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Child Pornography Produced Without an Actual Child: Constitutionality of 108th Congress Legislation

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Summary

In *Ashcroft v. Free Speech Coalition*, the Supreme Court declared unconstitutional the Child Pornography Prevention Act of 1996 (CPPA), P.L. 104-208, to the extent that it prohibited material that was produced without the use of an actual child. The only possible means that the Court explicitly left open for Congress to try to restrict such material was to ban it, but allow an affirmative defense that the material was produced without using actual children. Even this approach the Court did not say would be constitutional, but merely found no need to decide whether it would be.

This approach would shift the burden of proof to the defendant on the question of whether actual children were used in producing the material. If the defendant could not meet the burden of proof, then he could be punished for child pornography that might or might not have been produced with an actual minor. The Court, however, said that "[t]he Government may not suppress lawful speech as a means to suppress unlawful speech." This suggests that an affirmative defense would be unconstitutional if it were not effectively available to all classes of defendant. It might not effectively be available, however, to individuals charged with mere possession of child pornography, or to producers of pornography that pre-dated the CPPA, as these defendants might have "no way of establishing the identity, or even the existence, of the actors."

This report analyzes S. 151, 108th Congress, as reported by the Senate Committee on the Judiciary (S.Rept. 108-2) and passed by the Senate, and considers whether it would violate freedom of speech.

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The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." In general, the First Amendment protects pornography, unless it constitutes obscenity or child pornography. Obscenity is material that appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value.[1] Child pornography is material that "*visually* depicts sexual conduct by children below a specified age."[2] It is unprotected by the First Amendment even when it is not legally obscene.[3]

On April 16, 2002, in *Ashcroft v. Free Speech Coalition*, the Supreme Court declared unconstitutional the federal child pornography law to the extent that it prohibited material that was produced without the use of an actual child.[4] The case held, in other words, that pornography created by artists, including "virtual" (computer-generated) pornography, and pornography produced with adult actors but with no actors below 18 years of age, are protected by the First Amendment, even if they appear to portray minors, unless they are obscene. In response to *Ashcroft*, bills were introduced in the 107th Congress that would continue to ban some child pornography that was produced without the use of an actual child. The Senate bills were S. 2520 and S. 2511; the House bill was H.R. 4623, which was identical to S. 2511, but which was amended by the House Judiciary Committee and reported on June 24, 2002 (H.Rept. 107-526), and passed by the House without further amendment on June 25, 2002.

In the 108th Congress, S. 151, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act) was reported by the Senate Committee on the Judiciary (S.Rept. 108-2) on February 11, 2003, and passed by the Senate on February 24, 2003.

This report will examine (1) the current federal child pornography statute, part of which was declared unconstitutional in *Ashcroft v. Free Speech Coalition*, (2)

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[1] *See* Miller v. California, 413 U.S. 15, 24 (1973). See also, *Obscenity and Indecency: Constitutional Principles and Federal Statutes* (CRS Report 95-804 A).

[2] New York v. Ferber, 458 U.S. 747, 764 (1982) (emphasis in original). See *Child Pornography: Constitutional Principles and Federal Statutes* (CRS Report 95-406 A).

[3] This means that child pornography may be banned even if does not appeal to the prurient interest, is not patently offensive, and does not lack serious value. *See Ferber, supra* note 2, 458 U.S. at 764.

[4] 535 U.S.234, 122 S. Ct. 1389, 152 L.Ed.2d 403 (2002).

Ashcroft v. Free Speech Coalition, and (3) S. 151, 108th Congress, reported by the Judiciary Committee and passed by the Senate.

The Federal Child Pornography Statute

The federal child pornography statute prohibits the transporting, shipping, receipt, distribution, reproduction, selling, or possessing of child pornography.[5] It defines "sexually explicit conduct" (conduct in which one may not depict minors engaging) as "actual or simulated"

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (B) bestiality;
> (C) masturbation;
> (D) sadistic or masochistic abuse; or
> (E) lascivious exhibition of the genitals or pubic area of any person.[6]

The Child Pornography Prevention Act of 1996 (CPPA)[7] added to the statute the following definition of "child pornography":

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where –
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[8]

The CPPA, however provides an affirmative defense (not available to a defendant charged with possession without intent to sell) that each person used in producing the alleged child pornography was an adult, and that "the defendant did not

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[5] 18 U.S.C. §§ 2252(a), 2252A(a).

