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# PORNOSHOPPED: WHY CALIFORNIA SHOULD ADOPT THE FEDERAL STANDARD FOR CHILD PORNOGRAPHY

*Brian Yamada**

In 2011, Joseph Gerber was convicted for possession of child pornography under California Penal Code section 311.11 when he photo-edited his 13-year-old daughter's face onto the bodies of adult women. However, the 6th District of the California Court of Appeal reversed his conviction because the language of the statute required the child to "personally" engage in the depicted conduct. As a result, in California it is very difficult to successfully prosecute morphed child pornography (where a picture of a real child is manipulated into an unidentifiable minor). In addition, the ability of section 311.11 to protect children is substantially diminished in comparison to the federal Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act). Therefore, this Comment proposes that California should adopt its own version of the PROTECT Act ("Cal-Pro"). It should have narrow language and a flexible sentencing scheme that recognizes the state's overcrowding epidemic. With these modifications, Cal-Pro strikes a balance between the goal of the Realignment Plan to reduce prison overcrowding and maximizing the protection of our children.

## I. INTRODUCTION

In the digital age, computer programs such as Adobe Photoshop are used to create works of art.[1] Some people use the program for more selfish

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purposes such as fixing unwanted defects in personal photographs or digitally inserting themselves into a picture with someone they admire.[2] Recently, Joseph Gerber used such technology for a more deviant purpose—editing pornographic photos of adult women to include the face of his 13-year-old daughter.[3] Initially, Gerber was convicted of possession of child pornography, but his conviction was overturned on appeal.[4] The California Court of Appeal for the Sixth District concluded that the photographs were more similar to virtual child pornography and held that the mere possession of virtual pornography was protected by the First Amendment.[5]

In *Gerber*, it was clear that no real child was used in the depicted sex acts,[6] but what happens when the subject cannot be conclusively classified as real or virtual? Morphed child pornography is a type of virtual pornography where the creator takes a photograph of a real child and manipulates the image into an unidentifiable minor.[7] Morphed pornography creates a problem for prosecutors because the prosecution must prove that an image is a real child by identifying the specific child or the origin of the image.[8] To meet this high burden of proof, expert witnesses are required.[9] However, even experts struggle to distinguish real images from virtual images as a result of sophisticated image-altering techniques.[10] For example, one technique disguises pictures of real children by making them appear computer-generated.[11]

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1. *See 50 Images for Fans of Photoshop Art*, PHOTOGRAPHY SCHS. ONLINE (Apr. 8, 2010, 5:40 PM), http://www.photographyschoolsonline.net/blog/2010/50-images-for-fans-of-photoshop-art/.

2. *See* Tara Parker-Pope, *Losing Weight by Photoshop*, N.Y. TIMES WELL (Dec. 17, 2009, 11:36 AM), http://well.blogs.nytimes.com/2009/12/17/losing-weight-by-photoshop/; *see also* Filonia LeChat, *How to Photoshop Yourself With a Celebrity*, EHOW.COM (last updated June 27, 2011), http://www.ehow.com/how_8655378_photoshop-yourself-celebrity.html.

3. *See Court: Calif. Dad Can Paste Daughter's Face On Porn Pics*, CBS L.A. (June 10, 2011), http://losangeles.cbslocal.com/2011/06/10/court-calif-dad-can-paste-daughters-face-on-porn-pics/.

4. *See* People v. Gerber, 196 Cal. App. 4th 368, 392 (2011), *review denied*, 2011 Cal. LEXIS 8915 (Aug. 17, 2011).

5. *See id.* at 386.

6. *See id.* at 392.

7. *See* Shepard Liu, Note, *Ashcroft, Virtual Child Pornography and First Amendment Jurisprudence*, 11 U.C. DAVIS J. JUV. L. & POL'Y 1, 3 (2007).

8. *See* James Nicholas Kornegay, Note, *Protecting Our Children and the Constitution: An Analysis of the "Virtual" Child Pornography Provisions of the PROTECT Act of 2003*, 47 WM. & MARY L. REV. 2129, 2148 (2006).

9. *Id.*

10. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, § 501, 117 Stat. 650, 677 (2003), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-108publ21/pdf/PLAW-108publ21.pdf (last visited Apr. 17, 2012).

11. *See id.* at 676.

The expert's job is further complicated because repeated transmissions of the image from one possessor to another may alter it.[12] In terms of time, money, and expertise, it has become uneconomical to prosecute morphed child pornography, and as a result, only the most clear-cut cases are pursued.[13]

This note proposes that California expand its ability to protect minors by passing a stricter child pornography law that will overcome the obstacles facing the prosecution of morphed child pornography. Part II of this paper traces the criminalization of child pornography through statutes and case law. Part III argues that the current California laws addressing child pornography do not adequately protect children as demonstrated through the recently decided case *People v. Gerber*.[14] Finally, Part IV urges California to adopt a modified version of the Federal Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act) to account for issues unique to California.

## II. FEDERAL REGULATION OF CHILD PORNOGRAPHY

### *A. Protecting Children Is an Objective of "Surpassing Importance"*[15]

Initially, the theory of obscenity was used to combat all kinds of pornography.[16] In *Miller v. California*, the United States Supreme Court held that work which was legally obscene was not protected by the First Amendment.[17] *Miller* defined obscenity as having three elements: (1) the work as a whole must appeal to the prurient interest when the average person applies contemporary community standards;[18] (2) it depicts or describes patently offensive sexual conduct, which is defined by state law;[19] and (3) the work as a whole lacks "serious literary, artistic, political, or sci-

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12. *See* Kornegay, *supra* note 8.

13. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act § 501.

14. *See Gerber*, 196 Cal. App. 4th at 392.

15. New York v. Ferber, 458 U.S. 747, 757 (1982).

16. *See* Miller v. California, 413 U.S. 15, 29 (1973) ("[A] majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment.").

17. *Id.* at 36.

18. *Id.* at 24.

19. *Id.*

entific value."[20] Unfortunately, under *Miller*, the only types of child pornography that could be prohibited were those that were legally obscene.[21]

As a result, the United States Supreme Court expanded its prohibition of child pornography to non-obscene material in *New York v. Ferber*.[22] In *Ferber*, the Supreme Court upheld a New York statute penalizing the knowing promotion of sexual performances by minors for five reasons: (1) there was a compelling governmental interest in protecting children; (2) child pornography was intrinsically related to the abuse of children; (3) there was an economic motive to distribute it; (4) child pornography had *de minimis* societal value; and (5) case precedent was consistent with the holding.[23] However, the Court noted an important limitation—if a description or depiction of sexual conduct was not obscene, or if it did not involve "live performances," then First Amendment protection was retained.[24]

Later, in *Osborne v. Ohio*, the United States Supreme Court emphasized the "gravity of the state's interests"[25] when it held that an Ohio statute could "constitutionally proscribe the possession and viewing of child pornography."[26] The statute prohibited possession of materials of a naked minor where the nudity was "a lewd exhibition or involve[d] a graphic focus on the genitals, and where the person depicted was neither the child nor the ward of the person charged."[27] Such regulation complied with the *Ferber* limitation because it narrowly defined the banned conduct and did not punish possession of innocuous photographs of nude children—like a father taking a picture of his child bathing.[28] The decisions in *Osborne* and *Ferber* established the importance of preventing child abuse in pornography and allowed for the prosecution of mere possession of child pornography.[29]

### *B. Federal Criminalization of Child Pornography Possession:*

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20. *Id.*

21. *Ferber*, 458 U.S. at 761 (stating the Court "cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem" because obscenity does not reflect the compelling interest in prosecuting promoters of child pornography).

22. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 234 (2002) ("[P]ornography depicting actual children can be proscribed whether or not the images are obscene . . . ." (citing *Ferber*, 458 U.S. at 758)).

23. *Ferber*, 458 U.S. at 756–63.

24. *Id.* at 764–65.

25. Osborne v. Ohio, 495 U.S. 103, 111 (1990).

26. *Id.*

27. *Id.* at 113.

28. *See id.* at 113–14.

29. *See* State v. Zidel, 940 A.2d 255, 258 (N.H. 2008) ("[*Ferber*] and [*Osborne*] together hold that a state may proscribe the distribution and mere possession of child pornography.").

