Loyola of Los Angeles
Entertainment Law Review

Volume 15 | Number 1 Article 4

9-1-1994

United States v. X-Citement Video: The Pariah Opinion

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NOTE

UNITED STATES v. X-CITEMENT VIDEO: THE PARIAH OPINION

I. INTRODUCTION

In 1989, Rubin Gottesman, the operator of X-Citement Video in Van Nuys, California, was convicted for his interstate distribution of several pornographic videotapes, including *Lust in the Fast Lane*, starring a minor[1] performing under the name of Traci Lords.[2] Despite the overwhelming evidence that Gottesman intended to distribute child pornography, the Ninth Circuit Court of Appeals overturned the conviction holding that section 2252 of the Child Protection Act,[3] the statute used to convict Gottesman, was unconstitutional on its face.[4]

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1. Section 2256(1) of the Child Protection Act defines a "minor" as any person under the age of 18. *See infra* note 53.

2. Ron Russell, *Law on Child Pornography Struck Down*, L.A. TIMES, Dec. 17, 1992, at A3.

3. 18 U.S.C. § 2252 (1993) provides:

> (a) Any person who -
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> (1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails any visual depiction, if -
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> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
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> (B) such visual depiction is of such conduct;
>
> (2) knowingly receives, or distributes any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if -
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;
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> . . . .
>
> (b)(1) . . . shall be fined under this title or imprisoned not more than ten years, or both. . . .

4. United States v. X-Citement Video, Inc., 982 F.2d 1285, 1286 (9th Cir. 1992). A statute will be found to be facially invalid if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that . . . constitute an exercise" of protected rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

In 1977, Congress passed the Protection of Children Against Sexual Exploitation Act[5] to prohibit the distribution of obscene[6] pornography depicting minors. In 1984, Congress amended the Act, lowering the standard for the prohibited material from "obscene" to "sexually explicit."[7] Application of the amended Act has been problematic, however, because it holds both distributors and recipients of videotapes containing child pornography strictly liable with respect to the contents of the tapes. As a result, even if a distributor honestly believes that none of the videotapes distributed contain child pornography, if a single videotape contains a scene depicting a minor engaged in sexual conduct, that distributor is in violation of section 2252 of the Child Protection Act.[8]

Distributors of adult pornography are the statute's most vulnerable targets. The burden upon distributors to accurately determine the age of every performer in each videotape is insurmountable. As a result, many distributors of adult pornography have chosen to leave the business of distribution entirely, for fear of violating the statute.[9]

In deciding *X-Citement Video*, the Ninth Circuit panel[10] unanimously agreed that section 2252 was unconstitutional without a mens rea[11]

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5. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 92 (codified as amended at 18 U.S.C. §§ 2251-2257 (1978)).

6. "Obscene" is defined as anything that is "[o]bjectionable or offensive to accepted standards of decency." BLACK'S LAW DICTIONARY 1076 (6th ed. 1990). The U.S. Supreme Court has also created guidelines for determining when material is deemed "obscene." *See infra* note 81.

7. Child Protection Act of 1984, Pub. L. No. 98-292, § 4(3), 98 Stat. 204 (1984), *reprinted in* 1984 U.S.C.C.A.N. 98 (codified as amended at 18 U.S.C. § 2252 (1984)).

8. *Id.*

9. Osborne v. Ohio, 495 U.S. 103, 110 (1990).

10. The panel included Judge William C. Canby, Jr., Judge Alex Kozinski and Judge Ferdinand F. Fernandez. *X-Citement Video*, 982 F.2d at 1286.

11. "Mens rea" literally means "guilty mind." BLACK'S LAW DICTIONARY 985 (6th ed. 1990). The degrees of mens rea, from highest to lowest, are "purpose," "knowledge," "reckless," "negligence," and "strict liability." Joseph V. De Marco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. REV. 570, 574 n.24 (1992).

The Model Penal Code defines these degrees of mens rea as follows:

(1) Purpose - A person acts purposefully with respect to a result or to conduct described by a statute when his/her conscious objective is to cause such result or engage in such conduct. MODEL PENAL CODE § 2.02(2)(a)(i).

(2) Knowledge - A person acts knowingly with respect to conduct or to a circumstance described by a statute when he/she is aware that his/her conduct is of such nature or that such circumstances exist. MODEL PENAL CODE § 2.02(2)(b)(i).

requirement with respect to the age of the performers in the videotapes.[12] A statute that holds distributors and recipients of child pornography strictly liable for their actions could deter people from distributing protected *adult* pornography.[13] Generally, strict liability is employed as a "procedural shortcut to punish those who would be culpable under traditional theories of criminal law."[14] However, strict liability statutes "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the [sic] more reluctant to exercise it."[15] Although adult pornography may not be the first thing that comes to mind when one thinks of protected free speech, it remains a protected, albeit unconventional, form of expression.[16]

The *X-Citement Video* panel was primarily faced with two issues: (1) what degree of mens rea was required for section 2252 to be valid; and (2) whether the court could save section 2252 from invalidation through judicial construction.[17] The majority in *X-Citement Video* found that section 2252, without a mens rea of at least "knowledge," creates an undesirable "chilling effect" on the distribution of adult pornography.[18]

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(3) Reckless - A person acts recklessly when he/she is aware of and consciously disregards a substantial and unjustifiable risk that will result from his/her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him/her, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the situation. MODEL PENAL CODE § 2.02(2)(c).