[6] 18 U.S.C. § 2256(2).

[7] P.L. 104-208, 110 Stat. 3009-26.

[8] 18 U.S.C. § 2256(8).

advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct."[9] For a defendant charged only with possession of child pornography, there is an affirmative defense that the defendant (1) possessed fewer than three images of child pornography, and (2) promptly and in good faith destroyed or reported the images to a law enforcement agency.[10]

Ashcroft v. Free Speech Coalition

On April 16, 2002, in *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down paragraphs (B) and (D) of the definition of "child pornography" quoted above. Paragraphs (A), which covers images of actual children engaged in sexually explicit conduct, and paragraph (C), which covers images of actual children "morphed" to make it appear as if the children are engaged in sexually explicit conduct, were not in issue. Paragraphs (B) and (D), by contrast, cover pornography that was produced without the use of actual children.

In *Ashcroft v. Free Speech Coalition*, the Supreme Court observed that statutes that prohibit child pornography that is produced with actual children are constitutional because they target "[t]he production of the work, not the content."[11] The CPPA, by contrast, targeted the content, not the means of production. "Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*."[12]

The government's rationales for the CPPA included that "[p]edophiles might use the materials to encourage children to participate in sexual activity" and might "whet their own sexual appetites" with it, "thereby increasing . . . the sexual abuse and exploitation of actual children."[13] The Court found these rationales inadequate because "[t]he evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. . . . The government 'cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. . . . The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.' . . . Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[14]

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[9] 18 U.S.C. § 2252A(c). The reason that this affirmative defense is not available to a defendant charged with possession without intent to sell is that the affirmative defense applies only to paragraphs (1), (2), (3), and (4) of section 2252A(a), whereas paragraph (5) covers possession offenses. (Paragraph (4) covers possession with intent to sell.)

[10] 18 U.S.C. §§ 2252(d), 2252A(d).

[11] *Ashcroft*, *supra* note 4, 122 S. Ct. at 1401; see also *id*. at 1397.

[12] *Id*. at 1402; see also *id*. at 1401.

[13] *Id*. at 1397.

[14] *Id*. at 1403.

The government also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because, "[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children."[15] "This analysis," the Court found, "turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. '[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . .'"[16]

The Court also noted that, because child pornography, unlike obscenity, may include material with serious literary, artistic, political, or scientific value, it includes "[a]ny depiction of sexually explicit activity, no matter how it is presented . . . . The CPPA [therefore] applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. . . . [T]eenage sexual activity and the sexual abuse of children . . . have inspired countless literary works."[17] The Court then noted that the CPPA would make it a crime to film Shakespeare's *Romeo and Juliet* in a manner that made it appear that the teenage lovers were engaging in sexually explicit conduct.

The majority opinion in *Ashcroft v. Free Speech Coalition* was written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsberg, and Breyer, with Justice Thomas concurring. Justice O'Connor concurred insofar as the decision struck down the prohibition of child pornography created with adults that look like children, but dissented insofar as it struck down the ban on virtual child pornography. Chief Justice Rehnquist wrote a dissenting opinion joined by Justice Scalia, arguing that the CPPA should be construed to apply only to "computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct," and upheld as such.[18]

Did the Court leave Congress with any constitutional means by which it may restrict child pornography that was produced without an actual child? The only possibility that the Court explicitly left open – not by saying that it would be constitutional, but merely by finding no need to decide the question – is to ban material that appears to depict an actual child engaging in sexually explicit conduct, but that was produced without using an actual child, while allowing an affirmative defense that the material was produced without using an actual child. This approach

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[15] *Id*. at 1397.

[16] *Id.* at 1404. Justice Thomas, concurring, wrote that "technology may evolve to the point where . . . the Government cannot prove that certain pornographic images are of real children," and that, if that becomes the case, "the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made though the abuse of real children." *Id*. at 1406-1407.

[17] *Id*. at 1400.

