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You Only Live Twice: How the First Amendment Impacts Child Pornography in Second Life

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YOU ONLY LIVE TWICE: HOW THE FIRST AMENDMENT IMPACTS CHILD PORNOGRAPHY IN SECOND LIFE

I. INTRODUCTION

Imagine a life beyond your wildest dreams—you live in a marvelous house, enjoy a fabulous career, come home to a beautiful family, and have more money than you know how to spend. All of this is possible in your Second Life. Second Life is a computer-generated community in which people can create virtual lives to escape the monotony of their regular lives.[1] In Second Life, people have the opportunity to rewrite their lives, indulge their fantasies, and explore a world without the limitations of rules and consequences.[2] Indeed, many use their Second Lives for less-than-honorable ventures, thereby presenting the issue of whether certain conduct in Second Life should subject the user to real-world regulations and legal consequences.[3]

This Comment explores whether virtual child pornography, as it appears "In-world,"[4] should be protected as free speech under the First Amendment.[5] While the First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech,"[6] the Constitution does not protect all categories of speech.[7] Child pornography, a long-recognized exception, falls outside the scope of First Amendment protection because society's interest in protecting children outweighs its interest in protecting this form of speech.[8] However, unless and until the

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1. *See* Second Life, FAQ—Frequently Asked Questions, http://secondlife.com/whatis/faq.php (last visited Feb. 22, 2009) [hereinafter FAQ].

2. *See id.*

3. *See id.*

4. "In-world" refers to the activity that exists and transpires in the virtual society of Second Life. This locale is also referred to as the "World."

5. *See* discussion *infra* Part IV.B.1.a. In Second Life, virtual pornography is created when the identities of two users have virtual sex In-world. When one of the identities is a child, it becomes virtual child pornography.

6. U.S. CONST. amend. I.

7. *E.g.*, Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not a form of constitutionally protected speech).

8. New York v. Ferber, 458 U.S. 747, 765 (1982) (recognizing that the First Amendment does not protect child pornography).

Supreme Court carves out a new First Amendment exception for virtual child pornography, the government may only prohibit such material if it harms real children in a manner comparable to harms caused by real child pornography.[9]

Virtual child pornography presents a unique problem in this modern age of rapidly increasing advancements in technology.[10] Enhanced computer graphics allow pornographers to manipulate images in a variety of ways: (1) real children may appear virtual; (2) virtual children may appear life-like; and/or (3) non-sexual images may be transformed into sexual images.[11] Because the First Amendment legally protects obviously virtual[12] child pornography from prosecution,[13] some worry that alleged pedophiles who use Second Life to have cyber sex with virtual children (who are, presumably, operated by adults[14]) will evade prosecution because pornographic images of virtual sex cannot reasonably be mistaken to depict real children engaged in sexual activity.[15] This Comment argues that, despite the assumed deviancy of such behavior,[16] cyber sex in Second Life with computer-generated children does not harm real children.[17] Thus, real-world prosecution of such In-world behavior violates the First Amendment because such behavior is merely a form of real-world "protected" speech.

Part II of this Comment outlines the development of First Amendment law and specifically, the categories of unprotected speech. It then explores the child pornography exception at length, discussing recent legislative attempts to expand child pornography law to proscribe virtual images, and the Court's response to each endeavor. Part III describes the World

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9. *See generally* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (dismissing legislative findings that virtual child pornography actually harms children, albeit less directly than real child pornography).

10. *See, e.g.*, Caroline Meek-Prieto, Note, *Just Age Playing Around? How Second Life Aids and Abets Child Pornography*, 9 N.C. J. L. & TECH. 88 (2008).

11. A computer-savvy user can morph images of real children posing innocently for the camera into sexually explicit positions.

12. For example, obviously virtual material may include animated figures or sketches that clearly indicate that no real person is depicted therein.

13. *E.g.*, 18 U.S.C. § 2256(8)(B) (2000 & Supp. 2003).

14. *See* Second Life, Terms of Service, http://secondlife.com/corporate/tos.php [hereinafter Terms of Service] (requiring members to be eighteen years of age or older to register for Second Life).

15. As discussed *infra* Part II.B.3, the law may only regulate virtual child pornography if it is "indistinguishable from" real child pornography.

16. *See* FAQ, *supra* note 1. Such conduct constitutes a violation of Second Life's policies and subjects the user to possible In-world consequences, such as account cancellation. *See id.*

17. *Cf.* Ashcroft v. Free Speech Coal., 535 U.S. 234, 241 (2002) ("These images do not involve, let alone harm, any children in the production process.").

contained in Second Life. This section uncovers the unique features of the virtual "Residents," the rules and policies binding them, and the potential overlap between real life and Second Life. Part IV analyzes relevant child pornography law. In particular, it addresses three distinct categories of alleged crimes involving virtual child pornography that may occur in Second Life. Part V argues that the unsupported possibility of harm to real children and the intangible harm to virtual children do not justify the prosecution of virtual child pornography in Second Life. This Comment concludes that because no harm befalls a real child, virtual child pornography lies outside the child pornography exception and thus, should retain First Amendment protection.

II. BACKGROUND

The First Amendment rests upon a simple tenet—speech is inherently valuable. As Justice Brennan eloquently expressed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[18] Still, when speech promotes certain types of harm, the government has found that the subsequent harm outweighs the value of free speech.[19] To date, the Supreme Court and the legislature have consistently recognized several categories of speech that do not warrant First Amendment protection.[20]

A. Speech Not Protected by the First Amendment

1. Impending Violence Exceptions

The First Amendment does not protect speech which is likely to provoke violent behavior.[21] The Court recognizes three such categories: (1) incitement; (2) fighting words; and (3) true threats.[22] Incitement occurs when an individual intends his or her words to produce imminent unlawful

18. Texas v. Johnson, 491 U.S. 397, 414 (1989).

19. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (noting that the government may regulate speech to promote a compelling interest, such as protecting the physical and psychological well-being of minors).

20. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 744 (1978) (stating that there is no mandatory rule prohibiting all governmental regulation on speech).

21. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that so-called "fighting words," which are personally abusive epithets likely to provoke violent reaction, can be banned).

22. Virginia v. Black, 538 U.S. 343, 359 (2003).

action by another and such words are likely to cause unlawful action.[23] Fighting words are used in face-to-face confrontations that may, but need not, induce an immediate retaliation against the speaker.[24] True threats include words intended to place and actually do place recipients in reasonable fear that violence or force will be used against them.[25] Because these categories of speech do not invite counter-speech, but rather counter-violence by increasing the likelihood the recipient will respond violently in defense,[26] they lack value and fall outside the scope of First Amendment protection.

2. Pornography Exceptions

Since its creation, pornography has bred much controversy.[27] The earliest traceable pornographic film was reportedly shown in 1897.[28] The market for pornography has since flourished, earning up to thirteen billion dollars per year.[29] Seemingly, this vast figure suggests that a substantial number of Americans produce, advertise, endorse, promote, or view pornography. Nonetheless, while many Americans are involved in the pornography business (perhaps secretly or shamefully), the general public historically has viewed the industry as disgusting and offensive.

Accordingly, American society as a whole has attempted to regulate the pornography industry.[30] For decades, however, First Amendment obstacles prevented the Court from promulgating a standard by which pornography could be clearly recognized and identified. Supreme Court Justice Potter Stewart notoriously summed up the Court's frustration with this elusive definition by remarking that, at best, pornography is such that

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23. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

24. *See Chaplinsky*, 315 U.S. at 572 (noting while retaliation need not actually occur for a court to find a proscribable fighting word, the exception only applies when the potential harm (reaction to the words) would be immediate and probable—it is the immediacy and likelihood that underlie this exception and others).

25. *See Virginia*, 538 U.S. at 359–60.

26. Kyle Duncan, *Prosecution Responses to Internet Victimization: Child Pornography and First Amendment Standards*, 76 MISS. L.J. 677, 681 (2007).

27. Ken Mondschein, *History of Single Life: Dirty Movies and You*, NERVE, Aug. 23, 2008, http://www.nerve.com/regulars/singlelife/history-of-single-life-dirty-movies-and-you.

28. Filmsite: Sexual or Erotic Films, http://www.filmsite.org/sexualfilms.html (last visited Feb. 16, 2009).

29. Family Safe Media: Pornographic Statistics, http://www.familysafemedia.com/pornography_statistics.html (last visited Feb. 16, 2009) (illustrating the separate aspects of the pornography industry and its relative revenues as recently as 2006).

30. Mondschein, *supra* note 27.

you "know it when [you] see it."[31] Throughout the late 1950s and early 1960s, the Court simply could not reach a majority standard that defined what kind of pornography was "too hard core for people to see or read."[32] For many years, the Court avoided defining the criteria for "too hard core."[33] Instead, it applied subjective notions of offensive material,[34] justifying certain exclusions on the basis that the morals of society widely embraced its decisions.[35] Not until 1973 did the Court finally articulate a standard by which it could restrict pornographic material.[36]

a. Obscene Pornography

In 1973, the Court in *Miller v. California* held that the First Amendment did not protect obscene material.[37] The Court set forth a three-part test for obscenity: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[38] Beyond articulating a definition for obscenity, the Court provided various examples of sexually explicit conduct that would qualify as "patently offensive" under its definition.[39] By furnishing a colorful, albeit graphic, list of activities that would escape First Amendment protection, the *Miller* Court seemingly suggested that only "hard core" pornography fell within the definition of obscenity.[40] As such, the Court later clarified that nudity alone did not satisfy *Miller*'s obscenity standard.[41]

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31. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

32. Mishkin v. New York, 383 U.S. 502, 516–17 (1966) (Black, J., dissenting).

33. *Id.*; *see also* Redrup v. New York, 386 U.S. 767, 770–71 (1967); Roth v. United States, 354 U.S. 476, 482–83
(1957).

34. *See, e.g.*, *Redrup*, 386 U.S. at 770–71.

35. *See, e.g.*, *Roth*, 354 U.S. at 482–83 (explaining that at the time of the Constitution's ratification, certain speech, including libel and blasphemy, was not afforded absolute First Amendment protection in many states).

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

37. *Id.* at 36–37.

38. *Id.* at 24.

39. *Id.* at 25.

