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Constitutional Law: Permitting Virtual Child Pornography--A First Amendment Requirement, Bad Policy, or Both?

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CASE COMMENTS

CONSTITUTIONAL LAW: PERMITTING VIRTUAL CHILD PORNOGRAPHY—A FIRST AMENDMENT REQUIREMENT, BAD POLICY, OR BOTH?

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

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The Child Pornography Prevention Act of 1996[1] (CPPA) prohibits distribution and possession of any image that "is, or appears to be, of a minor engaging in sexually explicit conduct."[2] Not only does the statute ban images depicting actual minors engaging in such conduct, but it also prohibits images of acts performed by adults who *appear* to be minors.[3] Furthermore, the entity in the image may be wholly computer-generated.[4] Claiming that the CPPA was unconstitutionally overbroad, the Free Speech Coalition[5] sued the U.S. Department of Justice in the United States District Court for the Northern District of California.[6] The district court upheld the CPPA's constitutionality.[7] The United States Court of Appeals for the Ninth Circuit reversed, holding that the statute was substantially overbroad.[8] The United States Supreme Court granted certiorari.[9] The Court HELD that, given its substantial overbreadth, the CPPA was unconstitutional.[10]

Notwithstanding the instant case, the holdings of prior cases consistently extended the prohibitions against those who distribute or

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1. 18 U.S.C. §§ 2251-2256 (1996).

2. *Id.* § 2256(8)(B) (2001).

3. *Id.* For example, a proscribed image might include an act performed by a young, underdeveloped adult. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240 (2002).

4. *See* 18 U.S.C. § 2256(8)(B); *see also Free Speech Coalition*, 535 U.S. at 241 ("The section captures a range of depictions . . . called 'virtual child pornography' . . . .").

5. The Free Speech Coalition is an organization formed during the Great Depression. It was a result of the interests of pro-labor, immigrant, and religious minority groups striving to safeguard freedom of expression. *See, e.g.*, Geoffrey D. Berman, Note, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 VA. L. REV. 291, 306 (1994).

6. Free Speech Coalition v. Reno, No. C97-028IVSC, 1997 U.S. Dist. LEXIS 12212, at *1-*2 (N.D. Cal. Aug. 12, 1997).

7. *Id.* at *23.

8. Free Speech Coalition v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999). Interestingly, there was a circuit court split concerning the CPPA's constitutionality. "[F]our other Court of Appeals have sustained it." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002).

9. Holder v. Free Speech Coalition, 531 U.S. 1124 (2001).

10. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).

possess child pornography.[11] The Court in *Miller v. California*[12] expounded a test to determine whether certain speech falls under the less-protected category of "obscenity."[13] In *Miller*, the defendant advertised adult pornography in the form of illustrated books.[14] The Court held that material is obscene only if it satisfies three elements.[15] First, an average person[16] must deem the work[17] as appealing to the prurient interest.[18] Second, the work must depict, in a "patently offensive way," sexual conduct that the applicable state law proscribes.[19] Finally, the work must lack value.[20]

Although *Miller* proffered an improved test for detecting obscenity,[21] the Court later, in *New York v. Ferber*,[22] held that the test was inapplicable to child pornography cases.[23] *Ferber* dealt with a New York criminal statute[24] that disallowed knowingly distributing depictions of a child's

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11. *Compare* New York v. Ferber, 458 U.S. 747, 761-62 (1982) (proscribing the distribution of child pornography), *and* Osborne v. Ohio, 495 U.S. 103, 111 (extending *Ferber* to prohibit mere possession of child pornography), *with Free Speech Coalition*, 535 U.S. at 244 (failing to extend the ban to virtual child pornography).

12. 413 U.S. 15 (1973).

13. *Id.* at 24. The Court explained that "no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power." *Id.* at 22; *see also id.* (asserting that the Court, faced with the task of formulating a test for obscenity, has "seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.'" (quoting Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704-05 (1968) (Harlan, J., concurring & dissenting))); Redrup v. New York, 386 U.S. 767, 770-71 (1967). *But cf. Miller*, 413 U.S. at 22 (conceding that Roth v. United States, 354 U.S. 476 (1957), was a notable attempt, before *Miller*, to formulate a workable test for dealing with obscenity).

