Entertainment Law

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30 August 2014

Lawyers For The Talent

by Richard Dooling

First Amendment - Sex

The First Amendment says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

But as lawyers, agents and representatives working for artists, or as people who collaborate with and represent artists, we are usually not concerned about establishing religions or assembling to petition the government; we are concerned about SPEECH. So an edited version of the First Amendment for those in the entertainment industry might go like this:

> Congress shall make no law . . . abridging the freedom of speech.

So much for *Congress* not making laws. Then we add the Fourteenth Amendment, which says:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Read together, the First and Fourteenth Amendments prohibit *GOVERNMENTS* from making laws abridging the freedom of speech. Private parties using private, lawful means may "abridge" the speech of others without causing First Amendment problems (e.g. by firing "speakers," or boycotting their performances, or slapping an NC-17 rating on their movies, or an ESRB warning on their video games.)

So always look for *STATE ACTION* first to determine if you have a First Amendment issue. The easiest way to check for state action? Look for a law (statute, ordinance, regulation), then look at the speech which supposedly violated the law.

What Is Speech?

In the United States, the First Amendment protects speech, but what kinds of speech? Spoken words? Printed words? Any behaviors meant to convey a message? Flag burning? Movies? Video games? Nude dancing? Child pornography? Writing a book called: *How To Make A Suitcase Nuke?*

What about slander? Isn't that speech? Or fraud, or hiring somebody to murder your spouse, or lying to an IRS agent, or soliciting a prostitute?

The First Amendment obviously does not protect ALL speech. Author Kurt Vonnegut once observed that: "The First Amendment reads more like a dream than a law." Indeed. So what speech does it protect? Or is it easier to ask what speech is NOT protected by the First Amendment?

If the First Amendment doesn't mean what it says, then what does it mean? Some First Amendment absolutists ask: What part of make no law is it that you don't understand?

What is the Purpose of the First Amendment?

Sounds like a question the professor might pose to kill twenty minutes of class time when he's unprepared to teach the next case, but the question lurks in the background of many a Supreme Court opinion. If not all speech is protected, courts often consider what the Founders meant by the simple statement: Congress shall make no law abridging the freedom of speech.

Why was the First Amendment added to the Constitution in 1791? And if Congress meant what it said about passing no laws abridging the freedom of speech, why seven years later (in 1798) did Congress pass the Alien and Sedition Acts which made it a crime for anyone to publish "false, scandalous, and malicious writing against the government or its officials?"

Eugene Volokh argues that the problematic words are not "make no law," but rather "the freedom of speech." In speculating on what the Founders had in mind, Volokh has this to say.

> But nearly everyone, as best I can tell, saw "freedom of speech" and "freedom of the press" as providing less than complete constitutional protection for spoken or printed words. And this suggests that the term "freedom of" referred to some understanding that there is a proper scope of such freedom (even if the scope was unsettled in some particulars), rather to unlimited freedom to say or print anything one pleases.
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> It's much like, if tomorrow a state enacted a law protecting "the freedom to marry," we probably wouldn't think that it means the freedom to marry a 10-year-old, or the freedom to marry one's daughter, or (depending on the circumstances) even the freedom to marry several people at once. "The freedom to marry" would be seen as referring to a broad but not unlimited concept that is less than the freedom to marry anyone one pleases.
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> Now, to be sure, during and after the controversy over the Sedition Act of 1798, some foes of the Act argued that the First Amendment did bar Congress from any authority to restrict spoken or printed words. But I'm rather skeptical that this was then or is now a sound interpretation of the constitutional text.

Do we have a First Amendment because speaking one's mind is a basic human right? Like the freedom to travel, or freedom to buy birth control? Perhaps the colonists wanted only to be certain that their new American government would be prohibited from imposing prior restraints on speech, the sort of licensing schemes that inspired the poet John Milton to write Areopagitica? Maybe free speech is a kind of civic "safety valve" allowing aggrieved citizens to march in the streets or issue screeds on street corners instead of arming themselves and starting a civil war? Theories one and all that have been propounded as possible reasons we have a First Amendment.

The Marketplace of Ideas

When the Supreme Court addresses these questions, they steer between two competing principles of First Amendment jurisprudence that will never be reconciled (think Scylla and Charybdis, a rock and a hard place, the horns of a dilemma).