(4) Negligence- A person is criminally negligent when he/she fails to perceive the substantial and unjustifiable risk that will result from his/her conduct. The risk must be of such a nature and degree that the failure to perceive it, considering the nature and purpose of the actor's conduct and the circumstances known to him/her, involves a gross deviation from the standard of care that a reasonable person would observe in the situation. MODEL PENAL CODE § 2.02(2)(d).

STANLEY S. ARKIN & JOHN R. WING, MENS REA STATE OF MIND DEFENSES IN CRIMINAL AND CIVIL FRAUD CASES 173-75 (1985).

12. *X-Citement Video*, 982 F.2d at 1291-92. *But see* Jorn Axel Holl, Comment, *Judges, Congress, and the Sixteen-Year-Old Porn Star: Questions on the Proper Role of the First Amendment*, 75 IOWA L. REV. 1355 (1990) (arguing that § 2252 should be enforced as a strict liability statute).

13. As one commentator suggested, strict liability could "deter *producers* from making adult films." Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 409 (1993) (emphasis added).

14. *Id.* at 421.

15. Smith v. California, 361 U.S. 147, 151 (1959).

16. Holl, *supra* note 12, at 1356.

17. *X-Citement Video*, 982 F.2d at 1286.

18. *Id.* at 1291.

Judge Alex Kozinski, however, disagreed with the court's invalidation of section 2252.[19] In his partial dissent, Judge Kozinski proposed that under traditional rules of statutory construction, a "reckless" mental state could be read into the statute so that it would not infringe upon the First Amendment right to free speech.[20]

This Note will focus on the Ninth Circuit's invalidation of section 2252 of the Child Protection Act. It is the author's opinion that the Ninth Circuit should have saved section 2252 by judicially narrowing the scope of the statute to require a mens rea with respect to the contents of the material distributed or received. Part II of this Note examines the First Amendment and the background of the Child Protection Act. Part III outlines the facts of *X-Citement Video*, the Ninth Circuit's reasons for invalidating section 2252, and the majority's improper reliance on the law governing obscenity cases. Part IV argues that, in order to save section 2252 from invalidation, the Ninth Circuit should have either judicially narrowed the scope of section 2252 to require a mens rea element of criminal negligence with respect to the contents of the material, or, in the alternative, created a mistake-of-age defense. Part V analyzes the effect this decision has had on subsequent decisions involving section 2252 and how the Ninth Circuit has expanded the scope of the *X-Citement Video* decision to apply retroactively.

II. BACKGROUND

A. *The First Amendment*

When determining the degree of protection to grant speech, courts weigh the value of the speech itself against the harm it causes.[21] The value allocated to various forms of speech depends on the subject matter.[22] For example, political speech or discourse receives special protection commercial speech receives less protection, and obscene speech receives no protection at all.[23] In addition, as the Ninth Circuit pointed out, "[t]he distaste we may feel as individuals toward the content or message of protected expression cannot . . . detain us from discharging our

19. *Id.* at 1292.

20. *Id.*

21. Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1891 (1992).

22. *Id.* at 1891-92.

23. *Id.* at 1892, 1894.

duty as guardians of the Constitution."[24] The constitutional rights of those involved in pornography were first considered by the United States Supreme Court in *Chaplinsky v. New Hampshire*.[25] In *Chaplinsky*, the Court first recognized that certain classes of speech do not receive the protection of the First Amendment.[26] The Court expressly excluded lewd and obscene speech as outside the First Amendment's protective umbrella.[27]

This holding was solidified fifteen years later in *Roth v. United States*.[28] In *Roth*, the Court attempted to lower the minimum standards for the exclusion of sexually explicit material from the ambit of First Amendment protection.[29] The Court announced a definition that distinguished protected speech from unprotected obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[30] This definition resulted in pornography receiving greater protection, some of which had only the slightest portion of redeeming social value.[31] Sixteen years after *Roth*, the Court decided *Miller v. California*,[32] in which it enunciated a less protective standard for determining what is obscene.[33]

Despite the Court's elimination of obscenity as a protected form of expression, non-obscene pornography remains a protected class of speech. Although the harms generated by pornography are serious,[34] they are insufficient, standing alone, to justify complete government prohibition.[35] In fact, pornography has been traditionally classified as political discourse,

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24. United States v. United States Dist. Court ("Kantor"), 858 F.2d 534, 541 (9th Cir. 1988).

25. 315 U.S. 568 (1942).

26. *Id.* at 571.

27. *Id.* at 572.

28. 354 U.S. 476 (1957).

29. Todd J. Weiss, *The Child Protection Act of 1984: Child Pornography and the First Amendment*, 9 SETON HALL LEGIS. J. 327, 349 (1985).

