering than a general abandonment of obscenity law and it is supported by precedent. Both arguments deserve consideration.

1. *The Obscenity Argument*

Obscenity laws are not based on fact, or policy, or harm done, but rather on a specific moral worldview.¹⁶⁶ They serve to sustain the dominant moral tone and social order existing at a particular time and place in history. The Supreme Court seems to subscribe to the belief that pornographic speech of almost any kind does not contribute to the marketplace of ideas, so no democratic value is lost by suppressing it if the majority finds it offensive.¹⁶⁷ But how does the court distinguish the value of sexual works from musical or artistic works, which also produce visceral and emotional responses, sometimes to the exclusion of coherent thought? First Amendment scholar Andrew Koppelman claims that obscenity laws are not really based on the idea that some speech is less valuable than others because it is non-cognitive or apolitical, as other scholars like Cass Sunstein have suggested,¹⁶⁸ but rather on the irrational fear that “sexuality has a powerful tendency to distort our powers of perception and judgment,” thereby corrupting the morals of otherwise healthy individuals and turning them into depraved criminals.¹⁶⁹

Clearly, people are justified in their outrage over the prevalence of child sexual abuse and in their fear for their own children. However, although this horror is widely shared among most non-pedophile adults in Westernized nations, pacification of the morally-outraged alone cannot serve as the kind of compelling interest which would allow Congress and the judiciary to disregard the First Amendment. Holocaust deniers and the Ku Klux Klan (KKK) are allowed to march and write and say things that offend most of the civilized world, as long as they cause no physical harm in the process and their advocacy does not reach the level of a credible

¹⁶⁵ 539 U.S. 558 (2003).

¹⁶⁶ See Henkin, *supra* note 67.

¹⁶⁷ See, e.g., *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹⁶⁸ Sunstein, *supra* note 71, at 603-04.

¹⁶⁹ Koppelman, *supra* note 68, at 1652; see also Adler, *supra* note 88, at 991 (remarking that “even when a photograph is not the product of a crime, we fear that it may in turn produce a crime”).

threat or incitement to imminent lawlessness.¹⁷⁰ While those who endorse the ideas behind the words and symbols of white supremacists constitute a minority of the population, the majority permits them to burn crosses and disseminate hateful speech.

But in a culture where many consider child abuse “worse than murder,”¹⁷¹ it seems that the government’s tolerance of distasteful views in the name of free speech goes as far as the KKK but stops short of the very idea of a sexually explicit child. The First Amendment is used to protect racists with violent ideologies, but not pedophiles, because our nation’s anxiety over sexual abuse is stronger than our anxiety over hate crimes. First Amendment scholar Amy Adler proclaims that fear of child abuse has in fact developed into a blinding hysteria so pervasive that it has produced lapses in judicial judgment, akin to those which weakened the government’s commitment to free speech ideals during the McCarthy era.¹⁷²

Of course, the government has the right to prevent behavior when it creates real victims.¹⁷³ As soon as a pedophile solicits or abuses a real child, or advocates the abuse of a child in a manner likely to incite imminent abuse,¹⁷⁴ there is a reason to prosecute him. Further, images of real children can be criminalized for being involved in the crime of child abuse.¹⁷⁵ But the government should not suppress speech based on its content when it has no proven harmful effects, as is the case with virtual child pornography. Short of establishing a strong link between virtual child pornography and some specific harm, a governmental ban on virtual child

¹⁷⁰ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

¹⁷¹ JAMES R. KINCAID, *EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING* 16 (1998).

¹⁷² Adler, *supra* note 88, at 935; see also Emily D. Goldberg, *How the Overturn of the Child Pornography Prevention Act Under Ashcroft v. Free Speech Coalition Contributes to the Protection of Children*, 10 *CARDOZO WOMEN’S L.J.* 175, 187 (2003) (commenting on the lack of neutral scholarship relating to the actual content of available child pornography: “People tend to become hysterical or irrational when speaking about child pornography, or even thinking about it”).

¹⁷³ This distinguishes laws criminalizing interracial marriage and homosexual intercourse from those criminalizing incest and child pornography. Despite the contentions of groups pushing for the abolition of consent laws, many reputable studies have proven the harmful physical and psychological effects of sex between adults and children, and among family members. For a list of resources discussing the psychological effects of sexual abuse from both scientific and personal perspectives, see National Society for the Prevention of Cruelty to Children (NSPCC), *Psychological Effects of Abuse*, http://www.nspcc.org.uk/Inform/resourcesforprofessionals/ReadingLists/psychologicaleffectsofabuse_wda48876.html (last visited Oct. 22, 2008).