One principle is called the marketplace of ideas, first formulated by Justice Oliver Wendell Holmes, who wrote:

> The best test of truth is the power of the thought to get itself accepted in the competition of the market. –Abrams v. United States (1919)

To Justice Holmes, there's no such thing as good or bad speech, only speech that competes in the Darwinian marketplace and lives or dies. The Court's job is to strike down any attempts by the government to regulate the marketplace of ideas. Of course, there are the inevitable exceptions, because Holmes was also the Justice who wrote: "The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic."

Civic Republicanism

Justice Louis Brandeis offered a parallel and sometimes competing principle of First Amendment theory eight years later, when he articulated what might be called the purpose of the First Amendment:

> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile . . . –Whitney v. California (1927)

See how Justice Brandeis suggests that the First Amendment does not exist to protect all speech; it exists to protect speech that leads to the discovery and spread of "political truth." Brandeis wants to protect speech, not because it's an absolute value or good for the soul, but because it's essential for democracy and civic republicanism. Quite a different concern than Justice Holmes' marketplace where it's every idea for itself and survival of the fittest. In fact, Holmes would probably say that there is no such thing as "political truth." Truth is whatever the marketplace says it is. If cat videos beat out President Obama's State of the Union address, so be it.

But a film producer or a director or an author needs an entertainment lawyer, not a con law scholar. The First Amendment is an absorbing system of case law and legal theories, but we have to get on with the business of ENTERTAINMENT.

Are Movies Speech?

Oh, what might have been! In 1915, when the motion picture business was still in its infancy many states censored movies as a matter of course. The first time a case arguing that the "boards of censors" interfered with the First Amendment rights of people who displayed the films or wanted to see them, the United States Supreme Court said: I beg your pardon? Movies are NOT speech.

Mutual Film Corp. v. Industrial Commission of Ohio

U.S. Supreme Court (1915)

- case at Google Scholar
- case on Westlaw
- case at Wikipedia.

The state government of Ohio had passed a statute in 1913 forming a board of censors which had the duty of reviewing and approving all films intended to be exhibited in the state. The board charged a fee for the approval service. The board could order the arrest of anyone showing an unapproved film in the state.

Mutual Film Corporation, a movie distributor, argued that this licensing scheme and Ohio's censorship of movies violated its freedom of speech.

The Supreme Court in a unanimous opinion noted the insidious power of movies to affect the sensibilities of women and children and dismissed Mutual Film's "freedom of speech" arguments without a second thought.

> [T]he exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.

The Hays Code

From 1915 (the date of the *Mutual Film* decision) to 1952, the film industry embarked on zealous self regulation to ward off the welter of state censorship laws that were passed to regulate morals and movies. The infamous Motion Picture Production Code aka the "Hays Code

The code had three general principles:

1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrong-doing, evil or sin.
2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.
3. Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation. (From the Production Code, 1934)

The Production Code became more stringent and obnoxious to filmmakers until 1952 when a "miracle" happened.

Joseph Burstyn, Inc. v. Wilson

U.S. Supreme Court (1952)

- case at Google Scholar
- how cited at Google Scholar
- case at Westlaw
- case at Wikipedia

The "miracle" took the form of the Supreme Court's next take on the question: Are movies speech? The movie in question, Roberto Rosselini's *The Miracle* starring the director Federico Fellini.

After its American release, the New York State Board of Regents reportedly received "hundreds of letters, telegrams, postcards, affidavits and other communications" protesting or defending the film's exhibition. Three members of the Board examined the movie and concluded that *The Miracle* was "sacrilegious" and ordered the film producers to prove otherwise at a hearing. The hearing determined that the film indeed constituted religious bigotry, and the Commissioner of Education rescinded the producer's license to exhibit the picture.

Here is a summary of *The Miracle's* story, written by a reporter for the *Atlantic Monthly* and quoted in a concurring opinion in the case itself:

> A poor, simple-minded girl is tending a herd of goats on a mountainside one day, when a bearded stranger passes. Suddenly it strikes her fancy that he is St. Joseph, her favorite saint, and that he has come to take her to heaven, where she will be happy and free. While she pleads with him to transport her, the stranger gently plies the girl with wine, and when she is in a state of tumult, he apparently ravishes her. (This incident in the story is only briefly and discreetly implied.)
>
> The girl awakens later, finds the stranger gone, and climbs down from the mountain not knowing whether he was real or a dream. She meets an old priest who tells her that it is quite possible that she did see a saint, but a younger priest scoffs at the notion. "Materialist!" the old priest says.