30. *Roth*, 354 U.S. at 489.

31. Weiss, *supra* note 29.

32. 413 U.S. 15 (1973).

33. *See infra* note 81 and accompanying text.

34. [T]he reasoning behind antipornography legislation is found in three categories of concrete, gender-related harms: harms to those who participate in the production of pornography, harms to the victims of sex crimes that would not have been committed in the absence of pornography, and harms to society through social conditioning that fosters discrimination and other unlawful activities.

Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595 (1986).

35. *Id.* at 602; *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that non-obscene speech cannot be regulated because of the harm it produces unless it is shown that the speech is directed to produce harm that is both imminent and extremely likely to occur).

and therefore is subject to protection.[36] At first glance, this may seem absurd. However, upon closer scrutiny, pornography often conveys many political messages which have great impact on societal values. For example, the subordination of women in pornography extends a sexist message about the role of women in society.[37] It has been argued that this message does not remain solely in the viewers' minds, but instead affects many different aspects of their lives.[38] Pornography may also reinforce values of hedonism or anti-establishment sentiments.[39] Even violent pornography can be said to endorse the concept of uninhibited and uncommitted sex, in other words, sex just for pleasure.[40] Although not all forms of pornography can be classified as political speech, non-obscene pornography continues to be a protected form of expression, so long as it does not involve minors.

B. The Child Protection Act

In the 1970s, an explosive growth in child pornography occurred. By 1977, child pornography had become a significant part of mainstream commercial pornography.[41] The Senate Judiciary Committee concluded that child pornography had become a "highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale."[42] Prevention of sexual exploitation and abuse of children became an increasingly serious national concern.[43] As a result of "growing pressure to eliminate child pornogra-

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36. Harel, *supra* note 21, at 1895-96. *But see* Smith v. California, 361 U.S. 147, 155 (1959) (holding that sexually explicit speech, such as pornography, is generally afforded the same protection as commercial speech, and is distinguishable from other more meritorious types of speech).

37. *See* Harel, *supra* note 21, at 1896. Recently, some feminists have attacked adult pornography from a civil rights perspective, claiming that it leads to the discrimination and subordination of women. *See generally* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987). However, this argument is self-defeating in that it admits that pornography conveys a political message, and therefore deserves heightened protection.

38. Harel, *supra* note 21, at 1897.

39. *See* Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1627 (1988).

40. Deana Pollard, *Regulating Violent Pornography*, 43 VAND. L. REV. 125, 137 (1990).

41. ATT'Y GEN.'S COMM'N ON PORNOGRAPHY, FINAL REP. 599-601 (1986).

42. S. REP. NO. 438, 95th Cong., 2d Sess. 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 42.

43. Weiss, *supra* note 29.

phy,"[44] Congress passed the Protection of Children Against Sexual Exploitation Act of 1977.[45]

The 1977 Act, however, proved difficult to enforce. First, it required that the videotapes distributed were produced for a commercial purpose, thereby allowing those who produced child pornography for personal uses to avoid prosecution.[46] Second, it prohibited distribution of *only* "obscene" child pornography.[47] As a result, non-commercial production and distribution of "non-obscene" child pornography flourished, while very few convictions were obtained.[48]

In 1982, the United States Supreme Court in *New York v. Ferber*[49] upheld a New York law that made it illegal to distribute "non-obscene" child pornography. The Court stated that "[t]he legislative judgment . . . is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment."[50] This decision "established child pornography as a separate form of sexually explicit speech whose production and distribution the states may prohibit without resorting to the test for legal obscenity."[51] It also provided the springboard for Congress to pass the Child Protection Act of 1984.[52]

The 1984 Act effected a number of major changes designed to facilitate the prosecution and enforcement of child pornography laws. The most significant change from the 1977 Act was the elimination of the obscenity and commercial purpose requirements.[53] Despite Congress'

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44. Robert R. Strang, Note, *"She Was Just Seventeen . . . and the Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779, 1782 (1990).

45. Pub. L. No. 95-225, *supra* note 5.

46. ATT'Y GEN.'S REP., *supra* note 41, at 604.

47. *Id.* at 605.

48. ATT'Y GEN.'S REP., *supra* note 41, at 604-05. In 1982, a Deputy Assistant Attorney General of the Criminal Division revealed that the Attorney General's office was able to obtain only twenty-three convictions for selling child pornography since the enactment of the Protection of Children Against Sexual Exploitation Act of 1977. H.R. REP. NO. 536, 98th Cong., 1st Sess. 9 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 500.

49. 458 U.S. 747 (1982).

50. *Id.* at 758.

51. Susan G. Caughlan, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187, 202 (1987).

52. Child Protection Act of 1984, Pub. L. No. 98-292, § 4, 98 Stat. 204 (1984), *reprinted in* 1984 U.S.C.C.A.N. 98.

53. *Id.* § 4. Incidentally, the 1984 Act also increased the age of majority from 16 to 18. 18 U.S.C. § 2256(1) (1993). Part of the rationale for increasing the age of majority from 16 to 18 was articulated by Congressman Hughes, the Act's sponsor, who noted that "with this change, perhaps we can actually protect children up to age 16." 129 CONG. REC. H458 (1983) (Rep.

good faith attempt to combat a well-established societal harm, it went too far in its desire to create optimal enforcement when it created section 2252 without a mens rea requirement as to the age of the performers.