40. *See id.*

41. Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

Furthermore, the *Miller* Court acknowledged in dicta that differing community standards could lead to different results between jurisdictions regarding obscenity laws.[42] Chief Justice Warren Burger noted that the First Amendment does not require "the people of Maine or Mississippi [to] accept public depiction of conduct found tolerable in Las Vegas, or New York City."[43] One year later in *Hamling v. United States*, the Court held that neither state nor national standards would determine whether material was "patently offensive" or appealed to the "prurient interest" of an individual.[44]

Because the First Amendment ideally operates to protect speech regardless of what it expresses, the *Miller* Court needed to provide an overriding state interest that superseded the right to freedom of speech and expression.[45] To that end, the Court identified society's interest to avoid offending the sensibilities of unwilling recipients and to prevent exposure to minors.[46] Additionally, in *Paris Adult Theater I v. Slaton*, decided that same day, the Court recognized a further public interest in "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."[47] There, the Court appeared to suggest that the mass production, advertisement, and sale of pornography negatively affects the nation as a whole. Accordingly, the Court concluded that withdrawal of First Amendment protection over obscene material was morally and rationally justified.[48]

b. Child Pornography

In 1982, the Court recognized another category of speech that the First Amendment does not protect—child pornography.[49] In *New York v. Ferber*, the Court upheld a New York statute that criminalized the "promotion" of sexual activity by a child under the age of sixteen.[50] In doing so, the Court held that states could ban visual depictions of children engaged in sexual activity, even when the material did not meet the

42. *See Miller*, 413 U.S. at 31–34 (quoting Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting)).

43. *Miller*, 413 U.S. at 32.

44. Hamling v. United States, 418 U.S. 87, 104–05 (1974).

45. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989).

46. *See* Stanley v. Georgia, 394 U.S. 557, 567 (1969).

47. Paris Adult Theater I v. Slaton, 413 U.S. 49, 57–58 (1973).

48. *See Stanley*, 394 U.S. at 567; *Slaton*, 413 U.S. at 57–58.

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

50. *See id.* at 751.

obscenity standard set forth in *Miller*.[51] Believing the prohibition of child pornography secured a "conceptually different" interest than that of the prohibition of obscene material, the Court categorized child pornography as its own distinct First Amendment exception.[52] Importantly, although the Court distinguished obscenity from child pornography, it also viewed the latter as a subset of the former.[53] Indeed, child pornography is often sufficient to meet the *Miller* standard of its own accord because promotion of child pornography is widely held to be an obscene practice.[54] In effect, when child pornography law is insufficient to penalize a child pornographer, the government may turn to obscenity law as an alternative.[55]

Justifying the exclusion of child pornography from First Amendment protection, the *Ferber* Court articulated the "surpassing[ly] importan[t]" public interest in preventing the sexual exploitation of minors in the production of the material.[56] Specifically, it identified four reasons why child pornography could be regulated.[57] First, the state has a compelling interest in "safeguarding the physical and psychological well being of a minor."[58] Second, shutting down the pornography distribution network protects children in two ways:[59] (1) it prevents the exacerbated harm to the depicted children caused by ongoing circulation of the "permanent record of the children's participation";[60] and (2) by "drying up the market" for pornography, fewer children participate in its production,[61] resulting in less exploitation of children.[62] The third underlying rationale supporting this exemption is the government's increased ability to prosecute the advertisers and distributors of the material, most of which are "integral" to the

51. *See generally id.* at 751 (explaining how *Miller*'s standard is not a satisfactory solution to the child pornography problem because the state has a particular and more compelling interest in protecting children from sexual exploitation).

52. *See* Duncan, *supra* note 26, at 684.

53. *See id.*

54. *See id.*

55. *Id.* at 684.

56. 458 U.S. at 757.

57. *Id.* at 756–63.

58. *Id.* at 756 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

59. *Ferber*, 458 U.S. at 759.

60. *Id.*

61. *Id.* at 759–60.

62. The Court even held, in a later case, that the state could proscribe the mere private viewing and possession of child pornography as unlawful, noting that such a law could effectively "destroy a market for the exploitative use of children." Osborne v. Ohio, 495 U.S. 103, 109 n.4 (1990).

"production of such materials."[63] Finally, the Court stated there was little, if any, serious educational, scientific, or literary value from the depictions of children involved in lewd conduct.[64] Recognized in later cases, any alleged value that results from such material can be achieved through the use of "youthful looking" adults.[65]

Ferber's child pornography exception is broader than *Miller*'s obscenity exception. Under *Ferber*, the material need not appeal to the prurient interest of the average person to qualify as child pornography, nor does the sexual conduct need to be portrayed in a "patently offensive" manner.[66] Additionally, unlike material analyzed under the *Miller* test, under *Ferber*, the work will not be evaluated as a whole, thereby vastly diminishing the instances where the Court might find value in the material.[67] Still, *Ferber* recognized that child pornography laws, like obscenity laws, also run the risk of being overbroad,[68] heavily restrictive, and may suppress too much protected speech.[69] In recognition of the powerful interests stated above, the Court deferred to the states' legislatures in regulating child pornographic material more than it deferred to states in regulating obscenity.[70]

3. The Remaining Exceptions

Finally, there are four other categories of speech the Court will not protect under the First Amendment.[71] These include defamation, perjury, blackmail, and solicitation to commit crimes.[72] Although the specific rationale supporting each category differs, these exceptions share one common feature—they reflect the Court's judgment that the need to

63. *Ferber*, 458 U.S. at 761–62.

64. *Id.* at 762–63.

65. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

66. 458 U.S. at 764.

67. *Id.*

68. Overbreadth refers to the doctrine that a law is unconstitutional if, in the course of proscribing unprotected speech, it suppresses a substantial amount of speech otherwise protected by the Constitution. *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973).

69. 458 U.S. at 756.

70. *Id.*

71. There are other categories of speech that receive less protection under the First Amendment, such as commercial speech and indecent broadcasts, but these are outside the scope of this Comment.

72. *See* First Amendment Center, Exceptions to First Amendment, http://www.firstamendmentcenter.org/faclibrary/libraryexpression.aspx?topic=exceptions (last visited Jan. 29, 2009).

regulate such speech outweighs the expressions' value.[73] Adhering to the constitutional limits on judicial power, the Court refrains from regulating the content of constitutionally protected speech unless the government demonstrates that the regulation is necessary to promote a "compelling interest" and the government "chooses the least restrictive means to further the articulated interest."[74] In effect, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, rather than through any kind of authoritative selection."[75] Therefore, the state may regulate speech only when it rises to the level of harmful conduct that requires public protection over freedom of expression.[76]

B. Child Pornography: Tension Between Congress and the Court

1. The Child Pornography Prevention Act of 1996

Ferber remained the prevailing federal law regulating child pornography until Congress enacted the Child Pornography Prevention Act of 1996 (CPPA).[77] Specifically, the legislature was concerned with technological developments on the Internet, which made it increasingly difficult to determine whether certain computer images depicted actual or virtual children.[78] A virtual child can take shape in many different ways. For instance, a virtual child may be a wholly computer-generated image that does not involve an actual child, though it may look indistinguishable from one.[79] On the other hand, a photograph or video may depict a real child that is computer-morphed into certain positions or movements, which the actual child did not perform.[80] A picture of a virtual child may even contain the head of an actual child plastered onto the body of another

73. *See, e.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (exemplifying the defamation exception).

74. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

75. Assoc'd Press v. United States, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) (quoting United States v. Assoc'd Press, 52 F. Supp. 362, 372 (S.D. 1943)).

76. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) (displaying an instance where the Court balanced the level of harmful conduct).

77. *See generally* 18 U.S.C. §§ 2251–2260 (2000 & Supp. 2003).

78. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 501(5), 117 Stat. 650, 676 (2003) [hereinafter PROTECT Act of 2003].

79. *Id.*; *see also infra* text accompanying notes 114–117.

80. *See generally* § 501(4), 117 Stat. at 676 (describing how technology now allows users to manipulate photographs in various ways).

(virtual or actual, adult or minor), or vice versa.[81] Due to the variety of situations that enabled child pornographers to slip past *Ferber* and evade prosecution, Congress sought to expand existing federal law to take into account evolving technology.[82] Through the CPPA, Congress sought to punish the production, promotion, and distribution of all apparently realistic pornographic depictions of children: actual, virtual, or any combination thereof.[83]

Similar to *Ferber*, the CPPA banned child pornography that used actual children.[84] Moreover, the CPPA extended the *Ferber* rule by further prohibiting pornography that involved "any visual depiction, including any photograph, film, video, picture, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, . . . [that] is, or *appears to be*, of a minor engaging in sexually explicit conduct."[85] Theoretically, this expansive definition of child pornography included not only digital depictions of simulated children, but also depictions of sexual activity between adult actors who looked "youthful."[86] However, the CPPA did more than merely prohibit the *existence* of such material.[87] The law banned any sexually explicit material that "is advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[88] This anti-pandering provision, taken with the expanded definition of child pornography, effectively proscribed material that never involved an actual minor.[89] Therefore, as long as the material suggested that a minor was sexually depicted therein, the material lost its First Amendment protection.[90]

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81. *See generally id.*

82. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002) (referring to one congressional finding that "[a]s imaging technology improves, . . . it becomes more difficult to prove that a particular picture was produced using actual children").

83. § 501(13)–(14), 117 Stat. at 678; *see also infra* Part II.B.3.

84. 18 U.S.C. § 2256(8)(A) (2000).

85. *Id.* § 2256(8)(B), *amended by* § 2256(8)(B) (Supp. 2003) (emphasis added).

86. *Ashcroft*, 535 U.S. at 270 (Rehnquist, C.J., dissenting) (citing S. REP. NO. 104-358, at 21 (1996)).

87. *See* § 2256(8)(D) (repealed 2003).

88. *Id.* (emphasis added).

89. *See generally* PROTECT Act of 2003, Pub. L. No. 108-21, § 501(4), 117 Stat. 650, 678.

90. *See id.* at 679.

2. *Ashcroft v. Free Speech Coalition*

In a somewhat controversial opinion written by Justice Kennedy, the Court in *Ashcroft v. Free Speech Coalition* held that the CPPA was unconstitutional insofar as it proscribed material that never involved actual children.[91] While the First, Fourth, and Eleventh Circuits upheld the CPPA, the Ninth Circuit struck down the "appears to be" and "conveys the impression" provisions, declaring them to be unconstitutionally overbroad.[92] On appeal, the Supreme Court affirmed.[93] Decided in 2002, the *Ashcroft* Court held that a ban on pornographic material could only survive if the material was obscene under *Miller* or involved actual children under *Ferber*.[94] The Court found that the unique interests justifying *Ferber*'s decision did not extend to the prohibition of material where no children were harmed in its production.[95] Where the "speech . . . itself is the record of sexual abuse," the *Ashcroft* Court could not find like harm in the production of material that never involved a child.[96] The Court noted that, under the CPPA, the government may prosecute the producers and possessors of valuable material that derives its worth from the very fact that the actors look youthful.[97] The Court argued that Academy Award-winning films such as *Traffic* and *American Beauty* would be criminalized under the CPPA, as would films exploring teen romances (e.g., *Romeo + Juliet*).[98] The CPPA could even ban psychological manuals used to instruct teenagers on sexual education, or films reporting the effects of sexual abuse.[99]

Based on legislative findings supporting the CPPA, the government tried, but failed, to keep the CPPA afloat with three distinct arguments.[100] First, it argued that the depiction of child-like images still whets pedophiles' appetites, availing them of material that "encourages them to engage in illegal conduct."[101] The Court rejected this argument on the ground that "[t]he mere tendency of speech to encourage unlawful acts is

91. 535 U.S. 234 (2002).

