

Computer-Generated Child Pornography: A Legal Alternative?

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*Meanwhile he carved his snow-white ivory
With marvellous triumphant artistry
And gave it perfect shape, more beautiful
Than ever woman born. His masterwork
Fired him with love. It seemed to be alive,
Its face to be a real girl's, a girl
Who wished to move—but modesty forbade.
Such art his art concealed. In admiration
His heart desired the body he had formed.*

Pygmalion
Ovid, *Metamorphoses*

Pygmalion was a man unable to find a suitable woman, and so he sculpted one for himself out of ivory. However, her perfect beauty aroused his passions and he ended up falling in love with his own creation. Luckily for Pygmalion, Venus took pity on him and gave life to the sculpture, and Pygmalion and his bride lived happily ever after. The “Pygmalions” of today are not so fortunate in this age of modern technology. Like Pygmalion’s tools, technology allows the modern man to create his own statues of ivory. Computers provide the necessary technology and man provides the creativity. It is this creativity and the uses to which it is put that is the subject of this Comment. For, unlike Pygmalion, some of today’s creators have used their artistic ability to impute the ugly morass of their own primal instincts into their creations. The creature born is computer-generated child pornography. And fortunately, Venus has not intervened.

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Computer technology has become much more complex within the last decade. Technology allows a user to generate simulated images of child pornography by altering or "morphing"¹ innocent photographs that are scanned into a computer. With the dawn of the Internet, users can now disseminate and receive information at a much faster rate and reach a wider population than ever before. Thus, the Internet is a powerful tool for someone wishing to distribute child pornography to a large population.

Although federal statutes criminalize placing child pornography into the federal mails,² the development of the Internet has made the distribution of information via the electronic analogue of the "mails" much more accessible to the average computer user. Computer technology allows the Internet to distribute information via telephone lines to locations all over the world.³ However, it also creates a new set of problems. Like a twisted version of Alice's looking glass, all the wonderful new possibilities presented by computer technology can easily become contorted into the perverse.

Congress reacted to this capacity to pervert technology by amending an existing child pornography statute to address such technology and its impact on child pornography. The Child Pornography Prevention Act's⁴ 1996 amendments include computer-generated children⁵ within its scope by adding "computer-generated image or picture" to the list of visual depictions already criminalized.⁶

This Comment does not debate the efficacy of the Child Pornography Prevention Act in accomplishing its purpose—the effective regulation of computer-generated images. Nor does this

1. "Morphing" is a technique by which multiple pictures are combined to make a final product, or where a picture is altered to change the substance of the depiction in either large or small proportions.

2. See, e.g., 18 U.S.C. §§ 2251, 2252, and 2252A (1984).

3. When that information crosses state lines or comes from abroad, the federal government has the authority to regulate that information. See U.S. CONST. art. I, § 8 cl. 7, 18 ("Congress shall have the Power . . . To establish Post Offices and Post Roads" as well as the ability to make laws in order to execute such power). Such power includes the regulation of child pornography. See 18 U.S.C. § 2251(c)(2)(A) (1984) (stating that it is illegal to knowingly permit a minor to engage in explicit sexual conduct producing a visual depiction when "such person knows or has reason to know that such notice or advertisement will be transported in interstate or foreign commerce by any means including by computer or mail"). See also 18 U.S.C. §§ 2252 and 2252A for further regulations against child pornography dissemination by federal mail.

4. 18 U.S.C. § 2256 (1986).

5. "Computer-generated child pornography" will be used to refer to pornography created without the use of minors in order to distinguish it from pornography using adults dressed as children, here referred to as "adult-simulated child pornography." See *infra* note 7.

6. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208 § 121(1)(8), 110 Stat. 3009-26, 18 U.S.C. § 2251 note.

Comment address adult-simulated child pornography.⁷ Rather, working under the assumption that the statute accomplishes what it aims to accomplish—namely the regulation of computer-generated child pornography—this Comment looks beyond the statute and its language to the broader discussion of the value in regulating this type of material. Specifically, this Comment will focus on two issues: first, whether legislation regulating computer-generated child pornography can survive First Amendment considerations of free speech, and second, the social arguments made in favor of regulating computer-generated child pornography. As this Comment will show, the government has a strong interest in protecting its children. It likewise has a legitimate interest in protecting other members of society. Both of these interests, combined with the material's lack of social value, propel computer-generated child pornography into that narrow class of unprotected speech in which obscenity and child pornography currently reside, rendering computer-generated child pornography subject to regulation despite any First Amendment concerns.

I. BACKGROUND

A. *Obscenity and Its Spin-Off, Child Pornography*

Obscenity has long been recognized as falling outside the protective umbrella of freedom of speech.⁸ Obscenity's cousin, child pornography, raises many of the same social concerns. Both are regulated in some respect to safeguard society from material that has little or no social value.⁹

7. Adult-simulated child pornography uses young-looking adults to convey the impression that children are featured when in actuality they are not. Although adult-simulated child pornography is outside the scope of this Comment, I encourage other interested readers to explore the impact of such material on the regulation of computer-generated child pornography.

8. See generally *Osborne v. Ohio*, 495 U.S. 103 (1990) (using reasoning in prior obscenity cases to justify excluding child pornography from First Amendment protection); *New York v. Ferber*, 458 U.S. 747 (1982) (likening child pornography to obscenity as nonprotected speech); *Miller v. California*, 413 U.S. 15 (1973) (creating test for States' regulation of obscenity); *Roth v. United States*, 354 U.S. 476 (1957) (sustaining conviction under obscenity statute); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that obscenity is without redeeming social importance and therefore without First Amendment protection).

9. "Obscenity" has been classified as works which, taken as a whole, appeal to the prurient interest in sex, depict sexual conduct in a patently offensive way, and do not have serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24. Child pornography has been classified in a similar manner. The New York Legislature found "the sale of . . . movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society" that it felt justified in aggressive prosecution for the distribution of such material. *Ferber*, 458 U.S. at 757, n.8.