The legislative history of the 1977 Act explicitly provides that it is not necessary to prove that a defendant *knew* that the videotapes contained child pornography.[54] When the Act was amended in 1984, the legislative history was silent as to what level of proof was required.[55] In *X-Citement Video*, the Ninth Circuit had to determine whether the statute should be invalidated or judicially narrowed by adding a mens rea requirement or a mistake-of-age defense.[56]

III. THE CASE: *UNITED STATES V. X-CITEMENT VIDEO*

A. The Facts

In 1986 and 1987, an undercover police officer contacted Rubin Gottesman, the operator of a video store, and asked to purchase videotapes starring Traci Lords.[57] The officer specifically stated "that he wanted tapes that Lords had made when she was under the age of 18."[58] Gottesman sold the officer two sets of tapes; one set he gave directly to the officer and the second set Gottesman shipped, per the officer's instructions, to Hawaii.[59]

"A federal grand jury indicted Gottesman for distributing, shipping, and conspiring to distribute and ship child pornography in violation"[60] of the Child Protection Act. After a bench trial, a federal district court in Los Angeles convicted Gottesman of violating sections 2252(a)(1) and (a)(2) of the Child Protection Act, sentenced him to twelve months incarceration and fined him $100,000.[61] On appeal, the Ninth Circuit ruled that section

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Hughes of New Jersey).

54. H.R. CONF. REP. NO. 811, 95th Cong., 2d Sess. 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 69.

55. H.R. REP. NO. 536, 98th Cong., 2d Sess. 12 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 503.

56. *X-Citement Video*, 982 F.2d at 1285.

57. *Id.* at 1286.

58. *Id.*

59. *Id.*

60. *Conviction of Distributor of Traci Lords Videotapes is Overturned as Court, Over Strong Dissent, Declares Section of Child Pornography Statute Unconstitutional*, 15 ENT. L. REP. 1, 11 (1993).

61. *Id.*

2252 was facially unconstitutional and reversed the district court's decision.[62]

B. The Reasoning

Judge Canby, writing for the majority in *X-Citement Video*, relied on an earlier Ninth Circuit decision, *United States v. Thomas*,[63] to conclude that "section 2252 does not require any knowledge of the contents of the material; the only scienter requirement of section 2252 is the defendant's knowledge that he mailed the material."[64] Moreover, relying on the United States Supreme Court decisions in *Smith v. California*,[65] and *New York v. Ferber*,[66] the majority determined that "the First Amendment mandates that a statute prohibiting the distribution, shipping or receipt of child pornography require *knowledge* of the minority of the performers as an element of the crime it defines."[67]

In *X-Citement Video*, Judge Kozinski dissented with respect to the majority's position on section 2252.[68] First, Judge Kozinski argued that *United States v. Thomas* did not hold that section 2252(a) is a strict liability statute,[69] only that *Thomas* simply tells us that "the word 'knowingly' in the statute does not apply to the age of the depicted children."[70] Hence, Judge Kozinski argued, the *Thomas* ruling "neither considered nor excluded the possibility that a lower level of scienter, like recklessness, might apply as a matter of *constitutional* interpretation."[71] Second, Judge Kozinski acknowledged that *Ferber* holds that criminal responsibility may not be imposed without some requirement of mens rea, "[b]ut *Ferber* did not say what level of scienter is sufficient in a child pornography case — whether it be purposefulness, knowledge, recklessness, negligence, or something else altogether."[72] Moreover, Judge Kozinski contended, "[w]e know,

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62. *Id.*

63. 893 F.2d 1066 (9th Cir. 1990). Thomas was convicted of mailing obscene material in violation of § 2252(a)(1). *Id.* at 1067. The Court held that the government was not required to allege that Thomas knew the victim was a minor to satisfy § 2252(a)(1). *Id.* at 1070.

64. *X-Citement Video*, 982 F.2d at 1289.

65. 361 U.S. 147, 153 (1959) (holding that book distributor in possession of obscene book can only be prosecuted if distributor has knowledge of contents of book).

66. 458 U.S. 747, 765 (1982) (holding that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.").

67. *X-Citement Video*, 982 F.2d at 1291-92 (emphasis added).

68. *Id.* at 1292 (Kozinski, J., dissenting).

69. *Id.* at 1295.