[18] *Id*. at 1411.

would shift the burden of proof to the defendant on the question of whether an actual child was used in producing the material. If the defendant could not meet the burden of proof, then he could be punished for child pornography that might or might not have been produced with an actual minor. Here is what the Court said on this matter:

> [T]he Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U.S.C. § 2252A(c).
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> The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.
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> We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. See *ibid*. So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors. See *ibid*. In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.[19]

In the third paragraph of this quotation, the Court notes that the CPPA's affirmative defense is not available to defendants charged with possessing, as opposed to distributing, proscribed works, and is not available to defendants charged with producing material using computer imaging, or through other means that do not

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[19] *Id*. at 1404-1405.

involve the use of adult actors who appear to be minors.[20] But, if Congress expanded the affirmative defense to include these two classes of defendants, the CPPA might still be unconstitutional. An affirmative defense that applied to defendants charged with possession offenses, or to producers of older works, might violate due process because such persons might, as the Court noted in the second paragraph of the above quotation, "have no way of establishing the identity, or even the existence, of the actors." If such persons had no way of establishing their innocence, then the affirmative defense would effectively not be available to them, and the government would still apparently, in violation of the First Amendment, "suppress lawful speech as a means to suppress unlawful speech."[21]

Justice Thomas, in his concurring opinion, wrote: "The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, see *ante*, at 1405, implicitly accepting that some regulation of virtual child pornography might be constitutional. I would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography."[22] He does not, however, suggest any other way.

The Court concluded: "In sum, §2256(8)(B) covers materials beyond the categories [of unprotected speech] recognized in *Ferber* [child pornography using an actual child] and *Miller* [obscenity], and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment."[23] It added that the prohibitions of § 2256(8)(D), as well as of 2256(8)(B), "are overbroad and unconstitutional."[24]

S. 151, 108th Congress

This section of the report will summarize the provisions of S. 151, as reported by the Judiciary Committee and passed by the Senate, that appear to raise First Amendment issues, and consider whether they would violate the First Amendment's prohibition on Congress's "abridging the freedom of speech."

First provision. Section 3 of S. 151 would make it a crime knowingly to "advertise[ ], promote[ ], present[ ], distribute[ ], or solicit[ ] . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material contains – (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct."

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[20] *See* note 9, *supra*.

[21] *Id*. at 1404 (previously quoted in the text accompanying note 16, *supra*).

[22] *Id*. at 1407.

[23] *Id*. at 1405.

[24] *Id*. at 1406.

The two types of material specified in (i) and (ii) – obscenity and child pornography produced with an actual child – are not, of course, protected by the First Amendment. If, however, material is not of the type specified in (i) or (ii) – if it is a visual depiction that is not obscene and is not of an actual minor but appears to be of an actual minor – then it is protected by the First Amendment. If it is protected by the First Amendment, then can the fact that a person "distributes" it "in a manner that reflects the belief, or that is intended to cause another to believe," that is unprotected render it unprotected? The answer, as we discuss following the next paragraph, appears to be "no," and this provision of S. 151 therefore would apparently be unconstitutional insofar as it applies to distribution of protected speech.

There would, however, appear to be no constitutional problem with respect to the words "advertises," "promotes," "presents," or "solicits" in the provision. This is because these words would not restrict protected material. To prohibit advertisements of protected material in a manner that "reflects the belief, or that is intended to cause another to believe," that it is unprotected would be to prohibit what is in effect false advertising.[25] False advertising, of course, is not protected by the First Amendment.[26]

Prohibiting distribution of protected speech, however, unlike prohibiting false advertising of it, would restrict protected speech. An argument that this would nevertheless be constitutional might rely on *Ginzburg v. United States*, a 1966 case in which the Supreme Court, by a 5-to-4 majority, found "that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity . . . ."[27] Considering the "setting" in which the publications in question were presented, the Court noted that the publications had been mailed from Intercourse and Blue Ball, Pennsylvania, solely "for the value their names would have in furthering petitioners' efforts to sell their publications on the basis of salacious appeal"; and that "[t]he 'leer of the sensualist' also permeates the advertising for the three publications."[28]

The Court found that evidence of the manner in which the publications were advertised and mailed "was relevant in determining the ultimate question of obscenity . . . ."[29] The first factor that must be considered in determining whether material is obscene is whether it appeals to the prurient interest, and as to this factor the Court found that "[t]he deliberate representation of petitioners' publications as

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[25] There appears to be no significant difference between "reflects the belief" and "is intended to cause another to believe." Both refer to the manner of advertising, promoting, etc.