### *The CPPA and the PROTECT Act*

In response to the holdings in *Osborne* and *Ferber*, Congress passed the Child Pornography Protection Act of 1996 ("CPPA").[30] This statute sought to prohibit child pornography but was held to be constitutionally overbroad in *Ashcroft v. Free Speech Coalition*.[31] The Court stated that the statute banned a substantial amount of materials that were neither obscene nor "'intrinsically related' to the sexual abuse of children."[32] For example, under the CPPA, a movie about Romeo and Juliet or the Academy Award-winning film *American Beauty* could be proscribed.[33] The statute was over-inclusive because it prohibited virtual child pornography where no children were used in production, and it banned some works that were not obscene.[34] For example, an educational video about safe sex with cartoon depictions of minors engaging in sexual conduct would be illegal even though it teaches safe sex and there is no direct harm to children.[35] Specifically, the Court disapproved of the "appears to be" and "conveys the impression" language, which resulted in the overbreadth problems.[36]

As a result, in 2003 Congress created the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today" Act ("PROTECT Act").[37] The PROTECT Act amended the CPPA sections regarding the definition of child pornography and the pandering of it, and created a new obscenity statute.[38]

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30. Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2256 and 2252A (2000) (repealed 2003) (current version is the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003,18 U.S.C. §§ 2256, 2252A, and 1466A (2006)).

31. *Free Speech Coal.*, 535 U.S. at 258 ("[T]he prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional.").

32. *See id.* at 249.

33. *Id.* at 247–48.

34. *See id.* at 234.

35. *See generally id.* at 248 (explaining that under the CPPA if a film contains a single graphic depiction of sexual activity in the statutory definition, then it is illegal without looking into its redeeming value—like teaching safe sex).

36. *See id.* at 258 ("[T]he prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional.").

37. *See* Chelsea McLean, Note, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL'Y 221, 236 (2007) ("Congress scrambled to enact legislation that would pass constitutional muster . . . .").

38. *See id.*

### 1. The Definition of Child Pornography

The CCPA prohibited child pornography in the form of "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct . . . ."[39] The PROTECT Act retains that language and other components of the CPPA's definition of child pornography.[40] Both statutes prohibited visual depictions where production of the depiction involved an actual minor engaged in sexually explicit conduct.[41] Also, each statute had a clause that punished morphed child pornography ("morphing clauses").[42] However, there were significant differences between the two acts.[43] First, the CPPA had 18 U.S.C. section 2256(8)(D), which was a pandering provision in its definition of child pornography ("CPPA definitional pandering provision") that was repealed by the PROTECT Act.[44] Also, even though both acts had a virtual child pornography clause, there are significant differences in the language used in the clauses.[45]

#### a. The virtual child pornography clause

The virtual child pornography clause of the CPPA prohibited a visual depiction if it appeared to be of a minor engaging in sexually explicit con-

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39. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8) (2000) (repealed 2003) (current version at 18 U.S.C. § 2256(8) (2006)).

40. *Compare id.* § 2256(8) (2000), *with* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2256(8) (2006).

41. *Compare* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2256(8)(A) (2006), *with* Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(A) (2000) (repealed 2003).

42. *Compare* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2256(8)(C) (2006), *with* Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(C) (2000) (repealed 2003).

43. McLean, *supra* note 37, at 238.

44. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(D) (2000), *repealed by* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21, § 502(a)(3), 117 Stat. 650, 678 (2003), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-108publ21/pdf/PLAW-108publ21.pdf (last visited Apr. 17, 2012) (including a pandering clause in the definition of child pornography (section 2256(8)(D)) that was distinct from the pandering provision in section 2252A, which was also part of the CPPA. The CPPA definitional pandering provision (section 2256(8)(D)) was repealed, but the CPPA's pandering provision in section 2252A was left intact only to be amended by the passage of the PROTECT Act.).

45. *Compare* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2256(8)(B) (2006), *with* Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(B) (2000) (repealed 2003).

duct.[46] This clause sought to cover virtual child pornography in all of its forms: wholly computer-generated images, morphed images, and child pornography created with the use of youthful-looking adults.[47] In ambitiously attacking these forms of child pornography, Congress sought to eliminate the indirect harms to children—the whetting of a pedophile's sexual appetite, the adverse psychological effects on a child whose image has been used, and the use of the images to seduce children.[48] However, these justifications were dismissed in *Free Speech Coalition* because there was no direct harm to children,[49] and the "mere tendency of speech to encourage unlawful acts" is not sufficient to ban it.[50]

As a result, the PROTECT Act narrowly tailored its definition of virtual child pornography by prohibiting a computer image or computer-generated image that is "indistinguishable from" a minor engaging in sexually explicit conduct.[51] This definition was significantly narrower because under the CPPA's "appears to be" language, a defendant could be convicted if the image seemed to be or gave the impression that it was depicting a minor.[52] In contrast, under the PROTECT Act, the depiction had to be indistinguishable so that an ordinary person would believe that the subject was an actual minor engaged in the sexual conduct.[53] This new definition reaches "substantially less material [than the CPPA] because it requires no arguable difference between the alleged image and that of a real child."[54]

b. The morphing clause

Under the CPPA, morphed child pornography was criminalized if it appeared that there was "an identifiable minor engaging in sexually explicit conduct."[55] An "identifiable minor" is a person who was a minor at the

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46. *See* Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(C) (2000), *invalidated by Free Speech Coal.*, 535 U.S. 234.

47. *See* Liu, *supra* note 7, at 14.

48. *See* Child Pornography Prevention Act of 1995, S. REP. NO. 104–358, § 2(2)–(4), at 2 (1996), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-104srpt358/pdf/CRPT-104srpt358.pdf.

49. *See Free Speech Coal.*, 535 U.S. at 251 ("[W]here the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

50. *See id.* at 253.

51. *See* 18 U.S.C. § 2256(8) (2006).

52. *See* Kornegay, *supra* note 8, at 2149–50.

53. *See* 18 U.S.C. § 2256(11) (2006).

54. *See* McLean, *supra* note 37, at 238 (citing Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(B)–(D) (2000)).

55. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(C) (2000) (repealed 2003) (current version at 18 U.S.C. § 2256(8)(C) (2006).

time of production, or a person whose image as a minor was used in a morphed image where he or she is recognizable as an actual person.[56] Under the PROTECT Act, proof of the actual identity of a specific minor does not need to be established to meet the standard of proof.[57] Section 2256(8)(C) ("morphing clause") was not challenged in *Free Speech Coal*.[58] As a result, the PROTECT Act adopted identical language[59] which was later attacked in *United States v. Hotaling*.[60]

In *Hotaling*, the defendant cropped the heads of six minors and pasted them onto the bodies of adult women engaging in sex acts.[61] The defendant claimed that the morphing clause was overbroad[62] and vague.[63] Any "visual depiction [that] ha[d] been created, adapted, or modified to appear that an identifiable minor [was] engaging in sexually explicit conduct" was prohibited under 18 U.S.C. section 2256(8)(C).[64] The court held that the statute was not overly broad[65] because "[t]he statute's definition of child pornography 'precisely track[ed] the material held constitutionally proscribable in *Ferber* and *Miller* . . . .'"[66] Regarding the vagueness challenge, the court recognized that the defendant had "no factual or legal support for his argument"[67] and that there is "no doubt the provision intends to criminalize the mere possession of pornographic images of children even when the images are morphed and no children [are] actually engaged in the sexually explicit conduct."[68] Therefore, the morphing provision of the PROTECT Act survived both the overbreadth and vagueness challenges.[69]

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56. *See* 18 U.S.C. § 2256(9) (2000) (repealed 2003) (current version at 18 U.S.C. § 2256(9) (2006)).

57. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2256(9)(B) (2006).

58. *Free Speech Coal.*, 535 U.S. at 242.

59. *See* 18 U.S.C. § 2256(8)(C) (2006).

60. *See generally* United States v. Hotaling, 599 F. Supp. 2d 306 (N.D.N.Y. 2008).

61. *See id.* at 307.

62. *See id.* at 311.

63. *See id.* at 322.