> There follows now a brief sequence—intended to be symbolic, obviously—in which the girl is reverently sitting with other villagers in church. Moved by a whim of appetite, she snitches an apple from the basket of a woman next to her. When she leaves the church, a cackling beggar tries to make her share the apple with him, but she chases him away as by habit and munches the fruit contentedly.
>
> Then, one day, while tending the village youngsters as their mothers work at the vines, the girl faints and the women discover that she is going to have a child. Frightened and bewildered, she suddenly murmurs, "It is the grace of God!" and she runs to the church in great excitement, looks for the statue of St. Joseph, and then prostrates herself on the floor.
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> Thereafter she meekly refuses to do any menial work and the housewives humor her gently but the young people are not so kind. In a scene of brutal torment, they first flatter and laughingly mock her, then they cruelly shove and hit her and clamp a basin as a halo on her head. Even abused by the beggars, the poor girl gathers together her pitiful rags and sadly departs from the village to live alone in a cave.
>
> When she feels her time coming upon her, she starts back towards the village. But then she sees the crowds in the streets; dark memories haunt her; so she turns towards a church on a high hill and instinctively struggles towards it, crying desperately to God. A goat is her sole companion. She drinks water dripping from a rock. And when she comes to the church and finds the door locked, the goat attracts her to a small side door. Inside the church, the poor girl braces herself for her labor pains. There is a dissolve, and when we next see her sad face, in close-up, it is full of a tender light. There is the cry of an unseen baby. The girl reaches towards it and murmurs, "My son! My love! My flesh!"

MR. JUSTICE CLARK delivered the opinion of the court.

Excerpts from the *Burstyn* opinion:

In a series of decisions beginning with *Gitlow* v. *New York,* 268 U. S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth

Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day. Since this series of decisions came after the *Mutual* decision, the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press."

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters* v. *New York,* 333 U. S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp.* v. *Industrial Comm'n, supra*, is out of harmony with the views here set forth, we no longer adhere to it.

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much

is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." *Id.,* at 716. In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.

New York's highest court says there is "nothing mysterious" about the statutory provision applied in this case: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . ." This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. Cf. *Kunz* v. *New York,* 340 U. S. 290 (1951).

Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. How-

ever, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

Since the term "sacrilegious" is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is "sacrilegious."

Reversed.

Categories of Unprotected Speech

In declaring that movies are indeed protected speech under the First Amendment, the *Burstyn* Court took pains to point out that the film was not obscene within the meaning of another famous First Amendment case.

Chaplinsky v. New Hampshire

U.S. Supreme Court (1942)

- case at Westlaw.
- case at Wikipedia.

In late 1941, Walter Chaplinsky, a Jehovah's Witness, was preaching on a public sidewalk in downtown Rochester, New Hampshire. It was a busy Saturday afternoon, and Chaplinsky was passing out pamphlets and railing against organized religion, calling it a "racket." People complained to City Marshal Bowering, who responded by saying that Chaplinsky was "lawfully engaged." But Marshal Bowering also warned Chaplinsky that the crowd was getting restless.

Later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station. On a public sidewalk near City Hall, the officer and Chaplinsky met Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky. Chaplinsky then shouted at Bowering:

> You are a Goddamned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.

Chaplinsky was arrested, charged and convicted in the municipal court of Rochester, New Hampshire, for violating a statute a New Hampshire state law that provided:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Chaplinsky appealed all the way to the Supreme Court, claiming that the law was "vague" and that it infringed upon his First Amendment and Fourteenth Amendment rights to free speech.

Justice Murphy, writing for a unanimous court, upheld Chaplinsky's conviction under the statute and crafted one of the most widely quoted paragraphs in First Amendment jurisprudence, often cited in cases where the first amendment speaker is about to lose the case:

> [T]he right of free speech is not absolute at all times and under all circumstances. 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, the profane, the libelous, and the insulting or "fighting" words–those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. 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. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Unprotected Speech

Some call this a "two-tier" or "category" approach to the First Amendment, meaning, some speech is protected by the First Amendment and some isn't. *Chaplinsky* is famous for listing the classes of speech historically not protected by the First Amendment, but also famous for planting the seed of the notion that not all speech is valuable or "essential" to the "exposition of ideas," a very Brandeis-like argument.