[26] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980).

[27] 383 U.S. 463, 465-466 (1966).

[28] *Id*. at 467, 468.

[29] *Id.* at 470.

erotically arousing stimulated the reader to accept them as prurient."[30] The second factor that must be considered in determining whether material is obscene is its degree of offensiveness, and here the Court found that "the brazenness of [the petitioners'] appeal heightens the offensiveness of the publications . . . ."[31] The third factor that must be considered in determining whether material is obscene is whether it has serious literary, artistic, political, or scientific value, and the Court found that "the circumstances of presentation and dissemination of material are equally relevant in determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality – whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes."[32]

The Court concluded in *Ginzburg* that it "perceive[d] no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question . . . ."[33] Evidence of such pandering "may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."[34]

The Supreme Court applied the "pandering" rationale in two subsequent cases in the 1970s.[35] Its continued validity, however, appears uncertain because the Supreme Court, also in the 1970s, held in *Virginia Pharmacy Board v. Virginia Consumer Council* that truthful, non-misleading commercial speech is protected by the First Amendment (although to a lesser degree than protected non-commercial speech).[36] The sort of "pandering" that caused the publications in *Ginzburg* to be found obscene, in other words, has, since *Ginzburg*, gained some First Amendment protection. In one of two post-*Ginzburg* pandering cases in the 1970s, a dissent joined by four justices stated that "*Ginzburg* cannot survive *Virginia Pharmacy*."[37] Since, the 1970s, the Supreme Court has not addressed the "pandering" rationale, but it has repeatedly struck down governmental restrictions on commercial speech.[38] Consequently, though *Ginzburg* has not been overturned, its precedential value seems questionable.

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[30] *Id.*

[31] *Id.*

[32] *Id.* With respect to all three factors, the Court in *Ginzburg* applied the *Roth* test for obscenity, which preceded the current *Miller* test (see note 1, *supra*), but the differences between the tests are immaterial for present purposes.

[33] *Id*. at 474.

[34] *Id*. at 476.

[35] Splawn v. California, 431 U.S. 595 (1977); Pinkus v. United States, 436 U.S. 293, 303-304 (1978).

[36] 425 U.S. 748 (1976).

[37] Splawn v. California, *supra* note 35, at 603 n.2 (Stevens, J., dissenting).

[38] See *Freedom of Speech and Press: Exceptions to the First Amendment* (CRS Report 95-815 A)

If the "pandering" rationale remains valid, then it might be a basis for a court to uphold a conviction under S. 151 for distributing obscene material that might not be obscene if the defendant had not distributed it "in a manner that reflects the belief, or that is intended to cause another to believe," that it was obscene. But, if the "pandering" rationale remains valid, then this would be the case under existing obscenity law as well. The "pandering" rationale would not appear to enable the government to justify a prosecution under S. 151 that went further than existing obscenity law by attempting to convict a defendant for distributing material that was clearly not obscene, merely because the defendant distributed it "in a manner that reflects the belief, or that is intended to cause another to believe," that it was obscene.

Consider, for example, the movie "Carnal Knowledge," which the Supreme Court found to be not obscene because it was not "patently offensive."[39] Under S. 151, if a defendant distributed "Carnal Knowledge" "in a manner that reflects the belief, or that is intended to cause another to believe," that it contained "an obscene visual depiction of a minor engaging in sexually explicit conduct," then the defendant would be guilty of a crime. But the "pandering" rationale of *Ginzburg* allows merely "that in close cases evidence of pandering may be probative" of obscenity.[40] "Carnal Knowledge," because of the Supreme Court decision, is not a close case; therefore, to distribute it in a pandering manner would not make it obscene. And, if it is not obscene, then it is protected speech, and S. 151 would be unconstitutional to the extent that it would punish the distribution of protected speech on the ground that the defendant distributed it "in a manner that reflects the belief, or that is intended to cause another to believe," that it was obscene.