64. 18 U.S.C. § 2256(8)(C) (2006).

65. *See Hotaling*, 599 F. Supp. 2d at 321.

66. *Id.* (tracking *Miller*, the statute prohibits obscene material of real or virtual children engaging in sexually explicit conduct; tracking *Ferber*, material depicting actual children engaging in sexually explicit conduct is proscribed).

67. *Id.* at 322.

68. *Id.*

69. *See id.* at 321–22.

### 2. The Pandering Provision

The CPPA definitional pandering provision prohibited visual depictions that "advertised, promoted, presented, described, or distributed" material in a manner that conveyed the impression that it contained child pornography.[70] The "conveyed the impression" language was problematic in *Free Speech Coalition* because it suppressed a substantial amount of protected speech.[71] The language had the effect of criminalizing the defendant's possession of material described, or pandered, as child pornography *by someone other than the defendant earlier in the distribution chain*.[72] An example of a violation is where a defendant possesses a sexually explicit movie and knows that the movie is not child pornography, but the box has been mislabeled by a prior distributor to suggest that it is child pornography.[73] As a result, the passage of the PROTECT Act repealed the provision.[74]

The PROTECT Act's pandering provision prohibits mere possession of child pornography in section 2252A(a)(5)[75] and known pandering of such material in section 2252A(a)(3)(B) ("known pandering clause").[76] The problem with the CPPA's definitional pandering provision is that it punished more than just pandering by prohibiting possession of material that could not be banned.[77] The PROTECT Act's known pandering clause remedied this problem by adding several important features.[78] First, it added a scienter requirement of knowledge.[79] Next, it included clear wording (such as "advertises," "solicits," and "distributes") penalizing speech that accompanies or induces transfers of child pornography.[80] Lastly, the defendant must believe that the material is child pornography (and must say or do something to show that he holds that belief)[81] or he must intend to

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70. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(D) (2000), *repealed by* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, § 502(a)(3), 117 Stat. 650, 678 (2003).

71. *See Free Speech Coal.*, 535 U.S. at 258.

72. *See id.*

73. *See id.*

74. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256(8)(D) (2000), *repealed by* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21, § 502(a)(3), 117 Stat. 650, 678 (2003).

75. *See* 18 U.S.C. § 2252A(a)(5) (2009).

76. *See* 18 U.S.C. § 2252A(a)(3)(B) (2009).

77. *See* United States v. Williams, 553 U.S. 285, 286 (2008).

78. *See id.* at 285.

79. *See id.* at 294.

80. *See id.*

81. *See id.* at 295–96 ("There is also an objective component . . . . The statement or action must objectively manifest a belief that the material is child pornography . . . .").

cause someone else to believe that it is child pornography (e.g., by misdescribing the material).[82] The effect of these changes is that the defendant must believe that the material is child pornography and must either make a statement that reflects that belief or communicate the belief in a manner that causes another to believe the material is child pornography.[83] These additions are important because they correct a deficiency in the CPPA by criminalizing the *act* of pandering rather than prohibiting possession of protected materials that *had once been pandered* as child pornography.[84]

a. Testing the pandering provision

In *United States v. Williams*, the United States Supreme Court tested the known pandering clause by considering whether it was unconstitutionally overbroad and/or vague.[85] In *Williams*, the defendant stated in an Internet chat room, that he could "PUT UPLINK CUZ IM FOR REAL" and posted a link to seven pictures of actual children engaging in sexually explicit conduct.[86] After analyzing the scienter requirement and wording of the statute, the Court held that the pandering provision was constitutional because it only prohibited offers to provide child pornography and requests to obtain it.[87] In resolving the vagueness challenge, the Court noted that the statute had no indeterminacy because its elements were based on clear questions of fact.[88] Therefore, the PROTECT Act's pandering provision was deemed constitutional.[89]

b. Pandering provision affirmative defenses

The PROTECT Act was narrowed further with the promulgation of section 2252A(c)(2) ("no actual minor defense") in addition to extending

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82. *See id.* at 295 ("The [known pandering clause] suggests that the defendant must actually have held the subjective 'belief' that the material or purported material was child pornography. [A] misdescription that leads the listener to believe the defendant is offering child pornography . . . may, however, violate the 'manner . . . that is intended to cause another to believe' prong if the misdescription is intentional.").

83. *See Williams*, 553 U.S. at 306.

84. *See* Gabrielle Russell, Note, *Pedophiles in Wonderland: Censoring the Sinful in Cyberspace*, 98 J. CRIM. L. & CRIMINOLOGY 1467, 1486 (2008) (emphasis added).

85. *See Williams*, 553 U.S. at 288.

86. *See id.* at 291.

87. *See id.* at 299.

88. *See id.* at 286.

89. *See id.* at 307; *see also* Taylor McNeill, *Protecting Our Children or Upholding Free Speech: Does One Exclude the Other?* United States v. Williams, 60 MERCER L. REV. 1059, 1059–60 (2009).

the protection of section 2252A(c)(1) ("adult defense") of the CPPA.[90] These affirmative defenses only apply to those prosecuted under the pandering provision.[91] The adult defense protects the defendant if he or she can show that the material was produced with "an actual person or persons engaging in sexually explicit conduct; and . . . each such person was an adult at the time the material was produced."[92] The no actual minor defense protects a defendant if the child pornography was created without using any actual minors.[93] While the two defenses may sound similar, the adult defense does not apply to computer-generated images.[94] In contrast, the no actual minor defense applies to digital or computer-generated images.[95] In addition, the PROTECT Act explicitly eliminated the no actual minor defense for morphing cases.[96] The distinction is important for morphed images because now the only affirmative defense that can be raised requires the defendant to prove that no image of a child was used (i.e., that the entire image is computer-generated or only adults were used), even if the depicted sexual conduct did not actually occur.[97]

### 3. The PROTECT Obscenity Statute

Section 1466A of the PROTECT Act incorporates elements of the *Miller* obscenity test to criminalize obscene images of minors.[98] Section 1466A is an "obscenity statute and not a child pornography statute."[99] However, it "technically proscribes obscene child pornography,"[100] and an offender will be punished as if they were convicted of a child pornography offense.[101] The PROTECT Act obscenity statute encompasses more media than child pornography laws because obscene drawings, cartoons, and

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90. *See Hotaling*, 599 F. Supp. 2d at 318.

91. *See* 18 U.S.C. § 2252A(c) (2006) ("It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) . . . .").

92. *Id.* § 2252A(c)(1)(A)–(B).

93. *See id.* § 2252A(c)(2).

94. *See Free Speech Coal.*, 535 U.S. at 237.

95. *See Hotaling*, 599 F. Supp. 2d at 311 (stating that the PROTECT Act's "no actual minor" defense extends "'to most possessors and distributors of these defined materials,'" which is to say "any digital or computer-generated image that is 'indistinguishable' of a minor engaging in sexually explicit conduct" (citation omitted)).

96. *See id.* at 318.

97. *See id.*

98. *See* Paula Bird, Note, *Virtual Child Pornography Laws and the Constraints Imposed by the First Amendment*, 16 BARRY L. REV. 161, 167 (2011).

99. United States v. Schales, 546 F.3d 965, 972 (9th Cir. 2008).

100. *See* Bird, *supra* note 98, at 176.

101. *Id.* at 167.

sculptures can render a person liable.[102] In section 1466A(a)(1) ("pandering-O") a person cannot knowingly produce, distribute, receive, or possess any visual depiction of a minor engaging in sexually explicit conduct when that depiction also meets the three elements of the *Miller* obscenity test.[103] Section 1466A(b)(1) ("possessing-O"), prohibits mere possession of the same material proscribed in the pandering-O subsection.[104]

In addition, both the pandering-O and possession-O subsections have been modified to ban materials containing images of virtual minors without having to pass the full *Miller* obscenity test.[105] Under section 1466A(a)(2) ("abridged pandering-O"), any visual depiction is prohibited if it is, or appears to be, of a minor engaging in bestiality, sadism, masochism, or sexual intercourse if it also lacks serious literary, artistic, political, or scientific value.[106] Section 1466A(b)(2) ("abridged possessing-O") criminalizes mere possession of the same material proscribed by the abridged pandering-O provision.[107]

Section 1466A has been controversial because the abridged pandering-O provision and the abridged possessing-O provision were deemed overbroad,[108] but a later court declined to follow that holding.[109] In *United States v. Handley*, the defendant was caught with drawings or cartoons that depicted minors engaging in sexually explicit conduct with animals.[110] He was tried in an Iowa District Court where he filed a motion to dismiss, claiming the abridged possessing-O and abridged pandering-O clauses were too vague and overbroad.[111] The vagueness challenge was defeated because the term "minor" provided adequate notice that did not lead to arbitrary enforcement, and because the phrase "appears to be" had a straightforward meaning.[112] However, regarding the overbreadth challenge, the court ruled that pornography could only be proscribed if it was obscene or

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102. *Compare* 18 U.S.C. § 1466A(a) (2006), *with* 18 U.S.C. § 2256(11) (the child pornography provision "does not apply" when the media form is a drawing, cartoon, sculpture, or painting).

