HOW THE OVERTURN OF THE CHILD PORNOGRAPHY PREVENTION ACT UNDER *ASHCROFT V. FREE SPEECH COALITION* CONTRIBUTES TO THE PROTECTION OF CHILDREN

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I. INTRODUCTION

On April 16, 2002, the Supreme Court, in a 7-2 decision written by Justice Kennedy, held that the ban on virtual child pornography in the Child Pornography Prevention Act of 1996 (CPPA)[2] abridges the freedom to engage in a substantial amount of lawful speech and is therefore overbroad and unconstitutional under the First Amendment.[3]

Part I of this Note will give a brief history of the CPPA and explain the reasoning behind the *Ashcroft v. Free Speech Coalition* decision. It will respond to the government's arguments that the CPPA was necessary to protect children. It will also discuss the legislation that has been proposed and passed in the wake of the Court's decision and analyze whether or not this legislation will withstand judicial scrutiny. Part II of this Note will propose that *Ashcroft v. Free Speech Coalition* may actually contribute to the protection of children by opening the door to the study and investigation of child pornography. In addition, the decision encourages and facilitates works with serious literary, artistic, political, or scientific value. Such works can have a positive effect in our society by creating a discourse on such difficult issues as child sexual abuse cases, where, much of the time, the victim remains without a voice.[4] Lastly, this Note will suggest that *Ashcroft v. Free Speech*

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[1] I would like to thank Sandra, Richard and Jenna Goldberg for years of encouraging my intellectual and creative pursuits. In addition, I would like to thank Philip Kimball for motivation and perspective.

[2] 18 U.S.C. §§ 2256(8)(B), 2256(8)(D) (1996), (D) *repealed* by Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 502 (A)(3), 117 Stat. 650, 677 (2003).

[3] *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244-58 (2002); *see also* U.S. CONST. amend. I ("Congress shall make no law. . . abridging the freedom of speech.").

[4] *See generally* Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y &

Coalition may have the unintended effect of protecting children because sexual prohibitions, such as the CPPA, may invite their own violation, by heightening the sexual allure of what they forbid.[5]

II. PART I

A. *The CPPA and the Road to Ashcroft v. Free Speech Coalition*

Congress enacted the CPPA on September 30, 1996, in order to keep pace with technological developments.[6] In a 1995 Senate Report, Senator Hatch argued that "the enforcement of existing laws against sexual exploitation of children with respect to the production, distribution or possession of child pornography requires Federal law to keep pace with the technology of pornography."[7] The CPPA expanded the definition of child pornography, criminalizing material that "appears to be" or "conveys the impression" of minors engaging in sexually explicit conduct.[8] This broader definition targeted virtual child pornography. Unlike actual child pornography, virtual child pornography includes images that appear to depict minors but were produced by means other than using actual children, such as through the use of youthful-looking adults or computer-imaging. The first problematic provision of the CPPA, § 2256 (8)(B), prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[9] The second problematic provision of the CPPA, § 2256 (8)(D), prohibited any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct."[10]

The Free Speech Coalition, an adult entertainment trade association, challenged the CPPA, alleging that §§ 2256(8)(B) and 2256(8)(D) were unconstitutionally overbroad and would chill the production of works protected by the First Amendment.[11] The United States District Court for

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L. 479 (1997).

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

6 S. REP. NO. 104-358, at 7 (1996).

7 *Id.* at 17.

8 18 U.S.C. §§ 2256(8)(B) and 2256(8)(D).

9 § 2256(8)(B).

10 § 2256(8)(D).

11 *See* § 2256(8)(B) and § 2256(8)(D). The Free Speech Coalition alleged that its members did not use minors in their sexually explicit works, but they feared that some of these works might fall within the CPPA's definition of child pornography. Other respondents included the publisher of a book advocating the nudist lifestyle, a painter of nudes and a photographer specializing in erotic images. *Ashcroft*, 535 U.S. at 243.

the Northern District of California granted the Government's motion for summary judgment and the plaintiffs appealed.[12] The Court of Appeals for the Ninth Circuit held that the law was unconstitutionally vague and overbroad and reversed the decision of the United States District Court.[13]

While the Ninth Circuit found the CPPA invalid, four other Courts of Appeals sustained it.[14] The Supreme Court granted certiorari to resolve this split and held that the CPPA's ban on virtual child pornography was unconstitutionally overbroad since it "abridges the freedom to engage in a substantial amount of lawful speech"[15] by proscribing speech which was neither obscene nor child pornography.[16]

B. *The Court's Reasoning: The CPPA Proscribed Lawful Speech Which Was Neither Obscene Nor Child Pornography*

Turning first to § 2256(8)(B), the Court noted that the CPPA is inconsistent with the *Miller v. California* standard for obscenity.[17] In *Miller*, the Court developed a tripartite test for obscenity, a category of speech not granted First Amendment protection.[18] *Miller* requires the Government to prove that the work in question, taken as whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value.[19] However, the CPPA extended to images that appeared to depict minors engaging in sexual activity without any regard to the requirements established in *Miller*.[20] First, the materials proscribed by the CPPA did not have to appeal to the prurient interest.[21] Any depiction of sexually explicit activity, no matter how it was presented, was proscribed by the CPPA.[22] Second, for material to be banned under the CPPA, it is not necessary that the material be patently offensive in light of community standards.[23] For instance, the Court mentions that images of what appear to be seventeen year olds engaging in sexual activity

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12 *See* Free Speech Coalition v. Reno, No. C97-0281 USC, 1997 WL 487758 (N.D.Cal. Aug. 12, 1997).

13 *See* Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999).

14 *Id.*; *see also* United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

15 *Ashcroft*, 535 U.S. at 256.

16 *Id.* at 240.

17 Miller v. California, 413 U.S. 15 (1973); *see also Ashcroft*, 535 U.S. at 246.

18 *See Miller*, 413 U.S. at 24. In addition to obscenity, another category of speech not granted First Amendment protection is the category of so-called fighting words. *See* Chaplinksy v. New Hampshire, 315 U.S. 568 (1942).

19 *See Miller*, 413 U.S. at 24.

20 *See Ashcroft*, 535 U.S. at 246.

21 *Id.*

22 *Id.*

23 *Id.*

do not always contravene community standards.[24] Finally, the CPPA prohibited speech despite its serious literary, artistic, political, or scientific value.[25] The Court observed that teenage sexual activity has been a theme in art and literature for centuries.[26] The statutory language of the CPPA would have prohibited everything from mainstream Hollywood films to Renaissance paintings depicting scenes of classical mythology, as long as the person being portrayed "appears to be" a minor engaging in "sexually explicit conduct."[27]

The Court described how proscribing speech that is not obscene under *Miller* leads to undesirable results.[28] For instance, the CPPA had the undesirable effect of chilling a substantial amount of protected speech.[29] Under the CPPA, if a film contained a single graphic depiction of sexual activity within the statutory definition, the possessor of that film would be subject to severe punishment without any inquiry into the value of the film.[30] *Ashcroft v. Free Speech Coalition* cites a number of acclaimed films made without any child actors (such as *Romeo and Juliet, American Beauty* and *Traffic*), which explore themes that fall within the wide sweep of the CPPA's prohibitions.[31] The Court worried that severe penalties would have deterred legitimate movie producers, book publishers, or other speakers from distributing images that were in or close to the uncertain reach of the CPPA.[32] This was not an unfounded fear. In fact, American film distributors refused to carry the recent film version of *Lolita* during its initial release, out of fear of violating the recently enacted CPPA. [33] As a result, a First Amendment lawyer spent over five weeks working with Director Adriane Lyne, making cuts to bring the film into conformity with the CPPA.[34] In imposing harsh penalties, the CPPA had the undesirable effect of chilling

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[24] *Id.*

[25] *See Ashcroft*, 535 U.S. at 256.

[26] *Id.*

[27] *Id.* at 241.

[28] *Id.* at 248.