92. Free Speech Coal. v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999); *see also supra* note 68.

93. *Ashcroft*, 535 U.S. at 258.

94. *See id.* at 256.

95. *See id.* at 250–51.

96. *Id.* at 250.

97. *See id.* at 246–47 (noting teenage sexual activity has inspired countless literary works, including William Shakespeare's *Romeo and Juliet*).

98. *Id.* at 247–48.

99. *Ashcroft*, 535 U.S. at 246.

100. *See id.* at 253–55.

101. *Id.* at 253.

not a sufficient reason for banning it."[102] Second, the Court rejected the government's unsupported assumption that since virtual and actual pornography may be indistinguishable, the two belong to the same market and should be regulated together.[103] The Court noted that if the two were nearly identical, then the "illegal images would be driven from the market by the indistinguishable substitutes," as no one would risk prosecution for actual child pornography if its computerized substitute sufficed.[104] Finally, the Court rejected the government's argument that since virtual pornography is often indistinguishable from actual pornography, prosecution under *Ferber* would become increasingly difficult if experts could not determine whether the material portrayed real children or computer-generated images.[105] The Court rationalized its holding by referring to the overbreadth doctrine, which forbids the legislature or the Court from banning unprotected speech when "a substantial amount of protected speech is prohibited or chilled in the process."[106]

Though its decision centered on the "appears to be" provision of the CPPA, the Court also invalidated the "conveys the impression" provision.[107] The Court concluded that, if enforced, this provision would have submitted any possessor of "pandered" material to prosecution, regardless of its source.[108] The Court found that the provision prohibited the possession by a subsequent purchaser if the material was earlier pandered as child pornography.[109] Again, the Court found the provision to be substantially overbroad.[110] In sum, *Ashcroft* remedied the likely consequences of both overbroad provisions of the CPPA, noting that the statute as a whole "proscribe[d] a significant universe of speech"[111] otherwise protected by the First Amendment.

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102. *Id.*; *see also* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (explaining that exceptions to the First Amendment require more than a tendency to result in harm, but probability).

103. *Ashcroft*, 535 U.S. at 254.

104. *Id.*

105. *Id.* at 254–55.

106. *Id.* at 255; *see supra* note 68.

107. *Ashcroft*, 535 U.S. at 257–58.

108. Duncan, *supra* note 26, at 690.

109. *Ashcroft*, 535 U.S. at 258.

110. *Id.*

111. *Id.* at 240.

3. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act

By invalidating the CPPA, *Ashcroft* forced Congress to try again. Congressional findings demonstrated that because *Miller* and *Ferber* failed to sufficiently address the child pornography problem, given recent developments in technology, "prosecutors have been hindered by not having all the tools needed to prosecute criminals who create child pornography."[112] As a result, Congress responded by passing the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT).[113] In support of PROTECT, Congress revealed new findings.[114] It found that "no substantial evidence" existed to suggest that "child pornography images being trafficked today were made other than by the abuse of real children."[115] Congress also found that, with the aid of current technology (as it existed in 2003), people could disguise images of actual children so as to make them "unidentifiable and to make depictions of real children appear computer-generated."[116] New technology could even generate realistic images of children over the computer.[117]

Based on these findings, Congress amended the CPPA "appears to be" provision to ban "any visual depiction . . . where . . . such visual depiction is a digital image, computer image, or computer-generated image that is, or is *indistinguishable from*, that of a minor engaging in sexually explicit conduct."[118] The amended provision limited the ban to digital, computerized, or computer-generated images, thereby effectively addressing *Ashcroft*'s concern that valuable films such as *Traffic* and *Romeo + Juliet* would not fall within its ban.[119] Furthermore, by replacing the "appears to be" language in the statute with the words "indistinguishable from," Congress remedied the problem that "drawings, cartoons, sculptures, or paintings depicting minors or adults" could fall

112. YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES, 118 (Ashgate 2008) (quoting President George W. Bush as he signed PROTECT into law on April 30, 2003).

113. *See* 18 U.S.C. § 2252A (2000 & Supp. III 2003); § 2256(8)(B) (Supp. 2003).

114. *See* PROTECT Act of 2003, Pub. L. No. 108-21, § 501, 117 Stat. 650, 676 (2003) (describing how technology now creates ways to alter photographs in a variety of ways).

115. *Id.* § 501(7), 117 Stat. at 677.

116. *Id.* § 501(5), 117 Stat. at 676.

117. *Id.*

118. 18 U.S.C. § 2256(8)(B) (emphasis added).

119. H.R. REP. NO. 108-66, at 60 (2003).

within the definition of proscribed material.[120] Under PROTECT, Congress defined "indistinguishable" as depictions that were "virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct."[121]

Furthermore, Congress passed a new anti-pandering provision to replace the CPPA's "conveys the impression" provision that the Court struck down in *Ashcroft*.[122] This provision punishes anyone who

> knowingly, advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that *reflects the belief, or that is intended to cause another to believe*, that the material or purported material is, or contains: (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.[123]

The implications of this provision are critical—no actual pornography (obscene, child, or otherwise) needs to exist for prosecution under this section.[124] Under this provision, there are two things the solicitor cannot do. First, the solicitor cannot specifically intend to cause recipients to believe they will receive actual child, or obscene, pornography.[125] Second, the solicitor cannot solicit what he or she believes is actual child, or obscene, pornography.[126] President Bush signed PROTECT into law on April 30, 2003,[127] and it remained the unchallenged law governing child pornography until 2006.[128]

4. *United States v. Williams*

In 2006, the Eleventh Circuit decided a case involving a defendant who attempted to use a public chat room to exchange actual child pornography with someone he believed to be a child, but was in fact a

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120. § 2256(11) (Supp. 2003).

121. *Id.*; *see generally* § 501(5), 117 Stat. at 676 (amending the definition of "indistinguishable").

122. § 2252A(a)(3)(B) (2003).

123. *Id.* (emphasis added).

124. H.R. REP. NO. 108-66, at 61–62.

125. *Id.*

126. *Id.*

127. *See generally* Akdeniz, *supra* note 112 (detailing the history of PROTECT and the President's statement made when signing the bill into law).

128. PROTECT contains further provisions that do not implicate the First Amendment and are therefore not discussed in this Comment.

Secret Service agent.[129] In *United States v. Williams*, the defendant posted a message stating that he had sexual pictures of himself, and other men, engaging in sexual acts with his four-year-old daughter and would swap them for other "toddler pics, or live cam."[130] Posing as a child, the agent gained the defendant's trust and subsequently received seven pictures featuring "actual children, aged approximately 5 to 15, engag[ed] in sexually explicit conduct and displaying their genitals."[131] After obtaining a search warrant for the defendant's home, agents discovered over twenty images of actual "children engaged in sexually explicit conduct."[132] Following his conviction for possession of child pornography and pandering under PROTECT,[133] the district court sentenced the defendant to concurrent five-year sentences, rejecting his constitutional challenge of the anti-pandering provision.[134]

On appeal, the Eleventh Circuit struck down the provision as unconstitutionally overbroad and vague.[135] In doing so, the court remained sensitive to the dangers of child pornography in an age where child pornographers can better evade detection through the use of the Internet and enhanced computer graphics.[136] In addition to the immediate abuse involved in the production of actual child pornography, the court recognized an additional harm—children also suffer from "the fact that mainstream and otherwise innocuous images of children are viewed and traded by pedophiles as sexually stimulating."[137]

Notwithstanding these concerns, the court was equally cognizant of the long recognized (and often cited) constitutional harms that would result from the enforcement of a law that prohibits a substantial amount of free speech.[138] By divorcing the pandering speech from the nature of the pandered material, the provision criminalized speech that solicits illegal material (i.e., actual child pornography) even when the material itself was

129. United States v. Williams, 444 F.3d 1286, 1288 (11th Cir. 2006).

130. *Id.*

131. United States v. Williams, 128 S. Ct. 1830, 1837 (2008).

132. *Id.* at 1837–38.

133. 18 U.S.C. § 2252A(a)(3)(B) (2003).

134. *Williams*, 128 S. Ct. at 1838 (explaining that the defendant was charged with further criminal violations, but the additional charges are not relevant for the purposes of this Comment).

135. *Williams*, 444 F.3d at 1309 (stating that overbreadth addresses First Amendment concerns while vagueness addresses Due Process concerns under the Fifth Amendment).

136. *See id.* at 1290 (noting how technological advantages have resulted in proliferation of child pornography on the Internet).

137. *Id.*

138. *See supra* note 68.

either legal or non-existent.[139] The incongruity between the underlying material and the speech that solicited it resulted in the criminalization of speech that merely advocated fantasies, but not actual illegal conduct.[140] This, the court indicated, would violate the First Amendment, unless it fell within the incitement exception under *Brandenburg* or other excluded categories.[141] For these reasons, the court struck down the provision for violating the First Amendment, urging Congress to try again.[142]

In 2008, the Supreme Court agreed to review the Eleventh Circuit's opinion.[143] In *United States v. Williams*, the Court reversed the Eleventh Circuit decision and upheld PROTECT.[144] In doing so, the Court held that a solicitor may not attempt to persuade a potential recipient that the solicitor has child pornography and is willing to make it available to the recipient, even when such material does not exist.[145] Distinguishing *Williams* from *Ashcroft*, the Court recognized that PROTECT did not require the existence of actual child pornography, as did the CPPA, which was held invalid in *Ashcroft*.[146] The Court made it clear that PROTECT's anti-pandering provision did not target the underlying material, but rather the "collateral speech that introduce[d] such material into the child-pornography distribution network."[147] The Court recognized three critical features of the provision.[148] First, "knowledge" was the level of intent required for every element of PROTECT.[149] Second, the language in PROTECT directed toward "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" suggests that speech is proscribable only when it is used to induce a commercial or non-commercial transfer of actual or virtual child pornography.[150] Lastly, Congress essentially used the same definition for "sexually explicit conduct" in PROTECT's anti-pandering provision as was used in the definition of "sexual conduct" in the

139. *Williams*, 444 F.3d at 1298.