The foundation for the exclusion of obscenity from First Amendment protection was laid down by the United States Supreme Court in *Chaplinsky v. New Hampshire*.¹⁰ In *Chaplinsky*, the court stated that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.¹¹

Although the Court acknowledged the lack of any First Amendment protection for obscene speech more than fifty years ago, it took legislatures quite a while longer to place child pornography within that same category.¹² Child pornography first received federal legislative attention in 1977, when Congress met to discuss the rising problem of child pornography in the United States. The Committee on Human Resources passed a resolution stating that the Committee had a "deep and abiding concern" for the well-being of the children of the United States and, because of that concern, felt it necessary to consider legislation targeted toward the elimination of child exploitation.¹³ The Committee's legislative goal in addressing the issue was to prevent the detrimental effects child pornography has on the children involved.¹⁴ Thus, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977.¹⁵ In cases interpreting the Act and similar legislation, courts have consistently upheld the Act and other legislative prohibitions of child pornography due to government's legitimate interest in protecting children from the harms of sexual exploitation.¹⁶

10. 315 U.S. 568 (1942).

11. *Id.* at 571-72.

12. See *New York v. Ferber*, 458 U.S. at 760-61, for a discussion of why child pornography does not necessarily fall under obscenity statutes.

13. See S. REP. 95-438, pt. 3 (1977), reprinted in 1978 U.S.C.C.A.N. 40.

14. See *id.* ("Of deep concern to the Committee is the effect of child pornography and prostitution on the children who become involved. . . . Such encounters cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future.").

15. 18 U.S.C. § 2251 (1984); Pub. L. No. 95-225, § 2(a), 92 Stat. 7.

16. For a discussion of why a state must have a legitimate interest in order to regulate speech, see *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973). See also *Ferber*, 458 U.S. at 757 (recognizing that a state's interest in protecting its youth is "compelling").

B. *Judicial Construction of the 1977 Act and Its Progeny*

Legislation prohibiting child pornography has been judicially upheld because of its impact on the depicted children. For example, in *New York v. Ferber*,¹⁷ decided in 1982, the Court heard a constitutional challenge to a New York statute that prohibited promoting the sexual performance of minors. The New York law stated that “[t]he care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children.”¹⁸ The Court, in acknowledging that nearly all of the States had enacted legislation targeted at combating child pornography, stated that “[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”¹⁹ Furthermore, the *Ferber* Court stated that “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”²⁰

When the Supreme Court first addressed the issue of child pornography in *Ferber*, it found that child pornography did not fit within its previous definition of obscenity as enunciated in *Miller v. California*.²¹ Almost a decade earlier, the *Miller* Court created a test for determining obscenity, stating that

[t]he basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²²

In *Ferber*, the Court held that the *Miller* test could not apply to the area of child pornography, given that the test lacked a stated interest in protecting the welfare of the children involved.²³ Because the *Miller* test was designed to combat obscenity and not child pornogra-

17. 458 U.S. 747 (1982).

18. *Id.* at 757.

19. *Id.* at 758.

20. *Id.* at 756-57 (quoting *Osborne v. Ohio*, 495 U.S. 103, 109 (1990)); see also *Aman v. Georgia*, 409 S.E.2d 645, 646 (Ga. 1991).

21. 413 U.S. 15 (1973).

22. *Id.* at 24.

23. *Ferber*, 458 U.S. at 761.

phy, it did not adequately reflect the psychological or physiological state of the child. According to the Court, a child could still be harmed under the *Miller* test when the work produced had an artistic or literary social value—emotional and physical damage to a child still occurs when the child is depicted in pornography, regardless of how “artistic” the pose.²⁴ To fill that void in the *Miller* test, the *Ferber* Court modified the test by holding that “[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.”²⁵ Thus, the *Ferber* decision reached beyond the limits of the *Miller* test by emphasizing the importance of the direct impact on children in child pornography legislation.

Because the impact of sexual exploitation on children was of primary importance in *Ferber*, it follows that if actual children are not involved in producing pornography, then the need to prohibit the conduct is also removed. Indeed, the *Ferber* Court embedded this idea in a prophetic statement: “the nature of the harm to be combated requires that the . . . offense be limited to works that visually depict sexual conduct by children below a specified age.”²⁶ The Court’s language implies that certain elements need to be met in order for the statute to apply: (1) a visual depiction; (2) of sexual conduct; (3) involving children; (4) below a specified age. Because of the Court’s use of the word “limited,” a logical extension of its statement would be that if one or more of those conditions did not apply, then the statute would not prohibit the conduct. That interpretation is strengthened by the Court’s later statement: “We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.”²⁷ Although the *Ferber* Court did not address the issue of computer-generated child pornography at that time because such material was not in existence, the language of the decision implies that the First Amendment may protect such material.

The district court’s findings in *United States v. Lamb*²⁸ support such an interpretation of the *Ferber* Court’s statement. *Lamb*, which was decided in 1996, was the first case to test the boundaries of the

24. *Id.* at 761.

25. *Id.* at 765.

26. *Id.* at 764.

27. *Id.* at 764-65.

28. 945 F. Supp. 441, 454 (N.D.N.Y. 1996).