[29] *See* Brief of Amici Curiae Liberty Project As Amicus Curiae at 19, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795). "The resulting impermissible sweep of the statute is substantial. By criminalizing works that do not even involve real minors, without regard to the materials' literary, artistic, scientific, or political value, the Act threatens to silence a great deal of fully protected speech." *Id.*

[30] *Ashcroft*, 535 U.S. at 248. It should be noted that the CPPA imposed harsh penalties. A first offender could be imprisoned for fifteen years, while a repeat offender faced a prison sentence of not less than five years and not more than thirty years. *See* 18 U.S.C. § 2252.

[31] *Ashcroft*, 535 U.S. at 247-48. For further discussion of these films, see Part II of this Note.

[32] *Ashcroft*, 535 U.S. at 244.

[33] *See* Celestine Bohlen, *A New "Lolita" Stalls in Europe; Hollywood Snubs Remake of the Tale of an Adolescent Siren*, N.Y. TIMES, Sept. 23, 1997, at E1. This sentiment echoes the fears Nabokov encountered when he first showed the *Lolita* manuscript to American publishers in 1954. Pascal Covici at the Viking Press worried "we would all go to jail if the thing were published." EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS 243 (Vintage Books 1992).

[34] Bohlen, *supra* note 33.

the creation of artistic work.[35]

In addition to failing to meet the *Miller* standard for obscenity, the Court next noted that the CPPA found no support in *New York v. Ferber*.[36] The Court in *Ferber* created a previously unknown exception to the First Amendment by holding that child pornography is a new category of speech not granted constitutional protection.[37] While pornography featuring adults can be protectable speech if it passes the *Miller* test, child pornography, if not obscene under *Miller*, could now be proscribed under *Ferber*.[38] At issue in *Ferber* was the constitutionality of a New York criminal statute that prohibited the knowing promotion of sexual performances by children under the age of sixteen, by distributing materials, which contained such performances.[39] In upholding a prohibition on the distribution, sale and production of child pornography, *Ferber* granted the states "greater leeway in the regulation of pornographic depictions of children" because these acts were "intrinsically related" to the sexual abuse of children in two ways.[40] First, the continued circulation of the material would harm the actual child who was featured in the promotional material, as a permanent record of abuse.[41] Second, because increasing traffic in child pornography is an economic motive for its production, the State has an interest in closing the distribution network.[42] Under either rationale, the speech in *Ferber* had a proximate link to the crime from which it came.[43]

In contrast, the CPPA prohibited speech that recorded no crime and created no victims through its production.[44] Unlike the materials in *Ferber*, virtual child pornography is not "intrinsically related" to the sexual abuse of children.[45] According to the Court in *Ashcroft v. Free Speech Coalition*, "the

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[35] *See generally* Linda Greenhouse, *"Virtual" Child Pornography Ban Overturned*, N.Y. TIMES, Apr. 17, 2002 (discussing the effect this decision will have on the film industry); Jeffery Douglas, Chairman of the Board of The Free Speech Coalition proclaimed that the decision was a victory for free speech and for the film industry. "We congratulate the producers of *Traffic, Fast Times at Ridgemont High, American Beauty, Midnight Cowboy, The Tin Drum* and many other films on not having to recall and destroy these important cinematic works of art." *See* Adult Industry News, *FSC, Adult Industry Advocate, Wins Landmark Court Decision, available at* http://www.ainews.com/Archives/Story3269/phtml (Apr. 16, 2002).

[36] 458 U.S. 747 (1982).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 749. In *Ferber*, "sexual performance" means "any play, motion picture, photograph or dance" which included "sexual conduct." *Id.* at 751.

[40] *Ferber*, 458 U.S. at 756-59.

[41] *Id.* at 759.

[42] *Id.* at 759-60.

[43] *Ashcroft*, 535 U.S. at 250.

[44] *Id.*

[45] *Id.*; *see also Ferber*, 458 U.S. at 759 (stating the ways in which child pornography is intrinsically related to the sexual abuse of children).

causal link is contingent and indirect."[46] The harm depends upon some unqualified potential for subsequent illegal acts.[47] Under the CPPA, images would be banned despite the fact that they did not involve any actual minors in the production process. In fact, the *Ferber* Court went so far as to suggest "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized."[48] This statement seems to implicitly acknowledge that virtual child pornography is a category of protected speech.[49]

The second provision, § 2256(8)(D), is also overbroad.[50] This provision bans depictions of sexually explicit content that are "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."[51] According to the Court, under this provision, a film could be treated as child pornography even if it contained no sexually explicit scenes involving minors.[52] For example, if a poster advertising a film or a film's trailers conveyed the impression that sexually explicit scenes involving minors would be found within the movie, even when, in fact, there were no such scenes, the film could be treated as child pornography under the CPPA.[53] The CPPA prohibited a sexually explicit film with no minor actors, just because the film's advertising or marketing suggested that the actors were minors.[54] Even if the possessor of the film was aware that there are no minor actors, possession would be a crime.[55] The Court concluded that the Government did not offer a serious defense of this provision and that it was "substantially overbroad."[56] Therefore, it was a violation of the First Amendment.[57]

C. *The Government's Argument that the CPPA was Necessary to Protect Children Fails*

Although the *Ashcroft* Court found that the CPPA was inconsistent with *Miller* and had no support in *Ferber*, the Government sought to justify the CPPA in other ways.[58] The first and primary argument that the Government

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46 *Ashcroft*, 535 U.S. at 250.
47 *See id.*
48 *Ferber*, 458 U.S. at 763.
49 *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 996 (2001).
50 *Ashcroft*, 535 U.S. at 258.
51 18 U.S.C. § 2256(8)(D) (emphasis added).
52 *Ashcroft*, 535 U.S. at 257.
53 *See id.*
54 *Id.* at 258.
55 *See id.*
56 *Id.* at 257-58.
57 *Ashcroft*, 535 U.S. at 258.
58 *Id.* at 251.

offered was that "pedophiles . . . use virtual child pornography to seduce children" into participating in sexual activity.[59] The Government argued that a child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be lured or convinced into participating in such activities after viewing depictions of other children participating in such activities.[60] The Court rejected this argument because "[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question."[61] Speech that is within the rights of adults to hear may not be silenced in an attempt to shield children from it.[62]

The second argument the government offered in support of the CPPA was that virtual child pornography whets pedophiles' appetites and encourages them to engage in illicit conduct.[63] The Government warned that the effect on viewers of child pornography is the same, whether the material is actual or virtual.[64] However, the tendency of speech to cause illegal acts, such as child abuse, is not sufficient reason for banning it.[65] The link between the speech and the illegal action was not strong enough. The government may only suppress speech for advocating illegal action if the advocacy is intended to incite "imminent lawless action."[66] In addition, it has to be highly likely that such imminent lawless action will result from the speech.[67] Absent the intent to incite illegal action and the likelihood that such speech will result in illegal action, the government may not suppress speech.[68] Because the government had shown no more than a "remote

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[59] *Id.*; *see also* Osbourne v. Ohio, 495 U.S. 103 (1990) (holding that Ohio may constitutionally proscribe the possession and viewing of child pornography because Ohio has a compelling interest in protecting the physical and psychological well-being of minors).

[60] *See* Brief for the Petitioners at 14-16, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795).

[61] *Ashcroft*, 535 U.S. at 252.

[62] *See* Sable Communications v. FCC, 492 U.S. 115 (1989) (holding that the denial of adult access to telephone messages which were indecent but not obscene exceeded that which was necessary to limit access of minors to such messages).

[63] *Ashcroft*, 535 U.S. at 253. Senator Hatch argued, "[c]hild pornography stimulates the sexual appetites and encourages the activities of child molesters and pedophiles who use it to feed their sexual fantasies." S. REP. NO. 104-358, at 12 (1996).

[64] S. REP. NO. 104-358, at 17. "To such sexual predators, the effect is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by computer." *Id.*

[65] *See* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the state may not prohibit the possession of obscene material on the grounds that it may lead to unlawful behavior).

[66] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (overruling a statute that purported to punish mere advocacy as opposed to incitement to action).