We have thus far addressed only S. 151's prohibition of distributing material "in a manner that reflects the belief, or that is intended to cause another to believe, that the material contains "(i) an obscene visual depiction of a minor engaging in sexually explicit conduct." We now address S. 151's prohibition of distributing material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains "(ii) a visual depiction of an actual minor engaging in sexually explicit conduct." As to this material, the "pandering" rationale would be of no relevance. If the "pandering" rationale remains relevant to determinations of obscenity, it does so because determinations of obscenity are made by a subjective test that weighs a publication's degree of prurience, offensiveness, and literary, artistic, political, or scientific value; and pandering, the Court held in *Ginzburg*, may be probative in weighing these factors. Determinations of child pornography, by contrast, are made by an objective test: does the material visually depict an actual child engaged in sexually explicit conduct? The manner in which the material is distributed cannot affect the answer to this question, and therefore is not relevant to whether it is child pornography. If the material is not child pornography, then S. 151 apparently could not constitutionally punish it because of the manner in which it is distributed.

To summarize our analysis of this provision, it would appear constitutional to make it a crime to advertise, promote, present, or solicit "in a manner that reflects the

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[39] Jenkins v. Georgia, 418 U.S. 153 (1974).

[40] See text accompanying note 33, *supra*.

belief, or that is intended to cause another to believe," that the material constitutes obscenity, or child pornography produced with an actual child. It would appear unconstitutional, however, to make it a crime to distribute protected speech "in a manner that reflects the belief, or that is intended to cause another to believe," that the material constitutes obscenity, or child pornography produced with an actual child. If the "pandering" rationale of *Ginzburg* remains valid, then S. 151 would constitutionally permit the prosecution of some speech that would be obscene by virtue of the "pandering" rationale, but it would not add anything to existing law in that respect.

Second provision. Section 3 of S. 151 would make it a crime knowingly to "distribute[ ], offer[ ], send[ ], or provide[ ] to a minor any visual depiction . . . [that] is, or appears to be, of a minor engaging in sexually explicit conduct . . . for purposes of inducing or persuading a minor to participate in any activity that is illegal." This provision would make it illegal to distribute some protected speech to minors, namely visual depictions, produced without using an actual minor, of a minor engaging in sexually explicit conduct. But it would make distribution of such material illegal only if done for an illegal purpose, and the government may prohibit inducing or persuading, *by any means*, a minor (or an adult) to participate in an activity that is illegal. Thus, Congress could prohibit individuals from using, for example, candy or tickets to a ball game, as well as visual depictions, to induce or persuade a minor to participate in an illegal activity.

But it seems uncertain whether Congress may make it a crime to induce or persuade, *only by a means that restricts protected speech*, a person to participate in an illegal activity. In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Supreme Court struck down New York's "Son of Sam" statute, which required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account and made available to victims of the crime and the criminal's other creditors.[41] The Court wrote:

> We conclude simply that in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment.[42]

Although the Court nevertheless stated that it was not basing its decision on the statute's underinclusiveness (its not including income from other sources),[43] its conclusion just quoted suggests that, had the statute required the seizure of income from non-speech sources as well as from speech sources, it would, at least, have had one less constitutional difficulty.

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[41] 502 U.S. 105 (1991).

[42] *Id*. at 123.

[43] *Id*. at 122, n* (the Court uses an asterisk instead of a number presumably because this is the only footnote in the opinion).

Analogously, in *R.A.V. v. City of St. Paul*, the Court struck down an ordinance that prohibited the placing on public or private property of a symbol, such as "a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others, on the basis of race, color, creed, religion or gender."[44] The Supreme Court held that, even construing the ordinance to apply only to "fighting words," which are not protected by the First Amendment,[45] the ordinance was unconstitutional because it did not ban all fighting words, but singled out some on the basis of hostility to their content. (The ordinance banned fighting words that insult "on the basis of race, color, creed, religion or gender," but not "for example, on the basis of political affiliation, union membership, or homosexuality. . . .")[46] If the government may not ban only some fighting words, then, arguably, it may not ban only a speech-related means of inducing or persuading minors to engage in illegal activities.

The government, however, may prohibit distribution to minors of some, if not all, visual depictions that appear to be of a minor engaging in sexually explicit conduct, and it may prohibit distribution of such visual depictions even if the distribution is not for the purpose of inducing or persuading a minor to engage in an illegal activity. It may do so because the Supreme Court has "recognized that there is a compelling interest in . . . shielding minors from the influence of literature that is not obscene by adult standards."[47] Thus, S. 151 might avoid the possible constitutional problem of banning only speech-related means of inducing or persuading minors to engage in illegal activities by simply banning distribution of the material to minors, regardless of the purpose of the distribution.