103. *See* 18 U.S.C. § 1466A(a)(1).

104. *Compare* 18 U.S.C. § 1466A(a)(1), *with* 18 U.S.C. § 1466A(b)(1).

105. *See* Russell, *supra* note 84, at 1486–87 (stating that only the third element of the *Miller* obscenity test is required).

106. 18 U.S.C. § 1466A(a)(2).

107. *Compare* 18 U.S.C. § 1466A(a)(2), *with* 18 U.S.C. § 1466A(b)(2).

108. *See* United States v. Handley, 564 F. Supp. 2d 996, 1007 (S.D. Iowa 2008); *see also* Marc H. Greenberg, *Comics, Courts & Controversy: A Case Study of the Comic Book Legal Defense Fund*, 32 LOY. L.A. ENT. L. REV. 121, 165–73 (2012).

109. *See* United States v. Dean, 635 F.3d 1200, 1206 n.5 (11th Cir. 2011).

110. *See Handley*, 564 F. Supp. 2d at 999.

111. *See id.*

112. *See id.* at 1004.

if it used real minors.[113] As a result, both abridged provisions failed because they did not require that either of those conditions be met.[114] The court stated that these subsections banned some forms of protected speech,[115] and they were both struck down as overbroad.[116] Despite this ruling, the motion to dismiss was denied in part when the pandering-O and possessing-O subsections of the PROTECT Act were deemed constitutional because they incorporated obscenity and they avoided "the same defect[s] as those found in the CPPA . . . ."[117]

In *United States v. Dean*, the Eleventh Circuit Court of Appeals refused to follow the opinion in *Handley*.[118] Dean was convicted of violating the abridged possessing-O provision, but as a defense he asserted the statute was overly broad.[119] The court found that the statute was not substantially overbroad because the defendant could not identify a substantial amount of hypothetically protected material that the statute criminalized.[120] The defendant and the court could only conceive of a narrow window of protected material unjustly punished by the statute—"adult actors or computer models [depicting] older teenagers engaged in non-offensive sexual acts."[121] Since *Handley* did not determine whether the statute's overbreadth was substantial, the court refused to follow its reasoning and affirmed Dean's conviction by upholding the constitutionality of the possessing-O provision.[122]

*Handley* and *Dean* denote a significant inconsistency in the precedent regarding section 1466A of the PROTECT Act.[123] The abridged possessing-O provision has been held unconstitutional in one circuit and constitutional in another.[124] This is important because the abridged possessing-O provision incorporates a truncated version of the obscenity test that punishes mere possession of material depicting a minor engaged in sexually explicit

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113. *See id.* at 1007.

114. *See id.*

115. *See id.* at 1009.

116. *See Handley*, 564 F. Supp. 2d at 1007.

117. *See id.* at 1009.

118. *See Dean*, 635 F.3d at 1206 n.5.

119. *See id.* at 1202.

120. *See id.* at 1208.

121. *Id.*

122. *See id.* at 1206 n.5.

123. *See* Bird, *supra* note 98, at 174 ("Clearly, there is a clash in the interpretation of the laws regarding virtual child pornography.").

124. *Compare Handley*, 564 F. Supp. 2d at 1009 (holding subsections 1466A(a)(2) and (b)(2) unconstitutional), *with Dean*, 635 F.3d at 1212 (holding subsection 1466A(a)(2) passes constitutional muster).

conduct.[125] If constitutional, the possessing-O provision will punish conduct that does not meet *Miller*'s test for obscenity.[126] Therefore, "it is imperative that the United States Supreme Court review the constitutionality of section 1466A of the PROTECT Act in order to guide . . . the lower courts . . . ."[127]

## III. CALIFORNIA'S REGULATION OF CHILD PORNOGRAPHY

In 1989, before the United States Supreme Court expressly authorized the prohibition of the possession of child pornography in *Osborne v. Ohio*, and at a time when only nineteen other states prohibited mere possession, California passed its Penal Code section 311.11.[128] The statute makes it an offense to knowingly possess information, data, images, or computer-generated images when production involved the use of a minor who is personally engaging in or simulating sexual conduct and the possessor knows that the person depicted is a minor.[129] Child pornography displayed on a computer screen is illegal even without knowledge of the corresponding data or files on the computer.[130]

### *A. California Dad Can Paste Daughter's Face on Porn Pictures*[131]

*People v. Gerber* exposes the weakness of California's current child pornography law. Gerber used Microsoft Paint to digitally insert the face of his 13-year-old daughter ("J") onto graphic pictures of women.[132] J testified that Gerber provided her with alcohol, cocaine, marijuana, and possibly methamphetamine in order to convince her to let him take pictures of her, sometimes in her bra and underwear.[133]

The child told her mother, causing the police to raid Gerber's apartment.[134] The police found two USB drives with pornographic images with J's face on them, but none of the photographs of J in her underwear were

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125. Russell, *supra* note 84, at 1486–87.

126. *See id.*

127. *See* Bird, *supra* note 98, at 174.

128. CAL. PENAL CODE § 311.11(a) (West 2011). *See generally* People v. Gerber, 196 Cal. App. 4th 368, 382 (2011), *review denied*, 2011 Cal. LEXIS 8915 (Aug. 17, 2011).

129. *See* PENAL § 311.11(a).

130. *See* Tecklenburg v. App. Div. of Super. Ct., 169 Cal. App. 4th 1402, 1418 (2009).

131. *Court: Calif. Dad Can Paste Daughter's Face on Porn Pics*, *supra* note 3.

132. *See Gerber*, 196 Cal. App. 4th at 376–77.

133. *See Court: Calif. Dad Can Paste Daughter's Face on Porn Pics*, *supra* note 3.

134. *Gerber*, 196 Cal. App. 4th at 376–77.

found.[135] Gerber admitted to masturbating to the composite photos and having "sick thoughts."[136]

At trial, Gerber was convicted of drug possession and possession of child pornography, with the latter under CALIFORNIA PENAL CODE section 311.11.[137] Gerber was sentenced to thirteen years and four months in prison with a concurrent one-year jail term.[138] On appeal, Gerber argued that there was insufficient evidence to sustain his conviction because the photos did not "personally" depict J engaging in the sex acts prohibited by the statute.[139] In June 2011, California's Sixth District Court of Appeal agreed with the defendant and reversed his conviction for possession of child pornography, remanding the drug charges for retrial.[140]

In reaching its decision, the court relied on the statute's plain meaning, legislative history, and legislative intent, as well as the underlying rationales in *New York v. Ferber* and *Ashcroft v. Free Speech Coalition*.[141] Ultimately, the court found that photo-editing a child's head on an adult's body does not create liability under section 311.11.[142] First, the court analyzed the language of the statute, which states,

> [e]very person who knowingly possesses or controls any matter . . . the production of which involves the use of a person under the age of 18 years, knowing that the matter depicts a person under the age of 18 years personally engaging in or simulating sexual conduct . . . is guilty of a felony . . . .[143]

The court announced that the word "personally" means "in person" according to the dictionary[144] and the word "depict" means "to represent by or as if by a picture."[145] Because the court considered these definitions to be ambiguous, it compared section 311.11 to prior California child pornogra-

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135. *Id.*

136. *Court: Calif. Dad Can Paste Daughter's Face on Porn Pics*, *supra* note 3.

