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Virtually a Minor: Resolving the Potential Loophole in the Texas Child Pornography Statute.

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"VIRTUALLY" A MINOR: RESOLVING THE POTENTIAL LOOPHOLE IN THE TEXAS CHILD PORNOGRAPHY STATUTE

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I. INTRODUCTION

Within the past few years, the child pornography business has become an ever-increasing and lucrative endeavor. The advent of the Internet, exploited by unscrupulous entrepreneurs, spurred this massive explosion.[1] Last summer in Texas, the reach of Internet pornography became ever more apparent. In Fort Worth, an extensive two-year investigation known as Operation Avalanche culminated in the arrest of Thomas and Janice Reedy who owned and operated Landslide, a child pornography access provider. Federal officials called Landslide the largest child pornography Internet operation ever discovered in the United States.[2] In addition to the Reedys, police arrested 100 people and exposed the horrific conditions relating to child exploitation.[3] Capitalizing on this exploitation, the Reedys made as much as $1.5 million in one month from their website that offered subscriptions to viewers.[4] Severe crimes call for

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1. *See* Paul Coggins, *Operation Avalanche Is Just the Beginning: Cutting-Edge Case Illustrates Changing Kiddie Porn Industry*, TEX. LAW., Sept. 3, 2001, at 47 (concluding "[i]n the past, street corner hustlers in dirty overcoats peddled child porn to inner city denizens or slumming suburbanites"); *see also* Lenny Savino, *Huge Bust Shows How Child-Porn Business Evolved*, MILWAUKEE J. SENTINEL, Aug. 17, 2001, at 03A, 2001 WL 9373454 (reporting that websites offering child pornography exploded in 2000 from 403 to 1391).

2. *See ABC News: World News Now* (ABC television broadcast, Aug. 9, 2001), 2001 WL 22698799 (announcing the conviction and sentence of Thomas and Janice Reedy); *see also* David E. Rovella, *"Virtual Kid" Porn Ban Reaches High Court: 1st Amendment Lawyers Fret over '96 Law*, NAT'L L.J., Aug. 20, 2001, at A1 (reporting that the recent sting yielded 100 arrests and may create 30,000 additional cases involving those receiving child pornography).

3. *See* Kevin Johnson, *100 Arrested in Net Child Porn Ring: Children As Young As 4 Were Abused*, USA TODAY, Aug. 9, 2001, at 1A (discussing the facts associated with recent Texas child pornography arrests). Police used a list obtained during their investigation to track down child molesters worldwide. *Id.* Hundreds of children were used in prostitution and the production of photos in the subscriber-based website. *Id.* Federal investigators were only able to discover the identity of two children depicted in the pornography—a six-year-old British boy and his eight-year-old sister. *Id.* The pictures were taken and distributed by their stepfather. *Id.* Additionally, a West Virginia man was found with a large collection of child porn. Kevin Johnson, *100 Arrested in Net Child Porn Ring: Children As Young As 4 Were Abused*, USA TODAY, Aug. 9, 2001, at 1A. This man was employed at a psychiatric hospital for sexually abused children. *Id.* Additionally, a North Carolina man received a seventeen-year sentence for producing videos depicting the sexual abuse of several girls, one of whom was only four. *Id.*

4. *See ABC News: World News Now* (ABC television broadcast, Aug. 9, 2001), 2001 WL 22698799 (indicating that Landslide charged a quarter of a million subscribers worldwide $29.95 a month for access). Websites provided by Landslide include "Child Rape" and "Cyber Lolita." *Id.*; *see also* Kevin Johnson, *100 Arrested in Net Child Porn Ring: Children As Young As 4 Were Abused*, USA TODAY, Aug. 9, 2001, at 1A (informing readers that the Reedys used the proceeds of their activities to fund a lavish lifestyle).

severe punishment, and a court sentenced Thomas Reedy to 1335 years in prison and Janice to fourteen.[5]

Regrettably, Landslide did not hold a monopoly on Internet pornography. Law enforcement officials recently discovered and destroyed a number of other child pornography rings, which again revealed the depravity of this business.[6] The advent of the Internet and its accompanying unique qualities facilitate the child pornography market, which is both pervasive and elusive.[7] New technologies allow child molesters to swap thousands of photos while remaining anonymous; low-priced digital cameras facilitate transmission of live sex shows, and high-speed Internet connections provide ease of access and clarity of picture at low cost.[8] Further, the Internet's anonymity seems to be drawing people to child pornography.[9]

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5. Lenny Savino, *Huge Bust Shows How Child-Porn Business Evolved*, MILWAUKEE J. SENTINEL, Aug. 17, 2001, at 03A, 2001 WL 22698799.

6. *See* Gregory Katz, *Dirty Secrets: Internet Advances Helping "Virtual Community" of Pedophiles Thrive, Elude Police Detection*, DALLAS MORNING NEWS, Nov. 26, 1999, at 1A, 1999 WL 29820220 (reporting on the various worldwide child pornography rings that have been dissolved). The Wonderland Club, with members in the United States and Europe, provided membership to persons who first make available 10,000 new child pornography pictures to other members. *Id.* These individuals were attempting to increase their collection rather than make a profit. *Id.* The California-based Orchid Club swapped explicit homemade pictures of young girls having sex. *Id.* The Dutch-based Apollo Bulletin Board Service transmitted pictures of two and three-year-olds to its members. *Id.*

7. *See* Reno v. ACLU, 521 U.S. 844, 851 (1997) (discussing the Internet's unique qualities). The Internet is a unique medium because the user can transmit and receive a wide variety of communication and information. *Id.* Indeed, the Internet is an entirely new medium of communication because it is anonymous, malleable, and cyberspace allows speakers and viewers to mask their identity. *Id.* at 889-90 (O'Connor, J., dissenting). Most colleges and universities provide access to students and faculty members, many communities and local libraries provide free Internet access, and an increasing number of "computer coffee shops" provide access at an hourly fee. *Id.* at 850; *see also* Paul Coggins, *Operation Avalanche Is Just the Beginning: Cutting-Edge Case Illustrates Changing Kiddie Porn Industry*, TEX. LAW., Sept. 3, 2001, at 47 (indicating most sophisticated cyber-criminals set up their "kiddie porn" websites overseas where there are lax or non-existent child pornography laws).

8. *See* Gregory Katz, *Dirty Secrets: Internet Advances Helping "Virtual Community" of Pedophiles Thrive, Elude Police Detection*, DALLAS MORNING NEWS, Nov. 26, 1999, at 1A, 1999 WL 29820220 (discussing the technological tools available to pedophiles).

9. *See ACLU*, 521 U.S. at 889-90 (O'Connor, J., dissenting) (noting the level of anonymity available through the Internet); Gregory Katz, *Dirty Secrets: Internet Advances Helping "Virtual Community" of Pedophiles Thrive, Elude Police Detection*, DALLAS MORNING NEWS, Nov. 26, 1999, at 1A, 1999 WL 29820220 (indicating that more pedophiles are attracted to the Internet because chatrooms preserve anonymity and allow pedophiles to mask their identity while luring children into face-face meetings).

Apparently, the existence of child pornography via the Internet promotes further exploitation of children.[10] However, some argue the First Amendment protects Internet child pornography. After all, the Internet is a conduit through which users find expression, and therefore, "the free exchange of ideas" conducted over this medium deserve protection.[11] Further, they argue that creators of child pornography are persons merely seeking a forum to express their views.[12] Indeed, all ideas with even the slightest degree of importance, even ideas hateful to popular opinion, receive First Amendment protection unless they encroach upon a limited area of surpassing interests.[13] Nevertheless, the Supreme Court ultimately decided that child pornography may not be sold or otherwise disseminated[14] and now allows prosecution for mere possession.[15]

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10. *See* Lenny Savino, *Huge Bust Shows How Child-Porn Business Evolved*, MILWAUKEE J. SENTINEL, Aug. 17, 2001, at 03A, 2001 WL 9373454 (identifying two kinds of child pornography customers: "pedophiles who fantasize about having sex with children, and molesters who act out their fantasies").

11. *See ACLU*, 521 U.S. at 885 (finding the federal statute unconstitutional because it inhibits the exchange of thoughts over the Internet). The Communications Decency Act ("CDA"), 47 U.S.C.A. § 223(a), prohibits knowingly transmitting obscene or indecent messages to any recipient under eighteen. *Id.* at 859. The Web is comparable to a massive library including millions of readily indexed publications, as well as a large shopping mall. *Id.* at 853. From the publisher's point of view, the Internet constitutes a vast platform from which to address a worldwide audience. *Id.* The allowance of a criminal statute such as the CDA would allow criminal sanctions that would "cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Id.* at 872.

12. *See* U.S. CONST. amend. I (establishing the freedom of speech, religion, and assembly); Stanley v. Georgia, 394 U.S. 557, 566 (1969) (finding "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts"); Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (suggesting unpopular ideas that may be propagated). Free speech is the freedom to express unpopular ideas. *Id.* "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 327. "A pernicious belief may prevail[,]" people may teach ideas others despise, and the Nazi party can march through a Jewish neighborhood because, if anything, the First Amendment means that the government may not restrict expression because of its message or its ideas. *Id.* at 328.

13. Roth v. United States, 354 U.S. 476, 483 (1957) (holding that the "First Amendment was not intended to protect every utterance"). However, the Court held "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have . . . full protection . . ., unless excludable because they encroach upon the limited area of more important interests." *Id.* at 484.

14. New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that public dissemination of child pornography has no protection). The Court lists five compelling interests: safeguarding the physical and psychological well being of children; that distribution of child pornography is intrinsically related to child abuse; that marketing child pornography provides an

Congress uses the Child Pornography Prevention Act of 1996 ("CPPA")[16] to attack virtually-created child pornography.[17] Subsequently, numerous defendants have unsuccessfully challenged the statute on various constitutional grounds.[18] However, in 2001, the Ninth Circuit, in *Free Speech Coalition v. Reno*,[19] struck down the CPPA, and resolved the "virtual" child pornography quandary.[20] Preliminarily, the First Amendment affords no protection to pornography using and involving actual, living children.[21] The question remains whether animated child

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economic incentive to further production; the value of such pornography is *de minimus*; and the content of the pornography is without First Amendment protection much like libel, and fighting words. *Id.* at 756-57, 759, 761-63.

15. Osborne v. Ohio, 495 U.S. 103, 109-10 (1990) (finding the Ohio statute, which penalized private possession of child pornography, not overbroad, but tailored to address compelling state interests).

16. *See* 18 U.S.C.A. § 2252(a)(1)-(3) (West 2000) (punishing knowingly transporting in interstate commerce or producing, receiving, and distributing any visual depictions of a minor engaging in sexually explicit conduct); *id.* § 2252(c) (providing affirmative defenses if the perpetrator possesses less than three visual depictions, or allows access by law enforcement to these visual depictions and takes reasonable steps to destroy or report the matter to law enforcement); *id.* § 2256(8)(B), (D) (defining child pornography as visual depictions that appear to be or convey the impression of a child); *see also* Free Speech Coalition v. Reno, 198 F.3d 1083, 1090 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (No. 00-795), *available at* http://www.supremecourtus.gov/docket/00-795.htm (indicating the CPPA counteracts the effect of child pornography).

17. 18 U.S.C.A. §§ 2252, 2256 (West 2000).

18. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 71-72 (1994) (finding the CPPA knowledge requirement is presumed with respect to child pornography crimes and other similar crimes against public morals); United States v. Grimes, 244 F.3d 375, 382-85 (5th Cir. 2001) (holding the "appears to be" clause applicable to child pornography when the creator digitally hides the minor's genitals); United States v. Corp, 236 F.3d 325, 332 (6th Cir. 2001) (questioning congressional authority to regulate interstate commerce in this area, but falling short of actually declaring the CPPA unconstitutional); United States v. Mento, 231 F.3d 912, 921-22 (4th Cir. 2000) (finding the federal statute not overbroad or vague when punishing creation of digitally-altered, life-like depictions of children); United States v. Acheson, 195 F.3d 645, 652-53 (11th Cir. 1999) (holding the "appears to be" language in the CPPA not overbroad or vague).

19. 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom.* Ascroft v. Free Speech Coalition, 531 U.S. 1124 (2001).

20. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (finding the "appears to be" and "conveys the impression" language vague and overbroad); *see also* David E. Rovella, *"Virtual Kid" Porn Ban Reaches High Court: 1st Amendment Lawyers Fret over '96 Law*, NAT'L L.J., Aug. 20, 2001, at A1 (reporting the appeal of *Free Speech Coalition v. Reno* to the Supreme Court).

21. *See Osborne*, 495 U.S. at 109-10 (allowing states to penalize those possessing and viewing child pornography); New York v. Ferber, 458 U.S. 747, 756 (1982) (providing states "greater leeway" to regulate dissemination of child pornography).

pornography deserves protection when it involves only creations from an individual's imagination and artistic ability.[22] An individual with exceptional artistic and computer skills who creates completely animated depictions without employing actual children can still be subject to prosecution.[23] The Ninth Circuit found the CPPA overbroad and vague, while the First, Fourth, Fifth, and Eleventh Circuits have reached contrary conclusions.[24] Ultimately, the Supreme Court will resolve this issue.[25]

The CPPA is the current federal statute controlling the legality of virtually-created child pornography. Although states, including Texas, have specifically targeted child pornography, the Texas statute, Section 43.26 of the Texas Penal Code, does not seem to suppress computer-generated child pornography.[26] For persons such as the Reedys, who have an economic incentive to exploit the Texas statute, the "virtual" market is the next logical step. Arguably, exclusive use of virtually-created child pornography will not matter because Texas is a highly scienter-oriented state. The Fifth Circuit and a Texas state court have found the actor's intent the

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22. *See* David E. Rovella, *"Virtual Kid" Porn Ban Reaches High Court: 1st Amendment Lawyers Fret over '96 Law*, NAT'L L.J., Aug. 20, 2001, at A12 (reporting that an Ohio man, Brian Dalton, had his probation revoked when his mother found his diary containing references to the rape and torture of fictitious children). Ohio construed the statute to include writings, not just images. *Id.* Dalton may receive a sentence of twenty years. *Id.*

23. *See Free Speech Coalition*, 198 F.3d at 1093 (reasoning that virtually-created child pornography cannot be suppressed simply because it involves "foul figments of creative technology" that do not involve actual children).

24. *Compare* United States v. Fox, 248 F.3d 394, 397-98 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (upholding the CPPA when a private investigator began sending and receiving numerous pieces of child pornography as part of his investigation), *and Mento*, 231 F.3d at 923 (describing the CPPA as bold and innovative but this fact alone does not render the act unconstitutional), *and Acheson*, 195 F.3d at 652-53 (upholding the CPPA because the average person would know whether a child was involved), *and* United States v. Hilton, 167 F.3d 61, 73 (1st Cir. 1999) (finding that the CPPA is a logical extension of *Ferber* and *Osborne* by allowing regulation of materials appearing to be a child), *with Free Speech Coalition*, 198 F.3d at 1095-97 (finding the statute overbroad because it suppresses legitimate activity, and vague because the statute encourages arbitrary and discriminatory results).

25. *See* Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (granting certiorari to determine whether animated child pornography needs protection when created by an individual).

26. TEX. PEN. CODE ANN. § 43.26 (Vernon Supp. 2002) (prohibiting the knowing and intentional possession of child pornography). Visual depictions also include any film, photograph, videotape, and more recently, any disk, diskette, or other physical medium that allows image display. *Id.* § 43.26(b)(3); *see also Ferber*, 458 U.S. at 749-50 n.2 (listing nineteen states prohibiting the dissemination of material depicting child pornography, fifteen prohibiting only obscene child pornography, two prohibiting pornography if obscene to minors, and twelve prohibiting the use of minors in the production).

controlling issue.[27] Essentially, with child exploitation crimes, if the defendant intends to target a child, he commits an offense regardless of actual child participation.[28] Unfortunately, Texas case law has yet to address the "virtual" situation contemplated by the federal circuits.[29]

This Comment shows that a person indicted for possession or promotion of virtually-created child pornography may not escape criminal liability in Texas, although the current statute does not specifically address this type of child pornography. Section II of this Comment outlines and discusses the background and history of child pornography law. Section III focuses on the recent split in the various federal circuits regarding virtually-created child pornography. Section IV analyzes the Texas statute by balancing the legislative intent, judicial interpretations, and plain meaning of the statute. Section V suggests a prophylactic amendment to the current Texas statute. Finally, Section VI summarizes the arguments and suggestions set forth in this Comment.

II. THE ROOTS OF "VIRTUAL" CHILD PORNOGRAPHY LAW

As with other obscenity conundrums, an analysis of pornography begins with the First Amendment.[30] Over the past two centuries, courts

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27. *Compare* United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001) (upholding the conviction of the defendant who attempted to solicit a fourteen-year-old girl who in fact was an adult FBI agent), *with* Chen v. State, 42 S.W.3d 926, 931 (Tex. Crim. App. 2001) (upholding a conviction where the defendant attempted to solicit a child to engage in sexual performance, but in fact, the child was a Dallas Police Detective purporting to be thirteen).

28. *See Farner*, 251 F.3d at 513 (upholding defendant's conviction because he intended to engage in sexual conduct with a minor and took substantial steps toward commission of the act); *Chen*, 42 S.W.3d at 930 (noting that if the minor actually existed, then the act the defendant intended to perform constituted a crime).

29. *See* Burke v. State, 27 S.W.3d 651, 655 (Tex. App.—Waco 2000, pet. ref'd) (finding that the defendant possessed child pornography where the image depicted a minor's face superimposed on photos of naked models); *see, e.g.*, Roise v. State, 7 S.W.3d 225, 230 (Tex. App.—Austin 1999, pet. ref'd), *cert. denied*, 531 U.S. 895 (2000) (upholding the conviction of a person in possession of pornographic materials depicting a child younger than eighteen); Porter v. State, 996 S.W.2d 317, 321-22 (Tex. App.—Austin 1999, no pet.) (acquitting defendant of possessing depictions of a girl under eighteen on his computer because the definition of "visual material" at the time of arrest did not include images stored on a computer or downloaded from the Internet); Savery v. State, 819 S.W.2d 837, 838 (Tex. Crim. App. 1991) (acknowledging that states have the power to regulate child pornography even when privately possessed).

30. U.S. CONST. amend. I (establishing that "Congress shall make no law . . . abridging the freedom of speech, or of the press"); *see generally* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811 (2000) (deciding whether a cable company has First Amendment protection from a federal statute requiring such companies to scramble their pornographic channels during hours when children might see or hear without parental consent); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986) (analyzing First

have interpreted free speech as more than merely providing newspaper publishers latitude to print the truth or some semblance thereof.[31] The initial importance of this amendment was to prevent the sovereign state from unduly suppressing the ability of persons and organizations from speaking out against the government or from expressing unpopular opinions.[32] However, the Constitution never contemplated extending absolute protection to every utterance.[33] Since the adoption of the First Amendment, the Supreme Court declined to protect several forms of speech. For example, the First Amendment does not protect libel,[34] fighting words,[35] words that create a clear and present danger,[36] and, most applicable to the current discussion, "hard-core" obscene speech.[37]

A. *Public Dissemination of Obscene Material*

In *Roth v. United States*,[38] the United States Supreme Court squarely addressed whether obscenity is an utterance protected by the First

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Amendment concerns regarding a zoning ordinance prohibiting establishment of adult theatres near residential zones); Miller v. California, 413 U.S. 15, 18-19 (1973) (deciding whether states may regulate obscene materials sent to unwilling recipients).

31. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (reiterating that although the First Amendment expressly mentions freedom of speech and press, this freedom also includes the right to distribute, receive, read, and the freedom of inquiry, thought, and to teach).

32. *See* Roth v. United States, 354 U.S. 476, 488 (1957) (reporting that oppression during the colonial period sparked the concept of free speech and the necessity of uninhibited public discussion to further public awareness and education without fear of prior restraint or punishment). Freedom of speech must encompass all necessary information to enable members of society to cope with current events. *Id.* The freedom of speech has greatly contributed to the well-being and growth of this nation. *Id.*

33. *See, e.g.,* N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (regulating libel); *Roth*, 354 U.S. 476, 492-93 (1957) (upholding the federal obscenity statute that punishes a person who uses the mail to transport obscene material); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (suppressing fighting words); Schenck v. United States, 249 U.S. 47, 52 (1919) (upholding the right to suppress and regulate speech that creates a clear and present danger).

34. *Sullivan*, 376 U.S. at 279-80 (holding that public officials cannot recover for defamatory falsehoods unless they prove "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

35. *Chaplinsky*, 315 U.S. at 571-72 (allowing the regulation of "fighting words," which are words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace").

36. *Schenck*, 249 U.S. at 52 (holding that Congress has the right to suppress and regulate speech that creates a clear and present danger).

37. Miller v. California, 413 U.S. 15, 29 (1973) (differentiating "hard-core" obscene speech from protected speech).

38. 354 U.S. 476 (1957).

Amendment.[39] The defendant in *Roth* published and sold obscene books, magazines, and photographs, and used circulars to advertise and solicit sales.[40] The Supreme Court held that the First Amendment always rejected obscene materials that were completely without any redeeming social value.[41] However, the exact definition of obscene materials remained abstract and difficult to define.[42] The average person may consider all pictures depicting nude or partially nude individuals obscene, while others regard obscenity as that which depicts only the ultimate sexual act. The Court defined obscenity as sexual material that appeals to prurient interests.[43] Because some disfavored speech may have scientific or social value, legislative efforts to regulate speech must be approached cautiously.[44] To address this issue, the Court apparently deferred to regional preferences by enumerating the "community standards" doctrine.[45] This doctrine requires considering the effects of pornographic materials, taken as a whole, on the average person in the community.[46]

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39. *See* Roth v. United States, 354 U.S. 476, 481 (1957) (indicating that obscenity is not protected under either the First or Fourteenth Amendments).

40. *See id.* at 480 (discussing the defendant's pornography business).

41. *See id.* at 485 (suggesting lewd and obscene speech are of such low value that their regulation has never raised constitutional concerns).

42. *See* Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (reiterating that the standard of obscenity has been the subject of much controversy). The obscene film in question received a number of critical and favorable reviews in national publications. *Id.* at 196. The last reel of the film depicted an explicit love scene. *Id.* Justice Potter Stewart wrote, "I shall not today attempt further to define [hard-core pornography] . . . . But I know it when I see it . . . ." *Id.* at 197 (Stewart, J., concurring).

43. *See Roth*, 354 U.S. at 487 (suggesting obscenity and sex are not synonymous). Some portrayal of sex has scientific, artistic, and literary value, and may involve areas of public concern. *Id.* at 487-88.

44. *See id.* at 488 (discussing the importance of the freedoms of speech and press to American society). The Court stated:

> Ceaseless vigilance is the watchword to prevent [erosion of free speech] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.

See id. at 488.

45. *See id.* at 490 (suggesting that the community standards test is not the effect on a particular segment in society, such as children or "highly prudish," but on the "average person in the community").

46. *See Roth*, 354 U.S. at 490 (holding the test for obscenity is the effect on the average person in the community). Indeed, the Constitution does not require absolute precision in defining obscenity. *Id.* at 491. All that is required is that the language conveys to the person a sufficiently definite warning which conduct is proscribed. *Id.*

B. *Private Possession of Obscene Materials*

While the Court in *Roth* regulated public distribution, advertisement, and circulation of child pornography,[47] in *Stanley v. Georgia*[48] it addressed whether to suppress private possession of obscene materials.[49] In *Stanley*, police found in the defendant's home three reels of eight-millimeter film containing obscene themes.[50] Thereafter, Stanley was prosecuted under a Georgia statute for possession of obscene material.[51] The Court considered the First and Fourteenth Amendments and concluded that the right to be free from government intrusion is inherent in the concept of due process.[52] Also inherent in due process is the right to receive information and ideas while in the privacy of one's own home, where the most intimate relationships exist.[53] Accordingly, the Court held that, in-and-of-itself, private possession of child pornography was not within the purview of state regulation.[54]

C. *The* Miller *Test*

In the years following *Stanley*, the Court sought in *Miller v. California*[55] to reduce the definitional confusion between obscenity and pornography.[56] Because the definition of obscene was abstract and ambiguous,[57]

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47. *See id.* at 480 (noting that Roth used circulars and advertising to solicit sales).

48. 394 U.S. 557 (1969).

49. *See* Stanley v. Georgia, 394 U.S. 557, 561-62 (1969) (finding only one instance prior to this decision where any court considered private possession of obscene material). The Supreme Court of Ohio found unconstitutional the state's attempt to prosecute private possession of obscene materials. *Id.* at 562 n.7.

50. *See id.* at 558 (indicating the arresting officers viewed the film while in Stanley's home to determine if the material was obscene).

51. *Id.* at 557.

52. *See id.* at 564 (suggesting the right to receive ideas and information is fundamental except in very limited circumstances).

53. *See Stanley*, 394 U.S. at 564 (suggesting the right to receive ideas and information in the privacy of one's home is fundamental); Griswold v. Connecticut, 381 U.S. 479, 481-82 (1965) (holding that the right of privacy in a marital relationship is a fundamental and basic right secured by the Fourteenth Amendment). Defendants were physicians who provided married couples with contraceptive information in violation of the state statute. *Id.* at 480.

54. *See Stanley*, 394 U.S. at 568 (holding that although states retain broad power to regulate obscenity, their authority does not extend into the home).

55. 413 U.S. 15 (1973).

56. *See* Miller v. California, 413 U.S. 15, 24 (1973) (setting forth the *Miller* Test).

57. *See id.* at 20-21 (holding that obscenity jurisprudence has experienced a "somewhat tortured history"). The defendant, in this case, conducted a mass mailing campaign advertising obscene books and films. *Id.* at 16. The brochures contained graphic illustrations of sex acts. *Id.* at 18. The defendant mailed brochures to an unwilling restaurant owner. *Id.*

the Court clarified its meaning. The *Miller* Court adopted the *Roth* suggestions and, with a few additions, formulated the *Miller* test, which provides guidelines for the fact-finder to determine if the material in question is truly obscene. The test is as follows:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[58]

The Court further suggested what a state statute might define as obscene. For example, a statute could regulate patently offensive representations of ultimate sex acts, normal or perverted, actual or simulated, or patently offensive representations or descriptions of masturbation, excretory functions, or lewd exhibition of genitals.[59] The Court further explained that persons could not be prosecuted for selling obscene materials unless these materials depicted patently offensive hardcore sexual conduct.[60]

D. *Public Dissemination and Private Possession of Child Pornography*

Thereafter, the *Miller* test became the standard for differentiating between obscene and non-obscene material. The *Miller* test extends to all subparts and classifications of obscene material. However, in *New York v. Ferber*,[61] the Court decided whether a state has more freedom to suppress material portraying sexual acts or lewd displays of children.[62] Ultimately, the Supreme Court found that persons who sell, advertise, and otherwise disseminate child pornography receive no First Amendment protection.[63]

In approving complete suppression of child pornography, the Court listed several justifications for this comprehensive ban.[64] Namely, a full-

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

59. *See id.* at 25 (providing examples states may incorporate when defining obscenity).

60. *See id.* at 28 (indicating that unless states are given power to define these materials, the juvenile, passerby, or consenting adult may be exposed without limit).

61. 458 U.S. 747 (1982).

62. New York v. Ferber, 458 U.S. 747, 753 (1982) (questioning whether a state has more freedom to proscribe obscene adolescent sexual material). The defendant owned a bookstore that sold two films to undercover police officers. *Id.* at 752. Both films depicted young boys masturbating as the general theme. *Id.*

63. *See id.* at 773 (finding the New York statute used to convict Ferber permissible since it was directed at hard-core child pornography).

64. *Id.* at 757-63 (listing five compelling interests that outweigh protection of child pornography). Such a broad ban on a single classification of speech is content-based regu-

scale suppression of child pornography is considered acceptable because states have valid interests in protecting the welfare of their children; the lucrative nature of the child pornography market is intrinsically related to and further promotes child exploitation; and finally, there is little value that child pornography may contribute to society.[65] Although content-based, the interests supporting suppression of child pornography dwarf whatever speech concerns may be offended.[66] Thus, the dissemination of child pornography receives no First Amendment protection whether disseminated by advertisement, circular, or sale.[67]

Inevitably, the issue of private possession of obscene materials, addressed by the *Stanley* Court, arose in *Osborne v. Ohio*.[68] Essentially, the *Osborne* Court decided whether an individual may possess child pornography within the privacy of his home.[69] The defense contended that *Stanley* should apply. If this assertion were true, a person would have a right to privately possess and receive child pornography.[70] However, applying the same justifications enunciated in *Ferber*, the Court refused to extend First Amendment protection even to private possession of child

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lation and to survive strict scrutiny, compelling state interests must exist. *Ferber*, 458 U.S. at 755-56. First, states have a compelling interest in protecting the physical, psychological, and emotional well-being of their children, and child pornography opposes that objective. *Id.* at 757. Second, child pornography is intrinsically related to child abuse. *Id.* at 759. Third, child pornography is a lucrative business that provides economic incentive to further exploit children. *Id.* at 761. Fourth, the contribution made by child pornography to literature, science, or art is *de minimis* and thus deserves little protection. *Id.* at 762-63. Finally, the evils associated with child pornography so outweigh the speech interests that the First Amendment is not offended. *Ferber*, 458 U.S. at 762-63.

65. *See id.* at 757-62 (discussing the compelling interests justifying suppression of child pornography).

66. *Id.* at 773 (holding that the statute's overbreadth concerns are of minimal concern compared to the problems addressed by the statute). The Court of Appeals was concerned that the statute would render obscene National Geographic or medical textbooks depicting nude children. *Id.* However, the potential impermissible reaches of the statute are a small fraction of the statute's overall purpose. *Id.* Further, the statute only focused on "lewd" exhibitions. *Ferber*, 458 U.S. at 773. The Court concluded, "[w]e consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications." *Id.*

67. *See id.* at 764 (holding that when a form of speech bears so heavily on the welfare of children a state may deny the mode of speech First Amendment protection).

68. 495 U.S. 103 (1990).

69. *See* Osborne v. Ohio, 495 U.S. 103, 108 (1990) (distinguishing the present case from *Stanley* because the interests associated with child pornography far exceed the interests at issue in *Stanley*, which prevented regulation of private possession of adult pornography).

70. *See id.* at 109 (questioning whether a person has a right to receive and view child pornography within the privacy of one's home).

pornography.[71] The Court further found that states may protect the physical, psychological, and emotional well-being of their children damaged by the child pornography market.[72] To extend this protection, a state may find it necessary to decrease the sale and production of pornography by also punishing consumers of child pornography.[73] Essentially, the states may punish both ends of the supply chain to "dry up" the market.[74]

E. *The Child Pornography Prevention Act of 1996*

In spite of the Supreme Court's efforts to deal with child pornography, Congress took the war on child pornography to another level with the Child Pornography Prevention Act of 1996 (CPPA).[75] The original act, the Protection of Children Against Sexual Exploitation Act of 1977, criminalized using a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of that conduct.[76] Although visual depictions included undeveloped film and reproductions of photographs, the Act resulted in only one conviction.[77]

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71. *Id.* at 110 (applying the findings of *Ferber* to private possession of child pornography).

72. *See id.* at 111 (allowing states to suppress possession of child pornography because such images record the victim's abuse causing perpetual harm to the child, and these images may be used to seduce other children).

73. *See id.* at 110 (allowing attacks on possession of child pornography to "dry up" the market because it is no longer feasible to solve the problem by prosecuting only production and distribution).

74. *See Osborne*, 495 U.S. at 111 (approving two legislative goals). The legislature may stamp out child pornography because it serves as a record of child abuse, and denies pedophiles access to child pornography that could be used to lower the inhibitions of children. *Id.*

75. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1089 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (reporting that the CPPA now suppresses virtually-created child pornography that does not employ actual children in its creation).

76. *See id.* at 1087 (citing Pub. L. No. 95-225, 92 Stat. 7 (codified as amended at 18 U.S.C.A. §§ 2251-53 (1977))).

77. *See id.* (discussing the flaws in the Protection of Children Against Sexual Exploitation Act). In response, the Supreme Court decided *Ferber* and Congress enacted the Child Protection Act of 1984, which raised the age limit of the subject, and changed the word "lascivious" to "lewd" in the definition of sexual conduct to hone in on visual sexual activity. *Id.* at 1087-88. Thereafter, Congress addressed new problems raised by court decisions through passage of the Child Sexual Abuse and Pornography Act of 1986. *Id.* at 1088. This law banned the production and use of advertisements for child pornography and made wrongdoers subject to tort liability for the child's personal injuries resulting from the production of child pornography. *Free Speech Coalition*, 198 F.3d at 1088. Later, the Child Protection and Obscenity Enforcement Act was enacted in 1988. *Id.* That law prohibited use of computers to transport, distribute, or receive child pornography. *Id.* Finally, the

With the growth of technology and the Internet, Congress expanded the law in 1996. The CPPA now addresses computer technology used to create visual depictions of children.[78] Further, this law punishes persons who knowingly ship or transport in interstate commerce or who receive or distribute sexually exploitive visual depictions that have traveled in interstate commerce by any means, including by computer or mail.[79] The Act is primarily concerned with child pornography that uses children in its production and portrays the child engaging in sexually explicit conduct.[80]

Lately, Section 2256 of the CPPA is receiving the most attention. Until recently, the Act's predecessors all dealt with the effects of child pornography on real children.[81] However, this new section defines "child pornography" as any visual depiction of sexually explicit conduct, including photograph, video, or other visual media, including computer-animated images produced electronically or by other means.[82] Section 2256 outlaws a visual depiction that "appears to be" a minor engaged in sexual activity or presented in a way that "conveys the impression" of a child engaged in sexual activity.[83] For example, this section covers photos of an adult model altered, using certain graphics programs, to appear thirteen.[84] The law also suppresses computer-animated images involving no

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Child Protection Restoration and Penalties Enhancement Act of 1990 criminalized the possession of three or more pieces of child pornography. *Id.*; *see* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 449-52 (1997) (discussing the origin of the Child Pornography Prevention Act of 1996).

78. *See Free Speech Coalition*, 198 F.3d at 1089 (finding the new expansion in the law combats the use of computer animation and other technological devices employed to produce images indistinguishable from real children).

79. *See* 18 U.S.C.A. § 2252(a)(1)-(2) (West 2000) (requiring the material to travel in interstate commerce).

80. *See id.* § 2252(a)(1)(A) (suppressing child pornography).

81. *See Free Speech Coalition*, 198 F.3d at 1089 (suggesting that Congress shifted the focus from harm to real children to regulating virtually-created child pornography involving no real children).

82. *See* 18 U.S.C.A. § 2256(8) (West 2000) (specifying various mediums available to produce child pornography).

83. *See id.* (defining anything that looks like child pornography even when actual children are not used). This visual depiction either:

> 1) involve[s] the use of a minor engaging in sexually explicit conduct; [or] 2) such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct; [or] 3) such visual depiction is advertised, promoted, presented, described, or distributed in such a way that *conveys the impression* that . . . a minor [is] engaging in sexually explicit conduct.

Id. at § 2256(8)(A), (B), & (D) (emphasis added).

84. *See, e.g.*, United States v. Katz, 178 F.3d 368, 371 (5th Cir. 1999) (suggesting that child pornographers may try to make a model look young by manipulating the model's

live children.[85] Further, the regulation applies to child pornography portraying children in sexually explicit poses, including images where computer-generated pixel boxes cover the private areas.[86] This particular clause has caused a deep division among federal courts. The Supreme Court granted certiorari to answer whether the prohibition against child pornography extends to virtually-created child pornography involving no children.[87]

III. WEIGHING THE ARGUMENTS: *CONSTITUTIONAL CONCERNS VS. COMPELLING GOVERNMENT INTERESTS*

A. *Opponent's Argument: Free Expression, Overbreadth, and Vagueness Concerns*

The Ninth Circuit is the only circuit to find the CPPA unconstitutional.[88] In *Free Speech Coalition v. Reno*,[89] the Ninth Circuit found the CPPA's terms "appears to be" and "conveys the impression" vague be-

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pubic hair); Burke v. State, 27 S.W.3d 651, 655 (Tex. App.—Waco 2000, pet. ref'd) (finding the defendant possessed child pornography where the image depicted a minor's face superimposed on photos of naked models).

85. *See Free Speech Coalition*, 198 F.3d at 1089 (recognizing that suppression of child pornography using actual children has always been permissible but the new shift to suppress virtually-created child pornography goes too far).

86. *See* United States v. Grimes, 244 F.3d 375, 383 (5th Cir. 2001) (allowing jurors to decide whether pixeled images are sufficiently lascivious to merit conviction). Pixeled images are those where part of the image is blurred electronically. *Id.* at 378 n.4. For example, when a person's face is blurred on television screens to conceal the person's identity. *Id.* The defendant contended the computer alterations brought the image out of the reach of the statute because they were not lascivious. *Id.* at 380. The court found such photographs are still used to seduce children, and that harms accrue when the image is produced, not later when the image is altered. *Id.* at 382.

87. *See Free Speech Coalition*, 198 F.3d at 1086 (holding certain provisions of the CPPA vague and overbroad). The Ninth Circuit did find that the remainder of the act would be constitutional if the "appears to be" and "conveys the impression" provisions were stricken. *Id.*

88. *Id.*; *see also* United States v. Fox, 248 F.3d 394, 403 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (holding the "appears to be" language is essential because technology has changed since *Ferber* and *Osborne* and these advances inhibit the ability to prove that the image is a real child); United States v. Corp, 236 F.3d 325, 332 (6th Cir. 2001) (questioning congressional authority to regulate interstate commerce in this area, but falling short of actually declaring the CPPA unconstitutional); United States v. Mento, 231 F.3d 912, 921 (4th Cir. 2000) (finding the "appears to be language" impossible to improve upon in regard to vagueness without frustrating the compelling government interests); United States v. Acheson, 195 F.3d 645, 652-53 (11th Cir. 1999) (upholding the CPPA because a reasonable person would know whether a child was involved); United States v. Hilton, 167 F.3d 61, 73 (1st Cir. 1999) (finding that the CPPA is a logical extension of *Ferber* and *Osborne* by allowing regulation of materials appearing to be a child).

