ARTICLES

The "Enticing Images" Doctrine: An Emerging Principle in First Amendment Jurisprudence?

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INTRODUCTION

The Child Pornography Prevention Act of 1996 ("CPPA" or the "Act")[1] is perhaps best known as the controversial and contested article of federal legislation that prohibits virtual child pornography—images that appear to be of minors engaged in sexually explicit conduct[2] but that do not necessarily involve real children in their creation or production.[3]

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1. 18 U.S.C. § 2252 (1994 & Supp. IV 1998).

2. *See* 18 U.S.C. § 2256(2) (1994) (defining "sexually explicit conduct" under federal child pornography laws).

3. *See* 18 U.S.C. § 2256(8) (Supp. IV 1998) (defining child pornography to include, among other visual depictions, computer-generated images of minors who appear to be engaging in sexually explicit conduct). The legislative record behind the law reveals that Congress was concerned that new technologies allow for the creation of visual images "of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct." S. REP. NO. 104-358, at 2 (1996). How are these images created? Professor Debra Burke writes:

> No longer are children needed in the production of child pornography. Through a technique know as *morphing*, the image of a *Penthouse* Pet can be scanned into a computer, then transformed fairly inexpensively through anima-

In December 1999, the Ninth Circuit Court of Appeals held that the First Amendment[4] protection of freedom of speech forbids Congress "from enacting a statute that makes criminal the generation of images of fictitious children engaged in imaginary but explicit sexual conduct."[5] Just one month earlier, however, the Eleventh Circuit Court of Appeals reached precisely the opposite result, concluding that the statute "does not run afoul of the First Amendment."[6] And ten months before that, in January 1999, the First Circuit Court of Appeals also rejected a similar challenge, holding that the disputed statutory language prohibiting a visual depiction that "is, or appears to be, of a minor"[7] was neither unconstitutionally vague[8] nor overbroad.[9]

There is something more interesting about the CPPA, however, than this recent flurry of legal challenges, the issues of vagueness and overbreadth, and the resulting split of federal authority between the Ninth Circuit, on the one hand, and the First and Eleventh Circuits, on the other. In particular, the legislative underpinnings of the Act and the subsequent judicial analyses in the cases examining it suggest the possible emergence of a new and potentially dangerous doctrine in First Amendment jurisprudence. Speech that merely *seduces* or *entices* others to engage in illegal conduct falls outside the scope of First Amendment protection under what might be called the enticing images doctrine.

> tion techniques into the image of a child. This computer-generated pornography, or *virtual child pornography*, can be customized to suit specific sexual preferences and used to alter non-obscene pictures of existing children. It also can be created imaginatively from adult pornography.

Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440-41 (1997) (citations omitted).

4. The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. Gitlow v. New York, 268 U.S. 652, 666 (1925).

5. Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999).

6. United States v. Acheson, 195 F.3d 645, 648 (11th Cir. 1999).

7. 18 U.S.C. § 2256(8)(B) (Supp. IV 1998).

8. "A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 763 (1997).

9. United States v. Hilton, 167 F.3d 61, 65 (1st Cir. 1999).

This nascent doctrine manifests itself in areas beyond the prohibition of simulated child pornography. Cries today for regulating everything from tobacco product advertisements to violent videos and movies are based on the premise that the images at issue entice children to engage in illegal conduct.[10] The danger to free expression of adopting an enticing images doctrine should be clear—an *enticement* standard represents a far flimsier firewall separating free speech from government censorship than the well-established *incitement* doctrine.[11]

In 1969 in *Brandenburg v. Ohio*,[12] the United States Supreme Court solidified what had been developing in a line of cases throughout much of the twentieth century[13] when it concluded that the government cannot forbid even the advocacy of force or illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[14] This incitement standard has, at least in the past, been applied by courts in tort cases in which media images and/or words allegedly induced children to imitate unlawful conduct they observed on television[15] or read about in magazines.[16] The *in-*

10. *See* Donald W. Garner & Richard J. Whitney, *Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation*, 46 EMORY L.J. 479, 578 (1997) (proposing an ordinance to restrict tobacco advertising based on the rationale of providing "a safe street environment for children, free of advertising messages that *entice* juveniles to purchase tobacco in violation of state law") (emphasis added).

11. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 13-55 (1999) (providing a summary, including case excerpts, of the development of the incitement jurisprudence under the First Amendment).

12. 395 U.S. 444 (1969).

13. *See* Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961); Yates v. United States, 354 U.S. 298 (1957); Dennis v. United States, 341 U.S. 494 (1951); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

14. *Brandenburg*, 395 U.S. at 447.