Child Pornography Prevention Act in dealing with computer-generated child pornography. In *Lamb*, the defendant was charged with twenty-three counts of receiving computer transmissions of sexually explicit images of children.²⁹ He argued that the Government must prove that the children depicted in the computer images were actual children. The Government did not dispute his contention.³⁰ The court agreed with the defendant and further emphasized the point by stating:

[A] cartoon character, a computer-animated image, a person eighteen or over who appears to be a minor, or an image of an adult "doctored" by computer or other means to appear younger are not covered by the statute. [18 U.S.C. 2256(1)] Although the welfare of children might well be served by prohibiting, for instance, the trafficking of child pornography cartoons, it does not appear that Congress intended such a result. . . . The question whether the images are of actual children under eighteen is an element of the crime that the government must prove at trial, and as such [it] is part of the general issue of guilt.³¹

Thus, in the first case in which a defendant argued that the Child Pornography Protection Act did not apply because actual children were not employed in the pornography, the court agreed that such a defense would negate an element of the crime. In its decision, the court made the first definitive statutory interpretation regarding an individual's culpability when using computer-generated child images to produce child pornography.³²

Although the *Lamb* decision appeared in 1996, it did not interpret the Child Pornography Prevention Act's 1996 amendments,³³ which broadened the category of visual images to include computer-generated graphics. However, the decision does illustrate the deficiencies of the Act without the amendments in its ability to regulate "childless" child pornography. The unamended Act did not provide for future technological capabilities which would allow the creation and dissemi-

29. *Id.* at 445.

30. *Id.* at 454.

31. *Id.*

32. Although this Comment does not debate the effectiveness of the Child Pornography Prevention Act, it is interesting to note the court's interpretation of the Act prior to its 1996 amendments. For present purposes, the opinion is used to demonstrate one court's view of computer-generated images.

33. For recent cases interpreting the 1996 Amendments to the Act, see *United States v. Hilton*, 999 F. Supp. 131, 136 (D. Maine, 1998) (holding that criminalizing "visual depictions" was unconstitutionally vague). See generally *United States v. Matthews*, WL 384588 (D. Md., June 29, 1988) (holding that research for freelance news reporting was not a defense to possession of child pornography obtained from the Internet).

nation of computer-generated child pornography. The following sections discuss why expanding the reach of the Act into computer-generated child pornography is necessary.

II. WILL THE REGULATION OF COMPUTER-GENERATED CHILD PORNOGRAPHY VIOLATE FIRST AMENDMENT PROTECTIONS?

While most Americans, as well as the judiciary, hold freedom of speech dear, that freedom is not absolute. There are constraints on the freedom of speech that exist for the greater good of society. The question is thus posed: "How can our society's freedom of expression be balanced with justified restraint concerning computer-generated child pornography?" This Comment argues that it cannot.

A. *The First Amendment Is Not Intended to Protect All Forms of Speech*

The First Amendment was originally meant to promote educated thought resonant with unpopular ideas—a tool to educate the uninformed and rally for political and ideological change.³⁴ However, this notion has been contorted into a convenient argument for unrestrained license to promulgate base, perverted, and degrading material, utterly devoid of social value, under the guise of free speech. "[S]elf-gratification radically transforms the First Amendment concept of self-expression."³⁵ It allows our modern contortions of freedom of expression to laden the First Amendment to such an extent as to deny it its potency and render it meaningless. "The eighteenth-century First Amendment, with its emphasis on serious public discourse and its adherence to an anticensorship maxim, can no longer easily coexist with the self-indulgent bent of a mass-entertainment culture."³⁶ This Comment does not presume to argue for a major revamping of the First Amendment's interpretation as it pertains to modern notions of protected speech; such a discussion is beyond its scope. Rather, this

34. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("[I]f, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed . . . that without free speech and assembly discussion would be futile . . . ; that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

35. RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* 154 (1996).

36. *Id.* at 35.

Comment merely suggests that the particular issue of computer-generated child pornography falls into a unique class that does not merit First Amendment protection.

The drafters of the First Amendment never contemplated the contorted use to which it has been put today.

The noble Madisonian First Amendment stands to lose its staying power when it is trivialized, marginalized, and eroticized by a mass commercial entertainment culture wed to self-gratification, particularly pornographic gratification. In such a world, the Madisonian ideal is subverted because key prerequisites for that system are perverted. Plainly put, the traditional system of free expression misfunctions in our contemporary popular culture. It misfunctions to the extent that we equate gratification with realization. It misfunctions to the extent that pornographic images masquerade as political ideas. . . . In all of this, the First Amendment is re-created so that personal pleasure is the ultimate political purpose.³⁷

The First Amendment was never intended to be an instrument designed to promote depravity and degeneration, and its use for such ends should be viewed with skepticism and trepidation lest our nation lose yet another handful of the threads still binding us to our original fabric.

Although there are compelling social and historical arguments in favor of prohibiting the child pornographic form of "speech," those arguments are not enough—the prohibition must still survive First Amendment scrutiny.³⁸ Because the freedom of speech is an enumerated right, *i.e.*, it is embodied in the Constitution in the First Amendment, any regulation restricting that right is subject to strict scrutiny.³⁹ However, while freedom of speech is cherished by the American people,⁴⁰ its guarantee is not absolute. In certain instances, the Court will permit a curb on that freedom due to the circumstances and

37. *Id.* at 150-51 (emphasis in original).

38. The criteria by which to evaluate a free speech regulation was set out by the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Under the Court's test, the government may impose restrictions on speech if they are (1) content-neutral, (2) narrowly tailored to meet a specific purpose, and (3) leave other channels of communication open. *Id.* at 791.

39. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech. . ."). Exceptions to the application of strict scrutiny occur in instances of certain commercial speech. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

40. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 24 (1971) (reasoning that freedom of speech "will ultimately produce a more capable citizenry and more perfect polity in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

]context of the speech. One such justification for the curtailment is known as the "clear and present danger" doctrine.