89. 198 F.3d 1083 (9th Cir. 1999).

cause the statute fails to define the criminal offense with sufficient specificity to put ordinary persons on notice of the prohibited acts.[90] Vagueness occurs when a person is left guessing about the legality of his actions.[91] Additionally, such vagueness allows investigating officers to exercise subjective discretion when determining what "appears to be" or "conveys the impression" of child pornography.[92] For example, law enforcement could arrest an individual for possessing pictures of the suspect's four small grandchildren taking a bath together if the officer determines the images convey the impression of sexual conduct. Language is arbitrary and discriminatory when it creates such random consequences.[93]

The Ninth Circuit also found a tenuous nexus between virtually-created child pornography involving no children and further sexual exploitation and abuse of actual children.[94] This link suggests that viewing any child pornography has the effect of increasing a pedophile's desire to engage in further criminal activity.[95] Borrowing the language of a sister circuit, the Ninth Circuit indicated that freedom of speech would congeal if the judiciary allowed Congress to regulate speech just because it plays a role in conditioning inappropriate behavior.[96] Consequently, depictions of virtu-

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90. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1095 (9th Cir. 1999) (holding that notice is unenforceable that does not give a meaningful understanding of the prohibited conduct).

91. *See id.* (holding that notice failing to provide a meaningful understanding of what is prohibited is vague and unenforceable).

92. *See id.* (finding that "appears to be" and "conveys the impression" are highly subjective and provide no explicit standard to define the phrases).

93. *See id.* at 1095 (indicating a statute is void for vagueness if it encourages arbitrary and discriminatory results and if the statute fails to define the criminal offense with sufficient definiteness that ordinary people can understand what is prohibited).

94. *See id.* 1094 (suggesting there is no demonstrated basis linking virtually-created child pornography to further abuse of actual children).

95. *But see Free Speech Coalition*, 198 F.3d at 1093 (indicating there are no studies linking virtually-created child pornography to additional acts of sexual abuse); *see also* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 461 (1997) (suggesting pornography that falls short of actually abusing children should be protected). The author stated the following:

> Virtual child pornography may encourage, promote, persuade, or influence pedophiles to engage in illegal activity with children, it may validate their illegal activity, and it may assist in their illegal activity, but the conduct is neither sufficiently imminent nor impelling to constitute incitement. As such, nonobscene virtual child pornography, which does not record a criminal act being perpetrated against an actual child, should constitute protected expression.

Id.

96. *See Free Speech Coalition*, 198 F.3d at 1093 (citing Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985)). In *Hudnut*, the Seventh Circuit held:

ally-created children and their effect on pedophiles, as opposed to depictions of actual children, are not compelling justifications for the CPPA.[97]

The Ninth Circuit also held the CPPA overly broad.[98] Opponents of the CPPA argue that the statute subjects producers and purchasers of movies such as *Traffic*, which received several academy award nominations, to criminal prosecution because an adult actor portrays a child engaging in sexual behavior.[99] The Ninth Circuit reasoned that the statute is overbroad because the statute prohibits more speech than necessary to protect actual children.[100]

Similar to the overbreadth challenge is the right to expression through art. Essentially, artists have a right to express their views, ideas, or imagination via canvas, photography, or any other medium.[101] Appellants in *Free Speech Coalition* were a trade organization representing businesses that produce adult-oriented materials, one of which published a book dedicated to ideas associated with nudism.[102] Artistic work is similar to

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> Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses .... If the fact that speech plays a role in a process of conditioning were enough to permit government regulation, that would be the end of freedom of speech.

Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985).

97. *See Free Speech Coalition*, 198 F.3d at 1093 (holding that the CPPA does not allow prosecution of persons for having bad thoughts).

98. *Id.* at 1097 (declaring that the CPPA regulates more speech than necessary to hinder exploitation of children, because virtually-created pornography does not involve actual children).

99. *See* Respondent's Oral Argument at 30-31, Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (No. 00-795), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html (arguing that the CPPA suppresses movies such as *Traffic*, which won critical acclaim, and the *Blue Lagoon* where minors engage in sexual activities).

100. *See Free Speech Coalition*, 198 F.3d at 1096 (suggesting that the CPPA prohibits non-obscene sexual expression that does not involve real children and is thus protected even if distasteful).

101. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414-15 (1989) (preventing the government from suppressing works said to be offensive including defacing an American flag); Miller v. California, 413 U.S. 15, 24 (1973) (suggesting works may only be banned that, among other things, lack serious literary, artistic, political, or scientific value); Brooklyn Inst. of Arts & Sciences v. City of New York, 64 F. Supp. 2d 184, 202 (E.D.N.Y. 1999) (holding "[t]he communicative power of visual art is not a basis for restricting [the art] but rather the very reason it is protected by the First Amendment").

102. *Free Speech Coalition*, 198 F.3d at 1086 (discussing the various groups who sought relief from the CPPA). One appellant was a New York artist whose paintings included large-scale nudes. *Id.* Another appellant was a photographer whose works included nude and erotic photographs. *Id.*

other forms of expression, such as flag burning.[103] According to the Supreme Court, burning a flag is not speech in the traditional sense, but is an expression of one's ideas.[104] The government has no right to control such expression.[105] Further, the First Amendment prohibits suppression of works said to be morally improper, offensive, sacrilegious, or even dangerous.[106] Likewise, the Free Speech Coalition and others argue that virtually-created child pornography, while offensive, harmful, and morally improper, is still protected speech.[107] Essentially, the federal statute announces that child pornography is evil regardless of whether its pro-

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103. *See* Esperanza Peace & Justice Ctr. v. City of San Antonio, No. SA-98-CA-0696-OG, slip op. at 19, 2001 WL 685795, at *8 (W.D. Tex. May 15, 2001) (comparing artistic expression to flag burning, and holding that the First Amendment prohibits viewpoint discrimination in the arts subsidy context). The City of San Antonio denied an artistic grant to a gay and lesbian organization while providing the grant to others. *Id.* at *5. To qualify, the applicant organization must meet several criteria. *Id.* at *3. Although qualified, the city denied the grant due to public outcry. *Id.* at *4-5. The *Esperanza* court held:

> The specter of government as "Big Brother" doling out subsidies based on the viewpoints of the recipients should be odious to all Americans, for the point of view officially favored today may be the one censured tomorrow. When dissenting voices are silenced, the public is deprived of their distinctive viewpoint, and thereby inhibited from arriving at its own conclusions uninfluenced by the government's selection of acceptable points of view.

Id. at *7; *see also Brooklyn Inst. of Arts & Sciences*, 64 F. Supp. 2d at 198-99 (comparing artistic expression to flag burning and holding that the city may not deny funds to the museum because it hosts a show that portrays offensive works while continuing to give funds to others).

104. *Johnson*, 491 U.S. at 404-05 (recognizing the communicative nature of conduct relating to flags such as "[a]ttaching a peace sign to the flag, refusing to salute the flag, and displaying a red flag").

105. *See id.* at 419-20 (holding that a state may not punish someone for burning an American flag). The Court held that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

106. *See Brooklyn Inst. of Arts & Sciences*, 64 F. Supp. 2d at 190 (discussing the offensive nature of the art exhibit hosted by the museum). New York City's mayor denied funds to the Brooklyn Museum of Arts and Sciences for hosting an exhibit containing works such as a depiction of the Holy Virgin Mary created with elephant dung, and cross-sections of lambs and sharks preserved in formaldehyde. *Id.* The court granted the injunction in favor of the museum. *Id.* at 205; *see also* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 458 (1997) (indicating that *Ferber* was only concerned with "hard core" pornographic depictions); *id.* at 458-59 (suggesting some virtually-created child pornography has value that does not involve the sexual abuse of children).

107. *See Free Speech Coalition*, 198 F.3d at 1094 (finding virtually-created child pornography morally repugnant, but because these depictions do not involve actual children they are protected).

duction uses real children.[108] In other words, the statute condemns a thought or idea because it is viewed as evil, not necessarily because there are any tangible implications.[109]

Opponents further assert that statutes such as the CPPA are also overly broad because they affect educational and health related efforts.[110] Thus, persons who use images of nude children for legitimate purposes, such as for medical education or to treat abused children, potentially violate the act.[111] This argument extends to persons such as the high school nurse

108. *See id.* at 1089 (holding that the CPPA marks a paradigm shift where the focus is not primarily on harm to real children); *see also* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 460 (1997) (suggesting non-obscene, virtually-created child pornography is nothing more than an imaginative idea). "However repulsive, however disgusting to majoritarian beliefs, ideas constitute protected speech." *Id.* Further, the suppression of child pornography will not solve the compelling interests asserted by Congress because adult pornography could be used to seduce children in the same way as virtually-created child pornography. *Id.* at 468. As such, the statute is underinclusive and not narrowly tailored. *Id.*

109. *See Free Speech Coalition*, 198 F.3d at 1089 (emphasizing the shift of focus on pornography not involving actual children illustrates a perception that child pornography is evil in and of itself).

110. *See* Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 675 (1999) (suggesting a good faith defense for those using images of child genitalia for medical purposes).

111. *See* New York v. Ferber, 458 U.S. 747, 766-67 (1982) (quoting the state court that found the New York statute would prohibit the sale, showing, or distribution of medical or education materials containing photographs of children engaging in real or simulated sexual acts); *see also* Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 675 (1999) (indicating that access to child pornography may perform a legitimate function in society). Close-up depictions of a sexually molested child's genitalia may provide important, helpful facts that otherwise would not be accessible. *Id.* Further, physicians and psychologists who regularly treat children may need access to actual photographs depicting the child engaged in sexual behavior where the depiction is a record of the child's sexual abuse. *Id.* One possible solution is to create a good faith defense for healthcare providers. *Id. But see id.* (reporting that Congress never intended to allow child pornography even if legitimately used). *See also* Sonja Garza, *Surgeon Admits Sending Child Porn over the Internet; Kimmel's Move Part of Plea Bargain with Federal Prosecutors*, SAN ANTONIO EXPRESS-NEWS, Aug. 15, 2001, at 01B, 2001 WL 24772483 (reporting that law enforcement arrested a surgeon, who also served as a high school team doctor, for possession of child pornography when he provided online sexual advice and confessed sexual desires online); Kevin Johnson, *100 Arrested in Net Child Porn Ring: Children As Young As 4 Were Abused*, USA TODAY, Aug. 9, 2001, at 1A (reporting that a West Virginia man, who worked at a psychiatric hospital as an attendant to sexually abused children, had a collection of child pornography, including videos, at his home).

who may use photographs of teenagers to show the effects of venereal diseases and the benefits of contraceptives.[112]

The public authority defense is another interesting attempt to declare the CPPA overbroad.[113] In *United States v. Matthews*,[114] a reporter claimed he possessed and downloaded child pornography for legitimate investigative purposes.[115] Essentially, Matthews attempted to reduce the effective reach of the CPPA by arguing he used child pornography for legitimate journalistic purposes, when, in fact, he engaged in non-legitimate activity.[116] Likewise, in *United States v. Hilton* ("*Hilton II*")[117] and *United States v. Fox*[118] both defendants were allegedly conducting investigative police work.[119] Allowing this excuse would permit pedophiles to volunteer their services to the FBI, then legally view and send child por-

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112. *See* Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 675 (1999) (arguing that close-ups of child genitalia may perform an important function).

113. *See* United States v. Fox, 248 F.3d 394, 398 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (finding the defendant was a private investigator and placed his name on a list to receive child pornography as part of an investigation); United States v. Hilton, 257 F.3d 50, 52 (1st Cir. 2001) (indicating the defendant volunteered his services as a confidential informant at the behest of law enforcement agencies); United States v. Matthews, 209 F.3d 338, 339 (4th Cir. 2000) (indicating the defendant received and sent child pornography, allegedly as part of a journalistic article).

114. 209 F.3d 338 (4th Cir. 2000).

115. *See* United States v. Matthews, 209 F.3d 338, 339-40 (4th Cir. 2000) (indicating the defendant's journalistic work was not solely for the purposes of investigation and when arrested, he was no longer investigating the story). This is a unique First Amendment question because it involves censorship of journalists and the public's right to know, as well as suppression of child pornography. *Id.* at 342.

116. *See id.* at 344 (arguing that Matthews felt such works should be protected when used for educational, academic, medical, and political significance, and for other legitimate purposes such as journalism).

117. 257 F.3d 50 (1st Cir. 2001).

118. 248 F.3d 394 (5th Cir. 2001).

119. *See* United States v. Hilton, 257 F.3d 50, 52 (1st Cir. 2001) (indicating the defendant volunteered his services as a confidential informant, whereby he provided the FBI and U.S. Custom's Service with child pornography sources by posing as a young girl in a chat room). Hilton claimed he was acting at the behest of these agencies. *Id.* The Custom's Service became suspicious and found that Hilton had an extensive collection of child pornography. *Id.* at 53; United States v. Fox, 248 F.3d 394, 398 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (claiming the defendant was investigating the source of child pornography images that suddenly appeared on the defendant's computer monitor). Fox worked for a private investigation firm and put his name on a list to receive child pornography as part of an investigation. *Id.* Regardless of his assertions, the FBI found he sent several images via the Internet including one marked "Here's my 15-year-old niece, Sky." *Id.*

nography with impunity.[120] The First, Fourth, and Fifth Circuits ultimately rejected these arguments because (1) the government has an interest in utterly suppressing child pornography, and (2) such an excuse creates a loophole for pedophiles intent on thwarting the statute's purpose by legitimizing certain uses of child pornography.[121]

B. *Proponent's Argument: The Compelling Interests*

1. *Ferber* Concerns

As a preliminary matter, the CPPA and other anti-child pornography laws are blatant content-based regulations.[122] To justify such broad sup-

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120. *See Hilton*, 257 F.3d at 52 (reporting that Hilton received permission from law enforcement to download child pornography); *Fox*, 248 F.3d at 408 (indicating a defendant may assert the public authority defense if he can show he was engaged by law enforcement to collect child pornography).

121. *See id.* (finding the defendant contacted the FBI and U.S. Customs Service to volunteer his investigative services but instead abused their permission by illegally collecting child pornography); *Fox*, 248 F.3d at 408 (suggesting that if the defendant could show he was engaged by the government to participate in covert investigative activity he may be able to invoke the public authority defense); *Matthews*, 209 F.3d at 339 (suggesting the defendant collected and sent child pornography under the guise of journalistic investigation); *see also* Clay Calvert & Kelly Lyon, *Reporting on Child Pornography: A First Amendment Defense for Viewing Illegal Images?*, 89 KY. L.J. 13, 61-62 (2001) (indicating that juries should consider a number of questions to determine whether journalists are appropriately engaged in investigative activities).

122. *See generally* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (upholding a city ordinance setting a moratorium on adult theatres because it was aimed at secondary effects of such businesses rather than the speech itself). The Supreme Court set forth the preliminary framework of the compelling interest test. First, statutes enacted to restrain speech are presumptively invalid content-based restrictions. *Id.* at 46-47. However, content-neutral time, place, and manner restrictions are acceptable if (1) they serve a substantial state/governmental interest and (2) do not unreasonbably burden alternative channels of communication. *Id.* at 47. Content-neutral statutes are those aimed not at the class of speech, but at the secondary effects of the speech. *Id.* For example, in *Renton*, the purpose of the zoning ordinance restricting adult theatres was not aimed at speech elements but at criminal elements, and the economic fallout sure to accompany adult theatres. *Id.* at 51.

When speech is banned altogether or significantly burdened, as opposed to mere limitations on time and place, the regulation is a content-based restriction and subject to strict scrutiny. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 812 (2000) (asserting that content-based restrictions, absent any compelling justifications, are not permitted by the First Amendment). If a statute suppresses speech based on content, the regulation must be narrowly tailored to effectuate a compelling government interest. *Id.* at 813. In *Playboy Entertainment Group*, the law required cable providers to scramble their pornographic stations between 10 p.m. and 6 a.m. to prevent signal bleed. *Id.* at 808. The asserted interest was to prevent unsupervised children from stumbling across pornographic programs during signal bleeds. *Id.* at 813. The statute was unconcerned with other stations such as Disney or HBO. *Id.* at 811. The Court held "[w]hen a plausible, less restrictive

pression and to avoid constitutional conflicts, the Supreme Court,[123] as well as the First, Fourth, Fifth, and Eleventh Circuits have asserted several compelling government interests specific to child pornography.[124] Regarding actual child pornography, the *Ferber* Court asserted several interests justifying a blanket suppression of the market. First, the state has a compelling need to protect the safety and physical, emotional, and psychological well-being of its children.[125] Further, the future of society as a whole rests on the well-rounded health of its youth.[126] The Court, citing congressional findings, indicated that sexually exploited children are unable to develop healthy relationships and often become abusive themselves.[127] Second, according to the *Ferber* Court, child pornography

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alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't Group, Inc.* 529 U.S. at 816. The government failed to show that the proffered alternative was ineffective, and that the current statute would effectively prevent children from accessing pornographic channels without parental supervision. *Id.* at 826-27.

123. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 764 (1982) (providing no protection to child pornography because it bears so heavily on the welfare of children). The Court made specific findings that the evils connected to child pornography so outweighs the free speech interests that a content-based suppression was appropriate. *Id.* at 763-64.

124. *See Fox*, 248 F.3d at 402 (supporting *Ferber* and *Osborne* which endorsed the destruction of a market that bears so heavily on the welfare of children); United States v. Mento, 231 F.3d 912, 918-19 (4th Cir. 2000) (reasserting the compelling interests discussed in *Osborne* and *Ferber*, which justify destruction of the child pornography market); United States v. Acheson, 195 F.3d 645, 651 (11th Cir. 1999) (supporting the Court's finding that child pornography makes a *de minimus* contribution to society); United States v. Hilton, 167 F.3d 61, 69-70 (1st Cir. 1999) (echoing the findings enunciated in *Ferber* and *Osborne*).

125. *Ferber*, 458 U.S. at 757 (illustrating that other cases have regulated speech elements affecting children).

126. *Id.* (recognizing that child pornography is harmful to both society and children).

127. *Id.* at 758 n.9 (finding child pornography harmful to both society and children). Since *Ferber*, numerous state legislatures have joined in asserting various associated interests. *See* COLO. REV. STAT. ANN. § 18-6-403(1) (West 2001) (proclaiming that children under eighteen are unable to provide consent to use their body in a sexually exploitive manner); *id.* § 18-6-403(1.5) (stating such material is a permanent record of sexual abuse); *id.* (finding each time this material is shown to a child, its purpose is to break down the child's will); *id.* (concluding that since current laws are insufficient to halt this abuse, it is necessary to ban all sexually exploitive materials); IDAHO CODE § 18-1507(1) (Michie 1997) (declaring that sexual exploitation of children is a privacy invasion and results in emotional, developmental, and social injury); *id.* (finding that children are unable to provide consent for commercial use of their bodies); *id.* (concluding that a ban on production of this material necessary to protect children); UTAH CODE ANN. § 76-5a-1 (1999) (finding that a ban on child pornography is consistent with the First Amendment and necessary and justified to reduce harm inherent in the perpetuation of a record of the child's sexual exploitation); *id.* (suggesting that this prohibition includes all materials used to sexually exploit minors whether legally obscene or not).

is intrinsically related to sexual child abuse.[128] Specifically, the actual image may haunt the child in the future as a permanent record of his involvement in the exploitation, and existence of such pornography may increase tension and fear that the act will become public.[129] Consequently, the only practical way to control child exploitation is to dry up the market on the production and receiving ends.[130] Third, because the child pornography market is so lucrative, an economic incentive exists that encourages further child exploitation.[131] Fourth, the social, literary, or educational value of live sexual performances is *de minimus*.[132] While there may be some place for images of nude children in *National Geographic*, viewing children engaged in sexual behavior is unlikely to have any social value.[133] Finally, the *Ferber* Court determined that although suppressing child pornography is a content-based restriction, suppression is justified where the restricted evils outweigh the speech concerns.[134]

2. "Virtual" Child Pornography Concerns

To justify changes to the federal statute aimed at virtually-created child pornography, courts have found further issue-specific concerns.[135] First, child pornography laws need revamping to keep pace with recent techno-

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128. *Ferber*, 458 U.S. at 759 (listing ways child pornography is related to sexual abuse). First, the child pornography serves as a permanent record of the child's involvement. *Id.* Second, to stifle exploitation of children, the market must be closed. *Id.*

129. *Compare* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (indicating that materials produced by child pornographers permanently record the victim's abuse), *with Ferber*, 458 U.S. at 759 n.10 (indicating that the victim's knowledge of the material, coupled with fear of exposure, increases emotional and psychiatric harm to the child).