15. *See* Olivia N. v. National Broad. Co., 126 Cal. App. 3d 488, 495 (Cal. Ct. App. 1981) (calling the *Brandenburg* incitement standard "the proper test" to apply in a tort action arising from the rape of a young girl committed by minors who watched an NBC television movie, *Born Innocent*, that depicted a similar act).

16. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (applying the *Brandenburg* incitement standard to reject liability arising from the death of a young boy who imitated the dangerous practice of autoerotic asphyxiation (masturbation while hanging oneself) described in an issue of *Hus-*

citement standard, as this article argues, represents a substantially higher threshold to clear before speech can be prohibited or punished than the emerging *enticement* standard.

This article initially analyzes the legislative and judicial underpinnings of the enticing images doctrine that emerges from the CPPA morass.[17] It then describes how the desire to censor enticing or seductive images is beginning to permeate other areas involving controversial images that allegedly affect children's behavior.[18] The article next compares and contrasts an enticement standard with the incitement standard, acknowledging potential differences between the two that may justify adoption of an enticement standard in limited instances. The article concludes, however, that the development of a new First Amendment principle that pivots around the notion of enticing images must proceed slowly and be scrupulously monitored. In particular, if the United States Supreme Court decides to grant certiorari in the CPPA cases—given the split of authority that developed in late 1999 among the federal appellate courts this seems quite likely—it should exercise extreme caution before adopting any rule that allows speech to be squelched because of its allegedly seductive or enticing effects.

I. IMAGES LIKE CANDY?: THE CPPA AND THE ENTICING IMAGES DOCTRINE

It is without dispute that the production, distribution and possession of child pornography involving the use of actual minors falls outside the ambit of First Amendment protection.[19] The United States Supreme Court made it clear in *New York v. Ferber*[20] that "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing impor-

tler).

17. *See infra* Part I.

18. *See infra* Part II.

19. *See* New York v. Ferber, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is "without the protection of the First Amendment"); Osborne v. Ohio, 495 U.S. 103, 111 (1990) (holding that "Ohio may constitutionally proscribe the possession and viewing of child pornography").

20. 458 U.S. 747 (1982).

tance."[21]

What *is* in dispute is the definition of child pornography. More specifically, the question today involving the Child Pornography Prevention Act of 1996 is whether an expansive statutory definition of child pornography that outlaws computer-produced images of imaginary children falls into the category of unprotected expression.[22] The problem arises, in part, because the United States Supreme Court has never established, as one of the federal appellate courts considering the constitutionality of the CPPA put it, "a single one-size-fits-all constitutional definition of child pornography."[23] What's more, the Supreme Court has emphasized that the distribution of "depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[24] This suggests, of course, that *non-live* visual images—computer-generated fictional images of children—depicting sexual conduct should receive full constitutional protection. There are then, as the Court wrote in *Ferber*, "limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment."[25]

To justify an expansion of the unprotected category of child pornography that sweeps up images that appear to be of minors engaged in sexually explicit conduct, Congress must assert a compelling interest to regulate otherwise protected expression. Content-based laws[26] such as the CPPA[27] are presumptively unconsti-

21. *Id.* at 757.

22. *See* United States v. Hilton, 167 F.3d 61, 69 (1st Cir. 1999) (stating that the appellate court was asked to determine whether the CPPA's "definition of child pornography, expanded in an effort to outlaw computerized child pornography, satisfies the First Amendment").

23. *Id.*

24. 458 U.S. at 765.

25. *Id.* at 764.

26. *See generally* Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69 (1997) (discussing judicial scrutiny of content-based and content-neutral laws).

27. All three of the federal appellate courts that have considered the constitutionality of the CPPA have held that it is a content-based law. *See* United States v. Hilton, 167 F.3d 61, 69 (1st Cir. 1999) (declaring the CPPA to be "a quintessential content-specific statute"); Free Speech Coalition v. Reno, 198 F.3d 1083, 1091 (9th Cir. 1999) (stating

tutional[28] and typically are subjected to a strict scrutiny standard of review in which the government must prove a compelling interest and show that it is served by a narrowly tailored statute.[29]

It is here, in the Congressional assertion of a compelling interest to justify a law that restricts both computer-created images of minors as well as images of adults digitally altered so as to appear as minors, that the roots of an enticing images doctrine begin to take hold. Because no children are actually used in the creation of what one scholar has called "childless child pornography,"[30] Congress was forced to identify harms other than the physical and psychological abuse that results from the making of pornography involving actual minors and the permanent record that the film or photograph leaves behind that may later haunt the child. It did just that when developing the CPPA.