Some of the categories (the obscene, the libelous, fighting words) are still with us. The Court has outlined several others (incitement, child pornography), but as we'll see the current Roberts Court is not receptive to legislatures adding "new" categories of unprotected speech, like stolen valor speech, or animal crush videos.

Other governments have different concerns and different categories of offensive speech. France and Germany prohibit varieties of hate speech or speech denying the historical facts of the Holocaust. See, for example, the wide variety of free speech laws collected at Wikipedia: Free Speech By Country. Canadian courts have held that pornography which is "degrading or dehumanizing" to women may be prohibited (see R. v. Butler an analysis explicitly rejected by Judge Frank Easterbrook in *American Booksellers v. Hudnut*, 771 F2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), Wikipedia.

- Nice summary of speech restrictions and unprotected speech categories

Child pornography and disclosing classified communications in violation of the Espionage Act are good examples. Both involve SPEECH, but the U.S. Supreme Court says these categories of speech are not protected by the First Amendment. Child porn and disclosing classified information therefore are both categories of "unprotected speech," meaning the government can fine you or send you to prison for engaging in them. 18 U.S. Code 2251 - Sexual exploitation of children

For several decades in the second half of the last century, the Supreme Court was deluged with obscentity cases, clearly a category of unprotected speech. But the problem was defining it.

Justice Potter Stewart gave the most honest and memorable definition in *Jacobellis v. Ohio* (1964):

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hardcore pornography"]; and perhaps I could never succeed in intelligibly doing so. **But I know it when I see it**, and the motion picture involved in this case is not that.

As we'll see later, obscenity trials are almost pass because of the advent of the Internet, but obscenity is worth studying because it provides case studies in how legislatures attempt to ban certain categories of speech. If intellectual property is like oil, waiting to gush forth and become valuable, then it's as if the government says: It's against the law for you to drill for certain kinds of speech, or make certain kinds of intellectual property.

No better example then 2 Live Crew's "Nasty As They Wanna Be."

Skyywalker Records, Inc. v. Navarro

Federal Dist. Court, SD Florida (1990)

- case at Google Scholar
- how cited at Google Scholar
- case at Westlaw
- case at Wikipedia
- The *Miller Test* at Wikipedia

Please read the *Skyywalker* opinion in its entirety. It's a great story (2 Live Crew versus the Broward County Sheriff's Office) and an excellent tutorial on how the famous *Miller* test for obscenity works in the real world.

Child Pornography

In *New York v. Ferber*, 58 U.S. 747 (1982), the U.S. Supreme Court unanimously ruled that the State of New York could ban the sale of material depicting children engaged in sexual activity.

Child pornography, the court said, is unprotected speech, not because it is obscene but because actual children are harmed in the making of it, and the resulting product provides a permanent record of the harm done, capable of inflicting grievous damage on child actors long afterwards.

Which raised the question: What about virtual child pornography, in which no actual children are used as actors?

Ashcroft v. Free Speech Coalition

U.S. Supreme Court (2002)

- case at Google Scholar
- how cited at Google Scholar
- case at Westlaw.
- case at Wikipedia

Justice Kennedy, delivered the opinion of the Court.

Excerpts from the *Ashcroft* opinion:

We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), 18 U. S. C. 2251 *et seq.*, abridges the freedom of speech. The

CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist. See Congressional Findings, notes following 18 U. S. C. 2251.

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York* v. *Ferber,* 458 U. S. 747 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See *id.,* at 758. As a general rule, pornography can be banned only if obscene, but under *Ferber,* pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller* v. *California,* 413 U. S. 15 (1973). *Ferber* recognized that "[t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." 458 U. S., at 761.

While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. 18 U. S. C. 1460-1466. Like the law in *Ferber,* the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber.*

I

Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber,* images made using actual minors. The CPPA retains that prohibition at 18 U. S. C. 2256(8)(A) and adds three other prohibited categories of speech, of which the first, 2256(8)(B), and the third, 2256(8)(D), are at issue in this case. Section 2256(8)(B) prohibits:

> "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."