B. *The Development of the Clear and Present Danger Doctrine*

The clear and present danger doctrine was originally proposed and advocated by Justices Holmes and Brandeis.⁴¹ Justice Holmes first employed the doctrine in *Schenck v. United States*,⁴² where the defendants violated the Espionage Act of 1917 by distributing a circular opposing the draft. Justice Holmes wrote that "[t]he question in every case is whether the words used are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁴³

As the doctrine evolved, courts have placed emphasis on the *present* aspect of the doctrine; the danger must not only be clear, it must also pose an immediate threat.⁴⁴ According to Justice Brandeis in *Whitney v. California*, the threat deriving from expression is not clear and present unless "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."⁴⁵

Although the *Whitney* decision was later overruled by *Brandenburg v. Ohio*,⁴⁶ immediacy is still a necessary element. The Court held in *Brandenburg* that

the constitutional guarantees of free speech and free press do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁴⁷

Brandenburg represents the current state of the law concerning the clear and present danger doctrine. The most significant feature of the *Brandenburg* test is the absence of reference to the "clear and present danger" doctrine itself. While the test used in *Brandenburg* (that words

41. See *Schenck v. United States*, 249 U.S. 47 (1919).

42. 249 U.S. 47 (1919).

43. *Id.* at 52.

44. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring).

45. *Id.*

46. 395 U.S. 444 (1969).

47. *Id.* at 447.

must be directed to produce lawless activity; that the threat is immediate; and that, based purely on the objective language used, the lawless action is likely to occur)⁴⁸ does not state that it is a clear and present danger test, its results are nearly identical to such a test.

C. *Does the Clear and Present Danger Doctrine Apply to Computer-Generated Child Pornography?*

It is difficult to argue that the clear and present danger doctrine applies to computer-generated child pornography. This Comment addresses the argument largely to point out its inapplicability.

Under *Brandenburg*, the State must show the defendant's intent to produce immediate and likely lawless activity before it may regulate computer-generated child pornography using the clear and present danger test. While harm certainly results—either to the child in the picture, to other children as a result of a viewer's acting out his or her desires, or to the viewer himself or herself—it is unknown how immediate that harm is.⁴⁹

Furthermore, and most importantly, the clear and present danger doctrine acts as a desperate policeman: it will only "shoot" if all other means of stopping the lawless activity are unavailing. The doctrine is not applied to a certain type of speech unilaterally; rather, it is applied to a certain type of speech used in a particular way—with a particular intent and with a particular probable result. It is a very fact-specific test—all the circumstances surrounding its application must be examined in each instance it is applied.

Because a broad criminalization of computer-generated child pornography is necessary, such a fact-specific test should not govern any particular instance of harm.

D. *Is Computer-Generated Child Pornography Even "Speech?"*

An even more interesting argument exists regarding computer-generated child pornography than that concerning "clear and present danger"—namely, that computer-generated child pornography is not speech at all. In such a case, the clear and present danger argument need not be addressed.

48. See also *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that particular speech did not pose clear and present danger based on context in which it was given).

49. See Friel, *infra* note 86, at 248-49 (stating that computer-generated child pornography does not present immediate danger and, therefore, cannot survive the clear and present danger test).

The Supreme Court has recognized certain categories of expression that it refuses to consider "speech." Obscenity comprises one category.⁵⁰ Child pornography comprises another.⁵¹ The Court's willingness to parcel off certain categories as unprotected speech suggests that other, as yet undiscovered, categories may also fall into such a classification.

As previously noted, the primary reasons for the Court's refusal to grant constitutional protection to certain speech has been based on the nature and context of that speech. For example, fighting words are regulable because of their peculiar ability to incite one to fight before considering one's actions.⁵² Obscenity is likewise regulable because it lacks social value and exhibits degrading and prurient sexual characteristics. Furthermore, certain sexually explicit material is simply deemed socially objectionable. Thus, such material is not protected largely due to policy considerations.

A similar vein of unprotected speech lies in child pornography. Again, the Court has used social policy to prevent its protection. Society, speaking through the Court, believes that children deserve greater protection than adults against the abuse inherent in pornography. This development in free speech jurisprudence occurred in the

50. See *Miller*, 413 U.S. at 19-20.

51. See *Ferber*, 458 U.S. at 747.

52. Although the fighting words doctrine sounds strikingly like the clear and present danger doctrine, the two are distinguishable. First, the purpose behind each has been somewhat different. Fighting words are not considered speech because of their ability to provoke an unthinking reaction of violence in another. See *Chaplinsky v. New Hampshire*, 315 U.S. at 572. The speech has little or no social value, and the little it does have is outweighed by social order and morality. See generally *Dennis v. United States*, 341 U.S. 494 (1951) (upholding the conviction of conspirators attempting to organize the Communist Party of the United States whose goal was to overthrow the existing government using violence). The clear and present danger doctrine, on the other hand, does not weigh the speech's value. Rather, the clear and present danger doctrine applies automatically to speech that, by its very nature, is political and provocative.

Second, the content of speech is examined under the clear and present danger doctrine. Certain types of speech, such as unpopular political speech, have been held to be dangerous because of their potential to incite lawless behavior. See generally *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding conviction for threatening to violently overthrow the government); *Whitney v. California*, 274 U.S. 357 (1927) (upholding conviction for assisting communist party in advocating violence to achieve political change); *Dennis*, 341 U.S. at 494. Although many of the Court's decisions applying the clear and present danger doctrine have been expressly overruled or are no longer followed, the fact that the doctrine was used based in part on the type of speech is significant. It is probably due to that very reason that the doctrine has not resurfaced since the *Brandenburg* decision in 1969.

Finally, unlike speech subject to a clear and present danger analysis, which is still speech, fighting words are not considered speech. See *Chaplinsky*, 315 U.S. at 572. The reason for its status as nonspeech lies in its lack of social value. *Id.*

Court's 1982 decision in *New York v. Ferber*.⁵³ If, within only the last twenty years, the Supreme Court has chiseled out another unprotected category of speech using its notions of desirable social policy, then it is likely that social policy may dictate further, undiscovered areas against which the Court will again wield its pickax. And like its twin, child pornography, computer-generated child pornography presents plausible characteristics which justify withholding constitutional protection on policy grounds. It degrades children in the same manner as conventional child pornography; it carries the same messages as child pornography; and it is put to the same uses as child pornography. Thus, computer-generated child pornography should receive the same constitutional treatment as child pornography.