[67] *Id.*

[68] *Id.*

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except

connection" between the speech and any resulting child sexual abuse, the government could not prohibit speech on the grounds that it may merely encourage, and not incite, pedophiles to engage in illicit conduct.[69]

Furthermore, the Government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[70] As the *Ashcroft* Court reasoned, "[t]he right to think is the beginning of freedom, and speech must be protected from the Government because speech is the beginning of thought."[71] In the *Harvard Journal on Legislation*, Debra Burke writes that virtual child pornography is merely an imaginative idea.[72] It is not obscenity.[73] However distasteful or repugnant an idea is to someone's belief, ideas are protected speech.[74] The only time the Government can ban such speech is when there is a direct connection between the speech and the illegal act.[75] In *Ashcroft*, the Court notes that Constitutional freedoms are most in danger when the Government seeks to control a person's thoughts or when the Government seeks to justify a law for that end.[76] Thus, the Court concluded that the Government's rationale could not sustain the CPPA.[77]

A third rationale the Government offered for the CPPA was that people charged with the possession and distribution of actual child pornography could establish reasonable doubt by claiming that the images were computer-generated.[78] The argument that images made using real children and images made via computer imaging should both be banned because it is difficult to distinguish between them contravenes the First Amendment.[79] On balance, the potential harm to society in allowing some unprotected

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where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id.

69 *Ashcroft*, 535 U.S. at 253-54.

70 Stanley v. Georgia, 394 U.S. 557, 566 (1969), *quoted in Ashcroft*, 535 U.S. at 253. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley*, 394 U.S. at 565.

71 *Ashcroft*, 535 U.S. at 253.

72 Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 460 (1997). *But see* http://www.usdoj.gov/criminal/ceos/ashcroft_childporn.htm (transcribing a news conference at the Justice Department with the Attorney General and members of Congress on May 1, 2002). Florida Representative Mark Foley asserted that, "[i]t doesn't make a difference if the child engaged in sex is real or virtual. In other words, an old simple saying: If it walks like a duck, talks like a duck, it is a duck." *Id.*

73 Burke, *supra* note 72, at 460.

74 *See id.*

75 *See Brandenburg*, 395 U.S. at 444.

76 *Ashcroft*, 535 U.S. at 253.

77 *Id.*

78 *Id.* at 254.

79 *Id.* at 255.

speech to go unpunished is outweighed by the possibility that other protected speech may be muted.[80] The *Ashcroft* Court agreed with this argument, stating that, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."[81] Therefore, the overbreadth doctrine forbids prohibitions on unprotected speech if a significant amount of protected speech is prohibited in the process.[82]

D. Alternatives to the CPPA

The very day that *Ashcroft v. Free Speech Coalition* was announced, Attorney General John Ashcroft issued a response stating that he directed the Department of Justice Criminal Division's Child Exploitation and Obscenity Section to work with United States Attorneys' Offices around the country to ensure that the decision affects as few pending child pornography cases as possible.[83] In reaction to the decision, The House of Representatives introduced The Child Obscenity and Pornography Prevention Act of 2003 (COPPA).[84] This bill narrows the statutory language of the CPPA by prohibiting only those computer images that are indistinguishable from real child pornography, as well as prohibiting all obscene pornographic images of prepubescent children, including drawings, cartoons, paintings and sculptures.[85] The amended language of § 2256(8)(B) reads as follows, "such visual depiction is a computer image or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct."[86] The COPPA was allegedly drafted with the Court's constitutional

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[80] *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (holding that an Oklahoma statutory provision that no employee in classified service should directly or indirectly solicit, receive or in any manner be concerned in soliciting or receiving any assessment or contribution for any political organization, candidacy or other political purpose or be member of any national, state or local committee of political party or officer or member of committee or partisan political club or candidate for nomination or election to any paid public office or take part in management or affairs of any political party or in any political campaign except to exercise his right as citizen privately to express his opinion and to cast his vote was not substantially overbroad and not unconstitutional on its face).

[81] *Ashcroft*, 535 U.S. at 255.

[82] *See Broadrick*, 413 U.S. at 601.

[83] *See* http://www.usdoj.gov/criminal/ceos/ashcroft_freespch.htm (transcribing the Attorney General's Response to the Supreme Court decision in *Ashcroft v. Free Speech Coalition* at the Department of Justice Conference Center on Apr. 16, 2002). In this response, Ashcroft stated that the Department of Justice will continue to pursue national initiatives against child pornography, such as Operation Avalanche and Operation Candyman. He also stated that he is committed to working with Congress to develop measures to fight against child pornography that will survive judicial scrutiny. *Id.*

[84] *See* H.R. 1161, 108th Cong. (2003).

[85] *Id.*

[86] *Id.* The COPPA replaces the CPPA's "appears to be" with "is, or is indistinguishable from," in an attempt to more narrowly define the prohibited material. *Id.*

concerns in *Ashcroft v. Free Speech Coalition* in mind.[87] However, the language of the COPPA remains overbroad and does not eliminate the same First Amendment problems faced by the CPPA.

Like the House of Representatives, the Senate also proposed legislation in the wake of *Ashcroft v. Free Speech Coalition.* On April 30, 2003, the President signed the Senate's Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT").[88] Like the COPPA, PROTECT modifies § 2256(8)(B) of the CPPA, changing the language from "appears to be" to "is, or is indistinguishable from."[89] As with the COPPA, the language of PROTECT remains overbroad and poses First Amendment questions. Congress' latest response to child pornography is once again subject to constitutional criticism.

Amy Adler explores the implications of child pornography law for the First Amendment.[90] She argues that our society is so horrified by child pornography that we have turned the First Amendment upside down in an effort to combat it.[91] Child pornography law has widespread implications for all of free speech.[92] It is "where the greatest encroachments on free expression are now accepted."[93] In *Brandenburg v. Ohio,* the Court rejected the notion that speech could be banned because it might provoke dangerous ideas.[94] However, child pornography law has begun to reverse this doctrine.[95] The CPPA was an example of how "[c]hild pornography law has collapsed the 'speech/action' distinction that occupies a central role in First

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[87] *See* http://www.usdoj.gov/criminal/ceos/ashcroft_childporn.htm (May 1, 2002). "Today I am pleased to be joined by a bipartisan group of legislators to announce legislation that restores the ability of law enforcement to protect children from abuse and exploitation, consistent with the Constitution." *Id.*

[88] Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 649 (2003).

[89] *Id.*

[90] Adler, *supra* note 49.

[91] *Id.*; *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment,* 85 COLUM. L. REV. 449, 513 (1985) ("The core commitments of the First Amendment tend to be jeopardized most seriously during certain periods that may be regarded as pathological due to their unusual social dynamics regarding the tolerance of dissent."); Osbourne v. Ohio, 495 U.S. 103 (1990) (holding that *Stanley v. Georgia* does not extend to the private possession of child pornography). In a dissenting opinion, Justice Brennan accused the Court of letting their uneasiness about the problem of child pornography to trump their First Amendment principles. *Id.* at 143-45 (Brennan, J., dissenting).

[92] *See* Adler, *supra* note 49, at 926.

[93] *Id.* at 922. *But see* Matthew K. Wegner, *Teaching Old Dogs New Tricks: Why Traditional Free Speech Doctrine Supports Anti-Child Pornography Regulations in Virtual Reality,* 85 MINN. L. REV. 2081 (2001) Wegner posits that virtual child pornography is "every bit as violent, realistic, suggestive, and detrimental to society" as actual child pornography and argues for a new national obscenity standard in lieu of *Miller's* community standard test. *Id.* at 2082-83. "The synthetic creation and rapid dissemination of both obscene images and child pornography across traditional geographic boundaries is ample justification for a new national standard." *Id.* at 2111.

[94] 395 U.S. 444 (1969).

[95] *See* Adler, *supra* note 49, at 926.

Amendment law."[96] In doing so, the CPPA subverted traditional First Amendment principles.[97] Neither the COPPA nor PROTECT eliminates this problem.

