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# DIGITIZED PORNOGRAPHY MEETS THE FIRST AMENDMENT

*Eric M. Freedman\**

As the professor on the panel, I feel that I should start by putting our subject into a bit of context. Then I will focus on the criminalization of depictions of imaginary children before saying a few words about the overbreadth of this statute.

By way of context, then, the problem that we are discussing is one that is characteristic of the introduction of new communications technologies.

At the end of the nineteenth century, when movies were first shown, people came running out of the theaters in panic when they saw a picture of a locomotive bearing down upon them—the effect was that intense.<sup>1</sup> As a result, in 1915 the United States Supreme Court said that movies are not protected, because they are something different, a dangerous form of expression, and not the newspapers, which the Framers had in mind.<sup>2</sup> But in 1952, the Court had to overrule that case, with some embarrassment,<sup>3</sup>

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This Article consists of the substance of the author's remarks on May 1, 2001 at the Benjamin N. Cardozo School of Law's Panel entitled *The Fate of the Child Pornography Act of 1996*. It builds upon Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883 (1996) [hereafter Freedman, *Remove the Lens Cap*] and Eric M. Freedman, *Pondering Pixelized Pixies*, COMM. ASSOC. COMPUTING MACH., Aug. 2001, at 27, and has been slightly updated in light of the lucid decision in *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002), which invalidated the sections of the Act that are discussed below. The Court's reasoning was substantially similar to that of this Article.

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<sup>1</sup> See Freedman, *Remove the Lens Cap*, *supra* note \*, at 958, n.368 (citation omitted).

<sup>2</sup> See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 241-45 (1915).

<sup>3</sup> See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952).

because by then movies had been incorporated into society and the initial hysteria had died. There are many more examples along those lines,<sup>4</sup> which simply reflect the reality that new communications modalities succeed exactly because they produce more dramatic, more vivid, and more realistic representations than the ones that could previously be created. A photograph is truer to life than a painting, which is why there developed a market for photographs, and movies displaced magic lantern shows for the same reason.

Furthermore, the hysteria problem is exacerbated because almost invariably one of the first uses of a new communications technique is to spread political dissent and sexual imagery.<sup>5</sup> This is a phenomenon that has been with us for centuries, but one that still gets governments very upset,<sup>6</sup> particularly because the early innovators tend to be the younger, more iconoclastic members of society, who are just the ones that make incumbent power-holders uneasy.

With that background, let's try to step back a bit and consider whether the First Amendment will survive the invention of the computer by looking at the various justifications that have been offered for a statute that criminalizes purely digital depictions. These are pixelized pixies. They are nothing more or less than images created by a more vivid communications technology than previously existed—images that some of our panelists really don't like.

Well that, too, is usual in First Amendment discussions. The single most common comment from someone advocating suppression of a particular communication is, "No one is a greater supporter of the First Amendment than I am. But this particular material under discussion simply doesn't deserve First Amendment protection." The appropriate answer to that is: "Why not?" Precisely because the First Amendment is designed to protect the unpopular message, the one whose dissemination would never carry if put to a vote, the burden is never on the speaker to explain the social value of the speech but always on the state to justify its suppression.

So before we get to child pornography and to this statute in particular, let us look at the state's justifications for the suppression of obscenity generally.<sup>7</sup> Both the oldest and the

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<sup>4</sup> See Freedman, *Remove the Lens Cap*, *supra* note \*, at 956-69 (providing numerous instances).

<sup>5</sup> See *id.* at 959 n.369.

<sup>6</sup> See *id.* at 960 n.377.

<sup>7</sup> For an extended formal treatment of this subject, see *id.* at 894-924.

newest interest asserted is simple thought control. In the original religious settlements of New England, if you indulged in unorthodox speech, reflecting unorthodox thinking, you not only endangered your own welfare—you were going to Hell forever—but, more critically, you put the entire community at the same risk.<sup>8</sup>

This thought control purpose still survives in some quarters. Catharine MacKinnon and Andrea Dworkin, for instance, have been leaders in arguing that the First Amendment should not protect “pornography,” broadly defined,<sup>9</sup> because pornography teaches by its content and demonstrates by its very existence that women are not full members of the community.<sup>10</sup> However, as the Seventh Circuit correctly ruled in invalidating an Indianapolis ordinance based on this theory, “the state may not ordain preferred viewpoints.”<sup>11</sup>

Thought control is not a legitimate First Amendment purpose even if—perhaps especially if—the thoughts are ones that the majority considers socially undesirable, as was true, for instance in the very recent past of beliefs in the propriety of homosexual conduct and interracial marriage. For example, when D.H. Lawrence’s work *Lady Chatterly’s Lover*,<sup>12</sup> which concerns a woman who has an inadequate husband and finds satisfaction with a gamekeeper, was made into a movie, the State of New York sought to ban it.<sup>13</sup> The government’s rationale was that the “presentation of adultery as a desirable, acceptable and proper pattern of behavior” was “contrary to the moral standards, the religious precepts and the legal code of its citizenry.”<sup>14</sup> Invalidating the state’s effort as a violation of the First Amendment, Justice Potter Stewart wrote for the Court,

[t]his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be

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<sup>8</sup> See Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 395 (1963) (commenting that obscenity is suppressed “for the purity of the community and for the salvation and welfare of the ‘consumer.’ Obscenity, at bottom, is not crime. Obscenity is sin.”).