137. *See Gerber*, 196 Cal. App. 4th at 373.

138. *Id.*

139. *Id.* at 377.

140. *Id.* at 392.

141. *See id.* at 386 ("We conclude, however, that the articulated rationales underlying both the *Ferber* and *Free Speech Coalition* decisions compel the conclusion that such altered materials are closer to virtual child pornography . . . . [T]o avoid constitutional infirmity, the term 'personally' in section 311.11 must be construed to mean that a real child actually engaged in or simulated the sexual conduct depicted, which is a reasonable interpretation given the legislative history.").

142. *See generally id.* at 386.

143. PENAL § 311.11.

144. *Gerber*, 196 Cal. App. 4th at 378.

145. *Id.*

phy laws including CALIFORNIA PENAL CODE section 311.2(b) to further clarify the meaning of child pornography laws.[146]

In 1977, California passed section 311.2(b) to curb the proliferation of child pornography, which posed a serious threat to the welfare of California minors.[147] The law made it a felony to "knowingly send . . . into the state for sale or distribution or to possess with intent to distribute . . . obscene matter when the person knows that the obscene matter 'depicts a person under the age of 18 *personally engaging in or personally simulating*' specified sexual acts."[148] The legislative history made it clear that the statute was meant to prevent the production of child pornography through the exploitation of children.[149] The emphasized terminology was used in the passage of sections 312.3, 311.10, and 311.11.[150]

To the court, the legislative history of sections 311.2, 312.3, 311.10, and 311.11 suggested that the law would only target material produced using real children, where the offender must know that the person depicted is an actual child, and the child must actually engage in or simulate the acts.[151] To buttress this interpretation, the court examined case precedent.[152]

The *Gerber* court focused on the holding of *Ferber*, which supported First Amendment protection when non-obscene depictions of sexual conduct did not involve *live* performances.[153] Furthermore, *Ferber* held that the state's interest in protecting children cannot justify restricting materials that are made without the use of real children because "virtual pornography is not 'intrinsically related' to the sexual abuse of children."[154]

Finally, the court decided that Gerber's depiction of his daughter was more similar to virtual child pornography than actual child pornography because the use of photo editing software to place a minor's head on an adult's body does not necessarily involve the exploitation of an actual child.[155] Therefore, the court overturned Gerber's conviction because photo-editing a child's head onto an adult's body is virtual child pornography that does not personally depict an actual child engaged in the conduct.[156]

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146. *See id.* at 379.
147. *See id.* at 379–80.
148. *Id.*
149. *See id.* at 380.
150. *See Gerber*, 196 Cal. App. 4th at 380–82.
151. *See id.*
152. *See id.*
153. *See id.* at 384.
154. *Id.* at 385 (citation omitted).
155. *See id.* at 386.
156. *See Gerber*, 196 Cal. App. 4th at 386.

### *B. California Is Behind the Times*

California fights child pornography with section 311.11 and its obscenity laws, but these laws fall short of protecting the vital interest of the state—i.e., California's children.[157] *Gerber* illustrates that section 311.11 fails to protect children from the child pornography predators who would be punished under the federal Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act").[158] The PROTECT Act punishes additional forms of child pornography media,[159] and its definition prohibits more types of child pornography including morphed child pornography.[160]

#### 1. Section 311.11 Is Too Weak

Federal law can punish more forms of child pornography than the corresponding California law.[161] For example, under California law, a person cannot be prosecuted for possession of child pornography in the form of "drawings, figurines, [or] statues . . . ."[162] Therefore, the statute would be inapplicable to "Japanese anime-style cartoons of children engaged in explicit sexual conduct with adults."[163] However, under federal law, possession of such material is punishable.[164] Possession of virtual child pornography is illegal because the PROTECT Act's prohibition applies to "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting,"[165] and "it is not a required element . . . that the minor actually exist."[166]

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157. *See generally id.* (reversing Gerber's conviction because section 311.11 requires a real child in the depiction); *see also* Bird, *supra* note 98, at 176 ("[U]sing obscenity laws as a guise to prohibit virtual child pornography is insufficient due to the inability of lawmakers to proscribe simple possession of obscene materials.").

158. *See generally Gerber*, 196 Cal. App. 4th at 386 (holding that an actual child must be depicted to violate the statute); *see also* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2252A(c)(2) (2006) (eliminating the defense used in *Gerber* in morphed child pornography cases).

159. *Compare* PENAL § 311.11(d), *with* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 1466A(a)(2)(A) (2006).

160. *See* United States v. Hotaling, 599 F. Supp. 2d 306, 321 (N.D.N.Y. 2008) (stating that morphed child pornography includes images altered to appear to depict minors engaged in sexual conduct).

161. *Compare* 18 U.S.C. § 1466A(a), *with* PENAL § 311.11(d).

162. PENAL § 311.11(d).

163. *See, e.g.*, United States v. Whorley, 550 F.3d 326, 330 (4th Cir. 2008).

164. *See id.* (convicting the defendant for possession of a drawing or cartoon).

165. 18 U.S.C. § 1466A(a)(1)(A).

166. *Id.* § 1466A(c).

Therefore, the federal act is clearly stronger because it has comparatively fewer restraints with respect to forms of child pornography media.[167]

Also, federal law protects children from being victims of morphed pornography.[168] In *United States v. Bach*, the defendant was charged with possession and receipt of child pornography.[169] The material at issue was a photograph where "the head of a well known juvenile . . . was skillfully inserted onto the body of [a] nude boy so that the resulting depiction appears to be a picture of [the juvenile] engaging in sexually explicit conduct . . . ."[170] The defendant argued that his conviction was invalid because there was no abuse of an actual minor.[171] However, federal law allowed the State to protect a minor's "physical and psychological well being," and the court found that there was an identifiable minor child who was victimized when the picture was displayed.[172] However, in California, the Sixth District Court of Appeal freed Gerber upon his presentation of the "no actual child" argument.[173] Therefore, the PROTECT Act provides more expansive protection than California's section 311.11 when it comes to morphed images.[174]

### 2. Obscenity Law Is a Poor Substitute

In addition to section 311.11, California has an obscenity law to punish those who pander obscene material.[175] However, there are several problems with using California's obscenity law to obtain a conviction when child pornography laws fail.[176]

California has adopted the definition of obscenity dictated by *Miller v. California*.[177] However, proving obscenity is difficult because of the sub-

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167. *See id.* § 1466A(a)(1)(A).

168. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2256(8)(C) (2006) (defining "child pornography" as "any visual depiction," including computer-generated depictions).

169. United States v. Bach, 400 F.3d 622, 624 (8th Cir. 2005).

170. *Id.* at 632.

171. *Id.* at 630.

172. *Id.* at 632.

173. *See Gerber*, 196 Cal. App. 4th at 378.

174. *Compare Bach*, 400 F.3d at 632, *with Gerber*, 196 Cal. App. 4th at 378.

175. CAL. PENAL CODE § 311.2 (West 2011).

176. *See* Bird, *supra* note 98, at 176.

177. *Compare* Miller v. California, 413 U.S. 15, 24 (1973), *with* CAL. PENAL CODE § 311(a) (West 2011) ("'Obscene matter' means matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.").

jective nature of its elements.[178] In addition, there are "demanding impositions that the Supreme Court has previously placed on obscenity laws as compared to child pornography laws."[179] For example, in obscenity cases, the material can only be removed from circulation with a prior adversarial hearing, whereas in child pornography cases, no hearing is required.[180] Finally, even though most child pornography would likely be considered obscene,[181] the United States Supreme Court has ruled that the government cannot prohibit the mere private possession of obscene material.[182] Subsequently, California's obscenity law only prohibits possession "with intent to distribute or to exhibit to others," which is a form of pandering.[183] Therefore, using obscenity law as a backup to a weak child pornography law is "insufficient due to the inability of lawmakers to proscribe simple possession of obscene materials."[184]

## IV. CALIFORNIA SHOULD ADOPT A MODIFIED PROTECT ACT

The PROTECT Act remedies the shortcomings of obscenity law by permitting prosecution for mere possession.[185] The PROTECT Act's obscenity statute (section 1466A) forbids the possession of obscene child pornography, even without the intent to distribute, as long as "the visual depiction . . . ha[s] travelled by any means of interstate or foreign commerce, including through the computer."[186] The Fifth Circuit defined the scope of section 1466A when it held that "the mere transmission . . . via the Internet is 'tantamount to moving photographs across state lines and thus constitutes transport in interstate commerce.'"[187] With such a broad holding, it is arguably "nearly impossible to acquire a [sic] material without some connection to interstate or foreign travel."[188] Therefore, the statute's

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178. *See* ALLAN IDES & CHRISTOPHER N. MAY, EXAMPLES & EXPLANATIONS: CONSTITUTIONAL LAW, INDIVIDUAL RIGHTS 387 (5th ed. 2010) ("It should be clear that the *Miller* definition of obscenity provides little more than a verbal screen for a highly subjective judgment.").