Ashcroft v. Free Speech Coalition seems to indicate that there is a way to tailor the CPPA without violating First Amendment principles by enforcing criminal penalties for unlawful solicitation.[98] The Court acknowledges that there are many seemingly innocent things that might be used for immoral purposes.[99] For instance, candy or some games, while seemingly harmless, might be used to convince a child to engage in sexual activity with an adult. Despite this, we would not expect the Government to ban those items simply because they can be misused for immoral purposes.[100] However, the Court posits that the Government may punish adults who provide unsuitable materials to children.[101] Danielle Cisneros agrees that enforcing a criminal penalty for unlawful solicitation is a possible solution in her article in the *Duke Law & Technology Review*.[102] Since one of the Government's main fears is that virtual child pornography will be used by pedophiles to seduce children into participating in sexual activities,[103] she suggests that the government could narrowly tailor a criminal statute to punish such uses of the materials severely without banning the creation and possession of the work.[104]

Some states have already made this move by enacting laws that target the seduction of minors to engage in sexual conduct via computer messages. For instance, Arkansas has enacted a law against "computer child pornography."[105] Under this statute, a person commits computer child pornography if he "knowingly utilizes a computer online service, Internet service, or local bulletin board service to seduce, solicit, lure, or entice a child or another individual believed by the person to be a child, to engage in sexually explicit conduct."[106] Enforcing criminal penalties for unlawful solicitation may be a way to punish the uses of certain materials without violating the First Amendment.

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96 *Id.* at 970.

97 *Id.* at 926.

98 *Ashcroft*, 535 U.S. at 251.

99 *Id.*

100 *See id.*

101 *Id.* at 251-52; *see also* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a harmful to minors statute).

102 Danielle Cisneros, *"Virtual Child" Pornography on the Internet: A "Virtual" Victim?*, 2002 DUKE L. & TECH. REV. 19 at 1.

103 *Ashcroft*, 535 U.S. at 251.

104 Cisneros, *supra* note 102, at 13.

105 *See* ARK. CODE ANN. § 5-27-603 (Michie 2001).

106 *See* § 5-27-603 (a)(2).

III. PART II

A. *An Introduction: How* Ashcroft v. Free Speech Coalition *Might Actually Contribute to the Protection of Children*

"The high court sided with pedophiles over children."[107] "The Court's ruling was a huge disappointment to everyone working to protect children."[108] These were common reactions to the *Ashcroft v. Free Speech Coalition* decision. However, despite the critics' fears that the decision to lift the prohibition on virtual child pornography will whet the appetites of potential abusers and encourage them to engage in unlawful behavior,[109] this decision might, ultimately, have the opposite effect. *Ashcroft v. Free Speech Coalition* may actually contribute to the protection of children.

Art plays a vital role in our society. It forces us to confront issues and it provokes discussions. Allowing scholars to study certain images, otherwise proscribed by the CPPA, can aid in shaping laws better tailored to fight against actual child pornography.[110] Furthermore, the CPPA would not only have prohibited artistic works exploring themes of teenage sexuality, as discussed in Part I of this Note, but it would have prohibited artistic works exploring the forbidden theme of child sexual abuse.[111] It is important to give victims of sexual abuse a voice. Films and other narratives can help empower sexual abuse victims.[112] Finally, in overturning the CPPA, the Court may have unwittingly helped to diminish the sexual allure of children.[113] Sexual prohibitions, such as the CPPA, might invite their own violation, by heightening the sexual allure of what they forbid.[114]

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107 Representative Mark Foley (R-Fl) *quoted in Child Porn Ruling Angers Ashcroft, available at* http://www.cbsnews.com/stories/2002/04/16/supremecourt/main506275.shtml (Apr. 16, 2002).

108 *See* http://www.usdoj.gov/criminal/ceos/ashcroft_childporn.htm (May 1, 2002) (quoting House Majority Whip Tom DeLay).

109 *See, e.g.*, Alison R. Gladowsky, *Has the Computer Revolution Placed Our Children in Danger? A Closer Look at the Child Pornography Prevention Act of 1996*, 8 CARDOZO WOMEN'S L.J. 21 (2001). In this article, the author defended Congress' justifications for enacting the CPPA and offered suggestions to combat the opposition that the CPPA was facing. She went on to argue that virtual child pornography poses the same threat as actual child pornography, and that it is used by pedophiles as a tool and that virtual child pornography has little or no social value.

110 *See* Clay Calvert, *Opening up an Academic Privilege and Shutting Down Child Modeling Sites: Revising Child Pornography Laws in the United States*, 107 DICK. L. REV. 253, 261 (2002). "Better knowledge via better testimony provided by neutral sources of information could well shape better laws." *Id.*

111 *Ashcroft*, 535 U.S. at 246.

112 *See generally* Henderson, *supra* note 4 (discussing the need the develop narratives of child sexual abuse).

113 Adler, *supra* note 5, at 212.

114 *Id.*

B. *The Research Privilege: The Usefulness of Studying Virtual Child Pornography*

Some scholars have called for a First Amendment-based academic research privilege to allow for the study and investigation of child pornography.[115] In overturning the ban on virtual child pornography, *Ashcroft v. Free Speech Coalition*, , opens the door to the study and investigation of certain images that would otherwise have been proscribed. However, some scholars feel that the freedom to study virtual child pornography is not enough. They call for a First Amendment-based research privilege to study actual child pornography.[116] With a better understanding of child pornography, lawmakers would be better equipped to fight it. For instance, Clay Calvert, a professor who has written extensively on First Amendment issues, calls for such a privilege in order to shield scholars studying child pornography from prosecution under federal and state laws.[117]

Calvert argues that there are several justifications for a research privilege to study child pornography.[118] First, if scholars are not allowed to view child pornography for legitimate academic purposes, then society is left to rely on either the Government or pedophiles for their information on child pornography.[119] That is, rather than being able to rely on scholars as an independent and neutral source of information, society would have to gather their information on this topic from either law enforcers or law breakers. When it comes to discussing child pornography, there is a vacuum of neutral information.[120] People tend to become hysterical or irrational when speaking about child pornography, or even thinking about it.[121] On the other hand, scholars could study the subject objectively.[122] They could be valuable, neutral sources of information.[123] An objective study would prove beneficial as the statistics on the prevalence of child pornography vary dramatically.[124] Scholars could verify the extent of child pornography.

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115 *See* Calvert, *supra* note 110. It should be noted that there is an affirmative defense for those who possess less than three images and who either destroy these images or notify law enforcement officials. *See* 18 U.S.C. §§ 2252-2252(A) (2002).

116 Possession of actual child pornography remains illegal. *See* Osbourne v. Ohio, 495 U.S. 103 (1990).

117 Calvert, *supra* note 110, at 259. Calvert stresses the importance of defining the scope of a research privilege, to reduce the chance of non-academic uses. The most important condition on the privilege is that an academic institution must employ the researcher invoking it. Also, the privilege must be limited to studying images that are already in existence. *Id.* at 266.

118 *Id.* at 259-63.

119 *See id.* at 260.

120 *See id.* at 261.

121 *See* Adler, *supra* note 49, at 935 (arguing that the passion and irrationality surrounding the problem of child pornography law have resulted in bad law).

122 *See id.*

123 *See* Calvert, *supra* note 110, at 261.

124 *See* Adler, *supra* note 5, at 217-18. Ironically, the CPPA made criminal many of the studies that could inform an analysis of child pornography. Under the CPPA, researchers could not

The need for an objective study leads directly to the second reason for an academic research privilege. Neutral sources, not directly tied to law enforcement agencies, could testify before congressional subcommittees considering proposed revisions to child pornography laws.[125] Knowledge from neutral sources of information could help shape better laws.[126]

Lastly, Calvert argues that an academic research privilege to study child pornography can be justified because of the heightened attention given to child pornography today.[127] He draws a parallel between media images depicting violence and images depicting child sexuality and sexual activity.[128] Just as scholars study the effects of violent images, they should be allowed to study child pornography without fear of prosecution.[129] The government sometimes cites academic research to support their desire to curb violence in the media.[130] Academic research on the scope and nature of child pornography could prove to be similarly useful to legislative bodies.[131]

A First Amendment-based research privilege to study and investigate child pornography would allow society to better comprehend the scope of child pornography. With a better understanding, lawmakers would be better equipped to halt its production. While no academic research privilege to study child pornography exists, as of yet, *Ashcroft v. Free Speech Coalition*, in overturning the ban on virtual child pornography and allowing the use of certain images, is a step in this direction.