70. *Id.*

71. *Id.*

72. *X-Citement Video*, 982 F.2d at 1292 (Kozinski, J., dissenting).

after *Osborne*, that recklessness is sufficient, but it is not at all clear that a lesser state of mind, such as negligence, would not suffice to save the statute."[73]

C. *The Court's Reliance Upon Obscenity Law*

In making its determination that section 2252 should require *knowledge* of the contents of the material, the majority in *X-Citement Video* relied upon *Smith v. California*,[74] an adult obscenity case.[75] In *Smith*, the Court held that the First Amendment prohibits prosecution of a book distributor for possession of an obscene book unless the distributor has knowledge of the contents of the book.[76] The majority in *X-Citement Video* used the holding in *New York v. Ferber*[77] to support its reliance upon *Smith*.[78] The *Ferber* Court held that "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."[79] But the *Ferber* Court also stated that "[t]he test for child pornography is separate from the obscenity standard . . . ."[80] This finding created the beginning of a new class of prohibited speech — child pornography.

Before *Ferber*, the production or distribution of non-obscene child pornography was protected by the First Amendment. In 1973, the United States Supreme Court set forth guidelines for determining obscenity in *Miller v. California*.[81] To most, the idea of child pornography may itself seem obscene. However, the guidelines created by *Miller* were of little use to those attempting to prohibit child pornography. For example, a film

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73. *Id.* at 1296 n.8 (Kozinski, J., dissenting); *see also* Osborne v. Ohio, 495 U.S. 103 (1990) (upholding a statute that outlawed the possession of child pornography where the defendant either knew the videotapes contained underage actors or was at least reckless as to this fact). *See infra* notes 87 through 94 and accompanying text.

74. 361 U.S. 147 (1959).

75. *X-Citement Video*, 982 F.2d at 1290.

76. *Smith*, 361 U.S. at 153.

77. 458 U.S. 747 (1982).

78. *X-Citement Video*, 982 F.2d at 1290.

79. *Ferber*, 458 U.S. at 765.

80. *Id.* at 764.

81. 413 U.S. 15 (1973). The guidelines for the trier of fact were:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

depicting two minors engaged in sexual intercourse would not be considered obscene under the *Miller* test if a jury decides that the film is not offensive or has some significant artistic value.

In 1984, the *Ferber* Court stated that the standard set forth in *Miller* "bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work."[82] The Court in *Ferber* used these harms as its rationale for establishing child pornography as a separate and completely prohibited form of expression whose distribution the states may prohibit regardless of whether the material would be deemed "obscene."[83] Moreover, the Court in *Ferber* stated that preventing the sexual exploitation of children through their performances in child pornography is of "surpassing importance,"[84] which suggests that the government has a greater interest in legislating conduct that involves minors.[85] Hence, with a greater government interest, the need for a mens rea requirement is diminished in child pornography cases.[86]

The difference in scienter requirements for child pornography and obscenity was recently recognized in *Osborne v. Ohio*.[87] In this case, the Court upheld a statute that made *possession* of child pornography illegal.[88] The statute allowed a conviction when a defendant was at least reckless with respect to the age of the performers in the videotape(s) possessed.[89] Osborne argued that the statute was unconstitutional because it was overbroad without requiring that the possessor of child pornography have a guilty mind.[90] However, the Court held that recklessness "plainly satisfie[d] the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter."[91] The Court also noted that the state's strong interest in preventing child pornography was far more compelling than the weak interest of preventing obscenity.[92]

As Judge Kozinski pointed out, *Osborne* could be distinguished from *X-Citement Video* because it involved the *possession* of child pornography, while *X-Citement Video* involved the *distribution* of child pornography.[93]

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82. *Ferber*, 458 U.S. at 761.
83. Caughlan, *supra* note 51, at 202 n.128.
84. *Ferber*, 458 U.S. at 757.
85. Strang, *supra* note 44, at 1797.
86. *Id.*
87. 495 U.S. 103 (1990).
88. *Id.*
89. *Id.* at 112.
90. *Id.*
91. *Id.* at 115.
92. *Osborne*, 495 U.S. at 109.
93. *X-Citement Video*, 982 F.2d at 1293 n.1 (Kozinski, J., dissenting).

However, if a mens rea of recklessness would be sufficient to convict a defendant for the private possession of child pornography, surely the same standard would be enough to convict a defendant for distributing child pornography through interstate commerce. It is well settled that the Constitution affords greater protection to the private possession of material than it does to material sent through interstate commerce.[94]

Although obscenity and child pornography cases have many similarities, courts should not rely on obscenity decisions when analyzing the mens rea required by section 2252. The basis for regulating the distribution of obscene material comes from society's "interest in order and morality."[95] On the other hand, "[t]he interest at stake [in child pornography cases] — protection of children from the extreme and lasting emotional harm caused by their performances" — is much more substantial.[96] Accordingly, the majority's reliance in *X-Citement Video* upon *Smith v. California* to find that a defendant must have at least "knowledge" that the material contains child pornography was misplaced.