130. *Compare Ferber*, 458 U.S. at 760 (holding that the best way to dry up this market is to impose severe "penalties on persons selling, advertising, or otherwise promoting" child pornography), *with* United States v. Fox, 248 F.3d 394, 401 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (finding a valid concern with the rejection by the Ninth Circuit of Congress's justification for supporting the destruction of the child pornography market).

131. *See Ferber*, 458 U.S. at 761-62 (holding that enforceable anti-production laws would close the child pornography market). One state committee indicated that selling these materials guarantees further child abuse. *Id.* at 761 n.13.

132. *Id.* at 762-63 (indicating lewd displays of genitals or live performance of sexual acts are not an essential part of literary, scientific, or educational work).

133. *See id.* at 773 (reporting the court of appeals was concerned that the statute would suppress National Geographic or medical textbooks depicting nude children).

134. *See id.* at 763-64 (classifying child pornography with other areas of banned speech such as libel and fighting words).

135. *See Fox*, 248 F.3d at 402 (finding the same abuse may occur using fake child pornography as when pedophiles use actual child pornography); United States v. Mento, 231 F.3d 912, 921 (4th Cir. 2000) (asserting that the government has a compelling interest to shield all children—actual children—used to create the pornography and those who could be seduced by virtually-created child pornography); United States v. Acheson, 195

logical advances that provide child pornographers the ability to "morph" innocent pictures of actual children into sexually explicit poses or to create purely imaginative children with computer animation.[136] Second, many animated images are virtually-indistinguishable from actual children, and these images can be created inexpensively and traded in the exact same way as actual child pornography.[137] As a result, whether actual or "virtual," the reality of the image makes little difference to children lured into sexual activity by pornography, or to the adult who uses child pornography to seduce other children.[138] The final effect of sexual abuse can be accomplished using either medium.[139] Ultimately, the government has a compelling interest in protecting all children from sexual exploitation, including the models used to create the images and the potential victims seduced or abused by child molesters.[140] Third, the gov-

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F.3d 645, 651 (11th Cir. 1999) (finding that computer-generated images present a potential expansion in child pornography if left unregulated).

136. *See Hilton*, 167 F.3d at 65 (listing congressional concerns associated with new technologies). Computerized virtual animation may take many forms. *Id.* A photograph of a child may be scanned into the computer and the operator may then manipulate the image to appear sexual in nature. *Id.* Life-like children may also be created wholly by computer. *Id.* Further, the lower court was troubled by the inability to determine the exact age of the child depicted due to animation or morphing. *Id.*

137. *See Hilton*, 167 F.3d at 66 (holding that virtually-created child pornography is traded, bought, and sold the same way as actual child pornography and that prior to the CPPA, this type of child pornography was unpunishable).

138. *See Fox*, 248 F.3d at 402 (finding the threat of sexual abuse to actual children when animated pictures are used the same as if the pedophile used real photographs of children); United States v. Pearl, 89 F. Supp. 2d 1237, 1244-45 (D. Utah 2000) (discussing harms enunciated by Congress in the CPPA). Congress justified a ban on virtually-created child pornography because these images are used to seduce real children. *Id.* at 1244. Further, criminalizing possession of virtually-created child pornography encourages pedophiles to destroy their collection, effectively destroying the market for all types of child pornography. *Id.* at 1244-45. The District Court held "without having to tread upon the thin ice of criminalizing thought for its content, . . . it is clear that the outlawing of 'cyber' child pornography is intended to and will protect real children from exploitation through criminalizing the transportation and possession of computer generated child pornography." *Id.* at 1246; *see also* Adam J. Wasserman, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 272-73 (1998) (suggesting that virtually-created child pornography has the same effect as actual child pornography "because [the virtual subjects] are *perceived* as minors by the psyche").

139. *See Fox*, 248 F.3d at 402 (finding the same abuse may occur using fake child pornography as when the pedophile uses actual child pornography).

140. *See Mento*, 231 F.3d at 920 (holding the government's interest in protecting the children extends only to those children actually used in the production of child pornography). The defendant was convicted in the district court for possession of downloaded child pornography. *Id.* at 915. The prosecution charged Mento with possession of child pornog-

ernment has an interest in protecting the privacy of children whose harmless and innocent pictures may be morphed by technology.[141] For example, some computer programs permit pornographers to superimpose a non-explicit photograph of a minor on to nude model images.[142] Fourth, pedophiles are more likely to use virtually-created child pornography as a tool to abuse children.[143] In all likelihood, child pornography will be used for molestation purposes rather than legitimate reasons because distributors of child pornography usually cater only to

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raphy that traveled in interstate commerce. *Id.* at 917. He entered a guilty plea but reserved his right for appeal regarding the constitutionality of the Child Pornography Protection Act of 1996. *Id.* at 915.

141. *See Hilton*, 167 F.3d at 66-67 (listing various concerns justifying the CPPA); *see also* Adam J. Wasserman, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 268 (1998) (suggesting that pedophiles using virtually-created child pornography to seduce their victims are less likely to document the child's abuse by photographing or filming the abuse). A pedophile uses virtually-created child pornography, as opposed to creating actual child pornography using video cameras, to avoid the prosecutorial effects accompanying actual documentation of a real child's sexual abuse. *Id.*

142. *See* Burke v. State, 27 S.W.3d 651, 655 (Tex. App.—Waco 2000, pet. ref'd) (finding the defendant possessed child pornography when he superimposed images of the fifteen-year-old victim's face on photos of nude models).

143. *See* Osborne v. Ohio, 495 U.S. 103, 111 n.7 (1990) (asserting several interests in stamping out child pornography, specifically pedophiles using child pornography to seduce other children). "Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." *Id.*; *Hilton*, 167 F.3d at 67 (listing ways child pornography is used to abuse children). Innocent pictures that are morphed or changed to depict the child engaging in sexual conduct could be used to blackmail the child into silence and force him into submitting to the abuse. *Id.* at 67. In addition to blackmailing the child, the images could be used to break down the child's natural inhibitions. *Id.* Child pornographic images may also be used to instruct the child how to perform sexual acts. *Id.* The threat of physical and emotional abuse associated with virtually-created child pornography is grave when actual child pornography is used because a child is not expected to know the difference between fantasy and reality. *Id.*; *see also* Adam J. Wasserman, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 267-68 (1998) (discussing uses of virtually-created child pornography in abuse of children). According to the psychologists testifying at congressional hearings, child pornography is shown to the child for educational purposes. *Id.* at 267. The pedophile "tries to convince the child that sexual conduct is desirable." *Id.* The child then becomes convinced "that other children are sexually active and that it is therefore permissible to engage in sexual conduct." *Id.* at 268. Further, the exposure to "pornography desensitizes the child and lowers inhibitions." *Id.*

pedophiles.[144] Finally, pedophiles use child pornography to "whet" or stimulate their own appetites.[145] This appetite increases the need for fur-

144. *See* United States v. Acheson, 195 F.3d 645, 652 (11th Cir. 1999) (finding the legitimate sweep of the CPPA exceeds the threat of suppressing appropriate speech). German authorities tipped off the U.S. Customs Department that a person with the screen name "Firehawk96" had been downloading graphics files of child pornography. *Id.* at 648. Officers learned of Acheson's screen name and arrested him for receiving and possessing child pornography. *Id.* Quoting congressional findings, the Eleventh Circuit held "purveyors of child pornography usually cater to pedophiles, who by definition have a predilection for pre-pubertal children." *Id.* at 652; *see also* Lenny Savino, *Huge Bust Shows How Child-Porn Business Evolved*, MILWAUKEE J. SENTINEL, Aug. 17, 2001, at 03A, 2001 WL 9373454 (citing the National Center for Missing and Exploited Children). "Child pornography customers are of two kinds . . . pedophiles who fantasize about having sex with children, and molesters who act out their fantasies." *Id.*

145. *See* United States v. Fox, 248 F.3d 394, 401 (5th Cir. 2001) (indicating that Congress was interested in, among other things, "eliminating pornographic images that 'whet the appetites' of pedophiles"); *Hilton*, 167 F.3d at 69 (indicating that in addition to "whetting" the appetites of pedophiles, "child pornography poisons the minds and spirits of our youth," and makes them more acquiescent to the sexual demands of abusers); *see also* Adam J. Wasserman, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 272 (1998) (discussing uses of virtually-created child pornography in the abuse of children). Almost all child sexual abusers exhibit a learned behavior. *Id.* at 273. Most pedophiles "use child pornography 'to stimulate and whet their sexual appetites which they masturbate to [and] then later use as a model for their own sexual acting out with children.'" *Id.* at 272 (alteration in original). Child pornography encourages pedophiles to imitate the depiction with a child whom they have access to and can intimidate into silence. *Id. But see* Free Speech Coalition v. Reno, 198 F.3d 1083, 1094-95 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (contending if actual children are not involved, a person should arguably be in control of his own thoughts); Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329-30 (7th Cir. 1985) (holding that pornography portraying women in a sexually demeaning way may condition how society perceives women, "[but] almost all cultural stimuli provoke unconscious responses"); *id.* (asserting that if the government were to engage in regulating all speech elements having any role in behavior conditioning, this would be the end of free speech); *see also* Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 667-68 (1999) (discussing the "safety valve" theory). Essentially, this theory suggests that the government should allow pedophiles to view child pornography because it allows the pedophile to indulge his obsession without involving children. *Id.* at 667-68; Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 464-65 (1997) (suggesting that viewing virtually-created child pornography may alleviate the pedophile's desire to pursue actual children). *But see* Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 668 (1999) (reporting that the CPPA rejected this theory because the mere existence of child pornography inflames the desires of pedophiles).

ther production and creation of child pornography.[146] The CPPA addresses the theory of supply and demand: if the demand for pornography decreases so will the production.[147]

Ultimately, the legislature of any governmental body has ample justification to regulate child pornography in any form. Moreover, the judiciary should give deference to congressional findings to preserve the separation of power and because the legislature is better equipped to accumulate and evaluate large quantities of data.[148] The question then turns to whether the statute is narrowly tailored to address these compelling interests. In other words, is the statute overbroad?

According to *Broadrick v. Oklahoma*,[149] the overbreadth doctrine is strong medicine and used "only as a last resort."[150] Otherwise, the potential exists for invalidating any statute that reaches even the slightest impermissible activity.[151] Accordingly, overbreadth must be real and substantial compared to the plainly legitimate purpose of the statute.[152] Essentially to be over broad, the statute must criminalize an intolerable range of permissible speech.[153] The language of the CPPA, on the other hand, is tightly construed to avoid any constitutional complications.[154] Congress only intended the "appears to be" and "conveys the impression" language to suppress images that are practically indistinguishable

146. *See* Lydia W. Lee, Note, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639, 667-68 (1999) (reporting actual children are abused and exploited because child pornography exists).

147. *See Osborne*, 495 U.S. at 109-10 (approving the state's interest in penalizing those possessing child pornography because it decreases demand for such materials).

148. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994) (finding "that courts must accord substantial deference to the predictive judgments of Congress"); United States v. Pearl, 89 F. Supp. 2d 1237, 1240 (D. Utah 2000) (giving deference to congressional exercise of legislative power to avoid infringing on traditional legislative judgment when enacting nationwide regulatory policy).

149. 413 U.S. 601 (1973).

150. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) (indicating that the overbreadth doctrine is employed by the Court as a last resort). The statute in question forbade classified service employees from participating in political activities. *Id.* at 605-06. However, the statute cannot be totally rejected because its present application is not overbroad. *Id.* at 618.

151. *See id.* (indicating the overbreadth doctrine should be used as a last resort).

152. *See id.* at 615 (holding that the overbreadth of the statute must be real and substantial compared to the statute's plainly legitimate sweep).

153. *Broadrick*, 413 U.S. at 613-15 (concluding that the statute must be construed to avoid any constitutional complications).

154. *See* United States v. Fox, 248 F.3d 394, 405 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (considering the potential effects of the CPPA on artistic expression).

from unretouched images of real children.[155] This places most artistic works, "such as drawings, cartoons, sculptures, and paintings," outside the federal statute's reach.[156] Further, the federal statute seems concerned only with depictions of children engaging in sexually explicit behavior.[157] Additionally, the purported focus of the CPPA is aimed at abuse and exploitation of young, inexperienced children, not youthful looking adults who are indistinguishable from sixteen and seventeen-year-olds.[158] Moreover, without the federal statute, no clear and effective alternative would control the harms associated with virtually-created child pornography.[159] By adopting the "appears to be" language, Congress focuses on a narrow range of images that, to this point, evaded prosecution.[160]

Unfortunately, CPPA language may reach child pornography that employs youthful looking adult models.[161] However, outlawing an animated image appearing to be a child is permissible, because the total ban on child pornography is intended to protect not only those harmed in pro-

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155. *See id.* at 405-06 (holding that borderline works may be handled on a case-by-case basis); United States v. Hilton, 167 F.3d 61, 72 (1st Cir. 1999) (concluding that Congress was concerned with visual materials indistinguishable from the actual photograph).

156. *See Fox,* 248 F.3d at 405-06 (holding the federal statute is not overbroad). The Fifth Circuit expressed some concern for artistic images that may be downloaded, such as works from the famed erotic painter Balthus, or stills from the movie *Lolita. Id.* at 405. Congress is more concerned with images that are indistinguishable from unretouched photographs and less concerned with cartoons, sculptures, and paintings such as the work of contemporary artists. *Id.* Any uncertainty in the statute regarding these marginal artistic works could be considered on a case-by-case basis. *Id.* at 405-06.

157. *See* 18 U.S.C.A. § 2256(2) (West 2000) (focusing on "sexually explicit conduct" which means sexual intercourse, bestiality, masturbation, lewd displays of genitalia, and masochism).

158. *See* Transcript of Petitioner's Oral Argument at 55, Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (No. 00-795), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html (arguing that persons renting or buying *Traffic,* which portrays teenage sex, will not be arrested and prosecuted for possessing child pornography). The conviction rate under the CPPA is currently ninety-seven percent. *Id.* This success rate reflects that the statute is used to prosecute significant, convictable violations, not fringe cases. *Id.* For example, in *Mento,* the prosecution charged the defendant for possession of over a hundred images of prepubescent children. *Id.* at 55-56.

159. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2000) (allowing content-based regulations when a less restrictive alternative to the regulation does not effectively achieve its goals).

160. United States v. Acheson, 195 F.3d 645, 651 (11th Cir. 1999) (holding that the CPPA easily passes constitutional muster).

161. *See id.* (finding insubstantial the argument that the statute proscribes pornography depicting youthful looking adults because the statute's purpose is to eliminate the child pornography market).

duction, but also those harmed when used as a molestation tool.[162] Removing the "appears to be" or "conveys the impression" language would result in an "epistemological conundrum."[163] Without this language, reasonable doubt would exist as to the legality of the act because law enforcement officials may be unable to prove the age or the identity of the subject.[164] This uncertainty would create tremendous enforcement problems.[165] Enforcement and reduction of the child pornography market is a plainly legitimate purpose even when balanced with the sweeping "appears to be" language.[166] This conclusion is especially fitting since the social value of live sexual performances is *de minimus*, as *Osborne, Ferber* and others have held.[167]

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162. *See id.* (holding the elimination of the child pornography market as a plainly permissible goal).

163. *See* United States v. Mento, 231 F.3d 912, 920 (4th Cir. 2000) (concluding that technological advances have resulted in enforcement problems); *see also* Andrea I. Mason, Casenote, *Virtual Children, Actual Harm:* Free Speech Coalition v. Reno, *198 F.3d 1083 (9th Cir. 1999)*, 69 U. CIN. L. REV. 693, 711 (2001) (discussing the technological advances perpetuating the child pornography problem). Computer users are able to produce "virtual" child pornography by animation, morphing, scanning, and other techniques using inexpensive programs. *Id.* Virtually-created child pornography is often so life-like that the viewer believes the image depicts an actual child. *Id.* With these developments, law enforcement officials have extreme difficulty tracing the origin and identity of the sources. *Id.* The prosecution must overcome a formidable burden to show that the pornographer used an actual minor. *Id.* New technology has effectively created a "computer-generated loophole" that foreclosed effective prosecution prior to the CPPA. Andrea I. Mason, Casenote, *Virtual Children, Actual Harm:* Free Speech v. Reno, *198 F.3d 1086 (9th Cir. 1999)*, 69 U. CIN. L. REV. 693, 711 (2001).

164. *See Mento*, 231 F.3d at 920 (indicating that if the child's identity is inaccessible, the only available avenue for law enforcement is to attack images that "appear to be" a minor); *see also* Petitioner's Oral Argument at 55, Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (No. 00-795), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html (suggesting that the ninety-seven percent conviction rate reflects that the CPPA allows prosecution of individuals even though there is reasonable doubt concerning the age of the virtually-created child).

165. *See Mento*, 231 F.3d at 920 (indicating that unless the prosecution can prove the age of the child, which is difficult when pornographers create computer images, they cannot prove their case).

166. *See id.* at 921 (approving the language of the CPPA because it suppresses images that harm actual children, although no actual children were used).

167. *See* Osborne v. Ohio, 495 U.S. 103, 108 (1990) (finding the interests supporting suppression of child pornography far outweigh the interests expressed in *Stanley*, which prohibits prosecution of private possession of pornography); New York v. Ferber, 458 U.S. 747, 762-63 (1982) (excluding visual depictions of children performing sexual acts from any literary or education work), *see also Mento*, 231 F.3d at 921 (denying that artificial child pornography has any social value); United States v. Acheson, 195 F.3d 645, 651 (11th Cir. 1999) (separating lewd displays of children's genitals from works with social, literary, and educational value); United States v. Hilton, 167 F.3d 61, 71 (1st Cir. 1999) (finding images have modest value that depict children engaged in sexual conduct).

Additionally, the potential vagueness problems are less problematic than they appear at first blush. First, the CPPA provides adequate notice to ordinary citizens of the prohibited activity.[168] The statute specifically identifies four categories of banned material: (1) pictures of actual minors, (2) altered pictures of actual minors, (3) pictures appearing to be minors, and (4) pictures represented as minors.[169] The statute also provides an affirmative defense to those in possession and those who knowingly transport such images.[170] Additionally, the "appears to be" language is an objective standard used to determine whether the actor had criminal intent to market or possess child pornography.[171] Consequently, the jury must conclude that the material in question is a depiction of a minor.[172] For guidance, the jury may consider the manner in which the material was marketed.[173] Disks, filenames, or images may be labeled in a way that irrefutably establishes the criminal intent of the actor to possess or market child pornography.[174] Further, juries consider the intent of the individual found in possession. Accordingly, the statute

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168. *See Mento*, 231 F.3d at 922 (indicating that in addition to defining banned conduct, the statute specifies a minor as person under eighteen).

