rationale, the Court found, "turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech." [1362]

In *United States v. Williams*,[1363] the Supreme Court upheld a federal statute that prohibits knowingly advertising, promoting, presenting, distributing, or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe, that the material" is child pornography that is obscene or that depicts an actual minor (*i.e.*, is child pornography that is not constitutionally protected).[1364] Under the provision, in other words, "an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute." [1365] The Court found that these activities are not constitutionally protected because "[o]ffers to engage in illegal transactions [as opposed to abstract advocacy of illegality] are categorically excluded from First Amendment protection," even "when the offeror is mistaken about the factual predicate of his offer," such as when the child pornography that one offers to buy or sell does not exist or is constitutionally protected.[1366]

Non-obscene But Sexually Explicit and Indecent Expression.—There is expression, consisting of words or pictures, that some find offensive but that does not constitute obscenity and is protected by the First Amendment. Nudity portrayed in films or stills

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[1362] 535 U.S. at 255. Following Ashcroft v. Free Speech Coalition, Congress enacted the PROTECT Act, Pub. L. 108–21, 117 Stat. 650 (2003), which, despite the decision in that case, defined "child pornography" so as to continue to prohibit computer-generated child pornography (but not other types of child pornography produced without an actual minor). 18 U.S.C. § 2256(8)(B). In United States v. Williams, 128 S. Ct. 1830, 1836 (2008), the Court, without addressing the PROTECT Act's new definition, cited Ashcroft v. Free Speech Coalition with approval.

[1363] 128 S. Ct. 1830 (2008).

[1364] 18 U.S.C. § 2252A(a)(3)(B).

[1365] 128 S. Ct. at 1839.

[1366] 128 S. Ct. at 1841, 1842, 1843. Justice Souter, in a dissenting opinion joined by Justice Ginsburg, agreed that "Congress may criminalize proposals unrelated to any extant image," but disagreed with respect to "proposals made with regard to specific, existing [constitutionally protected] representations." Id. at 1849. Justice Souter believed that, "if the Act stands when applied to identifiable, extant [constitutionally protected] pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally . . . ." Id. at 1854. Justice Scalia's opinion for the majority replied that this "is simply not true . . . . Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography. . . . There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts." Id. at 1844–45.