IV. SAVING THE STATUTE

The question remains whether the Ninth Circuit, through judicial construction, could have narrowed section 2252 by adding a mens rea requirement. Some believe that "[c]ourts should [either] strike down a statute as unconstitutional or let it stand."[97] They argue that "[u]nauthorized meddling into the detailed mechanics of carefully drafted statutes is an intolerable exercise in judicial one-upmanship."[98] With respect to section 2252, some commentators believe that the legislature's decision to drop "knowledge" from the statute in 1977, and the silence of "the legislative history of the 1984 Amendment precludes the judicial creation of a scienter requirement as a matter of statutory interpretation."[99] On the other hand, Judge Kozinski, in *X-Citement Video,* noted that while "Congress did delete a knowledge requirement, . . . I do not read this as precluding any and all scienter requirements."[100] Moreover, he stated that "[s]tatutes often fail

94. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

95. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973).

96. Strang, *supra* note 44, at 1802.

97. Holl, *supra* note 12, at 1367.

98. *Id.*

99. Strang, *supra* note 44, at 1780.

100. *X-Citement Video*, 982 F.2d at 1297 (Kozinski, J., dissenting).

to specify mental states for each element of the criminal offense, and courts routinely read scienter into a statute even absent constitutional considerations."[101]

A general rule of American criminal law is that every crime must include a mens rea and an actus reus,[102] i.e., the "concurrence of an evil-meaning mind with an evil-doing hand . . . ."[103] When a statute does not expressly provide a mens rea requirement for all elements of a crime, the general rule is that the mens rea required for some elements will be presumed to apply to every element of the offense *unless* a clear legislative intent to the contrary exists.[104] With respect to section 2252, the statute expressly requires defendants have knowledge of their distribution, receipt, or shipment of the material. However, the legislative history clearly indicates that knowledge is *not* required with respect to the contents of the material itself.[105] Hence, the presumption of mens rea set forth by the Model Penal Code and adopted by many of the states is not applicable here, where there is clear legislative intent to exclude knowledge from the content element of the statute.

The modern interpretation of criminal statutes involves an element-by-element analysis.[106] This analysis recognizes the different states of mind that may apply to different elements of a crime.[107] When performing this analysis, courts separate the elements of a statute into three classes: conduct, surrounding circumstances, and prohibited result.[108] If an element is classified as conduct, then only mental states of purpose or knowledge may apply.[109] For example, section 2252 requires that a defendant have *knowledge* of the prohibited *conduct.* On the other hand, if an element is classified as a surrounding circumstance or a prohibited result, then any of the four levels of mens rea may apply.[110] According-

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101. *Id.* at 1296 (Kozinski, J., dissenting) (referring to Liparota v. United States, 471 U.S. 419, 426 (1985)).

102. "Actus reus" literally means "guilty act." BLACK'S LAW DICTIONARY 36 (6th ed. 1990).

103. Morissette v. United States, 342 U.S. 246, 251 (1952).

104. Matthew T. Fricker & Kelly Gilchrist, Comment, United States v. Nofziger *and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the* Mens Rea *Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 812 (1990).

105. H.R. CONF. REP. NO. 811, 95th Cong., 2d Sess. 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 69.

106. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 423 n.5 (1985).

107. *See* United States v. Bailey, 444 U.S. 394, 406 (1980).

108. Fricker & Gilchrist, *supra* note 104, at 826.

109. MODEL PENAL CODE § 2.02(2) (1985).

110. *Id.*

ly, when analyzing section 2252, the fact that the material is child pornography would clearly be a surrounding circumstance, and therefore any level of mens rea would be appropriate, including negligence.

A. *Criminal Negligence*

The question then turns to *which* level of mens rea would be the most appropriate. This determination requires balancing First Amendment rights with the importance of protecting the victims of child pornography. The Senate Committee on the Judiciary stated its belief that the "use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole."[111] In fact, studies show that sexually exploited children have difficulty developing healthy, affectionate relationships later in life and have a tendency to become sexual abusers as adults.[112] Moreover, since videotapes create a "permanent record" of the sexual exploitation and abuse, distribution of these tapes creates an ongoing harm that could potentially continue for years after the initial abuse.[113] This is why preventing the distribution of child pornography is of such great importance. Considering this potential harm to children, the Ninth Circuit should not have been so quick to invalidate section 2252.

Instead, in light of the important purpose behind the statute and the need to deter distribution of child pornography, the Ninth Circuit should have looked past *Osborne* and the Model Penal Code and implied a requirement of negligence with respect to the content of the material in section 2252. "A criminal negligence standard [much like strict liability] . . . shifts the risk to the party engaging in the activity [i.e. pornography distribution] and punishes those who act carelessly."[114] However, unlike strict liability, a criminal negligence standard would allow a jury to decide whether the defendant acted as a reasonable person would under the circumstances.

Assume a defendant sells or distributes pornographic videotapes and claims to be unaware of the fact that any of the videos contain child pornography. Under a criminal negligence standard, the defendant will only be found guilty if a jury believes that his lack of awareness fell below that of a reasonable person.

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111. S. REP. NO. 438, 95th Cong., 2d Sess. 5 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 43.

112. Ulrich C. Schoettle, M.D., *Child Exploitation: A Study of Child Pornography*, 19 J. AM. ACAD. CHILD PSYCHIATRY 289, 296 (1980).