The seed of an academic research privilege was planted in *New York v. Ferber*.[132] In a concurring opinion, Justice Stevens wrote, "[t]hus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientist studying human behavior, could not, in my opinion, be made a crime."[133] Despite the

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study the impact of virtual child pornography to determine whether it "whets the appetite" of the viewer. They could not determine whether there is, in fact, a connection between viewing certain images and committing illegal acts. *See* Brief of Amici Curiae the American Civil Liberties Union et al. at 6, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (No. 00-795).

125 *See* Calvert, *supra* note 110, at 261.

126 *Id.*

127 *Id.* at 262; *see also* http://www.survivorsswindon.com/ore.htm (last modified Dec. 14, 2003) (discussing Operation Ore, the United Kingdom's investigation into "online pedophiles"); http://www.theregister.co.uk/content/6/29043.html (Jan. 27, 2003) (revealing that 7,272 names were passed onto British police in connection with Operation Ore, including the names of at least twenty senior executives, an official with the Church of England and Pete Townsend of the Who). Townsend claimed he was researching child pornography for a book he is writing based on his own experiences as being abused as a child. Interestingly enough, the Who's rock opera, *Tommy*, features a child who is sexually abused by his uncle.

128 Calvert, *supra* note 110, at 262-63.

129 *Id.* at 263.

130 *See id.*

131 *See id.*

132 458 U.S. 747 (1982) (Stevens, J., concurring).

133 *Id.* at 778.

fact that Justice Stevens' opinion was a concurrence, without precedential value, some courts have cited his opinion favorably.[134] For instance, a federal district court in New York held that a defendant "may well advance the argument that his possession of child pornography was pursuant to research he was undertaking in his capacity as psychiatrist . . . ."[135] Similarly, a district court in Maine indicated that in some cases involving university level research, defendants in child pornography cases should be able to assert a "literary purpose" defense.[136] In addition, some states' child pornography statutes contain an exception for material used for a "bona fide artistic, medical, scientific, educational, religious, governmental or judicial purpose."[137] Thus, many jurisdictions recognize the literary, artistic, political or scientific value tied to images. Depictions of abuse, while often repugnant, can actually be a very strong method by which to confront and discuss these difficult issues. Such depictions and stories have tremendous power. By sparking a dialogue on child sexual abuse, society will be better equipped to prevent it.

C. *The Power of Narrative Voice: Works that Give Voice to Sexual Abuse Victims*

A narrative, or story, is an account of events. A narrative can be spoken or written. It can be factual or fictitious. The narrative voice in works of art, including films, can be a strong method by which to convey a message. The ability to tell a story is a powerful one. People express themselves through the telling of stories.[138] The telling of a narrative is "someone telling someone else that something happened."[139] Storytellers are empowered by speaking. In telling their tale, storytellers, in turn, inspire and empower others. Narratives can broaden the listener's capacity to sympathize with others' experiences.[140] The narrative endows the speaker with credibility and familiarizes the listener with different ways of conceptualizing and describing situations.[141] This is what is meant by the power of narrative voice.

Narrative is a form of discourse that is significantly different from

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134 *See* Calvert, *supra* note 110, at 267.

135 U.S. v. Lamb, 945 F. Supp. 441, 450 (N.D.N.Y. 1996) (citing Justice Stevens' concurrence in *Ferber* and recognizing the need for a legitimate use defense for researchers and psychiatrists).

136 *See* U.S. v. Bunnell, No. CRIM. 02-13-B-S, 2002 U.S. Dist. WL 981457, at *3-7 (D. Me. May 10, 2002); *see also* U.S. v. Fox, 248 F.3d 394 (5th Cir. 2001) (recognizing the need for a legitimate use defense for artists); Calvert, *supra* note 110, at 268.

137 *See* CONN. GEN. STAT. § 53(a)(2001). Several other states have statutes with similar exceptions. *See* CAL. PENAL CODE § 311.2(e)(West 2001); GA. CODE ANN. § 16-12-100(d)(2001); N.Y. PENAL LAW§ 235.15(2)(McKinney 2000).

138 *See* Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CIN. L. REV. 95 (1994).

139 *Id.* at 98.

140 *See id.* at 142.

141 *See id.*

standard academic texts.[142] It is a form of discourse that allows for the expression of emotion and emotion-laden thoughts.[143] Narratives bring moral conflict to the forefront.[144] *Ashcroft v. Free Speech Coalition*, in overturning the CPPA, opened the door to films and portrayals that can be useful in expressing emotion and bringing conflicts, including child sexual abuse, to the forefront. For instance, the CPPA prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[145] Films and stories with literary, artistic, political or scientific value contain narratives with moralizing discourse, which mere academic texts do not.

The materials banned by the CPPA did not need appeal to the prurient interest.[146] Any depiction of sexually explicit activity, no matter how it was presented, would have been banned.[147] For instance, the CPPA would have even proscribed a picture in a psychology manual or a movie depicting the horrors of sexual abuse.[148] The Court discussed how the CPPA would have prohibited works exploring themes of teenage sexuality.[149] The Court mentions Williams Shakespeare's *Romeo and Juliet*, the work that arguably created the most famous pair of teenage lovers, one of whom is just thirteen.[150] Shakespeare's play has inspired no less than forty motion pictures, some of which suggest that the teenagers consummated their relationship (e.g. 1996's *Romeo and Juliet*, directed by Baz Luhrmann).[151] *American Beauty*, also cited by the Court, contains many scenes that would have been banned by the CPPA.[152] In the film, a teenage girl engages in sexual relations with her teenage boyfriend.[153] In another scene, another teenage girl yields herself to a middle-aged man.[154] Finally, the film contains a scene where, although the audience understands the act is not actually happening; one character believes he is watching a teenage boy perform a

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142 *See* Cook, *supra* note 138, at 99. "They differ in emphasis, perspective, and style. Writers of literature employ techniques of voice, syntax, and symbolism that often contrast sharply with those used by writers of academic articles; the products do not look at all the same." *Id.* at 128-29.

143 *See id.* at 101.

144 *See id.* at 99.

145 18 U.S.C. § 2256(8)(B) (1996).

146 *Ashcroft*, 535 U.S. at 246.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Ashcroft*, 535 U.S. at 247; *see also* ROMEO + JULIET (20th Century Fox 1996).

151 *See* ROMEO + JULIET (20th Century Fox 1996).

152 *Ashcroft*, 535 U.S. at 248; *see also* AMERICAN BEAUTY (DreamWorks 1999). *American Beauty* won the Academy Award for Best Picture in 2000.

153 *See* AMERICAN BEAUTY (DreamWorks 1999).

154 *Id.*

sexual act on an older man.[155] *American Beauty*, an evocative portrayal of the dark side that lies beneath the seemingly placid surface of American suburban life, earned popular and critical success. The Court also cites *Traffic*.[156] This film depicts a sixteen year old girl trading sex for drugs.[157] The film was intended to be a critique of drug prohibition. The teenager's sexuality was used in the film to make a strong social statement about the potentially devastating effects of drugs.[158] The film would not have made such an impact without scenes involving the girl's sexuality.

Furthermore as the Court notes, the CPPA would have also prohibited works exploring the forbidden theme of child sexual abuse.[159] *Antwone Fisher*, a film released in 2002, depicts the true story of a boy who survives physical, emotional and sexual abuse to become a successful writer and children's advocate.[160] The sexual abuse in *Antwone Fisher* was not explicit, it was implied off camera. However, under the CPPA, if a film was advertised or described in such a manner that conveyed the impression that it contained a visual depiction of a minor engaging in sexually explicit conduct, it could be banned.[161] Thus, even though there were no sexually explicit scenes in *Antwone Fisher*, the film could have potentially been banned under the CPPA, if an advertisement or trailer suggested that such a scene might be found within it. Today, *Antwone Fisher* exists as an inspiration for others who have been victims of sexual abuse.