14. 413 U.S. at 16. At the time, disseminating obscene material was a misdemeanor in California. *Id.*

15. *Id.* at 24.

16. Such a person would apply a view representative of "'contemporary community standards.'" *Id.* (quoting *Roth*, 354 U.S. at 489).

17. The finder of fact is to judge the work "as a whole." *Id.* (quoting *Roth*, 354 U.S. at 489).

18. *Id.*

19. *Id.*

20. *Id.* at 24-25 (enumerating four categories of valuable works: literary, artistic, political, and scientific). Note that *Miller's* third element, which requires a national standard, contrasts with the first, calling for a "community" standard. *See* Pope v. Illinois, 481 U.S. 497, 508 (1987); *see also supra* note 16 and accompanying text. The Court in *Miller* remanded the case to the appellate court to determine whether any such value inhered in the defendant's publications. *Miller*, 413 U.S. at 37.

21. *See supra* note 13 and accompanying text.

22. 458 U.S. 747 (1982).

23. *Id.* at 761.

24. *Id.* at 750 (quoting N.Y. PENAL LAW § 263.05 (McKinney 1980) (current version at N.Y. PENAL LAW 263 (1999))).

sexual performance.[25] Interestingly, non-obscene materials could be included in the ambit of the statute.[26] The Court held that, given the state's interest in protecting minors, the *Miller* test does not apply to child pornography cases.[27]

The Court in *Ferber* enumerated five considerations supporting its reasoning.[28] First, the state has a compelling interest in safeguarding, both physically and psychologically, the well-being of children.[29] Second, the distribution of child pornography is directly related to the sexual abuse of children.[30] Third, the promotion and sale of these materials provide a monetary incentive for producing illegal child pornography.[31] Fourth, such materials have little value.[32] Fifth, denying protection to child pornography is consistent with precedent.[33]

A more recent case, *Osborne v. Ohio*,[34] reaffirmed *Ferber*'s rationale and extended its holding.[35] In *Osborne*, police discovered in the defendant's home sexually explicit photographs of minors.[36] The issue was whether Ohio could prohibit the mere possession of child pornography.[37] Interestingly, the Court held that Ohio could prohibit possession.[38] The Court reasoned that, given current conditions, proscribing production and

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25. *Id.* Specifically, only children under the age of sixteen fell within the purview of the statute. *Id.*

26. *See id.* at 749-50.

27. *Id.* at 761 ("We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.").

28. *Id.* at 756-64.

29. *Id.* at 756-57.

30. *Id.* at 759. The Court specified that this relationship is apparent in two ways. *Id.* First, such "materials produced are a permanent record" of a child's participation in lewd activity. *Id.* Second, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." *Id.* Another way in which child pornography is related to child sexual abuse is that it may "whet [] the appetites" of pedophiles. *See infra* note 89. For empirical evidence supporting this possibility, see MYERS, *infra* note 96.

31. *Id.* at 761.

32. *See id.* at 762; *see also supra* note 20 and accompanying text.

33. *See Ferber*, 458 U.S. at 763 ("'The question whether speech is . . . protected by the First Amendment . . . depends on the content of the speech.'") (quoting Young v. American Mini Theaters, Inc., 427 U.S. 50, 66 (1976)).

34. 495 U.S. 103 (1990).

35. *See, e.g., id.* at 108 (upholding *Ferber's* fourth element).

36. *Id.* at 107. A jury convicted the defendant and the trial court sentenced him to six months in prison. *Id.*

37. *Id.* at 108.

38. *Id.* at 111. *But see* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that states cannot prohibit "mere private possession of obscene material"). *Osborne* significantly narrowed the reach of *Stanley*: "Stanley should not be read too broadly. . . . [S]tanley was a narrow holding." *Osborne*, 495 U.S. at 108.

distribution of child pornography solves only a portion of the problem.[39] The Court also must allow banning of the possession of child pornography, since its market has become so clandestine and its producers so elusive.[40] Emphasizing the timeliness of its holding, the Court noted further that nineteen states had already outlawed the possession of child pornography.[41]

In contrast to *Ferber* and *Osborne*, the instant case failed to extend the prohibitions on child pornography.[42] In overturning the CPPA, the instant Court applied the overbreadth doctrine.[43] The Court adduced several reasons why the CPPA was overbroad.