113. New York v. Ferber, 458 U.S. 747, 759 (1982).

114. Levenson, *supra* note 13, at 420.

This approach is better than reading a reckless mental state into the statute, as Judge Kozinski suggested, because negligence is not a state of mind. Rather, it is a standard of conduct the defendants are expected to maintain *regardless* of their state of mind. In fact, the criminally negligent offender, unlike the reckless offender, is completely unaware of the risk created, and therefore cannot be guilty of consciously disregarding it.[115] Instead, "[t]he liability stems from a culpable failure to perceive the risk."[116] Hence, by requiring a mens rea of negligence, section 2252 would survive First Amendment review, and at the same time, preserve judicial economy by limiting a defendant's opportunity to provide evidence of his state of mind. As Judge Kozinski noted, the drafters of the child pornography statute would surely have chosen a statute with a mens rea requirement over no statute at all.[117]

B. The "Mistake-of-Age" Defense

As an alternative to narrowing section 2252 by adding a mens rea requirement, the Ninth Circuit could have created a "mistake-of-age" defense.[118] With this defense, mens rea would still be a factor in determining whether the statute was violated, but the burden of proof would be on the defendant.[119] With respect to section 2252, a mistake-of-age defense would permit a defendant to prevail if he could prove that he honestly and reasonably believed that none of the videotapes he distributed, received, or shipped contained child pornography.

A classic example of this approach was used in the Ninth Circuit's decision in *United States v. United States District Court for the Central District of California ("Kantor").*[120] This 1988 case also involved the notorious Traci Lords, except the issue here was whether the *producers*, rather than the *distributors*, could be held strictly liable with respect to Lords' age.[121] Writing for the majority this time, Judge Kozinski

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115. STANLEY S. ARKIN & JOHN R. WING, MENS REA STATE OF MIND DEFENSES IN CRIMINAL AND CIVIL FRAUD CASES 178 (1985).

116. *Id.*

117. *X-Citement Video*, 982 F.2d at 1295 (Kozinski, J., dissenting).

118. The mistake-of-age defense is simply a type of mistake-of-fact defense. A mistake-of-fact is a mistake "not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting [of] . . . an unconscious ignorance or forgetfulness of a fact . . . ." BLACK'S LAW DICTIONARY 1001 (6th ed. 1990). For the purpose of § 2252, the pertinent fact is the age of the performers in a particular videotape.

119. Levenson, *supra* note 13, at 420.

120. 858 F.2d 534 (9th Cir. 1988).

121. *Id.* at 538.

concluded that section 2251 of the Child Protection Act, the statute used to convict the producers, was improperly drafted because it violated the First Amendment.[122] But instead of invalidating it, the Ninth Circuit created a mistake-of-age defense to save the statute.[123] The court relied heavily upon the notion that Congress, if given the choice, would have preferred section 2251 with a reasonable mistake-of-age defense to no statute at all.[124]

The defendants in *Kantor* were not satisfied with this defense, and requested that the Ninth Circuit go further and hold that the First Amendment requires the government prove scienter with respect to the content of the material.[125] However, Judge Kozinski noted that "[t]hose who arrange for minors to appear in sexually explicit materials [i.e. producers] are in a far different position from those who merely handle the visual images [i.e. distributors] . . . ."[126] This suggests that the *Kantor* majority felt that it was fair to place the burden of proof upon producers to prove their honest and reasonable mistake-of-age. On the other hand, distributors are less likely to know or have control over who is portrayed in a particular video. Therefore, in cases involving the distribution or receipt of child pornography, the burden to prove mens rea should be on the government.

To some, the mistake-of-age defense may be more desirable than reading criminal negligence into section 2252 because the heavy burden of proof would be on the defendant.[127] Others argue that the government should only be required to prove all the factors necessary to establish a sufficient basis to convict and punish a defendant.[128] They believe that if the government wishes to provide a mistake-of-age defense, it should be allowed to shift the burden of proof to the defendant on that issue.[129] Yet others contend that the government should be required to prove every element of an offense,[130] because to allow convictions on less would

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122. *Id.* at 543.

123. *Id.* at 542.

124. *Id.*

125. *Kantor*, 858 F.2d at 543 n.6.

126. *Id.*

127. *See, e.g.*, Levenson, *supra* note 13, at 410.

128. *See, e.g.*, Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which our Criminal Law is Predicated*, 66 N.C. L. REV. 283, 290 n.46 (1988) (citing as an example Ronald J. Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30 (1977)).

129. *Id.* at 291.

130. *See, e.g.*, Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

violate the presumption of a defendant's innocence.[131] This presumption is important because the result could be that a defendant, although innocent, may not have the ability to meet the heavy burden of proof required by a mistake-of-age defense as Judge Kozinski seems to suggest in *Kantor*. In addition, some states do not allow this type of defense because of the increased chance for jury error and the possible incentive it creates for defendants to take the risk of engaging in the prohibited conduct.[132]

Moreover, Judge Kozinski emphasized in *X-Citement Video* that creating an affirmative defense for a statute is "something far more exotic than just reading in a mental state element."[133] Therefore, although adding a mistake-of-age defense would save the statute from invalidation, the addition of a requirement of negligence would be a fair and effective solution.