The prohibition on "any visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated . . . sexual intercourse."

These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in 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." Congressional Finding (3), notes following 2251. Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." *Id.*, Findings (4), (10)(B). Under these rationales, harm flows from the content of the images, not from the means of their production. In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. See *id.*, Finding (6)(A). As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber.* Respondents do not challenge this provision, and we do not consider it.

Respondents do challenge 2256(8)(D). Like the text of the "appears to be" provision, the sweep of this provision is quite broad. Section 2256(8)(D) defines child pornography to include 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."

One Committee Report identified the provision as directed at sexually explicit images pandered as child pornography. ("This provision prevents child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material which is intentionally pandered as child pornography"). The statute is not so limited in its reach, however, as it punishes even those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

Fearing that the CPPA threatened the activities of its members, respondent Free Speech Coalition and others challenged the statute in the United States District Court for the Northern District of California. The Coalition, a California trade association for the adult-entertainment industry, alleged that its members did not use minors in their sexually explicit works, but they believed some of these materials might fall within the CPPA's expanded definition of child pornography. The other respondents are Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images. Respondents alleged that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling them from producing works protected by the First Amendment. The District Court disagreed and granted summary judgment to the Government. The court dismissed the overbreadth claim because it was "highly unlikely" that any "adaptations of sexual works like 'Romeo and Juliet,'. . . will be treated as 'criminal contraband.'" App. to Pet. for Cert. 62a—63a.

The Court of Appeals for the Ninth Circuit reversed. See 198 F. 3d 1083 (1999). The court reasoned that the Government could not prohibit speech because of its tendency to persuade viewers to commit illegal acts. The court held the CPPA to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in *New York* v. *Ferber,* 458 U. S. 747 (1982). Judge Ferguson dissented on the ground that virtual images, like obscenity and real child pornography, should be treated as a category of speech unprotected by the First Amendment. 198 F. 3d, at 1097. The Court of Appeals voted to deny the petition for rehearing en banc, over the dissent of three judges. See 220 F. 3d 1113 (2000).

While the Ninth Circuit found the CPPA invalid on its face, four other

We granted certiorari. 531 U. S. 1124 (2001).

II

The First Amendment commands, "Congress shall make no law . . . abridging the freedom of speech." The government may violate this mandate in many ways, *e. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. 2252A(b)(1). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. *Ibid.* While even minor punishments can chill protected speech, see *Wooley* v. *Maynard*, 430 U. S. 705 (1977), this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612 (1973).

The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. In its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses. See Congressional Findings, notes following 2251; see also U. S. Dept. of Health and Human Services, Administration on Children, Youth and Families, Child Maltreatment 1999 (estimating that 93,000 children were victims of sexual abuse in 1999). Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.

Congress may pass valid laws to protect children from abuse, and it has. The prospect of crime, however, by itself does not justify laws suppressing protected speech. See *Kingsley Int'l Pictures Corp.* v. *Regents of Univ. of N. Y.*, 360 U. S. 684, 689 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech" (internal quotation marks and citation omitted)). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); see also *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is

protected by the First Amendment"') (quoting *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115, 126 (1989)); *Carey* v. *Population Services Int'l,* 431 U. S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.,* 502 U. S. 105, 127 (1991) (Kennedy, J., concurring). While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA. In his dissent from the opinion of the Court of Appeals, Judge Ferguson recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. See 198 F. 3d, at 1101. It would be necessary for us to take this step to uphold the statute.

As we have noted, the CPPA is much more than a supplement to the existing federal prohibition on obscenity. Under *Miller* v. *California,* 413 U. S. 15 (1973), the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Id.,* at 24. The CPPA, however, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements. The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.

The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea—that of teenagers engaging in sexual activity—that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations . . . . (48 States permit 16-year-olds to marry with parental consent) . . . . (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.