Another film dealing with child sexual abuse is *Capturing the Friedmans*, which won the Documentary Grand Jury Prize at the 2003 Sundance Film Festival.[162] *Capturing the Friedmans* is an examination of a suburban family torn apart by child sexual abuse allegations made against the father.[163] The film deliberately leaves many questions unanswered. This prompts the viewer to engage in a dialogue about difficult subjects. These contemporary films highlight that child sexual abuse is a relevant topic. *Ashcroft v. Free Speech Coalition* will encourage and facilitate such works.

It is imperative to develop sexual abuse narratives, in order to better comprehend abuse, and to enable society to protect children against the dangers of abuse.[164] .In her article in the *Virginia Journal of Social Policy and*

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155 *See id.*

156 *Ashcroft*, 535 U.S. at 247; *see also* TRAFFIC (USA Films 2000). *Traffic* was nominated for an Academy Award for Best Picture in 2001.

157 *See* TRAFFIC (USA Films 2000).

158 *See id.*

159 *Ashcroft*, 535 U.S. at 246.

160 ANTWONE FISHER (20th Century Fox 2002).

161 *Ashcroft*, 535 U.S. at 257; *see also* 18 U.S.C. § 2256(8)(D) (1996).

162 CAPTURING THE FRIEDMANS (Magnolia Pictures 2003).

163 *Id.*

164 Henderson, *supra* note 4.

the Law, Lynne Henderson argues that if there is no way to tell the story of sexual abuse, there cannot be a way to respond to it.[165] If adult victims of sexualized violence traditionally have had little or no voice, then it is likely that victims of child sexual abuse have had even less of a voice.[166] The voices of many outsiders, such as children, have been excluded from the predominant discourse, surrounding sexual abuse.[167] Our experience is enriched by the inclusion of previously unheard speakers in the dialogue.[168] For instance, narratives can play a beneficial role in supporting claims of child sexual abuse.

Narratives that document the concrete, immediate and individual harms and pains of everyday life have a power and force that often transcend statistical or more generalized accounts of social inequities. Narratives can evoke compassion, heighten awareness, bridge individual and collective differences, and provide a more comprehensive and systematic understanding of complex social and legal issues.[169] Therefore, narratives found in serious literary or artistic works, such as films that would have otherwise been proscribed under the CPPA, can have many positive effects in our society.

There is an atmosphere of disillusionment regarding the credibility of child victims in sexual abuse cases.[170] Narratives need to be actively encouraged because even when victims of child sexual abuse do speak, they are often not heard.[171] Claims of sexual abuse are often silenced.[172] The silencing of claims of sexual abuse usually takes one of two forms. The first level at which silencing, or denial, operates is at the individual level.[173] This silencing is due to the belief that children often have a difficult time distinguishing between reality and fantasy.[174] Thus, they are likely to concoct stories and it is difficult to tell whether they are telling the truth when they

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165 *Id.*

166 *See* Cook, *supra* note 138, at 113 (discussing that issues relating to sexual assault, abuse and sexual harassment are not often discussed in public). *See also* Henderson, *supra* note 4, at 481. "Unlike most victims of other sexualized violence, the victims of child sexual abuse have had little or no voice, creating a literal as well as figurative absence of narrative about the harm." *Id.*

167 *See* Cook, *supra* note 138, at 142.

168 *See id.*

169 *See Colleen* Sheppard & Sarah Westphal, *Narratives, Law and the Relational Context: Exploring Stories of Violence in Young Women's Lives*, 15 WIS. WOMEN'S L.J. 335, 336 (2000).

170 *See* Leslie Feiner, *The Whole Truth: Restoring Reality to Children's Narrative in Long-Term Incest Cases*, 87 J. CRIM. L. & CRIMINOLOGY 1385, 1386 (1997).

171 Henderson, *supra* note 4, at 537 (speaking of "the resistance to claims of sexual abuse").

172 *See generally* Elizabeth Mertz & Kimberly A. Lonsway, *The Power of Denial: Individual and Cultural Constructions of Child Sexual Abuse*, 92 NW. U. L. REV. 1415 (1998) (discussing the various forms of denial of child sexual abuses claims).

173 *See id.*

174 FLORENCE RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN 80-81 (McGraw-Hill Book Co. 1980).

allege sexual abuse. However:

> Children perceive the difference between reality and fantasy, often with more accuracy than adults, and sexual advances are in fact made to children in the course of everyday life. To insist that these advances are imagined is to underestimate a child's perceptive capacity, create doubt and confusion, undermine self-confidence, and provide the food upon which nightmares are nourished.[175]

The belief that children cannot distinguish between reality and fantasy contributes to "perpetuating a meta-narrative of falsity."[176] Children are viewed as having less than the fully formed personalities of adults.[177] Thus, when someone says a child is somewhat confused or perhaps simply mistaken, it evokes a sense that their less than fully formed awareness has gone astray.[178] Child abusers may attack a young victim's basic sense that he can trust his own senses, his own perception of reality.[179] This is especially true in cases of incest. Given a child's dependence on a parent for physical survival, not to mention emotional security, it is unsurprising that children can easily be induced to recant if a parent denies having committed sexual abuse.[180] Because children are often perceived as confused or mistaken, there is often skepticism surrounding a child's ability to recall abuse.[181] For the reasons stated above, narratives, including films, should actively be encouraged because they will help children to be heard. Creating narratives will help eradicate the silencing of children's voices and allow children to be recognized as credible speakers, which will aid in the prevention of abuse.[182] Society needs films and other works of art that counteract the "dominant narratives of fantasy, falsehood, and non-existence."[183] *Ashcroft v. Free Speech Coalition* will encourage the creation of works with serious value. Not only do facts influence narratives, but narratives influence what society perceives as the truth.[184] Such works can help give voice to child victims whose stories traditionally have gone unheard.

The second level at which silencing operates is at the cultural or

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175 *Id.*

176 Henderson, *supra* note 4, at 512.

177 Mertz & Lonsway, *supra* note 172, at 1422-23.

178 *See id.*

179 *See id.* at 1425.

180 *See id.*

181 Henderson, *supra* note 4, at 487. Henderson speaks of the "dominant narratives of fantasy, falsehood, and non-existence." *Id.* at 495. This skepticism has "deflected attention from the reality of child abuse, allowing us to avoid acknowledging that reality and the questions of moral responsibility that it raises." *Id.* at 487.

182 Henderson, *supra* note 4, at 483 (discussing that narratives determine what is accepted as "true" and "untrue" by imposing meanings on events).

183 *Id.* at 495.

184 *Id.* at 484.

institutional level.[185] This silencing is due to contemporary societal attitudes. Elizabeth Mertz and Kimberly A. Lonsway confront such cultural and institutional denial of child sexual abuse claims in their article in the *Northwestern University Law Review*.[186] They discuss not only how abusers effectively deny their actions, but how "courts, therapists, academics and the media can collude in this denial."[187] They argue that a common feature of the denial of child sexual abuse claims is an attempt to neutralize the voices of the victims.[188] Society neutralizes the voices of victims so much so that the victims themselves actually participate in deconstructing their own stories of abuse.[189] Therefore, according to Lynne Henderson, "We need to provide safe ways of telling, and we need to develop sensitive ways to interview and record experiences — not only should we worry about 'suggestibility,' but we also need to worry about efforts to suppress telling."[190]

Child victims of sexual violence are easy targets for this kind of erasure due to aspects of our cultural belief system.[191] Florence Rush elaborates on our cultural belief system and contemporary attitudes toward the sexual abuse of children in her book, *The Best Kept Secret: Sexual Abuse of Children*.[192] For instance, a "current inclination to view child-adult sex as harmless and a reluctance to hold molesters responsible for their behavior has encouraged sexual liberationists to insist... 'children aren't always children anymore,' that pedophilia is a victimless crime and, comes the sexual revolution, 'the taboo of pedophilia will fall away.'"[193] These attitudes work together to silence the voices of sexual abuse victims, especially children.