Preliminarily, the Court established that the CPPA prohibits conduct that is not obscene under the *Miller* test.[44] Materials appearing to depict minors engaging in sexual activity need not appeal to the prurient interest, nor do such materials necessarily display patent offensiveness.[45] For example, the CPPA might criminalize a sexually explicit picture in a psychology manual that exhibits neither prurience nor patent offensiveness.[46] Also, the CPPA could ban works that have value—Shakespeare's *Romeo and Juliet*, for example.[47] Thus, if the CPPA is not obscene according to *Miller*, its constitutionality must depend on *Ferber* and *Osborne*, which prohibit some child pornography despite its non-obscenity.[48]

The Court next reasoned that the CPPA is invalid under *Ferber* and *Osborne* because it fails to proscribe the conduct it purports to proscribe: sexual abuse of children.[49] The Court stated that virtual child pornography does not, in its production, require the victimization of children.[50] Notably, the majority in *Ferber* and *Osborne* emphasized the importance of

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39. *Osborne*, 495 U.S. at 110.

40. *See id.* ("[T]he child pornography market has been driven underground; as a result, it is now difficult . . . to solve the child pornography problem by only attacking production and distribution.").

41. *Id.* at 110-11.

42. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002).

43. *See id.* at 244, 258. The Court applied the overbreadth principle as expounded in *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). *Free Speech Coalition*, 535 U.S. at 244. *Broadrick* asserted that a statute is unconstitutionally overbroad if the overbreadth is "substantial." *Id.* (citing Broadrick, 413 U.S. at 612).

44. *Id.* at 246 ("The CPPA . . . extends to images . . . without regard to the *Miller* requirements.").

45. *Id.*

46. *Id.*

47. *See id.* at 247 (citing WILLIAM SHAKESPEARE, ROMEO AND JULIET act 1, sc. 2).

48. *See supra* text accompanying note 23.

49. *See Free Speech Coalition*, 535 U.S. at 250 ("[T]he CPPA prohibits speech that records no crime and creates no victims . . . .").

50. *Id.*

protecting children from sexual exploitation.[51] The statute in the instant case, however, would proscribe materials produced without the exploitation of children.[52] Thus, the Court implied that the instant case is distinguishable from precedent.[53]

Similarly, the Court reasoned that, as worded, the CPPA would chill a significant amount of protected speech.[54] For example, legitimate movie producers might be at risk of violating the CPPA.[55] The Court named two recent award-winning movies that could, in their depicting of child-sexual activity, run afoul of the CPPA.[56] Emphasizing the CPPA's draconian penalties,[57] the Court claimed that few producers would risk uttering even arguably protected speech nearing the ambit of the statute.[58]

Last, the instant Court impugned the Government's four arguments supporting the CPPA's constitutionality.[59] First, the Government argued that virtual child pornography generally has no value.[60] Second, pedophiles may use it to seduce children.[61] Third, it "whets the appetites" of pedophiles.[62] Finally, its similarity to actual child pornography makes it difficult to prosecute actual child pornographers.[63]

The Court riposted by stating that child pornography may, in fact, have significant value.[64] Also, even though pedophiles may use virtual child pornography for seduction purposes, there are many innocent materials,

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51. *Id.* ("The Court[s] . . . anchored . . . [their] holding[s] in the concern for the participants . . . ."). *But cf.* 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, 262 (1998) ("The *Ferber* and *Osborne* balancing approach readily leads to the conclusion that Congress can constitutionally criminalize *computer-generated* child pornography . . . .") (emphasis added).

52. *Free Speech Coalition*, 535 U.S. at 250.

53. *See id.*

54. *Id.* at 244.

55. *Id.* at 247-48.