Both themes–teenage sexual activity and the sexual abuse of children–have inspired countless literary works. William Shakespeare created the most famous

pair of teenage lovers, one of whom is just 13 years of age. See Romeo and Juliet, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. *E.g.,* Romeo and Juliet (B. Luhrmann director, 1996). Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, Traffic, which was nominated for Best Picture. The film portrays a teenager, identified as a 16year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, American Beauty won the Academy Award for Best Picture. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. See *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.,* 383 U. S. 413, 419 (1966) (plurality opinion) ("[T]he social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness"). Under *Miller,* the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. See *Kois* v. *Wisconsin,* 408 U. S. 229, 231 (1972) *(percuriam).* For this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohi-

bitions and the affront to community standards prohibited by the definition of obscenity.

The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. See *New York* v. *Ferber,* 458 U. S., at 761. Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. See also *id.,* at 775 (O'Connor, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas"). The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants. It was simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation."

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.

Later, in *Osborne* v. *Ohio,* 495 U. S. 103 (1990), the Court ruled that these same interests justified a ban on the possession of pornography produced by using children. "Given the importance of the State's interest in protecting the victims of child pornography," the State was justified in "attempting to stamp out this vice at all levels in the distribution chain." *Id.,* at 110. *Osborne* also noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors. *Id.,* at 111. The Court, however, anchored its holding in the concern for the participants, those whom it called the "victims of child pornography." *Id.,* at 110. It did not suggest that, absent this concern, other governmental interests would suffice. See *infra,* at 251-253.

In contrast to the speech in *Ferber,* speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to

the sexual abuse of children, as were the materials in *Ferber.* 458 U. S., at 759. While the Government asserts that the images can lead to actual instances of child abuse, see *infra,* at 251-254, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

The Government says these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech. See 458 U. S., at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*"). This argument, however, suffers from two flaws. First, *Ferber* 's judgment about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. See *id.,* at 764-765 ("[T]he 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").

The second flaw in the Government's position is that *Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value, see *id.,* at 761, but relied on virtual images—the very images prohibited by the CPPA—as an alternative and permissible means of expression: "If it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.,* at 763. *Ferber,* then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.

III

The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber.* The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials to children, see *Ginsberg* v. *New York,* 390 U. S. 629 (1968), and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to

hear may not be silenced completely in an attempt to shield children from it. See *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115 (1989). In *Butler* v. *Michigan,* 352 U. S. 380, 381 (1957), the Court invalidated a statute prohibiting distribution of an indecent publication because of its tendency to "'incite minors to violent or depraved or immoral acts.'" A unanimous Court agreed upon the important First Amendment principle that the State could not "reduce the adult population . . . to reading only what is fit for children." *Id.,* at 383. We have reaffirmed this holding. See *United States* v. *Playboy Entertainment Group, Inc.,* 529 U. S. 803, 814 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno* v. *American Civil Liberties Union,* 521 U. S., at 875 (The "governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults"); *Sable Communications* v. *FCC, supra,* at 130-131 (striking down a ban on "dial-a-porn" messages that had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").

Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The 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. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley* v. *Georgia,* 394 U. S. 557, 566 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See *Kingsley Int'l Pictures Corp.,* 360 U. S., at 689; see also *Bartnicki* v. *Vopper,* 532 U. S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it"). The government may not prohibit speech because it in-

creases the chance an unlawful act will be committed "at some indefinite future time." *Hess* v. *Indiana,* 414 U. S. 105, 108 (1973) *(per curiam).* The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio,* 395 U. S. 444, 447 (1969) *(per curiam).* There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

In the case of the material covered by *Ferber,* the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. See *Osborne,* 495 U. S., at 109-110. Even where there is an underlying crime, however, the Court has not allowed the suppression of speech in all cases. *E. g., Bartnicki, supra,* at 529 (market deterrence would not justify law prohibiting a radio commentator from distributing speech that had been unlawfully intercepted). We need not consider where to strike the balance in this case, because here, there is no underlying crime at all. Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. 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.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely be-

cause it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." *Broadrick* v. *Oklahoma,* 413 U. S., at 612. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U. S. C. 2252A(c).

The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.

We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. See *ibid.* So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors. See *ibid.* In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the af-

firmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.

In sum, 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller,* and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional . . . .

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice Thomas, concurring in the judgment.

In my view, the Government's most persuasive asserted interest in support of the Child Pornography Prevention Act of 1996 (CPPA) is the prosecution rationale–that persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer generated, thereby raising a reasonable doubt as to their guilt. At this time, however, the Government asserts only that defendants *raise* such defenses, not that they have done so successfully. In fact, the Government points to no case in which a defendant has been acquitted based on a "computer-generated images" defense. While this speculative interest cannot support the broad reach of the CPPA, technology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children. In the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction.