169. *See id.* (listing four categories of banned materials).

170. *See id.* (discussing the affirmative defense provided by the statute). An individual who ships in interstate commerce has an affirmative defense if he can prove the person depicted reached majority. *Id.* Further, a person may assert an affirmative defense by showing he possessed fewer than three pieces of child pornography; that access to his computer was provided to law enforcement; and reasonable steps were taken to destroy the visual depictions. 18 U.S.C.A. § 2252(c) (West 2000). Thus, the availability of such a defense reduces the likelihood that innocent persons could be mistakenly convicted for accessing child pornography. *Mento*, 231 F.3d at 922.

171. *See Mento*, 231 F.3d at 922 (requiring the jury to consider whether a reasonable person would conclude the material depicts an actual minor).

172. 18 U.S.C.A. § 2252(a) (West 2000) (prohibiting knowing receipt, transportation, or distribution of any visual depiction of a minor); United States v. X-Citement Video, Inc., 513 U.S. 64, 72-73 (1994) (finding the age of the performers essential to the prosecution's case); *id.* at 78 (finding the term "knowing" modifies the "nature of the material and . . . the age of the performers").

173. *See* 18 U.S.C.A. § 2256(B) (West 2000) (holding an independent basis of conviction when the presentation gives the impression that the image depicts a minor).

174. *See, e.g.*, United States v. Fox, 248 F.3d 394, 398 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (finding the defendant possessed and sent visual depictions of children labeled as child pornography). The defendant sent two images of young girls "in a state of undress" via the Internet. *Id.* One picture was labeled "Here's my 15-year-old-niece, Sky" and the other labeled "Here's another of Poppy." *Id.*; Renfro v. State, No. 01-98-01232-CR, slip op. at 5-6, 2001 WL 204724, at *1 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (not designated for publication) (indicating that law enforcement officials found child pornography in a folder labeled "Young" on the defendant's computer containing a file entitled "12boymas.jpg"). Expert testimony explained that the boy was twelve and that the image file depicted a boy masturbating. *Id.*

lists affirmative defenses that may absolve innocent persons.[175] Additionally, the CPPA is concerned with depictions that "appear to be" or "convey the impression" of children engaging in sexually explicit conduct.[176] The statute explicitly defines this conduct as sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious display of the genitals.[177] The confusion regarding the definition of "sexually explicit conduct" is a tenuous argument.[178]

IV. Applications in the Lone Star State

A. *Statutory Applications*

This section explores whether the Texas statute would survive a challenge if child pornographers create "virtual" child pornography, and, if not, how the Texas statute may be amended to address these concerns. First, persons who knowingly or intentionally possess or distribute child pornography violate Section 43.26 of the Texas Penal Code.[179] The current version of the statute prosecutes persons found in possession of visual material depicting a child younger than eighteen engaging in sexual conduct at the time the material was made.[180] The subsequent subsection indicates that the person must know the child depicted was under eighteen.[181] Further, Section 43.26 punishes persons who knowingly or inten-

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175. *See* 18 U.S.C.A. § 2252(c)(1), (2) (West 2000) (providing affirmative defenses for possession of child pornography). The defendant in possession has an affirmative defense if he possessed fewer than three items of child pornography, and "promptly and in good faith" allowed law enforcement access to the visual depiction without retaining or allowing another person access to the depiction. *Id.* Essentially, the defendant may demonstrate through these objective acts that his possession of child pornography was unintentional. *Id.*

176. *See* 18 U.S.C.A. § 2256(8)(B), (D) (West 2000) (defining "child pornography" as it applies to virtually-created child pornography).

177. *See id.* § 2256(2)(A)-(E).

178. *See* United States v. Mento, 231 F.3d 912, 922 (4th Cir. 2000) (holding that juries should have little trouble rejecting prosecutions where the sexual content of the child depiction is questionable).

179. *See* Tex. Pen. Code Ann. § 43.26 (Vernon Supp. 2002) (providing that a person commits a third degree felony for possession of pornographic material depicting children under eighteen, while persons who promote, or possess with intent to promote, child pornography are guilty of a second degree felony); *id.* § 43.25(a)(5) (providing that the term "promote" means to "procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above").

180. *Id.* § 43.26(a)(1) (requiring the image to portray a minor).

181. *See id.* § 43.26(a)(2) (requiring the actor in possession to actually know the person depicted is a child); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 73 (1994) (holding the age of the person portrayed is the crucial element separating innocent from wrongful conduct).

tionally promote, or possess with intent to promote, the material described above.[182] The statute even goes so far as to presume that those possessing more than six identical depictions of a child intend to promote the material.[183]

Although the statute clearly defines the proscribed conduct regarding the *actus reus*, problems may arise in the definition of "child," especially in light of the recent federal circuit split. Does the term "child," as set forth in the statute, reach those who create virtual child pornography without use of actual children? Apparently, the language of the statute implies application to the use of living children, rather than cyber children, in the production of pornography.[184] The question is best answered by considering the legislative intent and the plain meaning of the statute.[185]

1. Apparent Legislative Intent

Previously, Section 43.26 prosecuted persons in possession of pornographic visual materials only if the visual material was a film image, which included photographs, videotapes, and other tangible media.[186] However, the legislature realized that criminals possessing or promoting child pornography might escape justice if they used a computer to download and store images.[187] Although the statute's legislative history is fairly scant, the purported goal of the amended statute was to: (1) keep pace with technology used to disseminate and store child pornography, (2) eliminate loopholes to possession and promotion of child pornography

182. *See* TEX. PEN. CODE ANN. § 43.26(e)-(g) (Vernon Supp. 2002) (indicating promotion of, or possession with intent to promote, child pornography is a third-degree felony).

183. *Id.* § 43.26(f) (holding that intent to promote is presumed if the actor possesses six or more depictions of the same child).

184. *See id.* § 43.26(a)(1) (focusing on a child younger than eighteen).

185. *See* Bouldin v. Bexar County Sheriff's Civil Serv. Comm'n, 12 S.W.3d 527, 529 (Tex. App.—San Antonio 1999, no pet.) (stating that when giving full effect to legislative intent, the statute is construed according to its plain language).

186. *Compare* TEX. PEN. CODE ANN. § 43.26(b)(3) (Vernon Supp. 2002) (including disk, diskettes, or other physical mediums that allow displays of child pornography), *with* TEX. PEN. CODE ANN. § 43.26(b)(1) (Vernon 1994) (including film, video, and photo images as illegal mediums).

187. *See* Greer v. State, 999 S.W.2d 484, 487 (Tex. App.—Houston [14th Dist.], pet. ref'd), *cert. denied*, 531 U.S. 877 (2000) (upholding appellant's conviction on other grounds, while finding because the new amendment was not yet in effect, the appellant could not be prosecuted for possession of child pornography via the Internet); Porter v. State, 996 S.W.2d 317, 321 (Tex. App.—Austin 1999, no pet.) (reversing the appellant's conviction for possession of child pornography via the Internet because the 1997 amendment was not in effect at the time of appellant's arrest); *see generally* HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 674, 75th Leg., R.S. (1997), *at* http://www.capitol.state.tx.us (attempting to eliminate loopholes).

created by computer technology, and (3) to incorporate all types of technology in prosecuting child pornography crimes.[188] Therefore, in addition to the corresponding definition of "visual material," the statute also includes computer disks or any other physical medium where an image can be displayed on a computer, and any image sent or received by a computer via phone line, cable, satellite transmission, or other method.[189]

The express intent of the legislature was to stay abreast of developing media in the child pornography market;[190] yet, the statute does not directly address virtually-created child pornography.[191] Likewise, the statute is concerned with visual depictions of children younger than eighteen,[192] but the use of the term "child" without any definition or qualifying language limits this concern to only actual children.[193] The crucial question is whether the term "child" is liberal enough to include virtually-created children.

When defining statutory terms, a court presumes the legislature intended to use every word for a purpose.[194] Additionally, courts should read and interpret each word in context according to the rules of gram-

188. *See* HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 674, 75th Leg., R.S. (1997), *at* http://www.capitol.state.tx.us (discussing the purposes of the statute and the proposed changes).

189. TEX. PEN. CODE ANN. § 43.26(b)(3)(B) (Vernon Supp. 2002) (including disks and other physical methods of storage in the definition of "visual material" that allows an image to be displayed on a computer or that can be transmitted to a computer by telephone line, cable, satellite, or other method).

190. *See* HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 674, 75th Leg., R.S. (1997), *at* http://www.capitol.state.tx.us (expressing the desire to stay abreast of developing technologies).

191. *Cf.* Burke v. State, 27 S.W.3d 651, 655 (Tex. App.—Waco 2000, pet. ref'd) (alluding that the magistrate inferred the defendant possessed child pornography on his computer, although the images were photos of nude models with superimposed faces of minor children).

192. *See id.* (requiring the visual material to depict a child under eighteen).

193. *Cf.* 18 U.S.C.A. § 2256(8) (West 2001) (including as child pornography images that "appear to be" or "convey the impression" of real children); TEX. PEN. CODE ANN. § 43.25(a)(1) (Vernon Supp. 2002) (requiring a sexual performance by a child younger than eighteen); *id.* § 43.26(a)(1) (requiring visual material to depict a child younger than eighteen).

194. *See* Linick v. Employers Mut. Cas. Co., 822 S.W.2d 297, 300-01 (Tex. App.—San Antonio 1991, no writ) (stating that the purpose of statutory construction is to determine legislative intent). A local recording agent sued an insurance company before the State Board of Insurance of Texas. *Id.* at 298. The sole issue was whether this agency or the judiciary had jurisdiction. *Id.* Interpretation of the statute determines the jurisdiction. *Id.* The legislative intent was to give the administrative agency authority to determine every instance when the insurance company violated the statute. *Id.* at 301.

mar and everyday usage.[195] Courts also give words their everyday meaning unless the term is statutorily defined, is a term of art, or has acquired a technical or particular meaning connected with a particular trade.[196] Without any statutory definitions, terms are given their natural[197] or plain meaning,[198] and can be measured as the term is generally understood.[199] Finally, courts strictly construe statutes so long as legislative intent is preserved,[200] and the court cannot insert additional words unless they are necessary to give effect to clear legislative intent.[201]

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195. TEX. GOV'T CODE ANN. § 311.011(a) (Vernon 1998) (indicating that words and phrases are read in context and interpreted "according to the rules of grammar and common usage").

196. *Id.* § 311.011(b) (indicating words that have technical or particular meaning are construed according to the special legislatively-defined meaning); *accord* Bouldin v. Bexar County Sheriff's Civil Serv. Comm'n, 12 S.W.3d 527, 529-30 (Tex. App.—San Antonio 1999, no pet.) (finding the plaintiff inserted extraneous words by suggesting a requirement that the plaintiff must receive the final notice of job termination before the decision of the Commission attaches); R.R.E., P.C. v. Glenn, 884 S.W.2d 189, 192 (Tex. App.—Fort Worth 1994, pet. denied) (indicating that the difficulty was not in interpreting the statute's meaning, since words are given everyday meaning, but in determining whether the statute altered a constitutional provision).

197. *See, e.g.*, Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 476 (1994) (noting the term "cognizable" is not defined in the statute, so the court must construe the term according to its natural meaning); Smith v. United States, 508 U.S. 223, 228-29 (1993) (finding the defendant's trade of a firearm for drugs constituted "use" within the definition of the statute that prohibits using a firearm during and in relation to drug trafficking).

198. *See, e.g.*, *Bouldin*, 12 S.W.3d at 529-30 (finding the plaintiff inserted extraneous words by suggesting a requirement that he must receive the final notice of job termination before the Commission's decision attaches); *Ex parte* Anderson, 902 S.W.2d 695, 699 (Tex. App.—Austin 1995, pet. ref'd) (upholding a statute prohibiting sado-masochistic abuse but not defining the term); *id.* at 699-700 (referencing the reader to other terms defined in the statute as well as to several encyclopedias and dictionaries to define "sadism" and "masochism"); State v. Garcia, 823 S.W.2d 793, 798-99 (Tex. App.—San Antonio 1992, pet. ref'd) (holding the terms "own," "operate," and "major business" should be given their plain meaning and construed according to common rules of grammar).

199. *Compare* Ely v. State, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979) (indicating the phrase "materially false or misleading statement" is not vague or indefinite because common understanding and usage makes clear the prohibited conduct), *with Anderson*, 902 S.W.2d at 699 (referencing other terms defined in the statute as well as various scientific and non-scientific encyclopedias and dictionaries to define "sadism" and "masochism").

200. *See Ex parte* Frye, 156 S.W.2d 531, 535 (Tex. Crim. App. 1941) (per curiam) (defining the phrase "according to the plain import of the language in which it is written," specifically the word "import" using a common dictionary).

201. *See Bouldin*, 12 S.W.3d at 529-30 (finding the plaintiff inserted extraneous words not in the statute by suggesting a requirement that the plaintiff must receive final notice of job termination before the Commission's decision attaches). The following illustrates how a statute's wording may be interpreted. In *Ex parte Anderson* the defendant argued that "sado-masochistic abuse" was vague because the penal code does not define the term. *See Anderson*, 902 S.W.2d at 700 (upholding a statute prohibiting sado-masochistic abuse but

The context in which the legislature uses the term "child" in the statute must be considered with these statutory interpretation concepts in mind. As a preliminary matter, "child" is not defined anywhere in the Penal Code,[202] and Section 43.26 only identifies a "child" as a person younger than eighteen years old.[203] Accordingly, the question turns on the words modifying "child."

2. The Plain Meaning of *Child* and *Visual Depiction*

Section 43.26 of the Texas Penal Code, covering possession and promotion of child pornography, requires the materials in question to visually depict a child.[204] The term "child" also provides insight. Black's Law Dictionary defines a child as a boy or a girl, a young person, a son or a daughter, or a baby or fetus, and at common law, a person under the age of fourteen.[205] The definition does not include "cyber" child, but it does list associated terms, such as biological child, illegitimate child, natural child, unborn child, and others.[206] This definition suggests that a "child" must be a person in existence or living, who has been born, or one who may be disqualified from an inheritance. Thus, although the words modi-

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not defining the term). In finding meaning, the court referenced other terms defined in the statute as well as various common and medical dictionaries to define "sadism" and "masochism." *Id.* at 700. The court found the term listed under "sexual conduct" in Section 43.25(a)(2) of the Texas Penal Code. *Id.* at 699. That section referred the reader to the definition of "deviate sexual intercourse." *Id.* After finding no definition for "sado-masochistic abuse" the court turned to an encyclopedic dictionary which defined "sadism" as a condition where the pain of others induces sexual gratification. *Id.* at 700. Likewise, "masochism" means sexual gratification dependant on receiving pain and humiliation. *Anderson*, 902 S.W.2d at 700. The court then combined the terms and found the definition of "sado-masochism" in a dictionary that defined "sado-masochism" as sexual gratification arising from inflicting or receiving physical or mental abuse. *Id.* Essentially, the court considered the term in context while applying its plain meaning. *Id.* at 700.

202. *See generally* TEX. PEN. CODE ANN. § 1.07 (Vernon Supp. 2002) (defining terms generally that are applicable throughout the penal code but failing to define "minor" or "child"); *id.* § 25.05(a)-(b) (defining "child," in reference to criminal non-support, as a person under eighteen including a child born out of wedlock); *id.* § 43.21 (defining terms for Section 43.26 and other public decency statutes but not defining "child"); *id.* § 43.24(a)(1) (prohibiting the sale, distribution, or display of materials harmful to minors and defining "minor" as a person younger than eighteen); *id.* § 43.25(b), (g) (defining "child" as a person under eighteen); TEX. PEN. CODE ANN. § 43.26(a)(1) (Vernon Supp. 2002) (indicating child pornography depicts a child younger than eighteen).

203. *Id.* § 43.26(a)(1).

204. *Id.* (requiring the defendant to know the image depicts a child).

205. BLACK'S LAW DICTIONARY 232 (7th ed. 1999).

206. *Id.* at 232-33 (listing legal terms associated with "child").

fying "child" may include "cyber" children, the literal meaning of the term does not seem to go that far.[207]

Likewise, a visual depiction is not defined in the Texas statute. "Depict" means, according to *Webster's*, to represent, portray, picture, or describe in drawing, painting, sculpture, or words.[208] A synonym for "depiction" is "representation."[209] "Representation" is defined as a description, account, or statement of facts especially one intended to influence action, and persuade hearers.[210] Apparently, a depiction is any work, such as art, that describes or presents a set of facts with the intent to influence action or persuade hearers. Undoubtedly, viewers of realistic "virtual" child pornography may be persuaded that the images depict an actual child.[211] Thus, with respect to the image, if the material persuades or influences perception that leads to action, virtual child pornography falls within the term "visual depiction" as set out in the Texas statute.[212]

3. Considering the Term *Child* in the Context of the Statute

However, in light of the recent federal circuit split, the term "child" is ambiguous regarding treatment of "cyber" children when placed in the context of the surrounding statute. Subsection (c) of the Texas child pornography statute provides affirmative defenses to this section and references the reader to Section 43.25(f), indicating that the same affirmative

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207. *Cf.* Burke v. State, 27 S.W.3d 651, 652 (Tex. App.—Waco 2000, pet. ref'd) (indicating that probable cause existed allowing an inference that the defendant possessed child pornography, although in actuality, the image consisted of a non-explicit photo of a minor's face superimposed on nude bodies of models).

208. WEBSTER'S NEW WORLD DICTIONARY 370 (Victoria Neufeldt ed., Prentice Hall 1988).

209. MERRIAM WEBSTER THESAURUS 150 (Merriam-Webster, Inc. 1989) (providing synonyms for "depiction").

210. WEBSTER'S NEW WORLD DICTIONARY 370 (Victoria Neufeldt ed., Prentice Hall 1988).

211. *See* United States v. Fox, 248 F.3d 394, 405 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (agreeing that some computer-generated images are indistinguishable from pictures of living children).

212. *See Fox*, 248 F.3d at 402 (reporting that when a child molester uses life-like computer animations or unretouched photos of actual children the harm is just as great to living children who may be molested with the aid of such material); Adam J. Wasserman, Note, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245, 272-73 (1998) (indicating virtually-created child pornography encourages pedophiles to further sexually abuse children just as they would using actual child pornography).

defenses apply in that section.[213] Section 43.25(f) deals with sexual performance of a child and provides a defense: (1) to persons who reasonably believe the child engaging in the sexual conduct was over eighteen; (2) to the person married to the child depicted; (3) if the conduct was for bona fide educational, medical, and other legitimate purposes; or (4) if the child is no more than two years younger than the defendant.[214] These excuses all suggest a living child must be involved, for example, one who can mature.[215]

Subsection (g) of 43.25 is also instructive in determining the reach of the Texas statute. When determining the majority status of the child for purposes of that section, as well as child pornography violations, the court or jury may determine age in two ways.[216] First, age may be established by personal inspection of the child, and second, by the oral testimony of a witness to the sexual performance who attests that the child was under eighteen.[217] Evidently, these provisions consider an actual child.[218] A violation may be proven by in-court examination of the child or the witness to the act.[219] Taking these provisions alone, there is no equivocation concerning the need to produce an actual, living child.