¹⁷⁴ *Ashcroft*, 535 U.S. at 253 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

¹⁷⁵ *New York v. Ferber*, 458 U.S. 747 (1982).

pornography as obscenity, especially the mere possession of it, would be unjustified.¹⁷⁶

It is hard to argue with the majority's observation in *Young v. American Mini Theaters* that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."¹⁷⁷ But perhaps this is the problem: if few step up to defend undesirable viewpoints, tyranny wins by default. While few have any interest in defending the right of pedophiles to fantasize about children amongst themselves, the same justifications given to suppress pedophiles' free speech rights could also be used to curtail the rights of gays, interracial couples, and any group not in the majority.

The thrust of the obscenity argument is that obscenity law, as distinct from child pornography law, runs counter to the First Amendment free speech ideal. If communities fear that potentially offensive materials might be forced upon unwilling listeners or viewers, laws may be tailored towards preventing such unwilling exposure, while not depriving willing adults of their right to decide what is and is not appropriate for themselves. If there is a certain type of speech that causes a particular, cognizable harm, then laws may be tailored to prevent that harm without unnecessarily affecting harmless speech. Laws premised on emotional and moral reactions to speech, however, gut democracy, and should not be tolerated simply because we have become habituated to them.

ii. The Liberty Argument

The less controversial argument against prohibiting online ageplay as obscenity is that online ageplay is simply not something that can be regulated by obscenity law. This argument recategorizes ageplay as something that does not fall within obscenity law's purview. The argument claims that online ageplay is essentially action, not depiction—sexual activity, not interactive pornography—and as such is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments as a matter of liberty.

It is easy for two consenting adults to keep their sexual activity online in any form—whether by email, live chat, or contact between avatars—private, as long as no one goes out of their way to intrude on that privacy.

¹⁷⁶ See *Roth v. United States*, 354 U.S. 476, 509 (1957) (Douglas, J., dissenting) ("To allow the State to step in and punish mere speech or publication that the judge or the jury thinks has an undesirable impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment.").

¹⁷⁷ *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976) (discussing lower value of sexual speech as compared to political debate).

The goal of the participants in creating a written dialogue or a scene between avatars is not the production of a pictorial sex aid, but rather the formation of an intimate connection, whether romantic or purely sexual. Participants are not in the business of producing pornography, but instead aim to create a pseudophysical connection, for very personal purposes. Long-distance couples who are unable to meet in person with great frequency can maintain their sexual connection through virtual trysts. For those who are physically disabled and incapable of having sex, or those whose psychological makeup prevent them from acting on their desires, virtual sex may be their only means of experiencing a sexual connection. Instead of conceptualizing online ageplay as a series of images which can be regulated by obscenity law, it should be seen as an intimate activity, albeit one conducted in an unconventional forum.

So if online ageplay is simply a type of sexual interaction that does not fall into the criminal categories of child abuse or child pornography, can it be regulated? A similar question was posed in *Lawrence v. Texas*.¹⁷⁸ The issue in *Lawrence* was whether the Constitution guaranteed two adult men, charged with violating a Texas statute prohibiting same-sex intimacy, the freedom to engage in consensual sexual activity with one another.¹⁷⁹ The Supreme Court held that the right of citizens to due process of the laws under the Fourteenth Amendment prevented the government from interfering with their sex lives, as long as the sexual activity “does not involve minors[,] . . . persons who might be injured or coerced[,] or . . . public conduct or prostitution.”¹⁸⁰ The reason for this, according to the Court, is that the Constitution grants citizens the liberty to decide how to conduct their most personal affairs, free from government intrusion.¹⁸¹ Though there may be a powerful majority who believe homosexuality, or ageplay, to be immoral, the Court in *Lawrence* correctly pointed out that the legal and the moral issues are distinct, with the legal question being whether “the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”¹⁸² The Court found the answer to the legal question to be *no*: there was no sound legal basis for prohibiting homosexual intimacy, apart from the erroneous *Bowers v. Hardwick* decision, which it took the opportunity to overrule.¹⁸³ Citing Justice Stevens’s dissent in *Bowers*, the court declared that a majority belief that a practice is immoral is insufficient grounds for criminalizing it, and

¹⁷⁸ 539 U.S. 558 (2003).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 578.

¹⁸¹ *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)).

¹⁸² *Id.* at 571.

