

Evolution of Child Pornography Regulation

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Objectives of Presentation:

After this session you will be able to:

1. Summarize First Amendment Concerns by examining categories of prohibited speech; and
2. Distinguish among types of images:
 - . "real" child pornography,
 - . virtual child pornography; and
 - . morphed images.

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Dimension of Problem:

Of CP victims identified by law enforcement:

- 42% appear to be pubescent
- 52% appear to be prepubescent
- 6% appear to be infants or toddlers.

NCMEC study

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Dimension of cp problem:



- **Estimated 14 million cp websites**
- **More than 20,000 images posted each week**
- **Up to 20 billion dollars in profits annually**
- **Reports of CP to NCMEC's CyberTipLine :**
 - 1998 – 3,267
 - 2004 – 106,119
 - **More than 30 fold increase**

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Operation Cathedral (1996)



- **Closed Internet network**
- **Over 200 elite cp traffickers from over 40 countries**
- **Distributed 750,000 images w/ 1,200 unique children**
- **5 levels of security such as complex passwords & encryption**
- **New candidate required to produce 10,000 cp images**

1996 – broadband Internet speed not widely available.

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11 Appalachian J.L.1 (2011)

First Amendment:

(Categories of speech)

- **Pornography is protected**
- **Obscenity is NOT protected**
 - **Average person, applying contemporary community standards, finds work as a whole appeals to prurient interests**
 - **Work depicts or describes in patently offensive way sexual conduct specifically defined by applicable state law**
 - **Work, as a whole, lacks serious literary, artistic, political, or scientific value**

Miller v. California, 413 U.S. 15 (1973)

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Private Possession of Obscenity

Cannot criminalize – Protected activity
Stanley v. Georgia, 394 U.S. 557 (1969)

**Can criminalize distribution of
obscenity**
United States v. Reidel, 402 U.S. 351 (1971)

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“Community Standards” ... when the “community” is the Internet



- Does not change *Miller* std.
U.S. v. Thomas, 74 F.3d 701 (6th Cir. 1996)
- Miller must be modified
U.S. v. Kilbride, 584 F.3d 1240 (9th Cir. 2009)

Community stds on Internet

- CA couple posted pics to Bulletin board
- Downloaded by TN investigator
- Charged in TN with obscenity
- Applied TN community stds:



**“NOT unconstitutional to
subject interstate
distributors
of obscenity to varying
community standards”**

U.S. v. Thomas, 74 F.3d 701 (6th Cir. 1996)

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Thomas...

Knew member was in TN...



“If Ds did not wish to subject themselves to liability in jurisdiction with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability.”

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Kilbride:



- Detailed examination of various opinions in SCT cases indicates problems with “local” standard.
- Concludes:
National community standard needed to regulate obscene speech on Internet.

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Justice Stewart on obscenity:

“I know it when I see it.”



Jacobellis v. Ohio, 378 U.S. 184 (1964)

**Child pornography:
Distinct category of prohibited speech**

N.Y. v. Ferber, 458 U.S. 747 (1982)

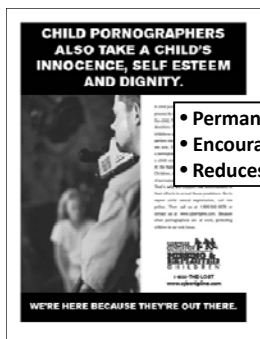
Banned distribution / manufacture of CP

- Does not have to meet obscenity test
- Rationale:
 - Safeguarding well-being of child
 - Permanent record of abuse
 - Close distribution network to combat abuse
 - Advertising/selling: economic motive is integral part of abuse
 - De minimis value of CP

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Osborne v. Ohio

Permissible to Ban Possession & Viewing of CP.



- Permanent record of abuse
- Encourages possessors to destroy images
- Reduces use of images for "grooming."

"Child Pornography" *federal definition*

VISUAL DEPICTION

OF SEXUALLY EXPLICIT CONDUCT, WHERE –

1. production involves the use of a minor (under 18) engaging in conduct;
OR
2. digital or computer-generated image is, or is indistinguishable from, a minor;
OR
3. Image created or modified to appear that an identifiable minor is engaging in the act.

18 U.S.C. §2252A CPPA

"Sexually Explicit Conduct"

- **Sex Acts**
(*Actual or Simulated*)

OR

- **Lascivious exhibition of genital or pubic area**

#1: "Real" kids



Permissible to ban *possession of* "real" child pornography.

Osborne v. Ohio, 495 U.S. 103 (1980)

2 "Virtual" kids

"virtual" child pornography

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2001)

At issue, provision of definition stating CP is a visual depiction that is, *or appears to be*, a minor engaging in sexually explicit conduct

Ct. rejected "**appears to be** a minor" language

- VCP not a record of crime.
- VCP creates no victim by its production.
- No evidence VCP used for "grooming" or to whet appetites of pedophiles and cause them to engage in illegal conduct.
- Overbroad: could include artistic works, young adults.



"Virtual" CP as Obscenity

"Virtual" child sex abuse images can be prosecuted as obscenity...

(Added by PROTECT Act of 2003 after *Ashcroft*)

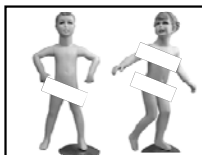
- if it meets the Miller standard,
OR
- it is graphic and "lacks serious literary, artistic, political, or scientific value."

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New language: "*indistinguishable*"

Digital / computer image that is or is *indistinguishable* from a minor.

- "Indistinguishable" – ordinary person would conclude depiction is of actual minor engaged in sexually explicit conduct.
- Inapplicable to:
 - drawings,
 - cartoons,
 - sculptures,
 - paintings



Affirmative defense for most crimes:
Image is an adult or not an "actual minor."

#3 Created or modified to appear that identifiable minor is engaging in act.

Ashcroft declined to address constitutionality, but noted:

Morphed images “implicate the interests of real children and are in that sense closer to *Ferber*.”

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Can be constitutionally criminalized (Morphed images)

Photo of head of well known juvenile was inserted into photo of nude boy engaging in sexually explicit conduct.

- Morphed images not protected.
- Can be prosecuted as child porn if evidence of identifiable child used in creation.

Jury could find that from looking at picture that:

- it is image of identifiable minor, and
- real interests of a child were implicated by being posed in that way.

U.S. v. Bach, 400 F.3d 622 (8th Cir. 2005)

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Cannot be constitutionally criminalized

Application of CP statute to pvt possession of morphed images (combining the head and shoulders of a real, existing child with images of adult bodies engaging in sexually explicit conduct) violated 1/A when children depicted did not actually engage in the sexual activity.

Limited holding to possession of this specific type of morphed image.

State v. Zidel, 940 A.2d 255 (N.H. 2008) 26

Pandering

18 U.S.C. 2252A(a)(3)(B)



“knowingly...advertises, promotes, presents, distributes or solicits...

any material or purported material in a manner that reflects the belief, or is intended to cause another to believe, that the material or purported material is, or contains, CP.”

- Did not violate 1st Amend (over breadth claim).
- Offers to give or receive what is illegal to possess have no 1/A protection.
- Gvt. can prohibit fraudulent offers *and* offers to provide illegal services.
- D. must believe the material was CP, or intend for the listener to believe it was CP.

U.S. v. Williams, 128 S.Ct. 1830 (2008)

Williams, continued...

- Did not violate Due Process: impermissibly vague claim
- Provides fair notice to person of average intelligence of what is being prohibited.

Recap:

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 - virtual child pornography; and
 - morphed images.

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Questions/Comments

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