However, additional methods exist for determining age to support prosecution of virtually-created child pornography. The state may prove a violation by inspecting a photo or video of the child engaged in a sexual performance.[220] Further, the prosecution may introduce expert medical testimony to determine the age of the child based on his or her appearance while engaging in sexual conduct.[221] These provisions provide the

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213. *See* TEX. PEN. CODE ANN. § 43.26(c) (Vernon Supp. 2002) (referencing affirmative defenses to this offense).

214. *Id.* § 43.25(f) (listing affirmative defenses to sexual performance by a child and possession and promotion of child pornography).

215. *See* BLACK'S LAW DICTIONARY 232 (7th ed. 1999) (defining "child" as biological child, illegitimate child, a fetus, and others).

216. *See* TEX. PEN. CODE ANN. § 43.25(g) (Vernon Supp. 2002) (listing methods for determining if the child is younger than eighteen).

217. *Id.* § 43.25(g)(1)-(3).

218. *See, e.g.,* Renfro v. State, No. 01-98-01232-CR, slip op. at 2, 2001 WL 204724, at *2 (Tex. App.—Houston [1st Dist.] Mar. 1, 2001, no pet.) (not designated for publication) (allowing testimony of a pediatrician and police to prove the age and identity of a child); Burke v. State, 27 S.W.3d 651, 655 (Tex. App.—Waco 2000, pet. ref'd) (finding the image involved depictions of an actual child).

219. *See* Roise v. State, 7 S.W.3d 225, 231 (Tex. App.—Austin 1999, pet. ref'd), *cert. denied,* 531 U.S. 895 (2000) (reviewing the allowance of a pediatrician to determine the child's age using the Tanner Staging Process).

220. *See* TEX. PEN. CODE ANN. § 43.25(g)(2) (Vernon Supp. 2002) (indicating a child's age can be determined by viewing a photograph or video).

221. *See id.* § 43.25(g)(2) (indicating a child's age can be determined by the appearance of the child at the time of the performance).

fact-finder with greater leeway. The judge or jury may determine the age, whether accurate or not, by simply viewing a film or photos. Further, a court may allow a physician to testify as to the age of the child based only on the child's appearance.[222] The wording of this provision does not focus on the actual age of the child, but on the child's appearance.[223] This provision sounds much like the problematic wording of the CPPA.[224] Nevertheless, case law suggests that courts are not to interpret the language of the statute so strictly as to defeat legislative intent.[225] A strict reading of the statute may exclude "cyber" children from the definition of "child." Further, reading the statute too strictly provides loopholes for "virtual" child pornographers.[226] Such a strict reading effectively defeats the asserted legislative intent.[227]

Additionally, a consideration of the verbs modifying "child" provides clarity to the intent of the statute. The material must visually depict a child, younger than eighteen at the time of creation, engaging in sexual conduct.[228] This provision may be interpreted in two ways: (1) either the child was a minor at the time the image was created, indicating use of an actual child, or (2) the child looks younger than eighteen regardless of whether the child is actual or "cyber." The latter method of determina-

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222. *See, e.g., Renfro*, No. 01-98-01232-CR, slip op. at 2 (not designated for publication) (allowing testimony of a pediatrician and police to prove the age and identity of a child); *Roise*, 7 S.W.3d at 231 (reviewing the allowance of a pediatrician to determine the age of the child using the Tanner Staging Process).

223. TEX. PEN. CODE ANN. § 43.25(g)(2) (Vernon Supp. 2002).

224. *See* 18 U.S.C.A. § 2256(8)(B) (2000) (prohibiting images that "appear to be" and "convey the impression" of a child); Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (finding that the remainder of the statute would be constitutional if the "appears to be" and "conveys the impression" provision were stricken).

225. *See Ex parte* Frye, 156 S.W.2d 531, 535 (Tex. Crim. App. 1941) (per curiam) (indicating that statutes should be strictly construed but should not frustrate the legislative intent); Bouldin v. Bexar County Sheriff's Civil Serv. Comm'n, 12 S.W.3d 527, 529 (Tex. App.—San Antonio 1999, no pet.) (holding that when giving full effect to legislative intent, the statute is construed according to its plain language); Porter v. State, 996 S.W.2d 317, 321 (Tex. App.—Austin 1999, no pet.) (providing that a construction should be adopted that effectuates rather than nullifies the intended change to the old statute).

226. *See* United States v. Mento, 231 F.3d 912, 920 (4th Cir. 2000) (finding the removal of the "appears to be" language creates enforcement problems, and allows pornographers to escape prosecution).

227. HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 674, 75th Leg., R.S. (1997), *at* http://www.capitol.state.tx.us (asserting a desire to eliminate any loopholes created by technology).

228. *See* TEX. PEN. CODE ANN. § 43.26(a)(1) (Vernon Supp. 2002) (criminalizing knowing or intentional possession of visual depictions of children under eighteen).

tion meshes with the affirmative defense set out in Section 43.25(g), allowing expert testimony based on the appearance of the child.[229]

Assuming the image visually depicts a minor, to violate the statute the child must still be depicted engaging in sexual conduct.[230] Section 43.25 also defines sexual conduct, which includes actual or simulated sexual intercourse.[231] The term "simulated" is not interpreted as fictitious or "virtual," but its definition is best illustrated in *Foty v. State*,[232] where the defendant instructed two children to disrobe and engage in simulated sexual intercourse.[233] Taking the court's interpretation, coupled with the plain meaning of "simulated," the children need not actually engage in sex, but merely perform acts that give the impression of such activity.[234] Section 43.25 also defines "sexual conduct" as deviate sexual intercourse, bestiality, masturbation, sado-masochistic abuse, and lewd exhibition of the genitals or anus.[235] This provision provides little insight as to whether a living or virtually-depicted child is the intended actor. Nevertheless, as *Fox* indicates, like actual child pornography, virtually-depicted children could appear life-like and perform acts that appear real.[236]

Further, the new definition of "visual material" found in Section 43.26(b)(3)(B) of the Penal Code persuasively indicates the Texas legislature's intent to embody virtually-created child pornography.[237] The new amendment now includes *any* image that could be transmitted via phone

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229. *See id.* § 43.25(f) (setting forward affirmative defenses).

230. *See id.* § 43.26(a) (requiring the material to depict the child engaging in "sexual conduct").

231. *Id.* § 43.25(a)(2).

232. 755 S.W.2d 195 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

233. *See* Foty v. State, 755 S.W.2d 195, 195 (Tex. App.—Houston [14th Dist.] 1988, no pet.) (reversing and remanding for a new trial because the trial court erroneously admitted a videotape of the complaining victim's accusations). The defendant photographed a female and male child in various sexual positions. *Id.* The Texas Department of Human Services interviewed the male child and took a videotape deposition wherein the child described the defendant's activities in detail. *Id.* A second videotape of the female child was made several days later. *Id.* at 195-96. The defendant complained that the admission of the male child's videotape violated his constitutional right to confront the witness. *Id.* This was sustained. *Foty*, 755 S.W.2d at 195.

234. *Compare* TEX. PEN. CODE ANN. § 43.25(a)(6) (Vernon Supp. 2002) (defining "simulated" as an "explicit depiction of sexual conduct that creates the appearance of actual sexual conduct"), *with Foty*, 755 S.W.2d at 195 (finding that the victims did not engage in actual sexual conduct but were instructed to engage in simulated sexual conduct).

235. TEX. PEN. CODE ANN. § 43.25(a)(2) (Vernon Supp. 2002).

236. *See* United States v. Fox, 248 F.3d 394, 403 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (suggesting the impossibility of knowing the actual existence of the person depicted).

237. *See* TEX. PEN. CODE ANN. § 43.26(b)(3)(A) (Vernon Supp. 2002) (defining "visual material" as any diskette or other physical medium that allows any image to be downloaded from the Internet).

line or satellite.[238] The "any image" language reaches all materials, not just those involving actual children.[239] Additionally, this new amendment encompasses any and all current and future methods invented for storage of visual material.[240] An obvious extension of the statute would include all technology capable of storing visual images.[241] Further, the inclusion of satellite transmissions in the amended statute is especially prophetic, considering the growth of public access to satellite programming.[242] Apparently, the legislature includes future technologies, such as transmissions via any source, as controlled media for child pornography storage.[243]

In sum, the term "child" may have been easily defined prior to the advent of "cyber" children in the federal courts.[244] However, with the ability to create "virtual" child pornography, the exclusive focus of child pornography laws on living children is no longer the only possible objective.[245] Nevertheless, ambiguities regarding the reach of the child pornography statute call into question whether the average person would appreciate the proscribed activity. Essentially, the statute is vague be-

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238. *Id.* (indicating that any child pornography is subject to regulation that may be transmitted via satellite or telephone line).

239. *Cf. Ex parte* Anderson, 902 S.W.2d 695, 699 (Tex. App.—Austin 1995, pet. ref'd) (providing that when words are not statutorily defined, they are given their plain meaning).

240. *See* TEX. PEN. CODE ANN. § 43.26(b)(3)(A) (Vernon Supp. 2002) (indicating the statute now includes, as visual material, any disk, diskette, or other physical medium that allows image display).

241. *See* Janjua v. State, 991 S.W.2d 419, 427 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (including anything tangible and capable of storing obscene images, such as diskettes, in the definition of obscene material).

242. *See* Diane Holloway, *The Heavyweight Bout in Your Living Room Has No Clear Winner*, AUSTIN AM.-STATESMAN, Sept. 29, 2001, at D1, *available at* WL 4584206 (reporting that satellite programming became popular in the mid-1990's with more than sixteen million subscribers nationwide).

243. *See Janjua*, 991 S.W.2d at 427 (stating visual material includes tangible mediums capable of being retouched that can store obscene electronic coding); Tex. Pen. Code Ann. § 43.26(b)(3) (Vernon Supp. 2002) (addressing the issue of "cyber-porn" as a "visual material").

244. *See* Burke v. State, 27 S.W.3d 651, 655 (Tex. App.—Waco 2000, pet. ref'd) (finding the image involved actual child depictions); Alexander v. State, 906 S.W.2d 107, 111 (Tex. App.—Dallas 1995, no pet.) (finding the defendant attempted to induce an actual child to engage in explicit acts while he took pictures).

245. *See* United States v. Fox, 248 F.3d 394, 401 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (indicating Congress was interested, in eliminating pornographic images that "whet the appetites" of pedophiles); United States v. Mento, 231 F.3d 912, 920 (4th Cir. 2000) (indicating Congress found that child pornography is used by the child molester to stimulate his sexual appetites); United States v. Hilton, 167 F.3d 61, 69 (1st Cir. 1999) (indicating that in addition to "whetting" the appetites of pedophiles, child pornography "poisons the minds and spirits" of children and makes them more acquiescent to sexual demands).

cause a person would not know whether possession of virtually-created child pornography is legal.[246]

Ultimately, several conclusions can be reached regarding the definition of "cyber" children. First, "virtual children" have yet to come to the attention of the Texas legislature, and whatever hints that may be apparent in Section 43.26, suggesting a concern for "cyber" children, are nothing more than dicta. Conversely, the legislature may have intended to regulate the production of both real and "cyber" children in the child pornography statute. Considering the legislative desire to keep pace with technology in the area of child pornography, the latter suggestion seems harmonious with legislative intent.[247] With this in mind, the courts should settle these ambiguities.

B. *Case Law Applications*

1. Judicial Interpretation of the Texas Child Pornography Statute Seems to Include Virtually-Created Child Pornography

The exploitation of children constitutes a paramount state interest,[248] which justifies the destruction of the market itself.[249] In the past, however, the failure of Section 43.26 to specifically address certain forms of child pornography has proven fatal to the prosecution's case. Two Texas cases in particular refused to enforce the pre-amendment statute[250] be-

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246. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1095 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (discussing CPPA's vagueness). A statute is vague if it does not "'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement.'" *Id.* (quoting Kalender v. Lawson, 461 U.S. 352, 357 (1983)). A statute is void for vagueness if it leaves an ordinary person guessing which conduct is prohibited. *Id.*

247. *See* HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 674, 75th Leg., R.S. (1997), *at* http://www.capitol.state.tx.us (discussing the purposes and changes to the current statute).

248. *See* Savery v. State, 819 S.W.2d 837, 838 (Tex. Crim. App. 1991) (indicating possession may be prohibited because possession is the first step in distribution).

249. *See* Osborne v. Ohio, 495 U.S. 103, 110 (1990) (approving Ohio's attempts to stamp out child pornography at all levels of the distribution chain); New York v. Ferber, 458 U.S. 747, 764 (1982) (denying First Amendment protection to child pornography); *Fox*, 248 F.3d at 402 (defining the interest in safeguarding children as compelling, and finding that protection extends to children actually appearing in child pornography and those secondarily harmed); *Mento*, 231 F.3d at 919 n.7 (suggesting "[c]hild pornography, unlike adult pornography, is a 'category of speech' that may . . . be utterly silenced"); *Savery*, 819 S.W.2d at 838 (holding that the interest in protecting the psychological, emotional, and mental health of the child is a compelling state interest).

250. *See* TEX. PEN. CODE ANN. § 43.26(b)(1)(3) (Vernon Supp. 2002) (including photographs, slides, or film images as child pornography). The new statute also defines "visual material" as any disk, or other physical medium, allowing the display on computer monitor

cause the crime was committed prior to the statute's effective date.[251] In *Porter v. State*,[252] the defendant's arrest occurred prior to the new amendment outlawing possession of child pornography stored on diskettes.[253] The court held that the act of one legislative session could not declare the intent of past legislative sessions.[254] Further, in *Greer v. State*,[255] the judge overruled a motion to revoke probation because the possession of pornography on the defendant's computer transpired during the life of the pre-amendment Section 43.26, which did not include possession of child pornography downloaded from the Internet.[256]

Even though *Porter* reversed the defendant's conviction because the child pornography statute was outdated, the court did indicate that the legislature intended the new version of the statute to cover modern methods of possessing visual material.[257] In regard to the new amendment to the definition of "visual material," courts should adopt a construction that effectuates, rather than nullifies, the intended change.[258] The current problem concerns the effect of this new definition on virtually-created child pornography. Thus, the crux of this application hinges on the intended meaning of the 1997 amendment to "visual material" contained in Section 43.26. In *Janjua v. State*,[259] the appeals court indicated the terms at issue—namely, disk, diskettes, or other physical media—were

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and any image that can be transmitted to the computer by telephone, satellite, or other method. *Id.* § 43.26(b)(3).

251. *See* Greer v. State, 999 S.W.2d 484, 487 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd), *cert. denied*, 531 U.S. 877 (2000) (finding the defendant possessed pornography downloaded from the Internet, but the statute prohibiting such electronic mediums was not in effect at the time of arrest); Porter v. State, 996 S.W.2d 317, 321 (Tex. App.—Austin 1999, no pet.) (following the old statute because the current statute penalizing possession of pornography contained on a hard drive was not in effect at the time of arrest).

252. 996 S.W.2d 317 (Tex. App.—Austin 1999, no pet.).

253. *See* Porter v. State, 996 S.W.2d 317, 319-20 (Tex. App.—Austin 1999, no pet.) (holding that the legislature did not include program and data files in the definition of "film image" as set forth in the statute applicable at the time of arrest).

254. *See Porter*, 966 S.W.2d at 321 (indicating the action of the 1997 legislature supports the idea that the current statute was not intended to deal with images downloaded and saved on a computer).

255. 999 S.W.2d 484 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

256. *See* Greer v. State, 999 S.W.2d 484, 487-90 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (refusing to sustain the possession of child pornography charge but upholding the revocation of parole for other reasons).

257. *See Porter*, 996 S.W.2d at 321 (suggesting the legislative intent of the 1997 legislature).

258. *Porter*, 996 S.W.2d at 321 (justifying the current holding because the legislature made the necessary provisions in the 1997 child pornography statute to ensure defendants, such as Porter, will not escape future punishment).

259. 991 S.W.2d 419 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

intended to include any tangible medium where obscene material might be stored.[260] Consequently, "visual material" means a tangible medium.

Although *Janjua* addresses the method of storage and possession, this interpretation does not address the realistic qualities of the subjects depicted.[261] In other words, the tangible nature of the storage device has no bearing on whether actual or "cyber" children were used in producing the images. In *Burke v. State*,[262] the court of appeals seemed to interpret this question of law.[263] The defendant superimposed a picture of the victim's face on the body of other adolescent-appearing models.[264] The fifteen-year-old victim testified that Burke thought these reproductions were how she appeared naked.[265] The defendant challenged the magistrate's search warrant alleging absence of probable cause to support the charge of possession of child pornography.[266] The victim's head alone was not pornography and there was some contention that the background nude bodies were not minors.[267] However, the court found that, because the defendant intended to convey the appearance of a fifteen-year-old by the manner presented, the background bodies were adolescents for all practi-

260. *See* Janjua v. State, 991 S.W.2d 419, 427 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (defining "tangible" according to its ordinary meaning as something capable of being touched). The court classified the defendant's computer as a criminal instrument in a forfeiture proceeding because the defendant used the computer to promote child pornography. *Id.* at 426-27. The court also found that the defendant's computer was specially adapted to further criminal purposes in several ways based on the following: he could convert moving images into still photos, ninety-five percent of the hard drive storage space was dedicated to pornographic images, and the defendant had not purged images from the hard drive that easily could have been purged. *Id.* at 426.

261. *See id.* at 427 (addressing only the tangible nature of child pornography storage devices and the forfeiture of the defendant's computer).

262. 27 S.W.3d 651 (Tex. App.—Waco 2000, pet. ref'd).

263. *See* Burke v. State, 27 S.W.3d 651, 654-55 (Tex. App.—Waco 2000, pet. ref'd) (finding the defendant possessed child pornography when he superimposed images of the fifteen-year-old victim's face on photos of nude models). The court decided as the ultimate issue the sufficiency of probable cause supporting an arrest warrant. *Id.* at 654. The magistrate based the warrant substantially on an affidavit by the victim attesting the defendant molested her and that he possessed child pornography. *Id.*

264. *See id.* at 655 (approving the finding of probable cause to support a search for child pornography because the affidavit attested that the defendant believed the images resembled an adolescent).

265. *Id.* (describing the defendant's offenses as listed in the victim's affidavit). As a result of the affidavit, the magistrate correctly believed that the bodies of the children depicted actual children although their true age was unknown. *Burke*, 27 S.W.3d at 655.

266. *See id.* at 655 (contending the prosecution's evidence was stale).

267. *See id.* (indicating that Burke thought the bodies were similar to the victim's fifteen-year-old body).

cal purposes.[268] The court labeled these images as child pornography, under Section 43.26 of the Texas Penal Code, based solely upon the intent of the defendant.[269]

As *Porter* indicates, an interpretation of the statute should not render the amendment useless.[270] If anything, the appellate court's interpretation in *Burke* gives added dimension to the Texas child pornography statute. In light of the concerns encountered by the federal courts, coupled with the Texas legislative intent to keep pace with growing technology,[271] interpreting the statute to include virtually-created child pornography in the definition of "visual material" seems an obvious and logical extension.[272] However, since *Burke* is not controlling statewide,[273] and did not squarely address whether virtually-created child pornography could be suppressed,[274] a contention to the contrary may be given the benefit of the doubt.