140. *See id.* at 1300 ("However repugnant we may find them, we may not constitutionally suppress a defendant's belief that simulated depictions of children are real or that innocent depictions of children are salacious.").

141. *Id.* at 1298; *see also supra* Part II.A.

142. *Williams*, 444 F.3d at 1309.

143. United States v. Williams, 128 S. Ct. 1830 (2008).

144. *Id.* at 1847.

145. *Id.* at 1838.

146. *Id.*

147. *Id.* at 1838–39.

148. *Id.* at 1839. The Court actually points out five significant features, but the three that address the First Amendment issue are the only ones relevant for the purposes of this Comment.

149. *Williams*, 128 S. Ct. at 1839.

150. *Id.* at 1839–40.

New York statute upheld in *Ferber* that first criminalized non-obscene child pornography.[151]

In the throes of twisted logic, the *Williams* Court rejected the Eleventh Circuit's rationale that the anti-pandering provision is unconstitutional because it punishes the speech of a "braggart, exaggerator, or outright liar."[152] Writing for the majority, Justice Scalia asserted that, if anything, such speech is "doubly excluded from First Amendment protection."[153] Offering child pornography is not only an offer to provide illegal products, regardless of whether such products exist, but it is also fraudulent.[154] Under this logic, a solicitor of child pornography is more protected if that solicitor actually has such material because the solicitation would not be fraudulent.[155] Nonetheless, Justice Scalia defended PROTECT in the face of the dissent's astute observation—that Congress circumvented the First Amendment protection of virtual child pornography by "prohibiting *proposals* to transact in such images rather than prohibiting the images themselves,"[156] thereby overruling *Ferber* and *Ashcroft*.[157] The majority defended its position by stating that even when child pornography is virtual, the proscribable feature is the fact that the solicitor knowingly intends to persuade the solicitee to believe it features real children.[158] Accordingly, *Williams* upheld PROTECT's anti-pandering provision. However, neither *Williams* nor any other federal or state appellate courts have yet addressed whether the "indistinguishable from" amendment to the CPPA is constitutional under the First Amendment.[159] Therefore, current law still protects a virtual image that portrays non-realistic depictions of children engaged in sexual activity.

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151. *Id.* at 1840.

152. United States v. Williams, 444 F.3d 1286, 1298 (11th Cir. 2006).

153. *Williams*, 128 S. Ct. at 1842.

154. *See, e.g.*, *id.* (citing Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 611–12 (2003), which allowed the government to ban "*both* fraudulent offers *and* . . . offers to provide illegal products").

155. Such would be the implication of Justice Scalia's reasoning. *See Williams*, 128 S. Ct. at 1842.

156. *Id.* at 1844 (emphasis added).

157. *Id.* at 1854 (Souter, J., dissenting).

158. *See id.* at 1844 (majority opinion).

159. Duncan, *supra* note 26, at 700; *see also* PROTECT Act of 2003, Pub. L. No. 108-21, § 501(5), 117 Stat. 650, 676 (2003).

III. WHAT IS SECOND LIFE?

As if managing one life is not challenging enough, now individuals can balance two. In 2003, Linden Lab, a privately held company, created an Internet phenomenon that opened up a whole new world of social networking.[160] Aptly dubbed Second Life, this virtual reality takes "living" to a whole new level—it provides a metaverse[161] in which users interact through a first person perspective.[162] To participate in Second Life, users create an avatar, which is a virtual person (called a "Resident") that lives in Second Life.[163] When they are In-world, users of Second Life, also known as "controllers," interact through their avatars.[164] These Residents live, communicate, and transact business much like people do in the real world.[165] They may engage in a variety of activities, including (but not limited to) joining recreational groups, establishing careers, dating,[166] and even purchasing and selling land.[167] However, Second Life is not without its virtual quirks, which make a Second Life uniquely preferable to a real life.

A. Critical Features of Second Life

To become a Resident, new users create an avatar, to which they assign any number of characteristics.[168] The user picks the gender, age, and

160. Philip Rosedale formed Linden Lab in 1999 and launched Second Life on June 23, 2003. Press Release, Linden Lab, Your Second Life Begins Today (June, 23 2003), *available at* http://lindenlab.com/pressroom/releases/03_06_23.

161. *See* NEAL STEPHENSON, SNOW CRASH 22 (1992) (coining the term "metaverse" to mean a virtual world where humans interact through avatars in a three-dimensional environment that simulates the real world).

162. Press Release, Linden Lab, Linden Lab Announces Name of New Online World 'Second Life™' and Availability of Beta Program (Oct. 30, 2002) [hereinafter Linden Lab Announces Name], *available at* http://lindenlab.com/pressroom/releases/02_10_30; *see generally* Second Life, http://secondlife.com (last visited Apr. 7, 2009).

163. Linden Lab Announces Name, *supra* note 162; *see also* MERRIAM-WEBSTER ONLINE, http://www.merriamwebster.com/dictionary/avatar (last visited Oct. 26, 2008) (defining "avatar" as an "electronic image that represents and is manipulated by a computer user (as in a computer game)").

164. Linden Lab Announces Name, *supra* note 162.

165. *Id.*

166. *See, e.g.*, Second Life Affair Ends in Divorce, http://www.cnn.com/2008/WORLD/europe/11/14/second.life.divorce/index.html (last visited Mar. 27, 2009) (discussing how people meet their real-life spouses in Second Life and treat virtual affairs with other avatars as cheating).

167. Meek-Prieto, *supra* note 10, at 89.

168. *Id.*

physical features of his or her avatar.[169] The avatar may be human, non-human, fictional, or non-fictional.[170] Once the user creates an avatar, the avatar resides in Second Life and may, currency-permitting, buy land to build a home or business.[171] The Resident is then free to explore Second Life, interacting with other Residents and conducting whatever business in the "marketplace" it desires. Unlike other virtual realities, Second Life is not a game with an objective.[172] Its purpose is merely to enjoy an alternate lifestyle and to experience a life beyond the parameters of the real world.[173]

The laws of physics are not strictly applied in Second Life.[174] Avatars typically travel on foot or in motor vehicles, but they can also fly (without airplanes) or teleport to their next location.[175] Second Life's appeal largely lies in its ability to provide a fantasy world, free from earthly restrictions where users enjoy experiences beyond the realm of physical possibility in real life.[176] Along these lines, Residents are not bound by the usual limitations of a legal justice system. There is no Second Congress, Second Court, or Second police. Consequently, avatars often engage in crimes with impunity—these can include tax evasion, robbery, prostitution, rape, and, as relevant here, sex with children.[177]

Nevertheless, although "the presence of sex as an aspect of creative expression and playful behavior in a place like [Second Life] is healthy,"[178] the creators of Second Life imposed some policies to prevent the sexually deviant behavior that most worries the general public.[179] First, users must be eighteen years of age to join.[180] But facing the common difficulty with adult websites and chat rooms, the Second Life creators have no practical

169. *Id.*

170. *Id.* Avatars can take any shape, including talking animals, mythological creatures, or even pieces of furniture. *See id.*

171. Press Release, Linden Lab, Second Life Opens the Lindex Currency Exchange (Oct. 3, 2005) [hereinafter Second Life Opens], *available at* http://lindenlab.com/pressroom/releases/10_03_05; *see also infra* note 189.

172. *See* Kristen Kalning, *If Second Life Isn't a Game, What Is It?*, MSNBC.COM, Mar. 12, 2007, http://www.msnbc.msn.com/id/17538999/.

173. *See id.* (attempting to classify Second Life's genre of entertainment).

174. Meek-Prieto, *supra* note 10, at 89.

175. *Id.* (stating that avatars can teleport to various locations).

176. *See, e.g.*, Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 193 (2004).

177. *See generally* Meek-Prieto, *supra* note 10.

178. Mitch Wagner, *Sex in Second Life*, INFORMATIONWEEK, May 26, 2007, *available at* http://www.informationweek.com/news/software/hosted/showArticle.jhtml?articleID=199701944 (quoting founder and CEO of Linden Lab, Philip Rosedale).

179. Terms of Service, *supra* note 14.

180. *Id.*

means to enforce this policy. Thus, the creators can do little to guarantee all users are age appropriate.[181] Secondly, the creators of Second Life responded to the rape and sexual abuse of child avatars occurring In-world[182] by implementing a new policy forbidding "sexual age-play."[183] The policy even prevents a child avatar from representing that its controller is less than eighteen years of age.[184] Further, the policy bans solicitation of any child pornography—both virtual pornography solicited for In-world use and actual pornography solicited for real-world use.[185] These policies are Abuse Reportable; when violated, Second Life will cancel the offending user's account,[186] thus ending his or her residency in Second Life. Under current American law, however, these virtual "crimes" are not punishable and will not result in real-world convictions.[187]

B. Intersection of Second Life and First Life

For the most part, Second Lives are just that—users explore their Second Lives while maintaining separate first lives. However, both corruption and ambition may blur the line between Second Life and the real world when In-world conduct causes real-world consequences.[188] For example, money earned In-world may be converted into real-world money.[189] Second Life even boasts of its own "virtual Donald Trump," whose estimated worth is over one million U.S. dollars in Linden-earned profits from real estate ventures.[190] Additionally, Second Life ensures that

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181. *See id.*

182. *See generally* Alan Sipress, *Does Virtual Reality Need a Sheriff?*, WASH. POST, June 2, 2007, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/01/AR20070 60102671.html (discussing investigations in Belgium and Germany where virtual crimes were committed In-world).

183. "Sexual age-play" is when a child avatar, controlled by an adult, engages in sexual activity with another avatar. *See* Posting of Kend Linden to Linden Lab Blog, http://blog.secondlife.com/community/features/blog/authors/Kend.Linden (Nov. 14, 2007).

184. Terms of Service, *supra* note 14

185. *Id.*

186. *Id.*

187. *But see* Sipress, *supra* note 182 (noting that under some foreign laws, such as German law, such conduct "could run afoul of [] laws against child pornography").

188. *See generally id.*

189. To earn real world money, a user must have initially converted U.S. currency into Linden Dollars (L$), allowing the Resident to use the Linden currency to transact business In-world. As in real life, such business transactions may result in profitable ventures. The user may then convert the L$ back into U.S. dollars, and "cash in" from activities conducted In-world. *See* Second Life Opens, *supra* note 171.