179. Bird, *supra* note 98, at 175.

180. *Id.* at 175–76.

181. *See id.* at 175.

182. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969).

183. PENAL § 311.2(a).

184. Bird, *supra* note 98, at 176.

185. *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 1466A(b) (2006).

186. Bird, *supra* note 98, at 176–77.

187. United States v. Moore, 425 F. App'x 347, 351 (5th Cir. 2011) (quoting United States v. Runyan, 290 F.3d 223, 242 (5th Cir. 2009)).

188. Bird, *supra* note 98, at 177.

effect is likely to proscribe mere possession of obscene material because it is easy to meet the interstate commerce requirement. As a result, the PROTECT Act's section 1466A(a)(1) ("possessing-O") provision would be a constitutional improvement to California law because the provision has the effect of prohibiting mere possession of obscenity.[189]

### *A. The First Challenge of Adopting a Californian PROTECT Act: Narrow Language*

When a law imposes content-based restrictions on speech, it can survive a First Amendment challenge if it: (1) serves a compelling state interest and (2) is narrowly tailored.[190] It is beyond doubt that the state has a compelling interest in protecting the physical and psychological well being of minors.[191] However, "[t]he 'governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech . . . .'"[192] Therefore, California should adopt a version of the PROTECT Act ("Cal-Pro") with wording that avoids overbreadth issues.

The first challenge in creating Cal-Pro would be drafting the statutory language narrowly so that the statute would survive a constitutional challenge to its validity.[193] Case precedent offers guidance in adopting narrow language, and it indicates that Cal-Pro may use language nearly identical to the PROTECT Act to pass constitutional muster.[194] After all, the provisions that have been challenged on constitutional grounds have overwhelmingly been upheld as constitutional.[195]

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189. *See generally* United States v. Mees, No. 4:09CR00145ERW, 2009 WL 1657420, at *4, *5 (E.D. Mo. June 10, 2009) (holding section 1466A(b)(1) is not vague or overbroad).

190. IDES & MAY, *supra* note 178, at 332.

191. New York v. Ferber, 458 U.S. 747, 756–57 (1982).

192. Ashcroft v. Free Speech Coal., 535 U.S. 234, 252 (2002) (citation omitted).

193. *See, e.g.*, United States v. Handley, 564 F. Supp. 2d 996, 1007 (S.D. Iowa 2008) (holding subsection 1466A(a)(2) unconstitutionally overbroad).

194. *See generally* United States v. Williams, 553 U.S. 285, 306–07 (2008) (holding subsection 2252A(a)(3)(B) constitutional); United States v. Schales, 546 F.3d 965, 972–73 (9th Cir. 2008) (holding subsection 1466A(a)(1) constitutional); United States v. Halter, 259 F. App'x 738, 740 (6th Cir. 2008) (holding subsection 2252A(a)(4)(B) constitutional); United States v. Smith, 459 F.3d 1276, 1285 (11th Cir. 2006) (holding subsection 2252A(a)(5) constitutional); *Mees*, 2009 WL 1657420, at *4–5 (holding subsection 1466A(b)(1) constitutional); *Handley*, 564 F. Supp. 2d at 1007 (holding subsections 1466A(a)(2) and (b)(2) unconstitutionally overbroad); United States v. Hotaling, 599 F. Supp. 2d 306, 321–22 (N.D.N.Y. 2008) (holding subsection 2256(8)(c) constitutional).

195. *See generally Williams*, 553 U.S. at 306–07 (holding subsection 2252A(a)(3)(B) constitutional); *Schales*, 546 F.3d at 972–73 (holding subsection 1466A(a)(1) constitutional); *Halter*, 259 F. App'x at 740 (holding subsection 2252A(a)(4)(B) constitutional); *Smith*, 459 F.3d at 1285 (holding subsection 2252A(a)(5) constitutional); *Mees*, 2009 WL 1657420, at *4–5 (hold-

Cal-Pro should use the definition of child pornography found in the PROTECT Act's section 2256, and it should criminalize knowing pandering according to section 2252A(a)(3)(B) of the PROTECT Act (the "known pandering clause"). If Cal-Pro adopted section 2256, it would define child pornography as a visual depiction whose production "involves the use of a minor engaging in sexually explicit conduct."[196] In addition, the definition of child pornography would extend to depictions that are indistinguishable from "a minor engaging in sexually explicit conduct," and depictions that are "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."[197] Cal-Pro's pandering provision would prohibit knowingly advertising, promoting, presenting, distributing, or soliciting child pornography using any means of interstate or foreign commerce in a manner that reflects the belief, or in a manner that "is intended to cause another to believe [] that the material" is child pornography.[198] These words should be adopted because the United States Supreme Court approved their constitutionality in *United States v. Williams*.[199]

In *Williams*, the Supreme Court held in a 7-2 split[200] that the PROTECT Act's known pandering clause is not vague or overbroad.[201] The Court also supported the PROTECT Act's definition of child pornography by stating, "[i]ts definition of material or purported material that may not be pandered or solicited precisely tracks . . . material held constitutionally proscribable . . . ."[202] Furthermore, various courts have favorably ruled on the constitutionality of the other provisions of sections 2256 and 2252A,[203] making it highly likely that if Cal-Pro adopted identical versions of those provisions, the provisions would be upheld as constitutional.

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ing subsection 1466A(b)(1) constitutional); *Handley*, 564 F. Supp. 2d at 1007 (holding subsections 1466A(a)(2) and (b)(2) unconstitutionally overbroad); *Hotaling*, 599 F. Supp. 2d at 321–22 (holding subsection 2256(8)(c) constitutional).

196. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2256(8)(A) (2006).

197. *Id.* § 2256(8)(A)–(C).

198. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2252(A)(a)(3)(B) (2006).

199. *See Williams*, 553 U.S. at 307.

200. *See generally id.* at 310 ("Justice Souter, with whom Justice Ginsburg joins, dissenting.").

201. *Id.* at 285–86.

202. *Id.* at 285.

203. *See, e.g.*, *Halter*, 259 F. App'x at 740 (holding subsection 2252A(a)(4)(B) constitutional); *Smith*, 459 F.3d at 1285 (holding subsection 2252A(a)(5)(B) constitutional); *Hotaling*, 599 F. Supp. 2d at 321–22 (holding subsection 2256(8)(c) constitutional).

Similarly, Cal-Pro should adopt the affirmative defenses described in the PROTECT Act to ensure that the statute's scope is narrowly tailored to ending child sexual abuse, although it will be at the cost of some of its protective capacity.[204] Both of the affirmative defenses described in section 2252A(c) should be employed, because solely having 2252A(c)(1) (the "adult defense") would leave a substantial amount of speech—i.e., computer-generated images—unprotected.[205] If Cal-Pro only used section 2252A(c)(2) (the "no actual minor" defense), then pandering completely computer-generated images would be legal.[206] However, a great amount of material would still be criminalized because the defense is disallowed in morphing cases.[207] By adopting both affirmative defenses, it is more likely that Cal-Pro will be narrow enough to overcome challenges to its constitutionality while simultaneously protecting morphed images of children.