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268. *See id.* at 655 (finding the photos were intended to appear like the fifteen-year-old victim). Based on Burke's comments to the victim, such as "he bets that's what her body looked like naked," the magistrate could reasonably infer that the images were child pornography. *Id.* at 654.

269. *See Burke*, 27 S.W.3d at 655 (holding that Burke had child pornography on his computer). The magistrate could reasonably infer that the defendant's computer contained child pornography in the fall of 1998. *Id.* at 654.

270. *See* Porter v. State, 996 S.W.2d 317, 321 (Tex. App.—Austin 1999, no pet.) (reciting the legislative intent of the 1997 legislature).

271. *See* HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 674, 75th Leg. R.S. (1997), *at* http://www.capitol.state.tx.us (indicating that the legislature amended the statute to include disk, diskettes, and other physical mediums to keep pace with advancing technology).

272. *See Porter*, 996 S.W.2d at 321 (citing *Ex parte Trahan*, 591 S.W.2d 837, 842 (Tex. Crim. App. 1979) for the proposition that new statutes should be given a construction that promotes rather than defeats legislative intent).

273. *See* Marquez v. State, 921 S.W.2d 217, 221 n.3 (Tex. Crim. App. 1996) (en banc) (holding that "the most recent pronouncement of the state's highest court" is controlling, although other authorities may be considered for their persuasive value); Sigard v. State, 537 S.W.2d 736, 741 (Tex. Crim. App. 1976) (Odom, J., dissenting) (indicating that the holdings of the federal courts of appeal are not controlling in this jurisdiction); Zarychta v. State, 44 S.W.3d 155, 162 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (holding that the decisions of the Court of Criminal Appeals are controlling on intermediate courts); Pace v. Jordan, 999 S.W.2d 615, 621-22 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (holding unpublished decisions from other jurisdictions non-controlling); *In re* R.I., No. 04-97-00971-CV, slip op. at 3, 1998 WL 846087, at *1 (Tex. App.—San Antonio Dec. 9, 1998, no pet.) (not designated for publication) (indicating that intermediate decisions are not binding on fellow intermediate appellate courts, but if their reasoning is persuasive their decisions are frequently relied upon).

274. *See Burke*, 27 S.W.3d at 654-55 (emphasizing that the defendant's challenge of the search was without merit because sufficient evidence of possession of child pornography existed to support the search warrant); Janjua v. State, 991 S.W.2d 419, 427 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (suggesting the legislature expressly addressed

V. SUGGESTIONS FOR THE TEXAS LEGISLATURE

Since the language of Section 43.26 of the Texas Penal Code seems uncertain as to the application of the term "child" to virtually-created child pornography, the Texas Legislature needs to clarify Section 43.26 to avoid inconsistent interpretations by state courts. The legislative intent to stay abreast of changing technology indicates a desire to prevail over any attempts to defeat the law based on a technicality.[275] Holdings of several Texas courts give this intent further life with respect to virtually-created child pornography.[276] However, because *Burke v. State* is the only decision that comes close to dealing with virtually-created child pornography,[277] that holding is not necessarily controlling until the Texas Court of Criminal Appeals or the U.S. Supreme Court rules upon the issue. Thus, the law in Texas still remains ambiguous. Considering the problematic nature of computer-generated child pornography, this ambiguity is a concern that needs clarification.[278]

"cyber-porn" when it defined "visual material" as tangible mediums such as disk, diskettes, or other physical storage device).

275. *See* HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 674, 75th Leg., R.S. (1997), *available at* http://www.capitol.state.tx.us (indicating that because the Texas Penal Code was not keeping up with technology, the legislature incorporated a new definition of "visual material" to better prosecute child pornography offenses). This new legislation was intent on closing the existing loopholes available to offenders who chose to possess or promote child pornography via the computer. *Id.*

276. *See Chen*, 42 S.W.3d at 930 (holding the intent of the defendant is controlling because if the child solicited were in fact a thirteen-year-old, the defendant most certainly would have committed a crime); Burke v. State, 27 S.W.3d 651, 654 (Tex. App.—Waco 2000, pet. ref'd) (finding the defendant possessed child pornography when he created images where a minor's face was superimposed onto photos of nude models); Alexander v. State, 906 S.W.2d 107, 110-11 (Tex. App.—Dallas 1995, no pet.) (holding that although the statute does not define "lascivious" the defendant's intention to portray the child in a lascivious manner was controlling).

277. *See Burke*, 27 S.W.3d at 654 (finding the defendant possessed child pornography where the image depicted a minor's face superimposed on photos of naked models). The defendant challenged the sufficiency of the affidavit on the basis that the information was stale, thus invalidating any probable cause. *Id.* at 655. However, the victim's statements in the affidavit indicated otherwise, which allowed the magistrate to reasonably infer that the bodies of the children were actual children, although their true age was unknown. *Id.* Burke thought the bodies were similar to the victim's fifteen-year-old body. *Id.* The appellate court found the defendant possessed child pornography because the photos were intended to appear like the minor victim. *Id.*

278. *See* Osborne v. Ohio, 495 U.S. 103, 111 n.7 (1990) (asserting several interests in stamping out child pornography—specifically, pedophiles using child pornography to seduce other children); *Hilton*, 167 F.3d at 65 (listing congressional concerns associated with new technologies). Computerized virtual animation may be created in various forms. *Id.* Pornographers may scan an innocent photograph of a child into a computer and then manipulate the image to appear in a sexual pose. *Id.* A pornographer may create an artificial child completely by computer. *Id.* Further, determining the exact age of the child depicted

First, the Texas Legislature should amend the current child pornography statute to reduce uncertainty by including "cyber" children. Because the current dispute centers on language, such as "appears to be" and "conveys the impression,"[279] the legislature should define more precisely the intended target: virtually-created child pornography. Second, the legislature could add a paragraph to Section 43.26(b) that focuses on the definition of "child." This section should adopt the language of the federal statute and other state statutes, specifically "appears to be" or "conveys the impression" of a child.[280] However, to avoid the same challenges made to the CPPA, the statute should add a clause to the "appears to be" language that focuses the general purpose of the material based on objective factors. For example, an Ohio statute and the Fifth Circuit allow an inference that the person depicted is a child if the material, through its title, text, or visual representation, depicts the person as a minor.[281] The determination of whether the pornography depicts a child

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is extremely difficult due to animation or morphing. *Id.* Consequently, virtually-created child pornography is easily used as a tool to abuse children. *Hilton*, 167 F.3d at 67. The images could be used to break down natural inhibitions. *Id.* at 69. A child who is reluctant to engage in sexual activity with an adult or pose for sexually explicit photos can sometimes be convinced by viewing other children having "fun" participating in the activity. *Id.* Further, child pornography may be used to instruct the child how to perform the sexual act. *Id.* Thus, the threat of physical and emotional abuse associated with virtually-created child pornography is as substantial as when child pornographers use actual child pornography because a child does not know the difference between real and artificial child pornography. *Id.*

279. *Compare* United States v. Fox, 248 F.3d 394, 403 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (holding the "appears to be" language is essential because technology has changed since *Ferber* and *Osborne*, and these advances inhibit the ability to prove the image is a real child), *and* United States v. Mento, 231 F.3d 912, 921 (4th Cir. 2000) (finding the "appears to be language" impossible to improve upon with regards to vagueness without frustrating the compelling government interests), *with* Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (finding that the remainder of the statute would be constitutional if the "appears to be" and "conveys the impression" provision were stricken).

280. *Compare* 18 U.S.C.A. § 2256(8)(B), (D) (1994 & Supp. 1999) (indicating visual depictions are illegal that appear to be or convey the impression of a child engaging in sexual conduct), *and* 720 ILL. COMP. STAT. ANN. 5/11-20.1(f)(7) (West Supp. 2001) (defining "child" as "a film, videotape, photograph or . . . depiction by computer that is, or appears to be, that of a person, either in part, or in total, under the age of 18" regardless of the method of creation), *and* OHIO REV. CODE ANN. § 2907.322(A) (West 1992) (prohibiting creation and advertisement of child pornography that "shows" a child engaging in sexual conduct), *and id.* § 2907.322(B)(3) (inferring minority status of the child "if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor").

281. *See* OHIO REV. CODE ANN. § 2907.322(A)-(B) (West 1992) (prohibiting creation or advertisement of child pornography that "shows" a child engaging in sexual conduct);

should also turn on obvious physical characteristics such as undeveloped breasts, genitals, and lack of pubic hair, although maturation should not be the exclusive classifying factor.[282] Therefore, a new section should be

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id. § 2907.322(B)(3) (inferring minority status of the child "if the material or performance, through its title, text, visual representation, or otherwise, represents or depicts the person as a minor"); *Fox*, 248 F.3d at 407 (encouraging the fact-finder to look at the physical characteristics of the minor along with computer file names such as "Falcon 10" that may indicate the actual ages of the children); United States v. Katz, 178 F.3d 368, 369 (5th Cir. 1999) (identifying two videotapes seized during arrest labeled "Masturbating Lolita" and "Dream Teens").

282. *See* COLO. REV. STAT. ANN. § 18-6-403(2)(d) (West 2000) (defining erotic nudity as a display of undeveloped breast or pubic areas for sexual gratification or stimulation). Courts have used the Tanner Staging Scale to determine the biological age of children in child pornography. *Compare* People v. Kurey, 106 Cal. Rptr. 2d 150, 153-54 (Cal. App. 2 Dist. 2001) (discussing the Tanner Scale of Physical Development), *with* Roise v. State, 7 S.W.3d 225, 231 (Tex. App.—Austin 1999, pet. ref'd), *cert. denied*, 531 U.S. 895 (2000) (using the Tanner Staging process to determine that most of the photographs admitted into evidence depicted children under eighteen). In *Kurey*, the prosecution revoked the defendant's probation for possessing images of persons appearing to be under eighteen. *Kurey*, 106 Cal. Rptr. 2d at 153. A certified pediatric nurse practitioner testified for the prosecution and indicated that maturation of the child can be determined by muscle development, body stature, lack of body hair, and breast development. *Id.* Based on the physical appearance of the subjects the nurse practitioner could not determine the chronological age of the children, but indicated that ninety-five percent of persons displaying these same traits were younger than eighteen. *Id.* The expert witness for the defense indicated that certain factors are more important than physical features when determining maturation. *Id.* at 154. For example, genetic and family history, malnutrition, racial background, and the mother's use of tobacco and drugs during pregnancy are strong influences upon physical maturation. *Id.*

The Tanner Staging process is used to measure sexual maturation by looking at secondary sexual characteristics such as breast development and growth of pubic hair. *See* Jamie Stang, *Adolescent Physical Growth and Development: Implications for Pregnancy*, *in* NUTRITION AND THE PREGNANT ADOLESCENT: A PRACTICAL REFERENCE GUIDE 31 (Mary Story & Jamie Stang, eds., 1999), *available at* http://www.epi.umn.edu/let/nmpabook.html (discussing the Tanner Staging scale). "The age of onset of puberty varies widely among young females[, and thus] [b]ecause chronological age doesn't correlate well with the timing of endocrinological or physiological growth and development, sexual maturation is used to determine biological age in adolescents." *Id.* The scale has five stages and considers various physical landmarks occurring during development. *Id.* at 32 tbl. 1. Stage 1 considers prepubescent children as having only nipple elevation and no pubic hair. *Id.* Stage 5 identifies a mature subject as having adult contour, areola in the same contour of the breast, and adult quality pubic hair. *Id.*

The Fifth Circuit and a federal district court addressed the conflict alluded to in *Kurey* concerning proper application of the Tanner Scale in expert testimony. *See* United States v. Katz, 178 F.3d 368, 373-74 (5th Cir. 1999) (discussing the district court's exclusion of images that were not susceptible to evaluation using the Tanner Scale because the angles and quality of the photos were poor); United States v. Pollard, 128 F. Supp. 2d 1104, 1123 (E.D. Tenn. 2001) (allowing expert testimony using the Tanner Scale when the expert also considers other factors). Essentially, the Tanner Staging process is intended to establish a

amended to add Section 43.26(b)(4).[283]

A. *Analysis of the Proposed Statute*

The statute proposed in this Comment combines the strengths of other legislation as well as existing legislative intent to address the problem of virtual child pornography. Initially, the terms "sexual performance" and "sexual conduct" are already defined by Texas Penal Code Section 43.25, thereby eliminating the need for further definition.[284] Additionally, although the amended statutory language of "appears to be" and "conveys the impression" may appear problematic,[285] the proposed amendment expounds upon and solidifies the intent of the two arguably vague expressions.[286] These proposed provisions require the depiction to resemble an actual minor.[287] This suggests a reasonable person, at first glance, would pause to determine whether the children depicted are "virtual" or actual. In other words, the observer has difficulty determining the existence of the child without closer examination of the material.

The proposed amendment also uses other objective factors suggesting intent to determine the illegal nature of the material. The factors acknowledged in *Alexander v. State*,[288] such as the lewd nature of the material and the way the pornographer portrays the child, are considered

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global picture of when events in life should occur, but not to establish the chronological age of a child. *Pollard*, 128 F. Supp. 2d at 1113 (suggesting that the Tanner Scale is improperly used to determine chronological age). Further, the Tanner Scale applies to Caucasians but not to all ethnic groups. *See Katz*, 178 F.3d at 370 (finding the methodology valid, but deciding that, under these facts, using the Tanner Scale was questionable). Nevertheless, the Tanner Scale is appropriately used to determine age when it is considered with other criteria and factors. *Pollard*, 128 F. Supp. 2d at 1123. For example, other criteria include knowledge of body configuration and milestones occurring during sexual development, fat displacement, change in anatomy, morphology and structure of the breasts and pubic region, and the way the child moves and adjusts herself. *Id.* at 1110. Further, problems with photos may preclude accurate use of the Tanner Scale. *Katz*, 178 F.3d at 370-71. For instance, poor photo quality, whether the image is black and white, or the angle of the depiction may prohibit the expert from determining the ethnicity of the subject, the amount of pubic hair, whether pubic hair was removed, or the development of certain features. *Id.* at 371.

283. *See* Appendix A.

284. TEX. PEN. CODE ANN. § 43.25(a) (Vernon Supp. 2002).

285. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (holding the CPPA vague and overbroad).

286. *See* Appendix A.

287. *See* United States v. Fox, 248 F.3d 394, 405 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (agreeing that the "appears to be" language focuses only on pictures that are "*virtually indistinguishable* . . .from *unretouched photographs* of actual children" as opposed to drawings, cartoons, and paintings).

288. 906 S.W.2d 107 (Tex. App.—Dallas 1995, no writ).

when determining the intent of the person promoting and possessing the material.[289] Thus, the amended Subsection (B) requires the prosecution and jury to consider the physical features of the virtually-created child, as well as labels on the disk, or data files, to determine whether the actor intended a child portrayal.[290] Here again, the current Texas Penal Code, Section 43.25(g), provides support to the proposed amendment in that it allows the prosecution to put on evidence of expert testimony, such as from a pediatrician, to determine the child's age.[291]

The language of the suggested amendment puts the average person on notice and does not permit arbitrary and discriminatory enforcement.[292] The suggested amendment requires the lay person to be practically convinced that the image represents an actual child engaged in sexual conduct. This implies two prongs. First, the depiction must be lifelike. Second, the viewer must believe that the general theme of the depiction is the presentation of a child engaging in sexual conduct.[293] "'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse . . . masturbation" and other sex related activities.[294] As such, any reasonable person could determine whether the child-subject is performing sexual activity in the depiction. Further, the requirement of physical features or other identifying factors suggests the person possessing and promoting the material surely knows the image is illegal. Such identifying marks, such as disk or filename labels, affirmatively suggest age, and

289. *See* Alexander v. State, 906 S.W.2d 107, 110 (Tex. App.—Dallas 1995, no writ) (finding that lewdness is not a characteristic of the child but how the photographer arrays the image to satisfy his particular lusts). In *Alexander*, the prosecution charged the defendant with "attempted sexual performance of a child." *Id.* at 108. He contended that his actions were not a "lewd exhibition" under the meaning of the statute. *Id.* at 109. To this point no Texas case had defined "lewd." However, the appeals court upheld the trial court's refusal to define lewd. *Id.* at 110.

290. *See* Appendix A.

291. *See* TEX. PEN. CODE ANN. § 43.25(g)(4) (Vernon Supp. 2002) (providing that expert medical testimony can testify concerning the age of the child); *accord* Renfro v. State, No. 01-98-01232-CR, slip op. at 6, 2001 WL 204724, at *2 (Tex. App.—Houston [1st Dist.] Mar. 1, 2001, no pet.) (not designated for publication) (using a pediatrician to determine "that there was a ninety-five percent probability that the" child depicted was under eighteen); Roise v. State, 7 S.W.3d 225, 231 (Tex. App.—Austin 1999, pet. ref'd), *cert. denied* 531 U.S. 895 (2000) (allowing a pediatrician's testimony to determine the age of the children depicted in photographs).

292. *But cf.* Free Speech Coalition v. Reno, 198 F.3d 1083, 1095 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (finding a statute void if it creates arbitrary and discriminatory results and "fails 'to define the criminal offense with sufficient definiteness that ordinary people understand'" the proscribed conduct).

293. *See* Appendix A.

294. *See* TEX. PEN. CODE ANN. § 43.25(a)(2) (Vernon Supp. 2002) (defining "sexual conduct").

thereby distinguish child from adult pornography.[295] Finally, the requirement that the child engage in sexual conduct defeats any ambiguity problems when defining obscenity.[296] Consequently, the threat that law enforcement officials will prosecute a person for possessing pictures of one's grandchildren in the bathtub or non-sexual artistic photographs or paintings of children is eliminated.

The suggested amendments would also survive any constitutional overbreadth challenges. The affirmative defenses applicable to the child pornography statute excuse those persons using the pornography for legitimate purposes.[297] Indeed, in addition to Texas, other states have enacted statutes that provide a defense if the defendant can demonstrate a legitimate use.[298] The federal statute has no such provision. Concerns

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295. *See id.* § 43.25(f) (providing an affirmative defense if it is reasonably believed the child depicted is eighteen or older); *id.* § 43.26(a)(1) (penalizing images depicting children younger than eighteen); *see also* Michael J. Eng, Note, Free Speech Coalition v. Reno*: Has the Ninth Circuit Given Child Pornographers a New Tool to Exploit Children?*, 35 U.S.F. L. REV. 109, 133 (2000) (suggesting a jury charge employing an objective test for determining if the image was marketed as child pornography). The following factors should be considered: "The physical characteristics of the person; expert testimony as to the physical development . . .; how the disk, file, or video was labeled or marked by the creator or the distributor of the image, or the defendant himself[;] . . . and the manner in which the image was described, displayed, or advertised." *Id.* (second alteration in the original).