190. Some users have dedicated their real-world lives to the pursuit of Linden-turned-U.S. profits, quitting their real jobs and "working" In-world. *See generally* Bettina M. Chin, Note, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72:4 BROOK. L. REV. 1303, 1305–

users retain all intellectual property rights to their creations.[191] As such, any virtual thefts of intellectual property occurring In-world may be litigated in real-world courts and may subject the thieving avatar's controller to real-world penalties.[192]

Avatars who commit In-world crimes such as rape or sexual child abuse, however, will not similarly face real-world consequences.[193] Whereas real-world property rights may be damaged if such rights are violated In-world, real-world personal safety is not likewise endangered when an avatar is subjected to violence or rape.[194] While "[p]eople have a [real-world] interest in . . . the integrity of their person, . . . in virtual reality, these interests are not tangible but [are] built from intangible data and software."[195] Accordingly, courts in the United States do not currently prosecute In-world "criminal" behavior.[196] However, advocates for real-world punishment for such In-world conduct suggest that a victim of cyber rape still suffers, albeit in a different way than a victim of real-world rape.[197] They even argue that the sexual depiction of virtual children harms real children,[198] even when the production of the images involves no real children, and no real children ever view the images. Despite these arguments, the potential harm a real child might suffer as a result of sexual predation In-world is intangible. Such harm does not resemble, or rise to the level of, the types of harm that have long since warranted exceptions to First Amendment freedoms.

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06 (2007) (referring to Alan Sipress, *Where Real Money Meets Virtual Reality, the Jury is Still Out*, WASH. POST, Dec. 26, 2006, at A1, *available at* http://www.washingtonpost.com/ wpdyn/content/article/2006/12/25/AR 2006122500635.html).

191. Terms of Service, *supra* note 14 (providing that any content created or "invented" by an avatar belongs not only to the avatar In-world, but to its real-world user as well).

192. *See* Wikipedia, Second Life, Fraud and Intellectual Property Protection, http://en.wikipedia.org/wiki/Second_Life#Fraud_and_Intellectual_Property_Protection (last visited Mar. 27, 2009) (explaining the Digital Millennium Copyright Act, the statute under which a user can sue for violation of these rights).

193. *See generally* Sipress, *supra* note 182 (contrasting foreign laws and United States law).

194. *See id.*

195. *Id.* (quoting Gregory Lastowka, a law professor at the Rutgers School of Law in New Jersey).

196. *See generally id.* (contrasting foreign laws and United States law).

197. *See, e.g.*, Castranova, *supra* note 176, at 192.

198. *E.g.*, Meek-Prieto, *supra* note 10, at 105.

IV. ANALYSIS

Second Life provides a forum for people to explore their fantasies.[199] In a perfect Second world, Residents would pursue idealistic dreams beyond the realm of real-world possibilities—fly across town, marry their soul mates, establish rewarding careers, and even rewrite painful childhoods. Unfortunately, the World, like the real world, is not without its flaws. For every "good" Resident pursuing innocent dreams of enhanced beauty, a "bad" Resident lives out a deviant fantasy that would be deemed "criminal" if conducted in the real world.[200] Avatars who choose to pursue particular deviant fantasies, however, face potential exile from the World.[201] Despite this Second Life policy, In-world criminals are immune from real-world prosecution[202] and, therefore, suffer no real-world ramifications.

Modern social norms suggest that those who view and/or circulate virtual child pornography should be subject to the same real-world penalties as real child pornographers because both use images of children as the subject of their arousal. While both In-world and real-world pedophiles may be classified as deviants and immoral, it is far-reaching to conclude the former is an equivalent offender to the latter. Indeed, First Amendment jurisprudence is currently insufficient to proscribe virtual child pornography as depicted in Second Life. For one, obscenity law does not encompass it.[203] Furthermore, in its present state, federal child pornography law may not prohibit In-world conduct that merely emulates real-world child pornographic material.[204] Unlike real-world child pornography, virtual child pornography in Second Life harms no real children. Still, some argue that even though the *production* of such material harms no actual child, its circulation does.[205] However, the potential harm to real children arguably resulting from virtual child pornography is too attenuated from the types of actual harm suffered by real-world victims that justified the child pornography exception in *New*

199. *See* FAQ, *supra* note 1.

200. *See* Sipress, *supra* note 182.

201. Terms of Service, *supra* note 14; *see also supra* text accompanying notes 179–86.

202. *E.g.*, Sipress, *supra* note 182 (explaining that virtual child abuse is not a crime in the United States).

203. *See* Miller v. California, 413 U.S. 15 (1973); *see also infra* Part IV.A.

204. *See supra* Part II.B.

205. *E.g.*, Meek-Prieto, *supra* note 10, at 105 (arguing that Second Life should be regulated for virtual child pornography because it harms real children).

York v. Ferber.[206] No sufficient harm results from In-world "crimes" that would justify exempting virtual child pornography from the constitutional guarantee of free speech. Because proscribing child pornography In-world would consequently chill otherwise protected speech, the Supreme Court should not withdraw its protection over such In-world conduct.[207]

Imagine the scenario where two adult users meet In-world through their avatars, one an adult and the other a minor. Both avatars have sex and walk away cyber-satisfied.[208] Had this occurred in the real world, the adult would, of course, be charged with statutory rape, regardless of whether the minor consented.[209] When sexual activity occurs In-world, however, users do not experience the physical sensation of sexual gratification. Rather, what they experience is more analogous to the psychic gratification of watching a pornographic film; any bodily pleasure they enjoy would have to be self-induced. As a result, no real-world child is actually harmed. Alternatively, in a similar scenario but where the child avatar does not consent, any resulting "harm" would likewise be intangible. Here, the "harm" would be analogous to the feeling of shock and disgust that is provoked when watching a rape depicted on film. Prohibited from this kind of age-play,[210] "criminal" avatars in the above situations would suffer In-world consequences for their conduct regardless of the willingness of the child avatar's adult controller.[211] But should their controllers face real-world consequences as well?[212]

A. Obscene Under Miller*?*

Denying First Amendment protection to an In-world sexual deviant requires an analysis of existing First Amendment law. If obscenity law could successfully proscribe the aforementioned In-world speech, prosecution would be straightforward. Courts could prosecute In-world criminals without having to address the complex issues surrounding the regulation of virtual child pornography. But for a court to conclude that the depiction of adult-child avatar sex is obscene, it must meet the three-part

206. *See* New York v. Ferber, 458 U.S. 747, 757–58 (1982).

207. Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002); *see also supra* note 68.

208. *See, e.g.*, Wagner, *supra* note 178. Avatars, by default, have no genitalia. To "have sex," avatars must purchase the necessary equipment to simulate sex as realistically as possible. *Id.*

209. *See, e.g.*, CAL. PENAL CODE § 261.5 (West 2008).

210. *See* Catherine Neal, *Children Avatars in Second Life*, ASSOCIATED CONTENT, May 18, 2007, http://www.associatedcontent.com/article/245698/children_avatars_in_second_life. html.

211. Terms of Service, *supra* note 14; *see also supra* text accompanying notes 179–86.

212. *E.g.*, Meek-Prieto, *supra* note 10, at 102.

test set forth in *Miller v. California*.[213] Indeed, a prosecutor would have great difficulty arguing that proscribing consensual avatar sex (regardless of the avatar's age) between two adult users in the privacy of an In-world home promotes either of the two rationales emphasized in *Miller*.[214]

1. Rationale One: Anyone Around to Offend?

There are few, if any, unwilling participants whom the state seeks to avoid offending here. In the scenario described above, both users consented and the only viewers of the pornographic depiction are the willing users themselves. Still, some argue that virtual sexual activity is not private even when conducted in a seemingly private locale In-world.[215] Because users may access their Second Lives in a public location, such as a coffee shop, unwilling viewers may be exposed to the pornographic images of the avatars.[216] However, given the predictability of certain conduct resulting from simple human nature, this possibility (that some individuals will be subjected to the material against their will) is more likely the exception than the rule. Surely, most users prefer to conduct their Second Lives in the privacy of their own homes, using their virtual lives to create anonymous identities to live out their private fantasies. Indeed, the more shameful the fantasy (e.g., sex with children), the more likely a user will indulge it in private. In such a situation, the danger to "unwilling participants" is minute. In line with the overbreadth doctrine, the law will not ban speech if doing so will also ban a substantial amount of protected speech.[217]

2. Rationale Two: Shielding Minors

Next, users must agree to the Terms of Service before starting a Second Life.[218] Once accepted, controllers on both ends are entitled to

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213. Miller v. California, 413 U.S. 15, 24–25 (1973) (setting forth the test as follows: (1) whether "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value").

214. *See id.* at 18–19; *see also supra* text accompanying note 46.

215. *E.g.*, Meek-Prieto, *supra* note 10, at 103 (referring only to the situation where the avatars and their respective controllers have virtual sex in the privacy of their virtual homes; it would not apply when avatars have sex in public In-world).

216. *Id.*

217. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002); *see also supra* note 68.

218. Terms of Service, *supra* note 14. In fact, a user need only be thirteen years of age to

assume that the other controller is of legal age. This is significant because *Miller* sought to prevent exposure to minors; what goes on behind closed Second doors remains private and thus, is not exposed to other avatars, their users, or the general public (children or adults).[219] Of course, though the creators of Second Life do their best to prevent minors' access, the Terms of Service[220] do not ensure that all Residents are indeed at least eighteen years of age. A child who sneaks onto Second Life might create either an adult or child avatar, both of which still entitle users behind other avatars to assume an adult controls it. In fact, any suggestion by an avatar that its user is less than eighteen years of age violates the Terms of Service.[221] Nevertheless, the very real possibility that children may sneak onto Second Life suggests to some[222] that the *potential* exposure to minors justifies bringing real-world criminal charges against an unsuspecting user whose avatar has sex with a child user's avatar.

But alas, consider the problem the following scenarios pose—distinguish: (1) a child sneaks onto Second Life, creates a *child* avatar, and has consensual sex with an adult avatar controlled by an adult; from (2) a child sneaks onto Second Life, creates an *adult* avatar, and has consensual sex with an adult avatar controlled by an adult. Some would argue that in both situations the identical potential "harm" is present—namely, a real child who witnesses his or her avatar having sex may become desensitized to the psychological harm that such voyeuristic conduct causes.[223] Presumably, this is the sole harm applicable to minors that *Miller* sought to prevent.[224] If interpreted broadly, *Miller* would then prohibit consensual sex between two adult avatars (as in the latter scenario) because of the remote possibility that a child could sneak onto Second Life and misrepresent himself or herself as an adult.[225] Yet, Second Life rightfully treats the two situations differently. The former involves age-play and is forbidden.[226] The latter involves two adult avatars and presents a situation that commonly arises during In-world dating. If *Miller* were applied to ban all virtual dating because of the possibility that a child would sneak onto

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participant in Second Life—however, those minors under age eighteen are restricted to a designated "Teen Area." *Id.*

219. This is so because Second Lives are generally conducted in private. *See* discussion *supra* Part IV.A.1.

220. Terms of Service, *supra* note 14.

221. *Id.*; *see supra* text accompanying notes 179–86.