Third provision. Section 3 of S. 151 would rewrite the affirmative defense provision of the CPPA, which provided that a defendant may avoid conviction by proving that each person used in producing the alleged child pornography "was an adult," and that "the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct." The affirmative defense provision of S. 151 would require the defendant to prove that each person used in producing the alleged child pornography was an adult or that none was a minor, except that to prove that none was a minor would not be an affirmative defense in a prosecution that involves child pornography as described in

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[44] 505 U.S. 377 (1992).

[45] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[46] *R.A.V.*, *supra* note 44, 505 U.S. at 391. The Supreme Court has heard arguments in another cross-burning case, *Virginia v. Black*, No. 01-1107, and is expected to issue a decision this term.

[47] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989). We said that the government may prohibit distribution to minors of "some, if not all," such material because the Supreme Court seems to be becoming less absolute in viewing the protection of all minors (regardless of age) from all indecent material (regardless of its educational value and parental approval) to be a compelling governmental interest. *See*, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, p. 1161, n.61 (2000 Supp.).

18 U.S.C. § 2256(8)(C), which covers images of an actual child "morphed" to make it appear as if the child is engaging in sexually explicit conduct. The defendant would no longer have to prove anything with regard to how he advertised, promoted, presented, described, or distributed the material. In addition, the affirmative defense in S. 151, unlike the one in the CPPA, would apply to prosecutions for possession of child pornography under 18 U.S.C. § 2252A(a)(5).

The change from having to prove that each actor was an adult, to having the option to prove that none was a minor, would be significant because the former requirement, as the Supreme Court noted in *Ashcroft*, meant that "the affirmative defense provide[d] no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors."[48] This also apparently explains why S. 151 would continue to require in "morphing" cases that the defendant prove that each person used was an adult: computer-generated morphing of images of an actual child is not intended to be protected from prosecution, and need not be under *Ashcroft*.

Would S. 151's changes to the affirmative defense make it constitutional? In *Ashcroft*, the Court found the affirmative defense in the CPPA "incomplete and insufficient" for two reasons: (1) "[a] defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors,"[49] and (2) "the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors."[50] S. 151 would eliminate both of these problems. But this would not necessarily mean that its affirmative defense would be constitutional, because the Court in *Ashcroft* did not say that eliminating these two problems would be sufficient. Rather, it said that it "need not decide" whether the government could impose on a speaker the burden of proving his innocence. And, it wrote:

> Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.[51]

All these facts would remain the case under S. 151. A defendant other than a producer might not be able to prove that a minor was not used in the production of child pornography, whether it was produced with adult actors or computer-generated, and even a producer might not be able to prove this with regard to material that pre-

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[48] Previously quoted in the third paragraph of the text accompanying note 19, *supra*.

[49] *Id.* *See* note 9, *supra*.

[50] *Id.* The reason that this was the case under the CPPA is that the affirmative defense required the defendant to prove that each actor was an adult at the time the material was produced.

[51] Previously quoted in the second paragraph of the text accompanying note 19, *supra.*

dated the CPPA. Though the Court left open whether prosecutions in either of these instances would be constitutional, it did say that "[t]he Government may not suppress lawful speech as a means to suppress unlawful speech."[52] The affirmative defense in S. 151 would arguably not prevent the suppression of lawful speech in some cases.

Fourth provision. Section 5 of S. 151 would revise the definition in 18 U.S.C. § 2256 of "minor," which is "any person under the age of eighteen years," to add that the term "shall not be construed to require proof of the actual identity of the person."