V. THE RESULT

Unless the United States Supreme Court rules on the constitutionality of section 2252, or Congress amends the statute, courts within the Ninth Circuit will be powerless to convict distributors of child pornography. This sends the message to distributors and receivers that, once again, child pornography is a legal and profitable venture.

On August 5, 1993, this message was reinforced by the Ninth Circuit's holding in *United States v. Ruddell*.[134] In this case, Ruddell was convicted under section 2252(a)(2) by a district court in Nevada for receiving child pornography. Although Ruddell pled guilty to the charge of receiving child pornography, the Ninth Circuit reversed his conviction based on its ruling in *X-Citement Video*.[135]

Unfortunately, the problems created by the Ninth Circuit's invalidation of section 2252 are not limited to the inability to prosecute and convict criminal acts involving the distribution and receipt of child pornography. The Ninth Circuit recently expanded the scope of the *X-Citement Video* decision to cover past convictions. In *Chambers v. United States*,[136] the Ninth Circuit decided that their decision in *X-Citement Video* invalidating section 2252 should be applied retroactively.[137] As a result, Defendant-

131. Loewy, *supra* note 128, at 291.
132. *Id.*
133. *X-Citement Video*, 982 F.2d at 1296 (Kozinski, J., dissenting).
134. 2 F.3d 1159 (9th Cir. 1993).
135. *Id.*
136. 22 F.3d 939 (9th Cir. 1994).
137. *Id.* at 941.

Appellant Richard Chambers' July 22, 1991 conviction was reversed, despite the fact that Chambers pled guilty to the indictment charging him with receiving child pornography under section 2252(a)(2).[138]

The ramifications of the *X-Citement Video* decision are clear. Without a statute to convict those guilty of distributing and receiving child pornography, there is no way to further the purpose of the Child Protection Act — to protect children. The *X-Citement Video* decision will revitalize the market for child pornography. Fortunately, the revitalization will be limited to those acting within the Ninth Circuit's jurisdiction, as no other court has followed the Ninth Circuit's lead in finding section 2252 unconstitutional.[139] Nevertheless, after *United States v. Ruddell*,[140] and *Chambers v. United States*,[141] it seems clear that the Ninth Circuit has no intention of rehearing *X-Citement Video* en banc. As a result, section 2252 will remain unenforceable within the Ninth Circuit unless the United States Supreme Court saves the statute and overrules *X-Citement Video*.

VI. CONCLUSION

Few would deny that child pornography is an evil that must be stopped. In fact, at least one commentator believes that the importance of preventing such an evil clearly surpasses any harm caused by section 2252.[142] Nonetheless, section 2252 as written clearly has a potential chilling effect on protected non-obscene adult pornography. However, the Ninth Circuit's decision to invalidate the statute because of this chilling effect was short-sighted. Instead, the Ninth Circuit should have narrowed the statute to save it from invalidation.

The United States Supreme Court has stated that "facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'"[143] Section 2252 clearly fits that description. In addition, the

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138. *Id.*

139. *See, e.g.*, United States v. Brown, 25 F.3d 307, 311 (6th Cir. 1994) (holding that § 2252(a)(2) "includes a knowledge requirement as to the nature of the materials received or distributed"); United States v. Burian, 19 F.3d 188, 191 (5th Cir. 1994) (holding that § 2252 requires "actual knowledge or reckless disregard of a performer's minority"); United States v. Cochran, 17 F.3d 56, 61 (3rd Cir. 1994) (holding that the word "knowingly" modifies the entire statute); United States v. Gifford, 17 F.3d 462, 472 (1st Cir. 1994) (noting that the "*X-Citement Video* opinion is something of a pariah").

140. 2 F.3d 1159 (9th Cir. 1993).

141. 22 F.3d 939 (9th Cir. 1994).

142. Holl, *supra* note 12, at 1365.

143. New York v. Ferber, 458 U.S. 747, 770 n.25 (1982) (citation omitted).

Court has held that "[w]hen a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems . . . ."[144] Hence, many believe that "[i]f a court concludes that the [Child Protection] Act is overbroad without a scienter requirement . . . it would be appropriate to add [it] . . . to the statute."[145] Although this technique would make the statute more difficult to enforce, it would at least preserve Congress' purpose for the statute and continue to prohibit the distribution of child pornography.[146] By requiring that a defendant be negligent, the statute would still have the strength to be enforceable, while passing First Amendment muster. A mistake-of-age defense would also save the statute, but may encourage unfounded prosecutions when the government knows the defendant cannot meet the heavy burden of proving beyond a reasonable doubt his mistake-of-age. Either way, it is clear that facial invalidation of section 2252 was inappropriate when the result allows those guilty of intentionally distributing or receiving child pornography to avoid conviction.

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144. *Id.* at 769 n.24.

145. Strang, *supra* note 44, at 1790.

146. *Id.*

* This Note is dedicated to my mother and father. I would also like to thank the staff and editors of the Entertainment Law Journal for their hard work and helpful suggestions.