The Court suggests that the Government's interest in enforcing prohibitions against real child pornography cannot justify prohibitions on virtual child pornography, because "[t]his analysis turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech." But if technological advances thwart prosecution of "unlawful speech," the Government may well have a compelling interest in barring or otherwise regulating some narrow category of "lawful speech" in order to enforce effectively laws against pornography made through the abuse of real children. The Court does leave open the possibility that a more complete affirmative defense could save a statute's constitutionality, implicitly accepting that some regulation of virtual child pornography might be constitutional. I would not prejudge, however, whether a more complete affirmative defense is the only way to narrowly tailor a criminal statute that prohibits the possession and dissemination of virtual child pornography. Thus, I concur in the judgment of the

Court.

[Justice O'Connor's dissent omitted]

Chief Justice Rehnquist, with whom Justice Scalia joins in part, dissenting.

We normally do not strike down a statute on First Amendment grounds "when a limiting construction has been or could be placed on the challenged statute." *Parker* v. *Levy,* 417 U. S. 733, 760 (1974) ("This Court has .. . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied"). This case should be treated no differently.

Other than computer-generated images that are virtually indistinguishable from real children engaged in sexually explicit conduct, the CPPA can be limited so as not to reach any material that was not already unprotected before the CPPA. The CPPA's definition of "sexually explicit conduct" is quite explicit in this regard. It makes clear that the statute only reaches "visual depictions" of:

> "[A]ctual or simulated . . . sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; . . . bestiality; . . . masturbation; . . . sadistic or masochistic abuse; or . . . lascivious exhibition of the genitals or pubic area of any person." 18 U. S. C. 2256(2).

The Court and Justice O'Connor suggest that this very graphic definition reaches the depiction of youthful looking adult actors engaged in suggestive sexual activity, presumably because the definition extends to "simulated" intercourse. *Ante,* at 247-248 (majority opinion); *ante,* at 263 (opinion concurring in judgment in part and dissenting in part). Read as a whole, however, I think the definition reaches only the sort of "hard core of child pornography" that we found without protection in *Ferber, supra,* at 773— 774. So construed, the CPPA bans visual depictions of youthful looking adult actors engaged in *actual* sexual activity; mere *suggestions* of sexual activity, such as youthful looking adult actors squirming under a blanket, are more akin to written descriptions than visual depictions, and thus fall outside the purview of the statute . . . .

Indeed, we should be loath to construe a statute as banning film portrayals of Shakespearian tragedies, without some indication—from text or legislative history—that such a result was intended. In fact, Congress explicitly instructed that such a reading of the CPPA would be wholly unwarranted. As the Court of Appeals for the First Circuit has observed:

> "[T]he legislative record, which makes plain that the [CPPA] was intended to target only a narrow class of images—visual depictions 'which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical

> sexual conduct."' *United States* v. *Hilton,* 167 F. 3d 61, 72 (1999) (quoting S. Rep. No. 104-358, pt. I, p. 7 (1996)).

This narrow reading of "sexually explicit conduct" not only accords with the text of the CPPA and the intentions of Congress; it is exactly how the phrase was understood prior to the broadening gloss the Court gives it today. Indeed, had "sexually explicit conduct" been thought to reach the sort of material the Court says it does, then films such as Traffic and American Beauty would not have been made the way they were. *Ante,* at 247-248 (discussing these films' portrayals of youthful looking adult actors engaged in sexually suggestive conduct). Traffic won its Academy Award in 2001. American Beauty won its Academy Award in 2000. But the CPPA has been on the books, and has been enforced, since 1996. The chill felt by the Court, *ante,* at 244 ("[F]ew legitimate movie producers . . . would risk distributing images in or near the uncertain reach of this law"), has apparently never been felt by those who actually make movies.