Initially, Congress found that "child pornography is often used as part of a method of seducing other children into sexual activity."[31] It then linked this conclusion to the finding that this seduction effect "is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by electronic, mechanical, or other means, including by computer, which are virtually indistinguishable to the unsuspecting viewer from photographic images of ac-

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that the "child pornography law is at its essence founded upon content-based classification of speech"); and United States v. Acheson, 195 F.3d 645, 650 (11th Cir. 1999) (stating that the CPPA "is a content-based restriction on speech, as it is the content of an image of a minor or cyber-minor engaged in sexually explicit conduct that defines its unlawful character").

28. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating that "[c]ontent-based regulations are presumptively invalid").

29. *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (writing that the government may regulate the content of speech "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). For an interesting argument that the strict scrutiny standard is *not* applied by the United States Supreme Court when it evaluates the constitutionality of child pornography laws, see Adam J. Wasserman, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996—A Reply to Professor Burke and Other Critics*, 35 HARV. J. ON LEGIS. 245 (1998).

30. Burke, *supra* note 3, at 442.

31. S. REP. NO. 104-358, at 2 (1996).

tual children."[32] Congress then concluded that this virtual enticement constituted "a compelling government interest" for prohibiting computer-generated depictions of child pornography.[33]

Therein lies the heart of the enticing images doctrine: images that might entice a person to engage in illegal conduct—in this case, sexual conduct between adults and minors or the use of children in the creation of actual child pornography[34]—may be prohibited. The images, in brief, are like eye candy, tempting a child to engage in illicit behavior by making the conduct seem attractive or even desirable. They are akin to the proverbial lollipop that a pedophile might use to seduce or entice a young child, gaining his or her trust and cooperation in the production and creation of child pornography.

A. *Images, Words, and Seduction: The Flaw in Congressional Logic*

It is important to emphasize here that the speech that allegedly seduces and entices the illegal conduct consists of *images*, not of *words*. It is the alleged force, power and impact of the printed or posted image, not of the spoken or written word, that is under attack. As the Senate record for the CPPA reflects, Congress was concerned that "a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes *be convinced by viewing depictions* of other children 'having fun' participating in such activity."[35] The image, in other words, is the key that unlocks the door to the unlawful activity. This all assumes, of course, very powerful media effects—a child who sees message X will engage in conduct Y.

Furthermore, the images in dispute are themselves produced without the aid of illegal activity and, at least until the adoption of the CPPA, protected by the First Amendment. The images regulated do *not* require the participation of children in sexual activity

32. *Id.*
33. *Id.* at 9.
34. *See* 18 U.S.C. § 2251 (1994 & Supp. IV 1998) (prohibiting the sexual exploitation of children).
35. S. REP. NO. 104-358, at 2 (1996) (emphasis added).

for their production. No illegal conduct involving the sexual exploitation of minors, in other words, is necessary in their creation.

The flaw in the Congressional logic—a major problem that basically eviscerates the enticing images rationale for adoption of the CPPA—is that the images standing alone do *not* seduce or entice children to engage in the production of child pornography. Far more likely, the images of childless child pornography are used by the pornographer or pedophile *in conjunction with words*. In particular, the adult may describe the conduct as fun and enjoyable and then attempt to visually illustrate this verbal point by showing the young victim a photograph of what appear to be minors engaging in sexually explicit conduct. One can easily imagine the pernicious pedophile showing a child the simulated images and perversely cooing, "See, doesn't that look like fun?" Put more bluntly, the fake images are but one part of the overall sales pitch of the pornographer/pedophile. It is *images plus words*—not images alone—that are the problem.[36]

The trouble for proponents of the CPPA, of course, is that many lawful items—the simulated images targeted by this law, it must be remembered, do *not* involve unlawful conduct in their creation—can be used to help seduce young children to engage in illegal behavior. Should candy be prohibited because a pornographer might use it to entice an eight-year-old girl into engaging in sexually explicit conduct? Should a stuffed teddy bear or other animal be made unlawful because a pedophile promises a young girl she can hold on to it and keep it if she poses for sexually explicit photographs? The answer to these questions, obviously, is a resounding "no." It is the overall conduct of the sexual abuser or pornographer, *not* the otherwise innocent objects used to implement and facilitate that heinous and repulsive conduct, that deserves punishment. Many benign objects, in other words, may be part of the package that helps entice children into engaging in illegal behavior.