<sup>9</sup> For a discussion of this definitional issue, see Freedman, *Remove the Lens Cap*, *supra* note \*, at 934.

<sup>10</sup> See *id.* at 931-32.

<sup>11</sup> *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 352 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1985).

<sup>12</sup> D.H. LAWRENCE, *LADY CHATTERLY’S LOVER* (Cambridge Univ. Press 1993) (1928).

<sup>13</sup> See *Kingsley Int’l Pictures Corp. v. Bd. of Regents*, 360 U.S. 684 (1959).

<sup>14</sup> *Id.* at 688-89, 695.

proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.<sup>15</sup>

So the argument that pedophiles should not be thinking that sexual conduct with children is acceptable behavior<sup>16</sup> is simply contrary to the First Amendment. For that reason, you get people like our two defenders of the Act here tonight conceding that point but defending the statute on the basis that this particular material will incite people to commit misconduct, whether direct sexual assaults or the seduction of children.<sup>17</sup> But there is a very long history of the First Amendment getting more and more stringent with respect to the justification that some communication will lead the hearers to behave in an antisocial manner, because that argument has been so often misused in political contexts.<sup>18</sup> Thus, in 1969 in *Brandenburg v. Ohio*,<sup>19</sup> the Court held that the government could only suppress speech on this basis if it proved that the communication is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>20</sup> That case built upon a number of basic principles.

One of these, which is especially applicable to our discussion here tonight comes from *Butler v. Michigan*,<sup>21</sup> which struck down a law aimed at violent comic books because they were publications “manifestly tending to the corruption of the morals of youth.”<sup>22</sup> The law in *Butler* violated the First Amendment, Justice Frankfurter wrote, because, “[t]he incidence of this enactment is to

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<sup>15</sup> *Id.* at 688-89; *see also* *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1399 (citing this case and its re-iteration of the words of Justice Brandeis quoted *infra* text accompanying note 25).

<sup>16</sup> *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26, § 1(4) (viewing “sexually explicit” images of juveniles “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”); *see also id.* at § 121(11)(B) (adding that such images create an unwholesome moral environment).

<sup>17</sup> *See* Panel Discussion, *The Fate of the Child Pornography Act of 1996*, at 8 (Benjamin N. Cardozo School of Law, May 1, 2001) (on file with CARDOZO L. REV.) [hereinafter Panel Transcript] (“I don’t think there is any reasonable argument that can be mustered that would contest the fact that the pedophile community, the preferential and situational offenders use child pornography to seduce and coerece real children.”); *id.* at 11 (“The Ninth Circuit failed to . . . find a link between visual depictions of child pornography in how the pedophile community and situational and preferential offenders abuse children. We think that that’s wrong.”); *see also id.* at 40 (“In enacting the CPPA, Congress found that virtual child pornography serves as a catalyst that stimulates . . . and ‘inflames pedophiles into sexual abuse of children,’ by ‘whetting their own sexual appetite and as a model for sexual acting out with children.’”).

<sup>18</sup> *See* Freedman, *Remove the Lens Cap*, *supra* note \*, at 906-11.

<sup>19</sup> 395 U.S. 444 (1969).

<sup>20</sup> *Id.* at 447; *see Ashcroft*, 122 S. Ct. at 1403 (relying upon this passage).

<sup>21</sup> 352 U.S. 380 (1957).

<sup>22</sup> *Id.* at 381 (quoting MICH. COMP. LAWS § 750.343 (repealed 1957)).

reduce the adult population of Michigan to reading only what is fit for children.”<sup>23</sup> So too, even if some pedophile might be inflamed by child pornography, one has to base one’s enactments on a reasonable viewer<sup>24</sup> or you will reduce the entire population of the country to viewing what is only fit for child molesters.

As Justice Brandeis said, “[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.”<sup>25</sup> If after viewing the material covered by the law someone goes out and commits a crime like some of the horrendous ones that Mr. Amar describes,<sup>26</sup> arrest the criminal, not the creator or distributor of the material. Unless the circumstances are such that a reasonable person would not engage in deliberation before acting (as upon hearing a cry of fire in a crowded theater), people should not be shielded from information by a paternalistic state which fears that they will misuse it.<sup>27</sup>

In response to all of this, you have heard a lot about *New York v. Ferber*.<sup>28</sup> In that case, the Supreme Court endorsed suppression of a broad range of “child pornography” for the following reasons.