The regulation of computer-generated child pornography will not infringe on First Amendment speech protections. First, Congress has a legitimate interest in protecting potential child victims from abuse due to increased dissemination of child pornography depicting computer-generated persons. Admittedly, the paternalistic regulation of an individual's thoughts has been held an unpersuasive governmental interest.⁵⁴ However, Congress will not regulate computer-generated child pornography with the paternalistic goal of controlling private thoughts, but, rather, with the legitimate interest of controlling private experience.⁵⁵ Protecting the victims of child pornography against private abuse is a legitimate state interest. As the *Osborne* Court stated in affirming the *Ferber* holding, "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'"⁵⁶ The interest in children as victims is no less relevant merely because the pornographic material is created using computer-generated child images rather than actual children. In both instances children are portrayed in a luridly degrading manner and are therefore at risk of victimization by pedophiles and sexual abusers.⁵⁷ Such potential risk

53. 458 U.S. 747 (1982).

54. See *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (holding that the paternalistic goal of controlling private thoughts is not a legitimate state interest).

55. To those readers who are repulsed at the possibility of the Court legitimizing the regulation of private experience, I refer you to *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld a statute criminalizing sodomy, even though the conduct at issue occurred between consenting adults in the privacy of home.

56. *Osborne*, 495 U.S. at 109.

57. Depictions of child pornography can magnify a desire to sexually abuse children by weakening internal inhibitions against acting out the desire. According to sociologist David Finkelhor's model of child sexual abuse, four conditions must be satisfied:

to children should allow Congress wide latitude in crafting laws intended to protect children.

Second, the judiciary has explicitly recognized that Congress has this latitude when enacting statutes for the protection of children. For instance, the *Ferber* Court held that “the States are entitled to greater leeway in the regulation of pornographic depictions of children” than in the regulation of obscenity due to the special interest they have in the protection of children.⁵⁸ The Court acknowledged that the government also has a special interest in its youth,⁵⁹ noting that it has repeatedly “sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected speech.”⁶⁰ In other words, when a legitimate interest in the protection of children lies within the legislative aim of a statute, that statute will be liberally construed to comply with the constitutional requirements of the First Amendment.

Because the proposed amendments to the Child Pornography Prevention Act reflect a legitimate governmental interest in protecting children from abuse, they do not alter the statute’s ability to withstand a potential First Amendment challenge.

III. WHY THE USE OF COMPUTER-GENERATED CHILD PORNOGRAPHY SHOULD BE SUBJECT TO CRIMINAL LIABILITY

Our defence, then, when we are reminded that we banished poetry from our state, must be that its character was such as to give us good grounds for so doing and that our argument required it. . . . Brought up as we have been in our own admirably constituted societies, we are bound to love poetry, and we shall be glad if it proves to have high value and truth; but in the absence of such proof we shall, whenever we listen to it, recite this argument of ours to ourselves as a charm to prevent us falling under the spell of a childish and vulgar passion. Our

First, someone has to want to abuse a child sexually. Second, this person’s internal inhibitions against acting out this desire have to be undermined [*e.g.*, by objectification]. Third, this person’s social inhibitions against acting out this desire (*e.g.*, fear of being caught and punished) have to be undermined. Fourth, the would-be perpetrator has to undermine or overcome his or her chosen victim’s capacity to avoid or resist the sexual abuse.

DIANA E.H. RUSSELL, PH.D., AGAINST PORNOGRAPHY: THE EVIDENCE OF HARM 118 (1993) (emphasis in original). See also Child Pornography Prevention Act of 1996, *infra* note 69, at § 121(1)(3), 110 Stat. 3009-26, 18 U.S.C. § 2256 note.

58. 458 U.S. at 756-57.

59. See *id.* at 757 (stating that the government was justified in regulating indecent broadcasting received by children).

60. *Id.*

theme shall be that such poetry has no serious value or claim to truth, and we shall warn its hearers to fear its effects on the constitution of their inner selves, and tell them to adopt the view of poetry we have described.

Plato, *The Republic*⁶¹

Although Socrates spoke of poetry, his reasoning equally applies to the case at hand—the issue of computer-generated child pornography. Socrates was concerned about poetry that rendered pleasure, but lacked “high value and truth,” poetry of such a nature as to elicit “vulgar passion” in those who heard it. He not only warned of its impact on the individual, but also of its impact on society at large. In other words, to Socrates, pleasure was not the ultimate measure of social worth; pleasure’s value was tempered by its imprint upon the soul of society.

This Comment by no means advocates the placement of Socrates’s poetry and our computer-generated child pornography in the same category of unprotected speech. Poetry typically possesses that redeeming characteristic which computer-generated child pornography does not: artistic and social value. Thoughts and their expression through the medium of words reflect the countenance and processes of the crafter and allow the hearer to weigh the matter. Computer-generated child pornography, on the other hand, reflects the prurient depravity of the crafter and allows no room for the viewer to weigh its value; rather, it invades his thoughts and imposes its pictures upon his very soul. It is precisely this reasoning which demands that Socrates’s argument, while possibly misguided as it pertains to poetry, be applied to an evil of a much worse and threatening nature—computer-generated child pornography.

Like the poetry in Socrates’s imagined state, child pornography has been banned in our real one. The primary thrust behind its prohibition was not the effect upon the “soul of society,” but its effect on the actual children involved. Therefore, the question arises whether the rationale behind such regulation will survive if actual children are no longer portrayed. However, the social concerns regarding child pornography extend beyond the actual children depicted and are strong enough to legitimate its regulation even when such pornography bypasses direct involvement of children by using innovative technology.

61. Penguin Classics, 438-39 (2d ed. 1955). Socrates did not record his own words; they were written later by others, including Plato, a pupil of Socrates.