222. *See, e.g.*, Meek-Prieto, *supra* note 10, at 98–99.

223. *See, e.g.*, *id.* at 105.

224. *See* Miller v. California, 413 U.S. 15, 18–19 (1973).

225. *See id.* at 24.

226. Terms of Service, *supra* note 14.

Second Life and pose as an adult, obscenity law would be largely impracticable. For example, the mere possibility that children could sneak into R-rated movies, or sneak past the "Adult Section" tape in video stores, or bypass the license agreements for adult websites, would require the proscription of all such materials.[227]

Accordingly, obscenity law under *Miller* is not concerned with what goes on "behind the scenes" of the material.[228] Rather, it addresses the content of the material itself. Applying *Miller*, proscribing the material requires that the image be so "hard core" as to escape First Amendment protection.[229] Regular consensual sex between avatars is not an obscene depiction.[230] Therefore, a nearly identical image (where the only difference is the substitution of a child avatar for an adult) is similarly not obscene under *Miller*,[231] provided that it would not, for other reasons, rise to the level of obscenity.[232] To subject a user who engages in age-play to real-world prosecution, then, requires an analysis of child pornography law as established in 1982, which has since developed over the last three decades.

B. Second Child Pornographers and the First Amendment

Because *Miller*'s obscenity definition cannot stretch to include a ban on sexual activity involving virtual children in Second Life, the courts would have to find that such "activities" constitute child pornography and thus do not warrant First Amendment protection. Standing alone, *Ferber* does not support the regulation or ban of such conduct in Second Life.[233] *Ferber*'s holding applies only when the production of child pornography involves a real child.[234] Therefore, a thorough analysis of current child pornography law necessarily involves consideration of developments in legislation and case law—specifically, those that involve Congress's continuing efforts to assure that legislation keeps pace with recent

227. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 252 (2002) (explaining that "[t]he Government cannot ban speech fit for adults simply because it may fall into the hands of children").

228. *See Miller*, 413 U.S. at 24–25 (announcing the test used to determine whether material can be regulated as obscene).

229. *See id.* at 25.

230. *See, e.g.*, Meek-Prieto, *supra* note 10, at 102–03 (acknowledging that prevailing law could not regulate virtual child pornography that involves only adults).

231. Of course, this assumes the image still only involves regular, consensual sexual activity and does not depict anything verging on "hard core" as under the three-part *Miller* obscenity test.

232. Terms of Service, *supra* note 14.

233. *See* New York v. Ferber, 458 U.S. 747 (1982).

234. *See id.* at 756–64 (discussing why children deserve special protection).

advancements in technology.[235]

Second Life might be used as a forum for three kinds of potentially illegal conduct that may harm children: (1) the possession of child pornography;[236] (2) the sale of or the intent to sell child pornography;[237] and (3) the solicitation of real-world meetings.[238] Each of these three possibilities implicates different laws as to the manner of participation in, and exploitation of, Second Life. This, in turn, requires separate analyses to determine if the user who engages in such conduct justifiably warrants any real-world consequences.

1. Possession of Virtual Child Pornography

a. The Law Now

In Second Life, "possession" of pornography may be inferred if a user watches his or her avatar having sex with other avatars, just as any pornographic viewing would be inferred. In turn, so long as one of the avatars is a child, both users engaging in the viewing would seem to "possess" virtual child pornography. Reducing child pornography law to its essence, the present law simply does not proscribe the possession of virtual child pornography that is not "indistinguishable from" real child pornography.[239] As child pornography appears in Second Life, Residents cannot reasonably believe that an avatar resembles a real person so closely that the avatar is "indistinguishable from" a real person. Indeed, given the current state of available technology, no user can configure an avatar so that it causes a reasonable viewer to believe that he or she is viewing a real person in Second Life. Therefore, child pornography law in its current form should not subject Second Life possessors of virtual child pornography to real-world criminal penalties.[240]

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235. The developments refer to the relevant cases and statutes discussed at length in Part II of this Comment.

236. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 111 (1990) (noting that unlike obscene materials, possession of child pornography is criminalized).

237. 18 U.S.C. § 2252(a)(3)(B) (2006).

238. For the purposes of this Comment, only two kinds of meetings are relevant: (1) a meeting for the purpose of luring and seducing a child into sexual activity; and (2) a meeting between fellow child pornographers to exchange pornography, or to swap techniques on methods of child abuse.

239. *See* 18 U.S.C. § 2256(8)(B) (2000 & Supp. 2007).

240. Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002) (holding that possession of virtual child pornography is not illegal, thereby striking the Child Pornography Prevention Act's definition of "child pornography" that Congress later corrected by substituting "indistinguishable from" in place of "appears to be").

A further problem arises in that the creation of pornographic images in Second Life requires two users to actively engage in the virtual activity. Because both participants arguably possess the images by virtue of having created them jointly, this raises the question of whom the law should punish in this situation: the adult-user/adult-avatar who seduces an adult-user/child avatar or the adult-user/child-avatar who enjoys viewing images of child-avatars having sex and thus seeks out other avatars with whom to have sex?[241] Both examples involve only real-world adults and do not harm real children. Still, some critics argue that despite current First Amendment law to the contrary, the government should expand the child pornography exception to include the type of virtual images appearing in Second Life.[242] For this argument to succeed, the legislature or the courts would have to find that the potential harm resulting from virtual child pornography is not only probable, but of a nature so great as to fall outside the scope of First Amendment protection.[243]

b. Could the Law Constitutionally Be Broadened?

Made explicit in *Ferber*, the rationale behind exempting child pornography from First Amendment protection lies largely in preventing the sexual exploitation of actual children.[244] The law not only subjects those who produce child pornography to criminal penalties, but also those who possess it.[245] Recognizing that the production of child pornography makes a permanent record of the sexual abuse the child experiences, *Ferber* noted three distinct harms to children that justify the exemption.[246] First, a child experiences immediate harm from the degradation, exploitation, and sexual abuse resulting from the creation of the pornography.[247] Second, the circulation of the material further harms the child by permanently documenting the abuse and damaging the child's reputation.[248] Finally, when a pedophile gains sexual pleasure from child pornography, the market for such material grows, generating an even greater demand for its production.[249]

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241. Meek-Prieto, *supra* note 10, at 106.

242. *See, e.g.*, *id.* at 91–92.

243. *See* New York v. Ferber, 458 U.S. 747, 756–58 (1982).

244. *Id.* at 757; *see supra* text accompanying notes 56–62.

245. 18 U.S.C. § 2252A(a)(5)(B) (2006); *see, e.g.*, Osborne v. Ohio, 495 U.S. 103, 106 (1990).

246. 458 U.S. at 758–59.

247. *Id.*

248. *Id.*

249. *Id.*

When an alleged pedophile creates a computer-generated image depicting children engaging in sexual activity, such as the hypothetical scenarios described above, no children are harmed from the material's *production* because real children are not involved.[250] Rather, as it is the *representation* of a child that elicits sexual gratification in the viewer, the production does not degrade, exploit, or abuse any real children.[251] Therefore, the first two harms articulated in *Ferber* are missing.[252] Nevertheless, some may argue the *possession* of virtual child pornography could harm children, implicating *Ferber*'s third harm.[253] The argument would go as follows: Child pornographic material, real or virtual, promotes real-world deviant behavior by whetting the appetites of pedophiles.[254] Thus, the material would increase the probability that a pedophile would either be encouraged to abuse a real child directly or be motivated to seek out real child pornography for more realistic images, thus fueling the market for child pornography.[255] Therefore, the possession of virtual child pornography can eventually lead to sexual abuse of real children. Accordingly, the law should treat virtual child pornography and real child pornography similarly.

Notwithstanding *Ashcroft*'s holding,[256] the arguments that virtual child pornography may increase the likelihood that pedophiles will sexually abuse real children or that it may increase the demand for real child pornography assume that those who view virtual child pornography are like-minded with those who view real child pornography and/or abuse real children.[257] Indeed, studies show that possessors of real child pornography are likely to be active child abusers.[258] Although most would agree that viewing virtual child pornography is its own degenerate practice, the *Ashcroft* Court, nevertheless, distinguishes between the materials found in *Ferber* (where actual children were used) and virtual images, noting that "[v]irtual child pornography is not 'intrinsically related' to the sexual abuse of children."[259]

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250. Meek-Prieto, *supra* note 10, at 102–03.

251. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

252. *Ferber*, 458 U.S. at 758–59.

253. *See id.*

254. *Ashcroft*, 535 U.S. at 253 (rejecting the government's argument that pedophiles will be "encourage[d] . . . to engage in illegal conduct"); *see supra* note 101 and accompanying text.

255. Meek-Prieto, *supra* note 10, at 107.

256. *See* 535 U.S. at 250 (recognizing that the causal link between virtual child pornography and the sexual abuse of children is "contingent and indirect").

257. *See id.*

258. *E.g.*, Meek-Prieto, *supra* note 10, at 107 n.84.

259. *Ashcroft*, 535 U.S. at 250.

Thus, there seemingly exists a notable difference between the possessor of actual child pornography and the participant in virtual child pornography. The former spends a significant amount of money procuring a collection and risks prosecution under known child pornography law.[260] The latter, on the other hand, simply enters Second Life free of charge and engages his or her avatar in sexual activity with a consenting user's child avatar, under the reasonable belief that all avatar-operators are contractually bound to be adults.[261] Thus, while such behavior may still be considered reprehensible, it does not exploit or injure any real child. Because the law forbids real-world sexual conduct with minors,[262] the user can indulge in certain fantasies in a harmless environment in which children are not involved. This virtual environment provides a forum for potential deviants to explore their fantasies without causing actual harm to anyone—arguably, a forum without which a deviant might take real-world action to injure a real-world child. Thus, allowing those with pedophilic fantasies to satisfy their curiosities in their Second Lives may actually decrease, rather than increase, the likelihood that real children are harmed.[263] Consequently, leaving Second Life unregulated may result in *less* harm to actual children,[264] particularly because there is no conclusive proof that leaving Second Life unregulated would result in *more* harm to real children.[265]

Furthermore, there is little to no evidence supporting the speculative belief that *virtual* child pornography fuels the market for *real* child pornography. Specifically in the context of Second Life, viewers or possessors actively participate in their own gratification by controlling their avatars' movements, as opposed to viewers who passively view pornography on a screen or in a magazine. This suggests that rather than purchasing pornography, the viewer's libido would be better served by maintaining an active role and getting more virtual "play"-time.