Cal-Pro should also identically draft the PROTECT Act's obscenity provisions including 1466A(a)(1) and 1466A(b)(1) ("possessing-O").[208] These provisions criminalize production, distribution, or possession of visual depictions of children engaged in sexually explicit conduct, regardless of whether they are real, if the depictions are also obscene.[209] In *United States v. Whorley* the court indicated that this language was a "valid restriction on *obscene speech* under *Miller* [*v. California*]," and that "obscenity in any form is not protected by the First Amendment."[210] Since the Supreme Court repeatedly finds that the regulation of material meeting the *Miller* test is not overbroad, there is a strong probability that Cal-Pro's identical language would also be upheld.[211]

However, Cal-Pro should not adopt identical language to sections 1466A(a)(2) ("abridged pandering-O") and 1466A(b)(2) ("abridged possessing-O") of the PROTECT Act.[212] The same language should not be implemented because the United States Supreme Court ruled that pornog-

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204. Gray Mateo, Note, *The New Face of Child Pornography: Digital Imaging Technology and the Law*, 2008 U. ILL. J.L. TECH. & POL'Y 175, 189 (2008).

205. *Free Speech Coal.*, 535 U.S. at 237.

206. *Hotaling*, 599 F. Supp. 2d at 311 (stating that the PROTECT Act's "no actual minor" defense extends to "most possessors and distributors of these defined materials," which is to say "any digital or computer generated image that is 'indistinguishable' from that of a minor engaging in sexually explicit conduct" (citation omitted)).

207. *Id.* at 318.

208. *See* 18 U.S.C. § 1466A.

209. *See id.*

210. *Id.*; United States v. Whorley, 550 F.3d 326, 330 (4th Cir. 2008).

211. *See, e.g.*, *Schales*, 546 F.3d at 971.

212. *See* 18 U.S.C. § 1466A(a)(2), (b)(2).

raphy is protected unless it is obscene or uses actual minors.[213] However, these provisions are problematic because they are a "truncation"[214] of the *Miller* standards for obscenity, and they do not require the material to meet the definition of child pornography.[215] For this reason, some legal scholars predict that these provisions will fail a constitutional challenge.[216] This prediction becomes even more likely because there is no affirmative defense to narrow the scope of the materials prohibited.[217]

Lastly, Cal-Pro would not be significantly weakened by excluding these provisions because there is "almost complete redundancy of the conduct criminalized by [pandering-O] and [possessing-O] with that of [abridged pandering-O] and [abridged possessing-O]."[218] The outcome of *U.S. v. Handley* proves this redundancy because abridged pandering-O and abridged possessing-O were deemed unconstitutional, while their more complete counterparts were constitutional and sufficient to charge the defendant.[219]

In summary, Cal-Pro should adopt PROTECT's definition of child pornography, its pandering provisions, and its pandering-O and possessing-O provisions. However, it should not accept abridged pandering-O and abridged possessing-O provisions for two reasons: (1) scholarly prediction that the provisions will fail because of the Supreme Court's strong language, and (2) because exclusion of the provisions will have minimal impact on Cal-Pro's protective capacity.

### *B. Cal-Pro's Second Challenge: Overcrowding*

#### 1. Lawmakers Should Do More for Overcrowded Prisons[220]

Most likely, California's legislature will take into account the special circumstances of the state when examining California's child pornography law. Unfortunately, California's prison system suffers from a severe over-

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213. *Free Speech Coal.*, 535 U.S. at 240.

214. *Williams*, 444 F.3d at 1296 (11th Cir. 2006), *rev'd*, 553 U.S. 285 (2008).

215. *See Handley*, 564 F. Supp. 2d at 1007.

216. Russell, *supra* note 84, at 1487 (citing Kornegay, *supra* note 8, at 2164).

217. *See* 18 U.S.C. § 1466A. While this statute has an affirmative defense, it does not limit its scope because the statute applies to virtual images including drawings, cartoons, and computer-generated images.

218. *Handley*, 564 F. Supp. 2d at 1007.

219. *Id.* at 1009.

220. *See generally* Ryan Gabrielson, *Analyst Says Lawmakers Should Do More for Overcrowded Prisons*, CALIF. WATCH (Aug. 8, 2011), http://californiawatch.org/dailyreport/analyst-says-lawmakers-should-do-more-overcrowded-prisons-11940.

crowding problem.[221] The prison system has over 140,000 inmates, but the system's maximum capacity is 78,858.[222] The overcrowding in California's prisons causes "severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care."[223] As a result, in *Brown v. Plata*, the United States Supreme Court ordered California to reduce its prison population from 175%[224] to 137.5% of its capacity within two years.[225]

In order to adhere to this Court Order, California has reformed its prison system by "changing the focus from incarceration to rehabilitation" through its "Realignment" plan.[226] The Realignment plan sends non-serious, non-violent, and non-sexual convicted felons to county jails instead of state prisons.[227] In addition, after non-serious, non-violent, non-high-risk sex offenders serve their felony sentences, they are "subject to community supervision provided by a county agency . . . ."[228] As a result, low-level felons will be subject to local jurisdiction, where the counties are instructed to employ community-based punishment demonstrated to reduce recidivism, such as mandatory community service, restorative justice programs, psychological counseling, mental health treatment, and home detention with electronic or GPS monitoring.[229] However, the Legislative Analyst's Office ("LAO") released a report concluding "the realignment plan alone is unlikely to reduce overcrowding sufficiently within the two-year deadline set by the court."[230]

In light of the overcrowding problem, the sentencing guidelines of the PROTECT Act should be modified in Cal-Pro. Currently, if a person is convicted under the pandering provisions of section 2252A for transport-

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221. *See Five Key Facts on California's Prison Overcrowding*, WHAT THE FOLLY?! (July 5, 2011), http://www.whatthefolly.com/2011/07/05/us-news-five-key-facts-on-californias-prison-overcrowding/.

222. *Id.*

223. Brown v. Plata, 131 S. Ct. 1910, 1923 (2011).

224. *OUR VIEW: No Easy Choices on Prison Overcrowding*, GADSDEN TIMES (Nov. 14, 2011), http://www.gadsdentimes.com/article/20111114/OPINION/111119896/1001/NEWS?Title=OUR-VIEW-No-easy-choices-on-prison-overcrowding&tc=ar.

225. *Plata*, 131 S. Ct. at 1945–47.

226. *California Attempts to Fix Broken Prison System with "Realignment"*, WHAT THE FOLLY?! (Oct. 4, 2011), http://www.whatthefolly.com/2011/10/04/california-attempts-to-fix-broken-prison-system-with-realignment/.

227. Jens Erik Gould, *As California Fights Prison Overcrowding, Some See a Golden Opportunity*, TIME (Sept. 29, 2011), http://www.time.com/time/nation/article/0,8599,2094840,00.html.

228. CAL. PENAL CODE § 3451 (West 2011).

229. CAL. PENAL CODE § 3450 (West 2011).

230. Mac Taylor, *A Status Report: Reducing Prison Overcrowding in California*, LEGIS. ANALYST'S OFF. (Aug. 2011), http://www.ccpoa.org/files/overcrowding_080511.pdf.

ing, receiving, distributing, reproducing, advertising, or selling child pornography, they are subject to a fine and imprisonment for a minimum of five years and a maximum of twenty years.[231] The same punishment applies if a person is convicted under section 1466A(a) for distributing, receiving, or possessing with intent to distribute obscene depictions of minors.[232] Furthermore, if the offender has a prior conviction under statutorily defined sections, then his or her sentence is increased to a minimum of fifteen years and a maximum of forty years.[233] However, an offender will receive a fine or imprisonment for a maximum of ten years if he or she is convicted of possession of child pornography (section 2252A(a)(5))[234] or possession of obscene visual depictions of a minor (section 1466A(b)(1)).[235] These sentences may also be enhanced to a minimum of ten years and a maximum of twenty years for prior convictions.[236] However, sending people to prison for such rigid lengths of time would only serve to exacerbate the overcrowding problem.