Section 5 would also revise the definition of "sexually explicit conduct," which is what a visual depiction must depict an actual minor to be engaged in for it to be illegal under 18 U.S.C. § 2252 (or, as discussed below, what, under S. 151, virtual child pornography must depict for it to be illegal under 18 U.S.C. § 2252A). Under its current definition, "sexually explicit conduct" includes, among other things, "simulated" sexual intercourse. Under S. 151, depictions of simulated sexual intercourse would be prohibited only if they are "lascivious" and only if "the genitals, breast, or pubic area of any person is exhibited." No distinction is drawn between the male and female versions of these parts of the body.[53]

Section 5 would next strike paragraphs (B) and (D) of the definition of "child pornography," which are the paragraphs that *Ashcroft* declared unconstitutional. It would replace current paragraph (B) with a new paragraph (B) that would define "child pornography" to include visual depictions whose production "involves the use of an identifiable minor engaging in sexually explicit conduct." At first glance, this provision might seem redundant of paragraph (A), which defines "child pornography" to include visual depictions whose production "involves the use of a minor engaging in sexually explicit conduct." But section 5 of S. 151 would also add a new definition of "identifiable minor" (without substantively altering the existing definition) to include "virtual" child pornography. Section 5 provides that "identifiable minor" –

> means a computer image, computer generated image, or digital image – (i) that is of, or is virtually indistinguishable from that of, an actual minor; and (ii) that depicts sexually explicit conduct as defined in paragraph (2)(B).

Paragraph (2)(B) is the portion of the definition of "sexually explicit conduct" that covers various "actual or simulated" sexual activities. Section 5 provides that "virtually indistinguishable" –

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[52] Previously quoted in the text accompanying note 16, which indicates that this statement was a response to the government's argument that a ban on virtual child pornography should be permitted because, "[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children."

[53] S. 151 would make this change in the course of restructuring § 2256(2)(A) through (E) into § 2256(2)(A)(i) through(v) and § 2256(2)(B)(i) through (iii). Section 2256(2)(A) currently begins "'sexually explicit conduct' means actual or simulated – ." S. 151 would strike "means actual" and insert "means – ." It presumably means to strike "or simulated" as well, but leaves these words floating. It then covers "actual or simulated" in § 2256(2)(B), with "actual" apparently redundant.

> (A) means that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor; and (B) does not apply to depictions that are drawings, cartoons, sculptures, diagrams, anatomical models, or paintings depicting minors or adults or reproduction of such depictions.

S. 151's inclusion of virtual child pornography that depicts an image that is virtually indistinguishable from an actual child would not, given *Ashcroft*, be constitutional. The majority in *Ashcroft* held it unconstitutional to prohibit *any* non-obscene material that does not portray an actual child engaged in sexually explicit conduct.

Fifth provision. Section 6 of S. 151 would make it a crime knowingly to "produce[ ], distribute[ ], receive[ ], or possess[ ][54] . . . a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that –

> (1)(A) depicts a minor engaging in sexually explicit conduct; and (B) is obscene; or
>
> (2)(A) depicts an image that is, or appears to be, of a minor engaging in [various sexual activities]; and (B) lacks serious literary, artistic, political, or scientific value.

Number (1) of these prohibitions would be constitutional because it would be limited to obscene material. Number (2) of these prohibitions would be unconstitutional to the extent that it banned material that did not portray an actual minor. The fact that material lacks serious literary, artistic, political, or scientific value means that it satisfies one of the three prongs of the *Miller* test for obscenity, but does not make it obscene or otherwise less than fully protected by the First Amendment.

Additional provisions. S. 151 includes other provisions that this report will not examine because they do not appear to raise First Amendment issues. These include provisions that concern the admissibility of evidence that could identify a minor (§ 4); adding "digital image" to the recordkeeping requirement of 18 U.S.C. § 2257 (§ 7); amending section 227 of the Victims of Child Abuse Act of 1990, 42 U.S.C. § 13032 (§ 8); amending 18 U.S.C. § 2702, concerning the disclosure of electronic communications (§ 9); using a minor to produce child pornography outside the United States (§ 10); creating a civil remedy for persons aggrieved by a violation of the child pornography prohibitions in18 U.S.C. § 2252A; sentence enhancements (§§ 12, 13); appointing additional trial attorneys to prosecute child pornography (§ 14); requiring the Attorney General to report to Congress on the subject (§ 14); reviewing the sentencing guidelines (§ 14); authorizing the interception of communications in the investigation of sexual crimes against children (§ 15); and amending the investigative authority relating to child pornography (§ 16).

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[54] Possession is prohibited with or without intent to distribute. If the defendant had no intent to distribute, then he would be allowed an affirmative defense substantively the same as the one at 18 U.S.C. § 2252(c).