Nevertheless, proponents of stricter regulation may argue that the user's more active role increases the need for real-world penalties for the possessor or creator of child pornographic material.[266] Indeed, some argue

260. *See generally* New York v. Ferber, 458 U.S. 747, 761–62 (1982).

261. Terms of Service, *supra* note 14.

262. *See, e.g.*, 18 U.S.C. § 2252A (2006).

263. *See generally* Wagner, *supra* note 178 (arguing that fulfilling sexual fantasies in Second Life does not lead to the need to fulfill those fantasies in real life).

264. *See generally id.*

265. *See generally* Ashcroft *v. Free Speech Coal.*, 535 U.S. 234 (2002) (rejecting the argument there is causal link between virtual child pornography and the sexual abuse of children).

266. *See id.*

that the users behind the avatars engaging in sexual behavior do more than merely possess the pornographic images.[267] Because the material's existence depends upon the user's participation, the possessor also plays the role of "producer," thereby doubling the justification for regulation.[268] This argument, however, misconstrues the relationship between the producer, possessor, and the harmed child. In the real world, producers who make pornographic images (be it in films, magazines, books, etc.) involving a child subject themselves to prosecution for directly exploiting and abusing a child.[269] In contrast, because mere possessors do not abuse the child directly, the law punishes them less harshly.[270] When applied in the context of virtual settings such as Second Life, the possessor/producer is even farther removed from the abused "child." In fact, the abused "child" does not even exist. No real child is *actually* harmed by the image production,[271] nor is a real child *potentially* harmed by an alleged increased likelihood of child abuse or demand for real child pornography. Rather, the victim of the "abuse" is merely a virtual child that neither feels physical harm at the time of "production," nor is harmed by any subsequent distribution. The only viewers of the In-world avatar-sex are the two users themselves, or others who consent to viewing the images.[272]

Taken together, *Ferber*,[273] *Ashcroft*, and *Williams* consistently hold that the possession of obviously virtual child pornography must retain First Amendment protection.[274] Moreover, despite the moral justifications that some people argue warrant the expansion of child pornography law so that it imposes criminal liability for the possession of material depicted in Second Life, the Court's jurisprudence does not justify such an expansion.[275] Although users whose avatars (adult or child) engage in virtual sex with child avatars may face exile from their Second Lives, their conduct alone does not warrant the abandonment of constitutional

267. *See* Meek-Prieto, *supra* note 10, at 108.

268. *See id.*

269. *See id.*

270. *See generally* Osborne v. Ohio, 495 U.S. 103, 144 (1990) (noting arguments that the states should not necessarily prohibit mere possession of child pornography).

271. *See* Meek-Prieto, *supra* note 10, at 108; *see supra* text accompanying notes 250–67.

272. "Nudity and sexual behavior is forbidden in Second Life outside of private areas and sex clubs." Wagner, *supra* note 178.

273. Because *Ferber* was decided before developments in technology, the Court did not address the issue of virtual child pornography.

274. *See* New York v. Ferber, 458 U.S. 747, 774 (1982); Ashcroft v. Free Speech Coal., 535 U.S. 234, 267 (2002); United States v. Williams, 444 F.3d 1286, 1308–09 (11th Cir. 2006).

275. *See generally Ashcroft*, 535 U.S. 234.

protection in favor of real-world criminal penalties.[276]

2. Pandering Child Pornography

Although Second Life's features extend beyond those of typical online social networks,[277] it too can be used for the simple purpose of communication. However, even when Residents use Second Life in this basic way, Second Life's inherent nature sets it apart from other social networks such as MySpace and Facebook. For one, Second Life users' conduct differs from those logging into a chat room because Second Life users do more than simply send and receive messages in text.[278] Second Life provides a method for users to not only "see" with whom they communicate, but also allows them to more actively interact with others.[279] Second Life also differs in another important way from other online social networks in that the use of an avatar—a unique aspect of participating in Second Life—secures the user's anonymity.[280] MySpace and Facebook, on the other hand, generally facilitate communication between real-world people using their real-world identities.[281] Thus, because of its exclusive features, Second Life poses a unique problem—what law, if any, should apply to regulate the conduct of a Second Life user who utilizes the World to indulge deviant fantasies by pandering child pornography, real or virtual?

a. Pandering *Real* Child Pornography

The first issue is whether a user may enter Second Life and solicit the transfer of *real* child pornography in the *real* world. Applying the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003's anti-pandering provision that was upheld in *Williams*, users may not distribute, promote, or solicit material in a way

276. Conversely, a user whose child avatar engages in virtual sex with any other avatar (adult or child) faces the same consequences, or lack thereof.

277. *See* MySpace homepage, www.myspace.com (last visited Mar. 27, 2009); *see also* Facebook homepage, www.facebook.com (last visited Mar. 27, 2009). MySpace and Facebook are two of the more well-known, online social networks. *See* Steve Rosenbush, *Facebook's on the Block*, BUSINESSWEEK, Mar. 28, 2006, *available at* http://www.businessweek.com/technology/content/mar2006/tc20060327_215976.htm.

278. *See generally* Wagner, *supra* note 178.

279. *See generally id.*

280. *Compare* Facebook, http://www.facebook.com (last visited Mar. 27, 2009), *and* MySpace, http://www.myspace.com (last visited Mar. 27, 2009), *with* Meek-Prieto, *supra* note 10, at 89.

281. *See generally* Facebook, http://www.facebook.com (last visited Mar. 27, 2009); *see also* MySpace, http://www.myspace.com (last visited Mar. 27, 2009).

that is intended to cause others to believe they will receive real child pornography, or that the panderer believes contains such images.[282] For example, User 1 may not intend to persuade User 2, via their avatars, that User 1 has pornographic images containing real children and will make them available to User 2. This speech, though conducted In-world, would be used to solicit a real-world exchange, regardless of whether User 1 in fact has such material.[283] Accordingly, such In-world speech is no different than that of chat room users who assert the same offer, or real-world individuals who tell others they will give or sell them real child pornography. Thus, current law prohibits those who use Second Life in any way that mirrors the defendant's speech in *Williams*[284] and potentially subjects the user to prosecution under PROTECT.

b. Pandering *Virtual* Child Pornography

Residents can also use Second Life to solicit *virtual* child pornography.[285] Consider the scenario in which a user creates multiple avatars, some of them children,[286] and retains complete control over them. The user establishes a career in Second Life, or simply pursues a personal hobby as a film producer. For his or her own amusement, and perhaps even indulgence, the user creates a film depicting some of his or her child avatars engaged in sexual activity with his or her other avatars. This is the classic case of obviously virtual child pornography.[287] Strictly speaking, the user could not be prosecuted for possession of child pornography because such images are clearly not "indistinguishable from" real children.[288] What happens, however, when one of the user's avatars goes out in the virtual "marketplace" and advertises that it (the avatar) has child pornography it would like to sell or give away?

Where the user does not pander a virtual film in a way that "reflects

282. 18 U.S.C. § 2252(A)(a)(3)(B) (2003).

283. Recall that even if the solicitor has only virtual child pornography, or regular adult pornography, or no pornography at all, the solicitor is still subject to PROTECT's anti-pandering provision. *See supra* notes 121–23 and accompanying text.

284. United States v, Williams, 444 F.3d 1286, 1288 (11th Cir. 2006). While the defendant in *Williams* indeed had actual child pornographic images and was charged for such, his speech alone, suggesting he had those images, subjected him to separate criminal charges under PROTECT. *Id.*

285. *See* Meek-Prieto, *supra* note 10, at 106–07.

286. While any user's individual account is only permitted one avatar, a user may create multiple accounts from the same computer, thus creating multiple avatars.

287. *See generally* Meek-Prieto, *supra* note 10, at 89–90.

288. 18 U.S.C. § 2256(8)(B) (Supp. 2003); *see also supra* text accompanying notes 118–21.

the belief, or that is intended to cause another to believe"[289] the film contains images of real people, it must be presumed that the user solicitor, recipient, and their respective avatars know the children depicted therein are virtual. Under PROTECT, this speech is not proscribable for the precise reason that neither solicitor nor recipient can reasonably believe the images depict real children.[290] However, although *Williams* upheld PROTECT's anti-pandering provision, an incongruity arises between the implications of the provision and the Court's rationale in support of it.[291]

The *Williams* Court distinguished the anti-pandering provision in PROTECT from the overbroad Child Pornography Prevention Act of 1996 provision struck down in *Ashcroft* (the "conveys the impression" provision).[292] In doing so, it noted that under PROTECT, no actual pornography (real, virtual, obscene, child, or otherwise) need even exist.[293] The Court did not want to make the underlying material the target of the regulation, but rather just the pandering speech alone.[294] But in support of this goal, the Court made proscribable speech to the effect of "I have some child pornography and I am willing to share it with you."[295] If made in a chat room or in real life, such a statement would subject the declarant to criminal penalties under PROTECT.[296] When spoken In-world, however, the nature of that speech is ambiguous: (1) is the user soliciting another *user* to provide actual material in the real world (regardless of whether the solicitor in fact has actual or virtual material, so long as it "reflects the belief, or . . . is intended to cause another to believe" the material contains real children);[297] or (2) is the user soliciting, through its avatar, another *avatar* to provide virtual material In-world (such as the aforementioned "film")? Some might argue that because such speech is prohibited in every other scenario (e.g., in a chat room, on MySpace, or in real life), identical speech, when asserted in Second Life, should similarly be prohibited.

The implication of proscribing such speech in Second Life is critical. In the situation discussed above where it must be presumed that both the declarant (the soliciting user and its avatar) and the recipient are interpreting the statement as initiating a purely In-world transfer, neither

289. § 2252A(a)(3)(B) (2003).
290. *Id.*
291. United States v. Williams, 128 S. Ct. 1830, 1852 (2008).
292. *Id.* at 1841; *see also supra* note 146 and accompanying text.
293. *See Williams*, 128 S. Ct. at 1838.
294. *Id.* at 1838–39.
295. *Id.* at 1837–38.
296. *Id.* at 1838–39.
297. 18 U.S.C. § 2252A(a)(3)(B) (2003).

can reasonably entertain a subjective belief that the pornographic material contains images of real children. Under the statutory language of PROTECT, this speech would likely evade prosecution because it neither "reflects the belief, [n]or . . . is intended to cause another to believe"[298] that the "film" contains real children. But under the *Williams* rationale, the speech would subject the declarant to real-world prosecution via PROTECT because the speech alone would be the target, rather than its underlying content (i.e., the virtual film).[299] If that speech were proscribed in a chat room or in real life, then under *Williams*, it would also be proscribed in Second Life.[300] This result would ignore the critical ambiguity that arises from the unique feature of Second Life—that for every Resident, two identities attach (the controller and its avatar).