A. *A Legitimate Interest Exists to Protect Not Only Victims, but Also Participants*

The United States has long recognized the government's legitimate interest in protecting society from its own lurid tendencies. Virtually unchallenged laws exist against prostitution, suicide, voluntary self-mutilation, brutalizing "bare fist" fights, bigamy, and dueling.⁶² These statutes clearly suppress an individual's freedom to associate and act according to one's own choosing, but "few people today seriously claim such statutes violate the First Amendment or any other constitutional provision."⁶³

Examples of legislation enacted for the moral edification of society are laws against bearbaiting and cockfighting: "Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles."⁶⁴ How much more, then, is society debased if allowed to create and view images of children depicted in sexually explicit scenarios?

Technology has impressed upon society the need for the legislature to criminalize computer-generated child pornography.⁶⁵ The Supreme Court has held that the "depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retain[] First Amendment protection."⁶⁶ The Court emphasized that its decision was based on the "welfare of the children engaged in its production."⁶⁷ But these holdings are inadequate in light of such material's effect upon society. The use of actual children should not be the only consideration when deciding whether to prohibit computer-generated child pornography. Rather, its effects upon its viewers as well as other

62. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 n.15 (1973).

63. *Id.*

64. *Id.* (quoting IRVING KRISTOL, *ON THE DEMOCRATIC IDEA IN AMERICA* 33 (1972)).

65. See, e.g., *Lamb*, 945 F. Supp. at 454 (stating that "the welfare of children might well be served by prohibiting . . . the trafficking of child pornography cartoons, [but] it does not appear that Congress intended such a result"). If, then, Congress can amend 18 U.S.C. § 2256 to reflect such an intention, the amendment would likely pass judicial scrutiny upon an adequate showing of legitimate government interest.

66. *Ferber*, 458 U.S. at 765. See also *United States v. Wiegand*, 812 F.2d 1239, 1245 (9th Cir. 1986) (holding that an adult can legally consent to being photographed in pornographic material); see generally *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding that pornography is a protected form of speech).

67. *Ferber*, 458 U.S. at 764.

children should be major determinants in deciding whether computer-generated child pornography is subject to regulation.

Just as the Court in *Ferber* found that a strong moral and social interest⁶⁸ exists for prohibiting actual child pornography, similar moral and social interests exist for prohibiting computer-generated child pornography.⁶⁹ There is a desensitization that occurs when a person is repeatedly engaged in a repulsive sensation.⁷⁰ After a while, that person becomes immune to his or her first feelings of repulsion and incorporates the offensive experience into his or her own level of acceptability.⁷¹ After an extended period of time, a more intense level of stimulation is required to achieve the same level of repulsion and, thus, that person can gradually withstand increasing amounts of unpleasant stimuli.⁷² Such is the occurrence among pedophiles: "[T]he use of child pornography can desensitize the viewer to the pathology of sexual abuse or exploitation of children so that it can become acceptable to and even preferred by the viewer. . . ."⁷³

If computer-generated child pornography is legislatively allowed to be created and distributed, then society is silently desensitized through repeated exposure.⁷⁴ Not only will individual members have

68. See also *Chaplinsky*, 315 U.S. at 571-72 (recognizing a social interest in order and morality as a basis for banning obscenity).

69. A 1986 study of eighty-nine nonincarcerated sex offenders found that "slightly more than one-third of the child molesters and rapists reported at least occasionally being incited to commit an offense by exposure to forced or consenting pornography." RUSSELL, *supra* note 57, at 147. See also Child Pornography Prevention Act of 1996, Pub. L. No. 104-208 § 121(1)(11)(A), 110 Stat. 3009-27, 18 U.S.C. § 2251 note ("the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them") (emphasis added).

70. A 1984 study examined the effects of nonviolent pornography by showing thirty-six nonviolent pornographic films to the first group, eighteen such films to a second group, and thirty-six nonpornographic films to the control group. RUSSELL, *supra* note 57, at 130. The researchers found that the subjects in the first two groups desired stronger and stronger material, indicating that "pornography can transform a male who was not previously interested in the more abusive types of pornography, into one who is turned on by such material." *Id.* (emphasis in original). A similar study designed to measure desensitization found that viewers of X-rated and R-rated sexually violent movies rated the movies as "less graphic and less gory" and "more humorous" and "more enjoyable" after repeated exposure. *Id.* at 136-37. For a general discussion of systematic desensitization, see JEFFREY S. NEVID ET AL., *ABNORMAL PSYCHOLOGY* 199-200 (Prentice Hall, 2d ed., 1994).

71. See NEVID ET AL., *supra* note 70.

72. *Id.*

73. Congressional findings, Pub. L. 104-208, Div. A, Title I, § 101(a), Sept. 30, 1996, 110 Stat. 3009-26(4). See also RUSSELL, *supra* note 57.

74. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208 § 121(1)(4), 110 Stat. 3009-26, 18 U.S.C. § 2251 note; see also Child Pornography Prevention Act of 1996, at § 121(1)(10)(A),(11)(B), 110 Stat. 3009-27, 18 U.S.C. § 2251 note ("[T]he existence of and traffic

legislative permission to access this material without restraint, but that unfettered access will erode the ability of computer-generated child pornography to shock society—by its commonplace acceptance, society, too, will become desensitized to its images. Unless computer-generated child pornography is recognized as belonging in the same class as child pornography and subjected to the same regulations as regular child pornography, society will be forced to crucify one twin, while tolerating the existence of the other. That will result either in society's realization of the noxious creation it has embraced, or in its Pygmalion-like intoxication with that creation, unable to discern its own crumbling state—the modern societal Nero fiddles as America burns.