56. As examples, the Court named the movies AMERICAN BEAUTY (Jinks/Cohen Company 1994) and TRAFFIC (Beford Falls, Fifty Cannon, Gramercy Pictures, USA Films 2000). *Id.*

57. Under the CPPA, a court may impose a fifteen-year sentence on a first-time violator. 18 U.S.C. § 2252A(b)(1) (2003). A repeat offender faces a five- to thirty-year sentence. *Id.*

58. *Free Speech Coalition*, 535 U.S. at 244. *But see infra* text accompanying note 79.

59. *Id.* at 249-56.

60. *Id.* at 250.

61. *Id.* at 251.

62. *Id.* at 253.

63. *Id.* at 254.

64. *Id.* at 251; *cf. id.* (stating that *Ferber* would allow, in the case of valuable child pornography, virtual images to substitute for actual images of a child's sexual conduct) (citing New York v. Ferber, 458 U.S. 747, 763 (1982)). More specifically, materials that one might deem "child pornography" could appear in legitimate artistic productions, such as motion pictures. *See supra* text accompanying notes 55-56.

such as video games and cartoons, that pedophiles may use to seduce children.[65] Additionally, the Government cannot prohibit virtual pornography simply because it "whets appetites," since such a prohibition would control private thoughts.[66] Finally, the Court stated that proscribing virtual child pornography because it frustrates prosecution would "turn[] the First Amendment upside down."[67]

While it is true that value may inhere in works depicting child sexual activity, the CPPA would probably not proscribe such productions. Given that "[w]ords inevitably contain germs of uncertainty,"[68] courts use the overbreadth doctrine sparingly.[69] For example, courts consult legislative history before declaring overbreadth.[70] Doing so substantiates a legislature's intentions.[71] Here, the CPPA's legislative history indicates that Congress intended to reach only depictions of hard-core child pornography.[72] Thus, the Court could have read the statute more narrowly to exclude valuable productions.[73]

Moreover, there is evidence that the Government itself has, in fact, read the CPPA narrowly to exclude the productions of legitimate movie producers.[74] *Traffic* and *American Beauty* are two examples of legitimate movies that the Court claims would fall within the CPPA's purview.[75] *Traffic* won an Academy Award in 2001;[76] *American Beauty* won an Academy award in 2000.[77] Congress enacted the CPPA in 1996.[78] Thus, the chill that the Court identifies "has apparently never been felt by those who actually make movies."[79]

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65. *Id.*

66. *Id.* at 253. *But see infra* notes 93-95 and accompanying text.

67. *Id.* at 255. *But see infra* notes 97-99 and accompanying text.

68. Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973).

69. *Id.* at 613 ("Application of the overbreadth doctrine . . . is . . . strong medicine. It has been employed . . . sparingly and *only* as a last resort.") (emphasis added); *cf. Free Speech Coalition*, 535 U.S. at 265 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("This Court has never required 'mathematical certainty' or 'meticulous specificity' from the language of a statute.").

70. *See, e.g., Free Speech Coalition*, 535 U.S. at 270-71 (Rehnquist, C.J., dissenting) ("We have looked to legislative history to limit the scope of child pornography statutes in the past, and we should do so here as well.") (citation omitted).

71. *See id.* at 270 (Rehnquist, C.J., dissenting).

72. *Id.* at 269-70 (Rehnquist, C.J., dissenting) (citing S. REP. NO. 104-358, pt. I, at 7 (1996)); *accord* Free Speech Coalition v. Reno, 198 F.3d 1083, 1102 (9th Cir. 1999); United States v. X-Citement Video, Inc., 513 U.S. 64, 73-77 (1994).

73. *See Free Speech Coalition*, 535 U.S. at 271 (Rehnquist, C.J., dissenting).

74. *Id.* (Rehnquist, C.J., dissenting).

75. *See supra* note 56.

76. *Free Speech Coalition*, 535 U.S. at 271 (Rehnquist, C.J., dissenting).

77. *Id.* (Rehnquist, C.J., dissenting).

78. *Id.* (Rehnquist, C.J., dissenting).

79. *Id.* (Rehnquist, C.J., dissenting).