The current scandal within the Catholic Church illustrates the cultural and institutional silencing of child sexual abuse claims. The sexual abuse crisis within the Catholic Church illustrates decades of silencing. According to a *New York Times* survey of documented cases of sexual abuse by priests (through December 31, 2002), sexual abuse has spread to almost every American diocese and involves more than 1,200 priests.[194] The danger of allegations of child sexual abuse going unheard is increased when the

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185 Mertz & Lonsway, *supra* note 172, at 1417.

186 *See id.* at 1415.

187 *Id.* at 1419.

188 *Id.* at 1417.

189 *Id.*

190 Henderson, *supra* note 4, at 541.

191 Mertz & Lonsway, *supra* note 172, at 1418.

192 RUSH, *supra* note 174.

193 *See id.* (quoting WILLIAM KRAEMER ET AL., THE NORMAL AND ABNORMAL LOVE OF CHILDREN (Sheed Andrews and McMeel, Inc. 1976)).

194 Laurie Goodstein, *Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, at A1. The *New York Times* used church documents, court records and published reports to identify the names of 1,205 Catholic priests accused of sexually abusing minors in the United States. *Id.* at A20. According to this survey, these priests are known to have abused more than 4,000 minors over the past sixty years. *Id.* at A1.

allegation is brought against a patriarchal institution, such as the Church.[195] According to Florence Rush, "[s]exual abuse thrived under Christendom."[196] If average citizens could rape and ravage without punishment, then members of the clergy enjoyed even greater privileges.[197] Allegations of child sexual abuse against members of the clergy were often vehemently denied. Claims were viewed through the lens of suspicion. This continues to be the case today as, "secrecy and silence have always characterized the Catholic Church, and in many of these cases the Church does all it can to prevent the charges from coming to light."[198] Priests spend years being trained in an insular world where secrets and transgressions, especially of the sexual kind, are considered matters for the confessional, not for the courts.[199] The danger of victims being silenced is great when the allegations of abuse are brought against a patriarchal institution, such as the Catholic Church.

Films and other works of art dealing with child sexual abuse are and will continue to be especially resonant in today's climate, as we come to terms with new allegations and revelations of sexual abuse by priests.[200] In the past year, hundreds of people have broken their silence on widespread child sexual abuse in the Catholic Church. Recently, there has been an avalanche of allegations against priests.[201] Two new films, *The Magdalene Sisters* and *The Crime of Father Amaro*, have upset the leaders of the Catholic Church.[202] While these two films do not directly address pedophilia, they illustrate the codified secrecy within the Catholic Church that makes committing such transgressions (and getting away with them) possible.[203] The decision in *Ashcroft v. Free Speech Coalition* opens the door to film makers and other creative people, who, hopefully, will produce works which force viewers to confront and respond to the sexual abuse of children in a positive way.

Films such as *The Magdalene Sisters* and *The Crime of Father Amaro* might inspire victims who have remained silent to finally come forward. Even though priests are known to have abused over 4,000 people in the past sixty

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195 *See* Mary E. Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. U. L. REV. 1459 (1998).

196 RUSH, *supra* note 174, at 30.

197 *See id.* at 36.

198 Lisa Miller & David France, *Sins Of The Father*, NEWSWEEK, Mar. 4, 2002 at 48. *See also* Goodstein, *supra* note 194, at A1 (discussing the Catholic Church's "deeply ingrained culture of secrecy").

199 *See* Goodstein, *supra* note 194, at A20.

200 *The Boys of St. Vincent* is one film that grapples with the short and long term effects of child sexual abuse.

201 *See* Miller & France, *supra* note 198.

202 THE MAGDALENE SISTERS (Miramax Films 2002); THE CRIME OF FATHER AMARO (Columbia Pictures 2002).

203 *See* Jessica Winter, *Mass Hysteria*, VILLAGE VOICE, Oct. 23, 2002, at 40.

years, these numbers merely represent those victims who have come forward.[204] A *New York Times* survey only shows what has become public about a crime that is usually kept secret by both victim and abuser.[205] Some child abuse experts believe that it will take many years for victims to become fully aware of the nature of the abuse that occurred when they were children.[206] The apparent decline in priest sex abuse cases in the 1990s may be due to the fact that the victims of the 1990s have yet to come forward.[207] Dr. Mary Gail Frawley-O'Dea, executive director of the Trauma Center of the Manhattan Institute for Psychoanalysis and a sexual abuse expert, believes that we will see a rise in priest sex abuse cases around 2005, when the people who were abused in the 1990s finally come forward.[208] Dr. Frawley-O'Dea believes that "[i]t takes a lot of survivors until their mid-20s, when they have accumulated enough life experience, to know they were messed up."[209] The combination of the veil of secrecy surrounding the Catholic Church and the fact that many victims have yet to come forward highlights the need for sexual abuse narratives.

D. *Diminishing The Sexual Allure of Children: The Unintended Effect of* Ashcroft v. Free Speech Coalition

Thus far, it has been observed that *Ashcroft v. Free Speech Coalition* has the positive effect of encouraging and facilitating works with serious literary, artistic, political or scientific value. Such works might contribute to the protection of children by encouraging the development of narratives that help society confront and respond to the difficult issue of child sexual abuse. In addition, *Ashcroft v. Free Speech Coalition* might contribute to the protection of children in another, more subtle way. In her article in the *Columbia Law Review*, Amy Adler argues that child pornography law, intended to protect children from sexual exploitation, threatens to reinforce the very problem it attacks.[210] "The legal tool that we designed to liberate children from sexual abuse threatens to enslave us all, by constructing a world in which we are enthralled – anguished, enticed, bombarded – by the spectacle of the sexual child."[211]

Adler explores the possibility that sexual prohibitions, such as the CPPA, might invite their own violation by heightening the sexual allure of

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204 *See* Goodstein, *supra* note 194, at A1.
205 *See id.*
206 *See id.* at A21.
207 *See id.*
208 *See* Goodstein, *supra* note 194, at A21.
209 *Id.*
210 *See* Adler, *supra* note 5.
211 *Id.* at 210.

what they forbid.[212] While she does not doubt that child pornography law has social benefits, she suggests that the law may perpetuate and escalate the sexual representation of the children that it seeks to constrain because people possess an inherent desire to transgress prohibitions, particularly in the realm of the regulation of sexual desires.[213] Adler makes a Freudian argument: sexual prohibitions exert a special hold on us because they allow us unconsciously to revisit our forbidden Oedipal longings. To exploit its pleasure to the fullest, we need to experience sexuality as forbidden.[214] The contravention of prohibitions is the theme of some of the most familiar myths of western culture such as Adam and Eve or Prometheus and Pandora.[215] In his book on the nature of transgression, *Wayward Puritans: A Study on the Sociology of Deviance*, Kai T. Erikson writes that "it is not surprising that deviant behavior should seem to appear in a community at exactly those points where it is most feared."[216] He writes that:

> [A]ny community which feels jeopardized by a particular form of behavior will impose more severe sanctions against it and devote more time and energy to the task of rooting it out. At the same time, however, the very fact that a group expresses its concern about a given set of values often seems to draw a deviant response from certain of its members.[217]

Adler believes that Erikson's theory indicates that society's heightened anxiety about child pornography makes it more inviting to violate criminal sanctions against it.[218]

One of the reasons Congress passed the CPPA was because it feared that child pornography was changing our view of children.[219] Congress feared that child pornography encourages a societal perception of children as sexual objects.[220] Adler agrees that child pornography changes the way we perceive children.[221] However, she goes further to say child pornography law itself has changed our view of children because child pornography law

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212 *Id.* at 212.

213 *See id.* at 245.

214 *See id.* at 249.

215 *See* ROGER SHATTUCK, FORBIDDEN KNOWLEDGE: FROM PROMETHEUS TO PORNOGRAPHY 329 (St. Martin's Press 1996) (discussing "the perverse human tendency to transform prohibition into temptation").

216 KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 22 (John Wiley & Sons 1966) (using the Puritan community as a setting to examine ideas about deviant behavior).

217 *Id.* at 20.

218 Adler, *supra* note 5, at 251.

219 Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 21(11)(A) (1996); *see also* Adler *supra* note 5, at 264.

220 *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 21(11)(A) (1996).