First, the state’s interest was not in preventing the public from viewing the material, but rather in protecting children from being used in its production, and “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”<sup>29</sup>

Second, a ban on the distribution of materials depicting sexual activity by juveniles furthers this interest because (a) “the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation,” and (b) “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”<sup>30</sup>

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<sup>23</sup> *Id.* at 383; see *Aschcroft*, 122 S. Ct. at 1402-03 (relying on this passage).

<sup>24</sup> If the rule were otherwise the result would be to ban a huge range of mainstream works, including the Bible and Disney movies. See Freedman, *Remove the Lens Cap*, *supra* note \*, at 909 n.125

<sup>25</sup> *Whitney v. California*, 274 U.S. 357, 378 (Brandeis, J., concurring).

<sup>26</sup> See Panel Transcript, *supra* note 17, at 63.

<sup>27</sup> See *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769-70 (1976) (holding that the First Amendment precludes the state from the “highly paternalistic approach” of forbidding a speaker to provide information on the ground that the recipient will misuse it).

<sup>28</sup> 458 U.S. 747 (1982). For a detailed consideration of the case, see Freedman, *Remove the Lens Cap*, *supra* note \*, at 925-30.

<sup>29</sup> *Ferber*, 458 U.S. at 757.

<sup>30</sup> *Id.* at 759.

Of course none of these justifications apply to purely imaginary children, and the depiction of those is protected by the First Amendment. The support for this proposition comes from *Ferber* itself, where the Court noted that little or no communication was being suppressed because creators could use over-age actors who looked younger, or simulate the scenes.<sup>31</sup> That means that the argument you just heard from Mr. Amar,<sup>32</sup> that the *Ferber* Court didn't anticipate today's realistic simulations, is just wrong. One key reason the Court upheld that statute was because creators would still be able produce works indistinguishable from ones employing actual children.

So what Mr. McCarthy describes as a "loophole," namely that one can use computer technology to make "images [that] are indistinguishable from photographs of real children,"<sup>33</sup> isn't a loophole at all. It's a requirement of any statute that is going to meet the First Amendment.

Therefore, the proponents of the statute are correct in saying that the government is going to have to prove in any criminal prosecution that real children were used. But so what? Legally, it's hardly a constitutionally acceptable response to the government's inability to bear the burden of proof in a criminal case to pass a statute relieving it of the need to do so.<sup>34</sup> As a practical matter, all that this means is that, in the extremely few cases that go to trial, the government will need an inside witness, as it frequently does in Mafia cases.

Turning to my last subject, the statute is also flawed because it covers all images that "appear to be" ones of children engaging in "sexually explicit" conduct.<sup>35</sup> Now this has two basic problems. First of all, it includes all sorts of works of art, like cartoons or cherubs cavorting at the edges of paintings, that appear to be images of such conduct because that is precisely what they are, although presumably the statute isn't aimed at them.<sup>36</sup>

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<sup>31</sup> See *id.* at 763; see *Ashcroft*, 122 S. Ct. at 1411 (citing this passage).

<sup>32</sup> Panel Transcript, *supra* note 17, at 12.

<sup>33</sup> *Id.* at 28-29.

<sup>34</sup> Cf. *Ashcroft*, 122 S. Ct. at 1404 ("The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down. . . . Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.").

<sup>35</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26, § 121(2)(4).

<sup>36</sup> This point was of repeated concern to the Justices during the oral argument of *Ashcroft v. Free Speech Coalition* on October 31, 2001, where there was much discussion of such mainstream movies as *THE TIN DRUM* (Warner Bros. 1979), *TRAFFIC* (USA Films 2000), and *ROMEO AND JULIET* (Paramount 1968), all of which contain scenes depicting sexual activity by persons under the age of 18, which are presumably designed to be as realistic as possible. Record of Oral Argument at 10-13, 31-32, *Ashcroft v. Free Speech*

Instead, the purpose of the statute seems to be to proscribe any image that is so closely indistinguishable from one of a real juvenile engaging in sexual activity that a reasonable person could not tell that it is not.<sup>37</sup> Well that certainly raises a second problem; as the Ninth Circuit correctly suggested, a statute written in those terms would be hopelessly vague. Nor is it reassuring to be told by Mr. Amar that we'll just rely on the good sense of the jury to determine whether or not the challenged image is or is not "virtually indistinguishable."<sup>38</sup>

In conclusion, I certainly hope that the Supreme Court will overturn the statute. After all, the whole point of the First Amendment is to preserve the possibilities of the future by denying the majority the right to suppress speech it finds hateful in the present.

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Coalition, 122 S. Ct. 1389 (2002) (No. 00-795) [hereinafter *Ashcroft Record*], available at 2001 WL 1398602. The ultimate decision reiterated these examples, see *Ashcroft*, 122 S. Ct. at 1400, to support its conclusion that the statute "proscribes the visual depiction of an idea." *Id.*

<sup>37</sup> In fact, the government on argument in the Supreme Court stated that "appears to be" should only "cover images that are virtually indistinguishable from traditional child pornography." *Ashcroft Record*, *supra* note 36, at 28.

<sup>38</sup> Panel Transcript, *supra* note 17, at 66.