### 2. California's Big Chance to Get Smart on Crime[237]

Prior to Realignment, California's reigning policy was "tough on crime," and it did not focus on preventing recidivism.[238] The recidivism rate is the percentage of individuals who return to prison within three years of their release.[239] California has one of the highest rates in the country at 67.5%.[240] Since recidivists made up 37% of California's prison population in 2007,[241] Realignment's resolution of this issue could significantly reduce overcrowding. In fact, other states report success in lowering their prison populations through alternative programs that have stabilized and reduced their recidivism rates.[242] For example, an American Civil Liberties Union ("ACLU") report indicated that Mississippi was able to reduce its prison population by 22%, while simultaneously lowering its crime rate over a three-year period by allowing inmates to earn time off from their sentences

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231. 18 U.S.C. § 2252A(b)(1).
232. *See* 18 U.S.C. § 1466A(a).
233. *See* 18 U.S.C. § 2252A(b)(1).
234. *Id.* § 2252A(a)(5).
235. *See* 18 U.S.C. § 1466A(b).
236. 18 U.S.C. § 2252A(b)(2).
237. *See* Gould, *supra* note 227.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Five Key Facts on California's Prison Overcrowding*, *supra* note 221.
242. Gould, *supra* note 227.

and employing programs that focused on education and reentry.[243] Kansas used similar reforms to achieve a 14.6% reduction in prison growth as of 2009, and an 18% drop in crime rates from 2003–2009.[244] Realignment has already begun enacting these kinds of programs to reduce recidivism.[245] However, California should also implement the ACLU's recommended sentencing scheme into Cal-Pro because the LAO does not believe that the current programs are enough to reduce overcrowding.[246]

Two reforms recommended by the ACLU that can be adopted by Cal-Pro are eliminating habitual offender laws[247] and terminating mandatory minimum sentences.[248] The ACLU has suggested that "[s]tates should eliminate . . . habitual offender laws that allow for automatic sentence enhancements based on prior convictions . . . ."[249] Since "habitual offender laws overcrowd our prisons,"[250] Cal-Pro should remove the sentence enhancements mandating higher minimum and maximum sentencing for prior convictions. Similarly, mandatory minimum sentences are problematic because they can be "strict, inflexible, and often irrational sentencing guidelines that . . . [tie] judges' hands."[251] Therefore, the ACLU recommends that states "eliminate mandatory minimum sentenc[ing] lengths for crimes and provide judges with slightly more discretion."[252]

Another reason to eliminate habitual offender laws and mandatory minimum sentencing is that they are counterproductive to the Realignment plan.[253] Since it is unlikely that those convicted of mere possession or pandering of child pornography will be classified as "high risk sex offend-

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243. *Id.*

244. *Smart Reform Is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities*, ACLU 1, 25 (Aug. 2011), http://www.aclu.org/files/assets/smartreformispossible.pdf.

245. *See supra* note 229 and accompanying text (listing several community-based punishments that are designed to reduce recidivism).

246. *See* Taylor, *supra* note 230 (stating that the current plan is unlikely to meet the two-year deadline).

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Smart Reform Is Possible*, *supra* note 244.

253. *See generally* Post Release Community Supervision Act of 2011, PENAL § 3451(b)(4) (indicating community supervision unavailable until after prison term served for high-risk sex offenders); RUDY BERMUDEZ, TODD SPITZER & JAMES TILTON, CALIFORNIA HIGH RISK SEX OFFENDER TASK FORCE 7 (Aug. 15, 2006), *available at* http://www.cdcr.ca.gov/Parole/Sex_Offender_Facts/docs_SOMB/HRSO_taskForce.pdf (providing a comprehensive summary of what classifies as a high-risk sex offender and the terms of parole).

ers,"[254] then it is probable that many Cal-Pro convicts will be eligible for community-based punishment after serving their sentences. However, when sentence-enhancement provisions "mandat[e] unnecessarily long prison sentences"[255] and convicted felons are only eligible for community supervision *after* they have completed their sentence,[256] then their access to community programs—programs that have been demonstrated to reduce recidivism—will be adversely affected.

## V. CONCLUSION

Case precedent established a compelling interest in protecting California's children,[257] which was undermined when the court overturned the child pornography conviction under CALIFORNIA PENAL CODE section 311.11 in *People v. Gerber*.[258] This controversial decision exposed many of the weaknesses of the California statute. The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act") provides stronger protection for children because it covers more types of media,[259] and it can succeed in prosecuting morphed child pornography where section 311.11 failed.[260] In addition, obscenity law is insufficient to make up for the weakness of section 311.11 because its elements are subjective,[261] and the state cannot prohibit mere private possession of obscenity.[262] For these reasons, this Comment proposes that California adopt the California PROTECT Act ("Cal-Pro").

However, some provisions of Cal-Pro cannot copy the exact language of the PROTECT Act because California must narrowly tailor its language

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254. *See* BERMUDEZ, SPITZER &TILTON, *supra* note 253 (stating that factors for high-risk sex offenders include: sexually violent predators, convictions related to two separate victims with at least one being a victim of a sex crime, felony convictions for child molestation, felony convictions for a forcible sex offense, and criminal history).

255. *Smart Reform Is Possible*, *supra* note 244.

256. PENAL § 3451(a) ("[A]fter serving a prison term for a felony [all persons] shall . . . be subject to community supervision.").

257. *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982).

258. People v. Gerber, 196 Cal. App. 4th 368, 392 (2011), *review denied*, 2011 Cal. LEXIS 8915 (Aug. 17, 2011).

259. *Compare* CAL. PENAL CODE § 311.11(d) (West 2011), *with* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, 18 U.S.C. § 1466A(a) (2006).

260. *Compare Gerber*, 196 Cal. App. 4th at 386 (overturning morphing conviction), *with* United States v. Bach, 400 F.3d 622 (8th Cir. 2005) (upholding morphing conviction).

261. IDES & MAY, *supra* note 178, at 387 ("It should be clear that the *Miller* definition of obscenity provides little more than a verbal screen for a highly subjective judgment.").

262. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

according to case precedent,[263] and it must consider the state's prison overcrowding problem.[264] Accordingly, the provisions of sections 2252A and 2256, and subsections 1466A(a)(1) ("pandering-O") and 1466A(b)(1) ("possessing-O") should be identically drafted because case precedent has upheld these provisions as constitutional.[265] Nevertheless, the provisions of subsections 1466A(a)(2) ("abridged pandering-O") and 1466A(b)(2) ("abridged possessing-O") should not be adopted because they prohibit speech that is neither child pornography nor obscenity according to the *Miller* test.[266] Additionally, Cal-Pro's sentencing provisions should accommodate the American Civil Liberties Union's suggestions to eliminate minimum sentencing and mandatory enhancements for habitual offenders[267] because it could interfere with Realignment's attempt at reducing overcrowding.

In conclusion, Cal-Pro will grant more protection for California's children, but it may not be fit for implementation until after the state has complied with the United States Supreme Court's mandate to reduce overcrowding.[268] However, once Cal-Pro is adopted, the suggested modifications will provide a narrowly tailored law that is compatible with Realignment's goal of reducing recidivism and overcrowding.

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263. *See generally* IDES & MAY, *supra* note 178, at 332.

264. *See Five Key Facts on California's Prison Overcrowding*, *supra* note 221.

265. *See generally* United States v. Williams, 553 U.S. 285, 299 (2008) (holding subsection 2252A(a)(3)(b) constitutional); United States v. Schales, 546 F.3d 965, 972 (9th Cir. 2008) (holding subsection 1466A(a)(1) constitutional); United States v. Halter, 259 F. App'x 738, 743 (6th Cir. 2008) (holding subsection 2252A(a)(4)(B) constitutional); United States v. Smith, 459 F.3d 1276, 1288–89 (11th Cir. 2006) (holding subsection 2252A(a)(5) constitutional); United States v. Mees, No. 4:09CR00145ERW, 2009 WL 1657420, at *2–4 (E.D. Mo. June 10, 2009) (holding subsection 1466A(b)(1) constitutional); United States v. Hotaling, 599 F. Supp. 2d 306, 321 (N.D.N.Y. 2008) (holding subsection 2256(8)(c) constitutional).

266. *Handley*, 564 F. Supp. 2d 996, 1007 (S.D. Iowa 2008).

267. *Smart Reform Is Possible*, *supra* note 244.

268. *See generally* Brown v. Plata, 131 S. Ct. 1910, 1917–18 (2011) (requiring a court-mandated population limit to remedy overcrowding in a manner than may conflict with a stronger child pornography law).