221 *See* Adler, *supra* note 5, at 265.

requires us to see, for a moment, as a pedophile does.[222] The steps of applying the law usher us step by step into a pedophilic world.[223] "The law requires us to study pictures of children to uncover their potential sexual meanings, and in doing so, it explicitly exhorts us to take on the perspective of the pedophile."[224] Applying Adler's theory, the CPPA especially exhorted us to take on this perspective, because its definition of child pornography was so broad.[225]

United States v. Dost, a California district court case, illustrates how the law requires us to take on the gaze of a pedophile.[226] This case announced a six-part test for analyzing pictures to determine whether or not a picture constitutes a "lascivious exhibition of the genitals or pubic area" under child pornography law.[227] The application of the "Dost Test" requires an inquiry into the intended effect of the material on an audience of pedophiles.[228] It asks us to consider: whether the focal point of the image is on the child's genitalia or pubic area; whether the setting of the image is sexually suggestive; whether the child is depicted in an unnatural pose or in appropriate attire; whether the child is fully clothed, partially clothed or nude; whether the image suggests sexual coyness or a willingness to engage in sexual activity; and whether the image is intended to elicit a sexual response in the viewer.[229] The last and most significant factor asks whether the image is intended to elicit a sexual response in the viewer, specifically the gaze of a pedophile.[230] This question forces us to get inside the head of a pedophile and to see the world from his eyes.[231] Indeed, each factor of the Dost Test requires us to take on the perspective of a pedophile.[232] Therefore, the process by which the law roots out child pornography is part of the reason it cannot be completely eliminated.[233] "[T]he circularity of the solution exacerbates the circularity of the problem. As everything becomes child pornography in the eyes of the law – clothed children, coy children, children in settings where children are found – perhaps everything really does become pornographic."[234]

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222 *See id.*

223 *Id.* at 261.

224 *Id.* at 264.

225 *Ashcroft*, 535 U.S. at 234.

226 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd*, United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987).

227 *Id.* at 832.

228 *See* Adler, *supra* note 5, at 262.

229 *See Dost*, 636 F. Supp. at 832.

230 *See* Adler, *supra* note 5, at 262.

231 *Id.* at 263.

232 *Id.*

233 *See id.* at 264.

234 *Id.*

Society's obsession with child pornography has created an environment where children are commonly regarded as sex objects.[235] Whether or not we intend to, child pornography law urges us to see the world from a pedophile's perspective.[236] For instance, images that once seemed innocent are now terrifying because they are read as explicitly erotic.[237] Thus, child pornography law has the unintentional effect of heightening the sexual allure of children. We see that as the legal crisis over child pornography escalates, the sexual allure of children does, as well.[238] As rhetoric rises about the threat of child sexual abuse, the sexualized child continues to seduce us in advertising, fashion, popular culture and art.[239] For instance, the sexualized child is widespread in popular culture, seen everywhere from Calvin Klein advertisements to Britney Spears on the television.[240] The sexualized child is also a common subject in artistic culture.[241] Sally Mann, a popular, renowned photographer, takes erotic nude photographs of her prepubescent daughters.[242] Larry Clark, a disturbing and well-known photographer and filmmaker, documents the lives of drug-addicted and violent teenagers.[243] Our society is obsessed with the sexual child.[244]

The proliferation of child modeling websites is a strong demonstration of how the sexual allure of children has escalated. Because child pornography law has forced us to see the world through a pedophile's gaze, we have become threatened by what we perceive as the sexual allure of children. Thus, there is a move to criminalize a variety of images. In fact, in May 2002, less than one month after the *Ashcroft v. Free Speech Coalition* decision, Representative Mark Foley, of the Sixteenth District of Florida, sponsored the Child Modeling Exploitation Prevention Act of 2002 (CMEPA).[245] This bill would make it a federal crime to operate child modeling sites.[246] To accomplish that goal, the CMEPA would add a new

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235 *See* Richard Goldstein, *Prosecuting Pee Wee: A Child-Porn Case That Threatens Us All*, VILLAGE VOICE, Jan. 15-23, 2003, at 42 (discussing Paul Reubens' possession of child pornography charges).

236 *See* Adler, *supra* note 5, at 265; Goldstein, *supra* note 235, at 42.

237 *See* Goldstein, *supra* note 235, at 42 (discussing Paul Reubens' possession of child pornography charges).

238 *See* Adler, *supra* note 5, at 254.

239 *See id.*

240 *See id.* at 253.

241 *See id.*

242 *See id.*

243 *See* Adler, *supra* note 5, at 253.

244 *See id.* Adler suggests that Mann and Clark's popularity, coupled with their legal vulnerability, suggests the complicated relationship between legal prohibition and artistic popularity. *Id.*

245 H.R. 4667, 107th Cong. (2002); *see also* Calvert, *supra* note 110, at 257. The CMEPA is only a proposal. It is not enacted law.

246 Calvert, *supra* note 110, at 257.

section to the current federal child pornography statutes.[247] The CMEPA appears to be rife with overbreadth problems.[248] It would proscribe speech that is protected by the First Amendment.[249]

The move to criminalize child modeling websites illustrates Adler's concern that child pornography law has changed the way we perceive children.[250] In fashioning laws to battle what we perceive as child pornography, we run the risk of inverting the First Amendment.[251] "No matter how well-meaning our goals in fashioning child pornography law, we have still created a space for the perpetual discussion of children and sex, where children and sex are bound together and where sex extends its grip on children."[252] According to Adler, child pornography law is both the solution and the problem as "both keep the sexualized child before us."[253] Therefore, in striking down two provisions of the CPPA, *Ashcroft v. Free Speech Coalition* may have the unintended effect of diminishing the sexual allure of children.

IV. CONCLUSION

Congress enacted the CPPA in an effort to combat virtual child pornography.[254] *Ashcroft v. Free Speech Coalition* overturned two provisions of the CPPA for being overbroad and unconstitutional under the First Amendment.[255] The CPPA proscribed speech which was neither obscene nor child pornography and thus, chilled a substantial amount of speech protected by the First Amendment.[256] The government offered several justifications for the CPPA, arguing that the CPPA was necessary to protect children.[257] In the wake of *Ashcroft*, Congress proposed the COPPA and

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247 *Id.* at 278. The new section, to be called "Exploitative Child Modeling" would provide the following:

> Whoever displays, in or affecting interstate or foreign commerce, the image of a child who has not attained the age of 17 years, with the intent to make a financial gain thereby, or offers, in or affecting interstate or foreign commerce, to provide an image of such a child with the intent to make a financial gain thereby, without a purpose of marketing a product or service other than an image of a child model, shall be fined under this title or imprisoned not more than 10 years, or both.

H.R. 4667, 107th Cong. (2002).

248 Calvert, *supra* note 110, at 283.

249 *Id.* Considering this, it is doubtful that the CMEPA would withstand judicial review. *Id.* at 286.

250 Adler, *supra* note 5, at 256.

251 *See* Adler, *supra* note 49.

252 Adler, *supra* note 5, at 267-68.

253 *Id.* at 273.

254 S. REP. NO. 104-358, at 7 (1996).

255 *See Ashcroft*, 535 U.S. at 244-58.

256 *Id.*

257 *Id.* at 252.

passed PROTECT. The language of PROTECT remains overbroad and faces similar First Amendment problems. Despite the government's fears, the *Ashcroft v. Free Speech* decision may actually contribute to the protection of children by encouraging and facilitating works with literary, artistic, political or scientific value. Works that might have been banned under the CPPA can now have a positive effect in our society by sparking a dialogue on subjects that are difficult to discuss, such as child sexual abuse. Until society gathers more stories, we will have a diminished understanding of child sexual abuse.[258] Victims of child sexual abuse can benefit from the power of the narrative voice, because once their stories are told, society will better understand and be better equipped to fight abuse. Finally, *Ashcroft v. Free Speech Coalition* may ultimately benefit children by diminishing their sexual allure, as prohibitions, such as the CPPA, sometimes have the unintended effect of inviting their own transgression.[259]

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[258] *See* Henderson, *supra* note 4, at 543.

[259] *See* Adler, *supra* note 5, at 212.