Consequently, Residents who pander virtual material harm no one, particularly when both the solicitor and recipient understand that the material is entirely virtual (as described above).[301] For one, those who pander virtual material do not harm real children when they produce such material.[302] Moreover, Residents do not *potentially* harm real children when they circulate such material because virtual child pornography has, at best, a "contingent and indirect" link to child abuse.[303] Finally, those who pander such material do not harm real children by fueling the market for real child pornography, most notably because virtual material and real child pornography are not part of the same market.[304]

Opponents of lenient regulation of virtual conduct might argue that potential deviants who enter Second Life may use it as a means to explore a yet-unexplored fantasy, thereby inching closer to the eventual sexual gratification with real-world children. Under this argument, Second Life functions as a gateway to sexual abuse, either directly through child abuse or indirectly by watching real child pornography. However, this view, which advocates the elimination of a virtual market, ignores the fact that doing so necessitates the use of the real market to satisfy a given deviant's curiosities or desires. More specifically, without a virtual market, a potential deviant would have one less outlet through which to safely explore his or her curiosity. Ignoring this implication runs counter to the

298. *Id.*

299. 128 S. Ct. at 1838–39.

300. *Id.*

301. *Id.* at 1844.

302. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 250 (2002).

303. *See id.*; *see also supra* notes 257 and 259 and accompanying text.

304. *See supra* note 104 and accompanying text (noting the inherent difference between virtual and illegal images as they relate to the pornographic market).

ultimate goal of protecting real children. Therefore, although pandering speech for virtual material subjects the user to In-world consequences for breaking Second Life's policies,[305] it should not subject the user to real-world penalties. To do so implicates and possibly violates fundamental First Amendment rights.

3. Solicitation for Real-World Meetings

Like other social networks, Second Life can be used as a channel to solicit meetings in the real world.[306] When used in this manner, it operates much like a chat room; therefore, the law regulating cyber conduct between chat room users applies.[307] Relevant here, Second Life may set the stage for two kinds of In-world meetings that may harm real children. First, an adult-controlled avatar propositions a child avatar—ostensibly controlled by a minor—to meet in the real world. This is done with the intent to seduce or lure the alleged child into sexual activity. Second, one adult user may proposition another adult user, whose avatar suggests its controller is a fellow child pornography connoisseur, to meet in the real world to exchange real child pornography.[308] The speech in these two scenarios poses different potential harms to children. Therefore, if the law must regulate the In-world conduct (i.e., real-world expression), it must differentiate between the above scenarios and address them separately.[309]

a. Meeting to Seduce a Child

A user might use Second Life in an attempt to seduce a child for real-world sex. Under applicable law, a user who solicits such a meeting is subject to real-world prosecution, regardless of whether the solicitee is in fact a minor.[310] The solicitee receiving this proposition may be an adult, or even a government agent posing as a child avatar in order to catch potential defendants.[311] However, because the culpability of the user lies in the *attempt* to engage in sexual activity with a minor, an actual minor need not

305. Terms of Service, *supra* note 14.

306. FAQ, *supra* note 1.

307. Third Anniversary Thoughts, Second Life, June 23, 2006, *http://blog.secondlife.com/2006/06/23/third-anniversary-thoughts/* (on file with author).

308. 18 U.S.C. § 2422(a) (2008).

309. Third Anniversary Thoughts, *supra* note 307.

310. § 2422(b).

311. *See* United States v. Meek, 366 F.3d 705, 710 (9th Cir. 2004) (involving a case where a police officer posed as a teenage user).

exist.[312] Second Life rightly provides no exception to real-world laws that prohibit this conduct.[313] Since this activity implicates child pornography laws, it warrants no further analysis here.

b. Meeting to Exchange Material with Other Deviants

When users exclusively use Second Life to meet other child pornography connoisseurs (producers, possessors, or any combination thereof), they have options. Users can proposition other users for real-world meetings to exchange actual child pornography. Alternatively, they can indulge their deviant fantasies by keeping it strictly In-world by soliciting meetings at In-world locales (e.g., a popular In-world bar) to exchange virtual child pornography. In both scenarios, child pornographers use Second Life as a forum to meet other users who share in their perverse interests. However, PROTECT treats the two differently. In the first situation, PROTECT prohibits the controller from using Second Life this way, when the speech proposing the real-world meeting "reflects the belief, or . . . is intended to cause another to believe" that the real-world pornography depicts real children.[314] PROTECT does not, however, prohibit the latter situation because no reasonable person would believe that the pornography showcased In-world depicts real children, or images that are "indistinguishable from" real children.[315]

Some argue that the solicitation for In-world meetings should be regulated because a pedophile might use Second Life to meet other like-minded users to gain support, affirm and share fantasies, or to exchange child abuse tactics.[316] Under this view, both the user and the willing recipient would be subjected to real-world legal consequences, just like those incurred for a meeting involving the exchange of child pornography in the real world.[317] While this argument addresses some of the state interests set forth in *Ferber*[318] that gave rise to the child pornography exception, it fails to account for the specific harms the Court sought to prevent in both *Ashcroft* and *Williams*.[319]

As discussed above, virtual child pornography does not involve, and

312. § 2422(a).

313. *See id.*; *see also* Terms of Service, *supra* note 14.

314. § 2252A(a)(3)(B) (2003).

315. § 2256(8)(B) (2000 & Supp. 2003).

316. *See* Meek-Prieto, *supra* note 10, at 106–07.

317. *See id.* at 106.

318. *See supra* notes 56–64 and accompanying text.

319. Specifically, the Court sought to prevent the exploitation of real children during production, permanent humiliation, and damage to reputation by ongoing circulation.

therefore does not potentially harm, a real child. Consequently, the rationale supporting the child pornography exception does not support prohibiting the production, or subsequent circulation, of such material. Proscribing this In-world speech is not for the purpose of preventing harm to a child, but is instead intended to prevent interaction between fellow child pornographers. This is analogous to prohibiting the speech of two strangers who meet in a park, discover a shared practice of sexually abusing children, and swap techniques. While certainly contemptible, such speech is clearly constitutionally protected and thus cannot be prohibited.[320] For this reason, the use of Second Life as a forum to meet other pedophiles does not justify banning In-world discussions, meetings, or virtual exchanges. Accordingly, the speech of a user who does not solicit any proscribed *real-world* conduct falls outside the scope of PROTECT and thus should retain First Amendment protection.

V. CONCLUSION

The government may regulate speech, but only within the bounds of the Constitution. The Supreme Court has interpreted the limits of the First Amendment and identified several exceptions where certain public interests outweigh the value of the speech in question.[321] As relevant here, the public's interest in protecting children justifies the child pornography exception.[322] The Court's willingness to deny protection to this form of speech is based on three potential harms that child pornography poses to children.[323] First, the production of child pornography results in the immediate abuse and degradation of a child.[324] Second, the advertisement, sale, and subsequent viewing of child pornography exploits the child (and children in general), thereby permanently documenting the abuse and damaging the child's reputation.[325] Third, the circulation and possession of child pornography advances two harms: (1) it may induce the viewer to directly abuse a child; and/or (2) it may fuel the market for more material, increasing the demand for production.[326] For these reasons, the Court refuses to extend First Amendment protection to speech that causes these

320. *See* New York v. Ferber, 458 U.S. 747, 764–65 (1982).

321. *See* Roth v. United States, 354 U.S. 476, 485 (1957); *see also supra* note 7 accompanying text.

322. *Ferber*, 458 U.S. at 757.

323. *Id.* at 759–62.

324. *See id.* at 756 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

325. *See id.* at 759.

326. *See id.* at 759–60; *see also supra* note 62 and accompanying text.

harms.[327]

However, the advent and evolution of virtual child pornography has blurred the line separating protected and unprotected speech.[328] Whereas the creation of real child pornography inherently involves harm to children, the creation of virtual child pornography does not. In Second Life, one may produce, solicit, and exchange virtual child pornography in ways that do not involve, resemble, or harm any actual children. Nevertheless, given differing moral standards in our diverse society, some may genuinely fear that the entanglement of children and sexual fantasies inherently harms real children, and that this speech deserves no First Amendment protection.[329]

Despite arguments to the contrary, the existence of virtual child pornography in Second Life does not directly harm any real children. Unlike real pornographers, virtual child pornographers do not require real children to participate in production of the images; rather, Residents create images by manipulating the movements of a user's avatar. No actual child is thereby degraded or abused in the process. Furthermore, the possibility that a child bypasses the age restrictions and sneaks onto Second Life does not justify the total ban on sexual expression in Second Life.[330] Under this rationale, a lot of otherwise protected speech would fall outside the scope of the First Amendment simply because a child might encounter it. The Court has consistently recognized that speech suitable for adults should not be banned simply because it "may fall into the hands of children."[331]

Moreover, those who would argue for greater legal restrictions on virtual child pornography have no conclusive empirical evidence that indicates that because virtual child pornography is allowed in Second Life, virtual deviants will inevitably abuse or molest real-world children.[332] While studies show that viewing real child pornography fuels the market for more like material, no evidence exists that the same is true for *virtual* child pornography.[333] Rather, the very nature of Second Life suggests the opposite. In Second Life, users have the opportunity to interact with the

327. *Id.* at 765.

328. *See, e.g.*, Meek-Prieto, *supra* note 10.

329. *See, e.g.*, *id.*

330. Presumably, a child that sneaks onto Second Life is "harmed" by becoming desensitized from viewing its avatar having sex. This would occur regardless of whether the child employed an adult or child avatar. Because the risk of a child unlawfully accessing Second Life always exists, a child posing as an adult would subject an unsuspecting user (and its controller) to punishment for simply dating what they believe is an avatar controlled by an adult.

331. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 252 (2002); *see also supra* note 227 accompanying text.

332. *See Ashcroft*, 535 U.S. at 250; *see also supra* note 256 accompanying text.

333. *See Ashcroft*, 535 U.S. at 250.

subjects of their arousal; actual pornography, on the other hand, avails its viewers of no such pleasure. Seemingly, a user has more to gain, and less to lose, by confining his or her deviant conduct to Second Life.

Nevertheless, participation in Second Life potentially involves objectionable conduct. The creators of Second Life now prohibit "sexual age-play" and discontinue the accounts of any members who use their Second Lives in this manner.[334] Such In-world regulation, however, should not result in real-world criminal penalties because the In-world conduct harms no one, adult or child. If anything, Second Life serves a purpose beyond that which the real world can provide: it allows individuals to pursue the most perverse fantasies without harm to anyone. Simply put, Second Life is good for society. But like a first life, Second Life just ain't perfect.

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334. *See supra* notes 179–86 and accompanying text.

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