B. *Allowing Computer-Generated Child Pornography Will Not Benefit Children*

Some argue that allowing computer-generated child pornography would insulate children from abuse, as they would no longer be necessary to pornography's production.⁷⁵ However, this result, although optimistic, is not likely. Instead of reducing child pornography dissemination through the use of computer-generated child pornography, the incidence of child pornography would likely increase due to technology's eradication of criminal liability.⁷⁶ Congress's findings indicate that child pornography is often used "by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, as well as a model for sexual acting out with children."⁷⁷

in child pornographic images created the potential for many types of harm in the community and presents a clear and present danger to all children. . . . This sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children."'). These same dangers can occur when computer-generated child images are used instead of actual persons, since, as Congress noted, the effect the images have is on the viewers and general society.

75. See Debra D. Burke, *Computer Legislation: Article: The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 339, 464 (1997) ("[V]iewing virtual child pornography may produce the opposite effect and alleviate the desire to pursue actual children.").

76. See *Osborne*, 495 U.S. at 110 ("According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground."). There is no reason, then, to believe the reverse will not occur if a possibility of legally maneuvering around the federal statute exists.

77. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208 § 121(1)(4), 110 Stat. 3009-26, 18 U.S.C. § 2251 note. The study cited *supra* note 69 found that 53% of the child molesters who "reported being incited by pornography to commit an offense" purposely used pornography to prepare for committing the molestation. RUSSELL, *supra* note 57, at 147. Russell notes that even if the child molesters who had already decided to commit the molestation before using pornography were eliminated from the sample, 47% would still remain who "were at least

Allowing the existence of computer-generated child pornography will likely increase pedophiles' acting out their desires with children. And while it is not necessarily logical that all pedophiles viewing such material are incited to act out their desires, it is also not logical to suggest that no causal relationship, or even correlation, exists between the two behaviors. Although one author has held that such correlation is "too tenuous a link" to sustain suppression,⁷⁸ her conclusion is not supported by Congressional findings and other studies.⁷⁹ In fact, a real material danger exists that such simulated material will be used to seduce children into performing sexual acts.⁸⁰ If, as Congress found, simulated persons are virtually indistinguishable from actual persons, then there should be little difference between their respective seductive abilities. Children could be as readily seduced by computer images as by real images, as they are virtually indistinguishable. And that seduction would escalate if computer images were afforded legal protection; instead of those images being driven underground as they are today, they would be legally available to any adult for the asking.

In addition to the danger of increased victimization resulting from legalized dissemination of computer-generated child pornography, there is also a danger that society's views toward children may shift. For over a decade, professors Catharine MacKinnon and Andrea Dworkin have advocated legislation regulating adult pornography.⁸¹ Their arguments center on pornography's effect on women in society and on women's treatment by society.⁸² Their main contention is that pornography demeans women by promoting a construct of domination and subordination where women are shown to enjoy their powerlessness and desire their victimization.⁸³ MacKinnon states, "[s]how me

sometimes incited by pornography to commit an offense." *Id.*

78. Burke, *supra* note 75, at 465.

79. See Catherine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L.L. REV. 1, 50-65 (1985) (using laboratory data to correlate pornography and attitudinal changes in tested subjects). See also RUSSELL, *supra* note 57, at 118-48 (reporting studies supporting a causative role).

80. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208 § 121(1)(3), 110 Stat. 3009-26, 18 U.S.C. § 2251 note ("[C]hild pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity."). See also RUSSELL, *supra* note 57, at 118-48 (discussing pornography's role in the rape of women).

81. See MacKinnon, *supra* note 79.

82. *Id.* at 50-65.

83. MacKinnon, *supra* note 79; see also CATHARINE A. MACKINNON, *ONLY WORDS* (1993); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981). See also RUSSELL, *supra* note 57, at 141: Russell quoted one woman, who said

an abuse of women in society, I'll show it to you made sex in the pornography. If you want to know who is being hurt in this society, go see what is being done and to whom in pornography. . . ."⁸⁴

The MacKinnon-Dworkin theory rests on women's past and continuing inability to assert their rights and their dignity in a society that suppresses and mocks that assertion in its embrace of materials that degrade and humiliate women. This theory is especially applicable to the issue of computer-generated child pornography. If women are unable to counter society's treatment and view of their sex, then that inability is even more profoundly apparent in the case of children. If, like adult pornography, computer-generated child pornography becomes legalized, then children will risk falling into that same category of sexual objects in which women are already placed. Currently, the criminalization of child pornography as well as the stigma attached to it prevents its acceptance, excepting the underground circles in which it circulates.

If there was no longer a need for computer-generated child pornography to be relegated to the underground, and if computer-generated child pornography is legalized because of the absence of children used in production, then it could become as commonplace as adult pornography is today. No longer would only skulking pedophiles look at it in the darkness of their private rooms. No longer would the purveyors and patrons of that material be forced to circulate it among their secret circles. Instead, computer-generated child pornography would be available at local supermarkets. Ultimately, its effects would begin to seep into America's fiber and be reflected in its luster, just as adult pornography has pervaded American society.

If allowed to surface legally, computer-generated child pornography would have a drastically detrimental effect on society: not only would its individuals be more easily drained of conscience and morals, but its children would be placed in jeopardy of objectification. Thus, its prohibition should be supported socially as well as judicially.

of her husband:

He told me that if I loved him I would do these things [in the pornography], and that, as I could see from the things that he had read to me in the magazines, a lot of times women didn't like it initially, but if I tried it enough, I would probably like it or learn to like it.

84. MacKinnon, *supra* note 79, at 56. For a contrasting view, see Donald P. Judges, 1 PSYCHOL. PUB. POL'Y & L. 643 (1995), stating that the degradation inherent in censorship far outweighs the feminist arguments of MacKinnon and Dworkin.