¹⁸³ *Id.* at 578 (overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

that sexual intimacy is a form of liberty protected by the Due Process Clause of the Fourteenth Amendment.¹⁸⁴

Online ageplay is not fundamentally different from the sexual activity at issue in *Lawrence*. That is not to say, of course, that one type of sexual preference is similar to the other. Rather, both types of sexual activity are practiced by a minority of the population and involve the participation of consenting adults, and neither is thrust upon unwilling viewers nor harm third parties. The idea that some people are aroused by fantasies involving underage partners and that those people may act out these fantasies in private may be repulsive to many. But so long as those acting out the fantasy are both legal, consenting adults, the government should not interfere.

One might argue that prohibiting online ageplay would not deprive people of the liberty to express their sexuality in the same way prohibiting homosexual intimacy would, because virtual sex is not the inevitable instantiation of some unchangeable sexual preference, as is homosexual sex to homosexuals. But this argument undermines the centrality of virtual sex to some people's fantasy lives. For some, sexual satisfaction is only achieved by way of a specific sexual fantasy, and they cannot, or are not willing to, explore that fantasy with another person in the real world. Perhaps they do not have a partner who is willing to indulge them or are too afraid to ask. Or perhaps there is no legal, real-world outlet for their fantasy. For them, virtual sex is the only way for them to express their sexuality. Perhaps allowing them this safe, insular forum for fantasy even has a social benefit. Regardless, denying them this outlet would certainly be an unconstitutional deprivation of liberty.

IV. CONCLUSION

Fantasies are not reality. The man who fantasizes about children or acts out those fantasies with his partner is often not the same man who molests actual children.¹⁸⁵ Moreover, there is no proof that the man who is stimulated by cybersex with a virtual child is any more likely to seek out real sex with a real child.¹⁸⁶ In fact, there may be some therapeutic value in indulging such fantasies. For instance, psychologist Michael J. Bader claims that sexual fantasies are specifically crafted by people's subconscious minds to help them feel comfortable expressing their

¹⁸⁴ *Id.*

¹⁸⁵ MICHAEL J. BADER, AROUSAL: THE SECRET LOGIC OF SEXUAL FANTASIES 186 (Thomas Dunne Books 2002) (noting that in the case of "Otto," who fantasized about teenage girls, "Otto's primary impulse was not to go out into the real world and have sex with teenage girls but instead to achieve sexual pleasure through a fantasy scenario that felt safe").

¹⁸⁶ *See id.*

sexuality.¹⁸⁷ He argues that those fantasies should be explored rather than suppressed, and indulging them may be productive rather than psychologically detrimental.¹⁸⁸ Bader further points out that fantasies involving youthful participants are not necessarily about children per se, but may be representative of something more subtle.¹⁸⁹ Such fantasies, especially the tamer varieties, are not uncommon—consider, for example, the popularity of the sexy school girl look, the incidence of flirtatious baby-talk between adult couples, or the prevalence of advertisements featuring teenage girls in suggestive poses. Our culture is overflowing with these and similar images of sexualized youth. Is it really so strange that these same images feature in people's fantasies?

Congress has made numerous attempts to ban virtual child pornography and offered a multitude of justifications in defense of those efforts. Recently, Congress tried a different approach, adding virtual child pornography to the range of materials banned under federal obscenity law. Critics and court rulings have suggested that the provision of the PROTECT Act which criminalizes virtual child pornography as obscenity are likely unconstitutional.¹⁹⁰ Some of these same critics have suggested that even if many provisions of the PROTECT Act are declared unconstitutional, virtual child pornography may still be suppressed as obscenity under the standard established in *Miller*.¹⁹¹ This Comment has argued that there is no sound constitutional basis for doing so, and at least one good argument, based on the concept of liberty, is refusing to honor any such intrusion into the private fantasy lives of consenting adults. Though the thought that a safe haven exists for pedophiles to act out their taboo fantasies may turn the collective stomachs of the government or civilian majority, unless the judiciary is willing to tolerate the prosecution of people for unpopular ideas, in violation of fundamental constitutional principles, citizens must be allowed to enjoy their harmless roleplay in peace.

¹⁸⁷ *Id.* at 187.

¹⁸⁸ *Id.* at 186.

¹⁸⁹ *Id.*

¹⁹⁰ *See, e.g.,* Kornegay, *supra* note 131, at 2130.

¹⁹¹ *Id.* at 2162 (citing Letter from Daniel Armagh, Dir., Legal Res. Div., Nat'l Ctr. For Missing & Exploited Children, to Sen. Patrick J. Leahy, Chairman, Comm. on the Judiciary (Oct. 17, 2002), in 149 Cong. Rec. S2582-83 (daily ed. Feb. 24, 2003)) (predicting that "it is highly unlikely that any community would not find child pornography obscene").