Even if the Government were to prosecute parties uttering protected speech, courts generally do, on a "case-by-case analysis," correct the misapplication of an overbroad statute.[80] A fortiori, the CPPA provides defendants with an affirmative defense[81] that facilitates such correction.[82] This affirmative defense allows, inter alia, a defendant to assert that the suspect images were produced using a person who was an adult at the time of production.[83]

Given the prospect of correcting any overbreadth (which is arguably not substantial),[84] the Court could have upheld the CPPA because the state has a compelling interest in prohibiting virtual child pornography. First, virtual child pornography, just like actual child pornography, is used to seduce children.[85] In fact, empirical findings show that pedophiles *often* use child pornography for this purpose.[86] These empirical data weigh against the instant Court's a priori observation that pedophiles "might" use innocent materials, like cartoons, to seduce children.[87] Child pornography

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80. Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973). In order to be correctable, however, such a statute cannot be "substantial[ly]" overbroad. *Id.* at 615.

81. 18 U.S.C. § 2252A(c) (2001).

82. *See, e.g.*, Wasserman, *supra* note 51, at 278 ("The CPPA's affirmative defense helps ensure that adaptations of *Romeo and Juliet* will not be treated as criminal contraband . . . . If any overbreadth does exist, it can . . . be corrected on a case-by-case basis.") (footnote omitted); *cf. Free Speech Coalition*, 535 U.S. at 259 (Thomas, J., concurring) ("[T]he government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense . . . .").

83. *Free Speech Coalition*, 535 U.S. at 256. It is true that "[a] defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors." *Id.* at 256. Note, however, that even if the affirmative defense is "incomplete," it is *only one* means of correcting overbreadth on a case-by-case analysis. *Id.* at 256. The Court might, for example, simply choose to read the statute more narrowly based on legislative history. *See supra* note 70 and accompanying text. Thus, an impeccably drafted affirmative defense is not necessary to a statute's constitutionality.

84. *See id.* at 265 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("[L]itigants . . . bear the heavy burden of demonstrating that the regulation forbids a *substantial* amount of . . . harmless speech. . . . Respondents have not made such a demonstration.") (emphasis added) (citations omitted).

85. *See id.* at 251-52.

86. *See, e.g.*, U.S. DEP'T OF JUSTICE, 1 ATT'Y GEN. COMM'N ON PORNOGRAPHY, FINAL REP. 649 (1986); *see also* David B. Johnson, Comments, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 327 ("'"Child pornography is often used as part of a method of seducing child victims."'") (quoting Osborne v. Ohio, 495 U.S. 103, 111 n.7 (1990) (quoting 1 ATT'Y GEN. COMM'N ON PORNOGRAPHY, *supra*, at 649)).

87. *Cf.* Johnson, *supra* note 86, at 327 ("[P]rohibiting the possession of computer-generated child pornography will prevent pedophiles from using these images to seduce children into sexual activity.").

is a tool for seduction, regardless of whether other innocent materials can be used for similar purposes.[88]

Second, virtual child pornography "whets the appetites" of pedophiles.[89] The instant Court concluded that such an incitement argument is unsound because it attempts to control a person's private thoughts.[90] Accordingly, the instant Court used the premise that "speech is the beginning of thought."[91] The Court reasoned that if the government regulates virtual pornography, a form of speech, it will thereby be regulating thoughts.[92] However, speech is not the beginning of thought.[93] This proposition rings true if one ponders a simple idea—it is impossible to have an ambiguous thought.[94] If ambiguity is not a part of thought, then speech, laden with ambiguity, cannot be the basis of thought.[95] Thus, one might question the soundness of this premise that the instant Court uses to refute the Government's incitement argument.[96]

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88. *See Osborne*, 495 U.S. at 111.

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

90. *See id.* ("The government 'cannot... premise legislation on the desirability of controlling a person's private thoughts.'") (quoting Stanley v. Georgia, 394 U.S. 557, 566 (1969)).