C. Virtual Reality

Another consideration in the regulation of computer-generated child pornography is the effect on society of technology's ability to simulate children. This consideration involves an innovation known as "virtual reality."⁸⁵ Virtual reality allows a user to put on equipment which enables him or her to manipulate and interact with a fictionalized environment. Carrying the virtual reality concept one step further, if instead of simulating two-dimensional child pornographic forms one could create an interactive computer-generated child pornographic world, the results would be horrific.⁸⁶ "Without fear of venereal diseases [, legal ramifications] or emotional commitments, and with frenzied visual, aural, and tactile sensations, real people could share erotic moments with imagistic 'people'"⁸⁷ or children. Instead of merely viewing a child, a user could have "virtual sex" with images of computer-generated children.

Many such "games" currently exist on CD-ROM.⁸⁸ Although not necessarily depicting children, these games promote sexual activity with various female characters. One of these games depicts a three-dimensional woman, Valerie.⁸⁹ As author Blake Bilstad has noted, "Valerie represents a quantum leap in pornography because she is not just a more sophisticated blow-up doll; she is the quintessential realization of woman as sex object. Precisely because she is not a real woman (no matter how much verisimilitude her makers achieve), ultimately anything one does to her is OK."⁹⁰ But these acts are not OK. The acts allow a user to have the same experience that he or she would if his or her object were human.

Through virtual reality, all the debasement abhorred in the perpetration of actual crimes would be tolerated and allowed in the

85. See *King v. Innovation Books, A Division of Innovative Corp.*, 976 F.2d 824, 827 (2d Cir. 1992) ("Virtual reality . . . allows [one] to enter a three-dimensional computer environment simulating various action scenarios."); see generally *FASA Corp. v. Playmates Toys, Inc.*, 912 F. Supp. 1124 (N.D. Ill. 1996) (noting that virtual reality allows multiplayers to experience real time simulation in which they can interact with a computer-generated universe).

86. See Samantha L. Friel, *Porn by Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 VAL. U.L. REV. 207, 224 (1997) (suggesting that virtual child pornography may soon replace the actual use of children in production).

87. COLLINS & SKOVER, *supra* note 35, at 156-57.

88. See Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 COMP. HIGH TECH. L.J. 321, 334 (1997).

89. *Id.*

90. *Id.* at 334-35.

perpetration of virtual crimes. Professors Collins and Skover recognize that

Pornography entices people to lust after sexualized images while readily abandoning the experience of real people. It concocts a pseudoworld in which all too frequently decent talk among men and women succumbs to indecent views of men and women, togetherness surrenders to selfness, and contact and communication between the sexes yield to autoeroticization.⁹¹

Although their observations pertain to pornography, their point applies to the world of virtual reality as well. While that world retains its pornographic nature, it also adds the feature of interaction. And both of those characteristics have now been combined by entrepreneurial opportunists to create games through which desperate persons can “express” themselves physically as well as emotionally. However, those “games” still have a real effect on a real person: the user.

At this point, many would argue that it is for precisely that reason that these “games” should be allowed—because the victims are not human, children are protected. However, this reasoning has missed one extremely important point. Victims, while a primary concern, are not always the only concern—sometimes the actors need protection as well.

Unrestrained choice as to what one will expose oneself is not only unrealistic, it is also unprecedented. Freedom to choose, freedom to express oneself, and freedom to act do not necessarily lead to freedom from regulation and freedom from consequence. Freedom, just like anything else, is not an absolute. America’s past illustrates exactly that point by its prohibition of bear-baiting, cockfighting, prostitution, suicide and the like. In those examples, the actor did not have the freedom to choose to watch a cockfight or to express himself through the act of suicide. Such measures are protective in nature, not necessarily toward the victim, but toward the participant. The upsurge of interactive computer-generated sex demonstrates that America has not outgrown its need for a paternalistic government to protect itself from its own lurid experiential tendencies.

The “victimless” crimes capable of being committed via virtual reality demonstrate a need for user protection. Extrapolating computer-generated sexual scenarios to other crimes, one could commit the virtual equivalent of battery, rape, murder, etc., via virtual reality. Allowing such conduct to occur under legal protection would under-

91. COLLINS & SKOVER, *supra* note 35, at 154.

mine the psychological well-being of those who participate in such events. As one author put it, “[b]its and bytes are not flesh and blood, but neither are they always ethically neutral.”⁹² Just as bearbaiting and cockfighting were abolished for the protection of those who viewed such activities, the use of computer-generated persons should not be used for purposes in which the use of actual persons would be criminal. Such use can only contribute to the users’ debasement and brutalization, the prevention of which has previously served as a legitimate governmental interest.

Similarly, because pedophiles and sexual abusers are aroused, and thus more prone to act out, after viewing child pornography,⁹³ virtual reality could reasonably be expected to contribute to child exploitation as well as to other brutalizing crimes. Because of the need to protect not only victims, but also actors, computer-generated child pornography should be subject to governmental regulation.⁹⁴

IV. CONCLUSION

The technological advancement of computer capabilities is a wondrous and efficient blessing to many persons. However, this blessing also has the capacity to become one of society’s most dangerous curses. Through morphing and other technologies, computer-generated images of children can be employed in the production of “nonperson” child pornography. Although past governmental interests were based upon compelling motivation to protect the children involved in pornography’s production, that motivation is significantly reduced, if not eradicated altogether, by the ability to produce the same material without ever photographing a child in a sexually explicit pose. However, strong policy arguments pervade this notion of proposed legality by demonstrating a need to protect society from the effects of such material. As has been demonstrated through past judicial holdings, the acts of both passive viewers and active participants in certain objectionable behavior are legitimately subject to regulation. The same rationales that apply to other regulated behaviors should be applied with the same, if not more, vigor in the case of computer-generated child pornography.

92. Bilstad, *supra* note 88, at 336 (quoting Margaret Wertheim, *The Electronic Orgasm*, GLAMOR, Feb. 1995, at 243).

93. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208 § 121(1)(3), 110 Stat. 3009-26, 18 U.S.C. § 2251 note.

94. Although virtual reality hypotheticals have been articulated that suggest computer-generated adult images, it is outside the scope of this Comment to fully address such possibilities.