296. *See* TEX. PEN. CODE ANN. § 43.25(a)(2) (Vernon Supp. 2002) (defining "sexual conduct" as deviate sexual intercourse, "bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals"). In defining "lewd," this jurisdiction adopts the *Dost* test. United States v. Fox, 248 F.3d 394, 408-09 (5th Cir. 2001), *petition for cert. filed*, 70 USLW 3395 (2001) (No. 01-805) (adopting the *Dost* Test to define lascivious in the Fifth Circuit); Alexander v. State, 906 S.W.2d 107, 110 (Tex. App.—Dallas 1995, no pet.) (finding the terms "lewd" and "lascivious" interchangeable and adopting the *Dost* Test to define "lewd"). In *United States v. Dost*, the district court listed factors used to determine if there is a lascivious display of genitals. *See* United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (enunciating the test for determining "lascivious exhibition of the genitals or pubic area"). The factors are as follows: (1) whether the focus of the image "is on the child's genitalia or pubic area;" (2) whether the setting is in a place or pose that is sexually suggestive; (3) whether the child is wearing inappropriate attire or in a sexually suggestive pose considering the child's age; (4) whether the child is nude or partially undressed; (5) whether the depiction suggests willingness to engage in sexual activity; (6) whether the depiction is meant to evoke "a sexual response in the viewer." *Id. But see* John T. Mitchell, *An Exclusionary Rule Framework for Protecting Obscenity*, 10 J.L. & POL. 183, 199 (1994) (suggesting that because obscenity cannot be distinguished from constitutionally protected speech, protected speech is often suppressed by good-faith, but erroneous, efforts of prosecutors to attack obscene materials).

297. TEX. PEN. CODE ANN. § 43.26(c) (Vernon Supp. 2002) (referring the reader to Section 43.25 for a list of affirmative defenses); *id.* § 43.25(f)(3) (allowing a defense for persons showing they used the material for legitimate purposes, such as medical, educational, or judicial purposes).

298. *See* CAL. PEN. CODE § 311.3(c) (Deering Supp. 2001) (exempting law enforcement agencies in investigation and prosecution activities or legitimate medical, scientific, or

that treating psychologists, physicians, educational, or law enforcement personnel may be implicated are unsubstantiated because the current Texas statute excuses such persons. Any other use is *de minimus* because there is little social value in sexual performances, even if artistic.[299] Thus, the overbreadth concerns expressed in *Free Speech Coalition* do not apply.[300]

Additionally, the Texas child pornography statute excuses the defendant who can prove they reasonably believed the child depicted was over eighteen, per Section 43.25(f)(1).[301] This defense is available to those who

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educational activities, or lawful conduct between spouses); COLO. REV. STAT. ANN. § 18-6-403(3)(b.5) (West 2000) (indicating possession or control of any sexually exploitive material is a crime except when used by police or court personnel during official capacities, or by physicians, psychologists, therapists, or social workers so long as such persons are licensed in Colorado and possession is in the course of a bona fide treatment or evaluation program); OHIO REV. CODE ANN. § 2907.322(B)(1) (West 1992) (exempting persons using child pornography for a bona fide medical, scientific, educational, religious, governmental, judicial or other proper purpose, or by a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, or any other person having proper interest in the material or performance such as librarian, clergyman, prosecutor, or judge); TEX. PEN. CODE ANN. § 43.26(c) (Vernon Supp. 2002) (indicating that the affirmative defenses for child pornography violators are the same available under Section 43.25 dealing with sexual performance of a child); *id.* § 43.25(f)(3) (providing an affirmative defense if the conduct can be shown to be for a "bona fide educational, medical, psychological, psychiatric, judicial, law enforcement, or legislative purpose").

299. *See* Osborne v. Ohio, 495 U.S. 103, 109-10 (1990) (holding possession of child pornography may be regulated); New York v. Ferber, 458 U.S. 747, 762 (1982) (holding production, advertising, selling, and otherwise disseminating child pornography may be regulated); United States v. Mento, 231 F.3d 912, 921 (4th Cir. 2000) (indicating because child pornography lacks any social or educational value, it may be utterly suppressed); United States v. Hilton, 167 F.3d 61, 72 (1st Cir. 1999) (providing legislatures greater leeway to regulate child pornography because there is an important government interest in protecting children from abuse and sexual exploitation); United States v. Acheson, 195 F.3d 645, 651 (11th Cir. 1999) (finding that virtually-created child pornography may be regulated because such productions are low-value speech).

300. *Contra* Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999), *cert. granted sub nom.* Ashcroft v. Free Speech Coalition, 531 U.S. 1124 (2001) (holding that since the CPPA also encompasses some constitutionally protected speech as well as illegal activity, the statute was overbroad). The court provided that the government's interest supporting suppression of virtually-created child pornography was not the same interest justifying the suppression of child pornography using actual children. *Id.* at 1096.

301. TEX. PEN. CODE ANN. § 43.25(f)(1) (Vernon Supp. 2002) (providing an affirmative defense if the actor reasonably believes in good faith the child was over eighteen); *see Fox*, 248 F.3d at 403 (indicating that the CPPA is narrowly tailored because it allows the defendant to escape prosecution if those promoting or distributing child pornography can prove the child's majority); *Mento*, 231 F.3d at 921 (asserting the CPPA was not overbroad because the statute provides an affirmative defense to persons showing the participant's majority); Samantha L. Friel, Note, *Porn by Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 VAL. U. L. REV.

promote and possess child pornography.[302] Hence, the suggested amendment is narrowly tailored to suppress the activities that harm children via virtually-created child pornography.[303]

B. *If the Federal Statute Works, Why Should Texas Make Any Changes?*

Since the federal statute already addresses the computer-generated child pornography problem, why should Texas amend the current law to address this same issue? First, the primary responsibility for criminal punishment and regulation rests with the states, while the federal government's authority is secondary.[304] When the federal government undertakes to regulate crimes, they must base their efforts on the Commerce Clause,[305] which may not reach all desired crimes.[306] In the present case,

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207, 265 (1997) (suggesting an alternative to the affirmative defenses in the federal statute). As the statute currently stands, pedophiles could claim that the images are virtually-created and the prosecution must then prove otherwise. *Id.* However, law enforcement officers should not have to bring photography and computer-graphics experts into each child pornography investigation. *Id.* at 264. Instead, the burden of proof should be on the pedophile because this forces the pedophile to produce evidence to substantiate his claim. *Id.* at 265. Otherwise, proving the pedophile actually abused the child would be almost impossible simply by looking at the picture. Essentially, the defendant is better positioned to present evidence relating to the age of the child depicted in the images. *Id.* at 266.

302. *See* TEX. PEN. CODE ANN. § 43.25(f)(1) (Vernon Supp. 2002) (providing an affirmative defense if the defendant can show he reasonably believed the child participant was over eighteen); *id.* § 43.26(c) (applying the affirmative defenses provided in Section 43.25(f) to possession and promotion of child pornography). *But cf. Fox*, 248 F.3d at 403 (indicating the federal statute only provides this defense to those promoting child pornography, not those who possess). However, an individual possessor can escape punishment if they possess fewer than three images, and promptly in good faith destroy the images or report them to law enforcement. *Id.*

303. *See Fox*, 248 F.3d at 403 (finding the CPPA does not offend free speech because the statute provides affirmative defenses, and a safe harbor to persons promoting and found in possession of child pornography).

304. *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (overruling Congress's attempt to provide a civil remedy to persons assaulted based on gender because the statute violated the Commerce Clause). The victim asserted claims that a Commerce Clause justification was appropriate because violent acts increase the cost of crime and effect willingness of persons to travel from state to state. *Id.* at 612-13. The Court considered these justifications tenuous and said, "'[u]nder the[se] theories . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.'" *Id.* at 613 (alteration in original); *see also* Bradley Scott Shannon, Article, *The Jurisdictional Limits of Federal Criminal Child Pornography Law*, 21 U. HAW. L. REV. 73, 126 (1999) (suggesting the states are better suited to handle child pornography traveling over the Internet).

305. *See* U.S. CONST. art. I, § 8, cl. 3 (promulgating that Congress has power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes").

the federal government is authorized to act in this matter,[307] because virtually-created child pornography may be placed on the Internet in Texas and access may be provided anywhere in the United States or the world. However, because states act as principal guardians of children, the states are not limited to activities that affect interstate commerce. States also have the power to prohibit the production and trafficking of child pornography, regardless of commerce concerns.[308] Furthermore, if the state

306. *See* Bradley Scott Shannon, Article, *The Jurisdictional Limits of Federal Criminal Child Pornography Law*, 21 U. HAW. L. REV. 73, 127 (1999) (suggesting that some crimes are beyond the purview of federal law making because federal legislation is checked by the Commerce Clause). States are not limited by the Commerce Clause. *Id.* They have power to regulate all production and trafficking of child pornography because they are not as limited as the federal government. *Id.*

307. *See* United States v. Corp, 236 F.3d 325, 332 (6th Cir. 2001) (declining to declare the CPPA unconstitutional based on the Commerce Clause). However, the Sixth Circuit indicated that the jurisdictional components of constitutional statutes were considered as meaningful restrictions. *Id.* This court also did not consider the aggregate effect of the Act on interstate commerce because the defendant's acts involved strictly intrastate possession of child pornography. *Id.*

308. *See* New York v. Ferber, 458 U.S. 747, 756 (1982) (holding that "states are entitled to greater leeway" regulating child pornography); Miller v. California, 413 U.S. 15, 18-19 (1973) (noting states may legitimately regulate dissemination or exhibition of obscene material without infringing on the First and Fourteenth Amendments); Ginsberg v. New York, 390 U.S. 629, 638 n.6 (1968) (stating that the well being of the state's children is a supervening subject within their power to regulate); *Corp*, 236 F.3d at 331-32 (falling short of declaring the CPPA unconstitutional based on the Commerce Clause); *see also* Bradley Scott Shannon, Article, *The Jurisdictional Limits of Federal Criminal Child Pornography Law*, 21 U. HAW. L. REV. 73, 125 (1999) (discussing the problems the federal government must undergo to prosecute Internet based child pornography in addition to overcoming the commerce hurdle). By having two statutes that punish the same crime, a federal and state statute, there is the possibility of double prosecution for the same crime, thus creating a dual system. *Id.* Further, enlargement of the federal system in criminal matters would strain the federal judicial and prison system. *Id.* Finally, if the federal government regulated areas historically in the domain of states, the line between federal and state jurisdiction would become blurred or destroyed. *Id.*

Recently, the Fifth Circuit dealt with the authority of a state to regulate interstate commerce via the Internet. *See* Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493, 498 (5th Cir. 2001) (affirming summary judgment against Ford's Commerce Clause, Due Process, and free speech claims). Ford posted advertisements on the Internet that allowed customers to view and order cars. *Id.* at 499. A number of dealers in Houston participated in the program that prohibited them from attempting to interest the customer in another vehicle until the customer refused to buy the Internet counterpart. *Id.* The Texas Motor Vehicle Commission Code prohibits selling vehicles in Texas without a license, and Ford was charged with violating the code for aiding and abetting the retailers to violate the code. *Id.*

Texas asserted a strong interest in regulating these transactions—namely, to ensure effective methods of distributing and selling new automobiles, and protecting the public by requiring a merchant license. *Id.* at 500. The Fifth Circuit agreed, "[i]t is not the function of the court to decide whether *in fact* the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the

can enact a statute that also reaches virtually-created child pornography, then the federal statute is duplicative.[309] A state statute attacking such child pornography provides a safety net for crimes inaccessible by the federal statute.

Second, Texas should amend its law because it may define child pornography differently than other states. The federal government changes state policy when it enacts regulations in areas where states have not chosen to regulate, and are therefore more restricted in what they may do.[310] However, the Supreme Court in *Sable Communications of Cal., Inc. v. FCC*[311] reaffirmed the notion suggested in *Miller* that states may define their community standards as strictly as they desire.[312] In *Sable Communications*, the Court held that the federal statute is not unconstitutional

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information is not wholly irrational in light of its purposes." *Ford*, 264 F.3d at 503-04 (quoting Kassel v. Consol. Freightways Corp., 450 U.S. 662, 680-81 (1981)). Finding a valid state interest existed, the Fifth Circuit held that this incidental regulation of interstate commerce was constitutional. *Id.* at 505; *see also* John Council, *Fifth Circuit Puts Brakes on Ford: Law Prohibiting Car Makers from Selling in Texas Stands*, TEX. LAW., Sept. 3, 2001, at 1 (quoting former Texas Solicitor General Gregory Coleman as stating "[t]he Fifth's Circuit's judgment demonstrates that traditional state regulation of marketing activities does not become unconstitutional simply because the participant's bring the Internet into the picture").

Interestingly, the Fifth Circuit also dealt with free speech concerns. The court applied the test enunciated in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), but the court found that because the commercial speech via the Internet involved unlawful activity, the analysis stopped there. *Ford Motor Co.*, 264 F.3d at 507. Simply because the conduct was initiated or carried out by speech elements did not mean that the activity was beyond reproach. *Id.* at 506-07. Such an expansive interpretation of the First Amendment would make it impossible to enforce laws in trade or in shadier enterprises. *Id.* The holding in *Ford Motor Co.* supports the proposition that Internet-based child pornography is not protected by the Commerce Clause or the First Amendment when the activity is illegal, and a rational legislative interest is asserted. *Id.*

309. *See* Bradley Scott Shannon, *The Jurisdictional Limits of Federal Criminal Child Pornography Law*, 21 U. HAW. L. REV. 73, 128 (1999) (indicating the areas of the CPPA that are also covered by state anti-pornography statutes, and in many cases use of the federal statute is "duplicative").

310. *See id.* at 125 (discussing the *Lopez* Court's finding that Congress is limited by the Commerce Clause). When Congress criminalizes areas already regulated by the states, it changes the relationship between the federal and state government. *Id.* Further federal regulation of crimes "displaces state policy choices in that its prohibitions apply even in States that have chosen not to outlaw the conduct in question." *Id.*

311. 492 U.S. 115 (1989).

312. *Compare* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125 (1989) (noting that distributors of obscene materials could be subject to varying community standards in various federal judicial districts into which they send pornography, but a federal statute is not unconstitutional simply because there are no uniform applications of national obscenity standards), *with* Miller v. California, 413 U.S. 15, 24 (1973) (allowing states to define "community standards"). *See also* Patrick T. Egan, Note, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyber-*

simply because it forces pornographers to comply with the varying obscenity standards of each community.[313] As a result, the person promulgating child pornography bears the risk of offending each of those community standards.[314] Shifting the risk to the pornographers is especially potent in the Internet age. Although sources of virtually-created child pornography may originate outside Texas, Texas has the ultimate right to define its community standards.[315] Thus, the course is obvious: Texas is relieved of interstate commerce constraints, and may apply its own standards to the definition and value of virtually-created child pornography.[316] States are inherently better suited to handle "virtual" child pornography, whether sent via the Internet or otherwise.

VI. CONCLUSION

The nature of the child pornography market is problematic. Without a statute targeting virtually-created child pornography, such as the CPPA, the Reedys, and others who create and promote child pornography, might escape prosecution. Therefore, states have compelling interests that disfavor both actual and computer-generated child pornography. First, the social value of a child's sexual performances is nonexistent. Further, virtually-created child pornography can be fashioned to appear so much like living children that these images may be used in precisely the same manner as actual child pornography. Although no actual children are used in the production, the pornography still whets the pedophile's appetite. Consequently, the pedophile seeks more child pornography and is willing to pay people like the Reedys for future access. This demand provides an incentive for producers of child pornography to

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space?, 30 SUFFOLK U. L. REV. 117, 145 (1996) (supporting the community standards doctrine, which allows states to define their standards as strict as they see fit).

313. *Sable Communications*, 492 U.S. at 125 (holding the defendant is subject to the standards of each community into which he sends obscene material).

314. *See id.* at 126 (placing the burden of complying with different community standards on the defendant).

315. *See* Hamling v. United States, 418 U.S. 87, 105 (1974) (indicating the "community standard" doctrine does not necessarily apply to any precise geographical location); *see also* Patrick T. Egan, Note, *Virtual Community Standards: Should Obscenity Law Recognize the Contemporary Community Standard of Cyberspace?*, 30 SUFFOLK U. L. REV. 117, 144-45 (1996) (indicating that, like jury instructions, statutes need not comply with geographic views of the community, but may draw on personal experience and knowledge when determining obscenity); *id.* at 145 (finding specific standards may apply to the specific community affected such as military courts that apply a military community standard).

316. *See Sable Communications*, 492 U.S. at 125 (holding that distributors of obscene materials could be subject to different community standards in various federal judicial districts into which they send pornography); *Miller*, 413 U.S. at 24 (allowing states to define local standards).

create more of their product. This situation becomes one continuous circle at the expense of real children. Either pedophiles exploit real children as models in production, or they use virtually-created child pornography to seduce their young neighbors or relatives by showing them how to perform sexual acts or by lowering their inhibitions.

The government has an interest in regulation of such a market. However, the problem involving exploitation of children is exacerbated because the First Amendment protects the creation and possession of adult pornography. However, *Ferber* proscribes the promotion, advertising, and selling of child pornography, and *Osborne* further prohibits its mere possession. Although these decisions have ejected child pornography from penumbral First Amendment protection, the Court has not ruled on whether computer-generated child pornography deserves similar treatment.

Regardless of the actions of the Supreme Court respecting the CPPA, the power to regulate criminal activity resides with the states. Currently, the Texas statute appears to be weak in light of recent federal attention to virtually-created child pornography. Because the current Texas statute closes the door on possession and promotion of actual child pornography, the realm of computer-generated child pornography is the obvious next step for those having an economic or sexual interest in this market. The Texas Legislature manifested an intent to stay abreast of advancing technology by changing the old child pornography statute to include possession or promotion of visual material that could be stored on a computer and transmitted via satellite or phone lines. However, the wording of the statute does not appear to have contemplated virtually-created child pornography.

Therefore, Texas must amend the current child pornography statute, Section 43.26, to specifically address virtually-created child pornography. The Texas Legislature could borrow from, and improve upon, provisions from the federal statute such as the "appears to be" and "conveys the impression" of a child language.[317] Further, the amendment should focus on physical characteristics depicted in the visual material or the manner in which the material was sent or stored, such as labeling that may be telltale signs of pornography. The State has inherent authority, and is thus better positioned, to regulate this situation without significant interstate commerce ramifications. Further, Texas has authority to determine local community standards via *Miller* and *Sable Communications*, which allow the state to decide community standards regardless of prevailing national views of child pornography.

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317. *See* 18 U.S.C.A. § 2256(8)(A), (D) (West 2000) (prohibiting visual depictions that "appear to be" or that "conveys the impression" of a minor).

APPENDIX: PROPOSED AMENDMENT TO TEXAS PENAL CODE SECTION 43.26

Section 43.26. Possession or Promotion of Child Pornography

(b) In this section:

Insert amendment after Section 43.26(b)(3).

(4) "Child" means the following for purposes of determining an offense under Subsections (a), (e), and (f) of this section:

(A) a person younger than 18; or

(B) any depiction appearing to be a child younger than 18 engaging in sexual conduct, or any depiction conveying the impression that a child younger than 18 is engaging in sexual conduct as defined in Section 43.25(a); and

1) the plain purpose of the depiction or performance must be to depict an actual minor engaged in a sexual performance;

2) the prosecution may infer that the person intended to commit a violation under Subsection (a), (e), and (f) if the child's breasts, female or male genitalia or pubic areas, and other developmental features so arranged or displayed in the material or sexual performance as defined by Section 43.25(a), depict a minor; or

3) the prosecution may infer that the person intended to commit a violation under Subsection (a), (e), and (f) if the material or sexual performance as defined by Section 43.25(a), through its title, text, visual representation, or otherwise, represents or portrays the person depicted as a minor.