91. *Id.*

92. *See id.*

93. One cognitive psychology expert states: "If one string of words in English can correspond to two meanings in the mind, meanings in the mind cannot be strings of words in English. . . . So the statements in a knowledge system are not sentences in English but rather inscriptions in a richer language of thought, 'mentalese.'" STEVEN PINKER, HOW THE MIND WORKS 70 (1997).

94. *See id.* at 297 ("[T]houghts, virtually by definition, cannot be ambiguous."). Thus, if anything, thought is the beginning of speech, not the other way around.

95. *See id.*

96. Interestingly, other arguments against the CPPA espouse premises that are empirically unsound. For example, one professor contests the idea that virtual child pornography may whet the appetites of pedophiles: "In fact, viewing virtual child pornography may produce the opposite effect and alleviate the desire to pursue actual children." Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 339, 464 (1997) (citing Carlin Myer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities* 83 GEO. L.J. 1969, 1999-2003 (1995)). Such a theory is suspect. One can trace such a catharsis theory back to Aristotle and Freud. However, science has discovered that the converse of the catharsis theory is closer to truth. For example, one expert states:

> Many Americans have bought the idea, . . . [that] "[s]exual materials provide an outlet for bottled-up impulses. . . ." If viewing erotica provides an outlet for sexual impulses, then people should afterward experience diminished sexual desire . . . . But experiments show the *opposite* is true. . . . The near consensus among social psychologists is that catharsis does not occur as Freud . . . supposed. . . . For example, Robert Arms and his associates report that . . . spectators of football, wrestling, and hockey games exhibit *more* hostility after viewing the event than before.

DAVID G. MYERS, SOCIAL PSYCHOLOGY 421 (6th ed. 1999) (first emphasis added) (internal citation

Third, the similarity of virtual versus actual child pornography makes it difficult to prosecute actual child pornographers.[97] Such a policy consideration does not "turn the First Amendment upside down," as the Court asserted.[98] If technology frustrates the prosecution of unprotected speech, the Government may, vis-à-vis such technology, regulate a "narrow category" of *protected* speech.[99] Moreover, here, the "narrow category," child pornography, is arguably low-value speech, thus making its regulation more permissible.[100]

One might question the wisdom and logical consistency of the instant Court's ruling. For instance, the Court noted that legitimate productions depicting children engaging in sexual activity remind us of "years we ourselves once knew, when wounds can be so grievous . . . ."[101] Paradoxically, the instant Court recognizes the sanctity of childhood years only to overturn a statute designed to safeguard the interests of children, morality, and society.[102] However, if wounds are so grievous at this formative stage, perhaps the Court should further children's welfare by banning virtual child pornography, which may, directly or indirectly, inflict wounds on the young.[103]

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omitted).

97. *See supra* note 63 and accompanying text.

98. *See supra* note 67.

99. *Free Speech Coalition*, 535 U.S. at 259 (Thomas, J., concurring). "[I]f technological advances thwart prosecution of 'unlawful speech,' the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech . . . .'"; *Id.*; *cf. id.* at 264 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("[G]iven the rapid pace of advances in computer-graphics techonology, the Government's concern is reasonable.").

100. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 762 (1982) ("The value of permitting . . . photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."); Wasserman, *supra* note 51, at 260 ("[T]he 'less valuable speech' approach registers . . . prominently in *Ferber*."); *id.* at 277 ([V]irtual child pornography, like 'real' child pornography, has little, if any, social value.").

101. *Free Speech Coalition*, 535 U.S. at 248.

102. Here, one might say that the majority's argument deconstructs; i.e., the majority inadvertently exposes assumptions that would lead to the opposite result of its contentions. *See generally* JACQUES DERRIDA, STRUCTURE, SIGN, AND PLAY IN THE DISCOURSE OF THE HUMAN SCIENCES (Lecture at Johns Hopkins University (1966)), *reprinted in* CRITICAL THEORY SINCE PLATO 1117 (Hazard Adams ed., rev. ed. 1992) (expounding the basic tenets of deconstruction, a mode of hermeneutical analysis).

103. *See* Johnson, *supra* note 86, at 330 ("With computer-generated child pornography, there is a victim. The child who gets seduced by a pedophile using computer-generated child pornography is a victim.").