To the extent the CPPA prohibits possession or distribution of materials that "convey the impression" of a child engaged in sexually explicit conduct, that prohibition can and should be limited to reach "the sordid business of pandering" which lies outside the bounds of First Amendment protection. *Ginzburg* v. *United States,* 383 U. S. 463, 467 (1966); *e. g., id.,* at 472 (conduct that "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed," may lose First Amendment protection); *United States* v. *Playboy Entertainment Group, Inc.,* 529 U. S. 803, 831-832 (2000) (Scalia, J., dissenting) (collecting cases). This is how the Government asks us to construe the statute, Brief for Petitioners 18, and n. 3; Tr. of Oral Arg. 27, and it is the most plausible reading of the text, which prohibits only materials "*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." 18 U. S. C. 2256(8)(D) (emphasis added).

The First Amendment may protect the video shopowner or film distributor who promotes material as "entertaining" or "acclaimed" regardless of whether the material contains depictions of youthful looking adult actors engaged in nonobscene but sexually suggestive conduct. The First Amendment does not, however, protect the panderer. Thus, materials promoted as conveying the impression that they depict actual minors engaged in sexually explicit conduct do not escape regulation merely because they might warrant First Amendment protection if promoted in a different manner. See *Ginzburg, supra,* at 474-476; cf. *Jacobellis* v. *Ohio,* 378 U. S. 184, 201 (1964) (Warren, C. J., dissenting) ("In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene"). I would construe "conveys the impression" as limited

to the panderer, which makes the statute entirely consistent with *Ginzburg* and other cases.

In sum, while potentially impermissible applications of the CPPA may exist, I doubt that they would be "substantial. . . inrelation to the statute's plainly legitimate sweep." *Broadrick*, 413 U. S., at 615. The aim of ensuring the enforceability of our Nation's child pornography laws is a compelling one. The CPPA is targeted to this aim by extending the definition of child pornography to reach computergenerated images that are virtually indistinguishable from real children engaged in sexually explicit conduct. The statute need not be read to do any more than precisely this, which is not offensive to the First Amendment.

For these reasons, I would construe the CPPA in a manner consistent with the First Amendment, reverse the Court of Appeals' judgment, and uphold the statute in its entirety.

Indecency

Just as we get comfortable with the notion of categories, and the notion that speech is either protected or unprotected, along comes a category of speech the FCC wishes to REGULATE.

Please read these two cases in their entirety. Keep your eye on the ball: Is George Carlin's speech protected speech? When Bono says, "This is really really fucking brilliant" during a prime time TV broadcast at the 2003 Golden Globe awards, is that obscene?

FCC v. Pacifica Foundation

U.S. Supreme Court (1978)

- case at Google Scholar
- how cited at Google Scholar
- case at Westlaw
- George Carlin's Seven Dirty Words routine.

FCC v. Fox Television Stations (Fox II)

- case at Google Scholar
- case at Westlaw
- case at Wikipedia.

Totally Optional Reading

- Eugene Volokh on the meaning of "Congress shall make no law . . .". If the the tiny print bothers you, try Readability.
- Congress Shall Make No Law . . ., by Richard Dooling
- ACLU: Freedom of Expression in the Arts & Entertainment
- *The Atlantic:* "The Most Powerful Dissent in American History" (a book that reveals precisely how and why Oliver Wendell Holmes changed his mind about the first amendment).
- *The Atlantic:* "It's Time to Stop Using the 'Fire in a Crowded Theater' Quote" (A nice take on the *US v. Schenk* and how it may have led to Holmes' opinion in *Abrams*).
- Fox Urges End to Broadcast Indecency Limits

Reference/Footnote Cases

In class, I may also refer to one or more the cases listed below. Again, the links simply provide more information if you are curious.

- *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme (LICRA),* 433 F.3d 1199 (9th Cir. 2006). Wikipedia.
- *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) 72 S.Ct. 777, 96 L.Ed. 1098, 1 Media L. Rep. 1357. Wikipedia.
- *Brandenberg v. Ohio*, 395 US 44 (1969). Wikipedia.
- *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Wikipedia
- *Miller v. California,* U.S. Supreme Court (1973) Wikipedia
- The *Miller* test at Wikipedia.
- *New York v. Ferber*, 458 US 747 (1982). Wikipedia.
- *American Booksellers v. Hudnut*, 771 F2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). Wikipedia.

Changelog

- Version 1.1 - 27-Aug-2014 - fixed broken ref links
- Version 1.2 - 30-Aug-2014 - fixed paragraph headers and Mutual Film broken link.