36. The legislative history behind the CPPA suggests that Congress even recognized that the images themselves, standing alone, do *not* bring about the harm. In particular, Senate Report 104-358 provides that "child pornography is often used as *part* of a method of seducing other children into sexual activity." *Id.* (emphasis added).

The Ninth Circuit Court of Appeals acknowledged this in December 1999 in rejecting what this article calls the enticing images doctrine in the context of the CPPA. In *Free Speech Coalition v. Reno*,[37] the appellate court wrote that "[m]any innocent things can entice children into immoral or offensive behavior, but that reality does not create a constitutional power in the Congress to regulate otherwise innocent behavior."[38]

Unfortunately for free speech advocates, the other appellate courts that considered the constitutionality of the CPPA in 1999 did not see it the same way as the Ninth Circuit. In *United States v. Hilton*,[39] the First Circuit accepted the argument that "Congress wished to deprive child abusers of a 'criminal tool' frequently used to facilitate the sexual abuse of children."[40] It never questioned or addressed the issue of whether other innocent items might be used as "tools" to induce illegal behavior.

The reality, of course, is that a bevy of lawful items can be used, quite literally, as tools for both lawful purposes and for unlawful ones. A hammer, for instance, can be used to pound a nail into a wall in order to hang a picture, or it may be used to facilitate a break-in into a home. But owning or possessing a hammer is not per se illegal.[41] A strand of rope can be used to play a friendly game of tug-of-war in the backyard or to tie up a boat to a dock, but it also can be used to tie up an innocent person during an armed robbery.

Also overlooked by the First Circuit is the fact that pedophiles may use adult pornography—speech clearly protected by the First Amendment provided it is not obscene[42]—to seduce minors into

37. 198 F.3d 1083 (9th Cir. 1999).

38. *Id.* at 1094.

39. 167 F.3d 61.

40. *Id.* at 67.

41. Some states do, however, have penal statutes regarding the possession of criminal tools. *See, e.g.*, CAL. PENAL CODE § 466 (1999) (criminalizing the possession of instruments and tools held with the intent to "feloniously . . . break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle"); N.Y. PENAL LAW § 140.35 (1999) (defining the crime of "possession of burglar's tools").

42. *See* Miller v. California, 413 U.S. 15, 24 (1973) (setting forth the three-part test for judging whether sexually explicit speech is obscene and thus outside the scope of First Amendment protection).

engaging in sexually explicit conduct.[43] Writing in the *Berkeley Technology Law Journal*, Gary Geating thus asks, "Such use of this protected speech [adult pornography] has not justified its suppression, so why should it justify the suppression of simulated child pornography retaining protection?"[44] To not regulate one form of protected speech—adult pornography—that can be used to the same effect suggests an underbreadth or underinclusiveness problem with the CPPA.[45]

The Ninth Circuit's reasoning, in fact, strongly suggests such a problem of underinclusion. The legislative history behind the CPPA provides that it was designed to regulate images that "are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children."[46] The Ninth Circuit pointed out, however, that much speech that does not fall within this language and thus is not regulated by the CPPA may nonetheless influence illegal conduct. The appellate court wrote:

> Children are enamored by cartoons and drawings. They are regularly used as a means of teaching and entertaining. Much debate exists about the effects that cartoons and video or computer games have on violent behaviors or other antisocial behaviors involving children. It is unsound to reason that cartoons cannot suggest pornographic behavior or that cartoons could not be used to entice a vulnerable child into illicit sexual behavior.[47]

Like the First Circuit before it, the Eleventh Circuit Court of Appeals also failed to acknowledge the flaws pointed out by the Ninth Circuit. In *United States v. Acheson*,[48] the Eleventh Circuit simply accepted the view that "[p]edophiles often rely on child

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43. Gary Geating, *Obscenity and Unprotected Speech: Free Speech Coalition v. Reno*, 13 BERKELEY TECH. L. J. 389, 400 (1998).

44. *Id.*

45. "While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles." Ladue v. Gilleo, 512 U.S. 43, 51 (1994). *See* 505 U.S. at 402 (1992) (criticizing the concept of an underbreadth doctrine).

46. S. REP. NO. 104-358, at 2 (1996).

47. 198 F.3d at 1094.

48. 195 F.3d 645.

pornography to win over their victims"[49] without questioning whether innocent objects or otherwise protected images might also be used to create that same effect.

The decisions of the First and Eleventh Circuits, it must be noted, are not without some support from the United States Supreme Court's 1990 ruling in *Osborne v. Ohio*.[50] In upholding a state law criminalizing the possession and viewing of child pornography, the Court found that "encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."[51] *Osborne*, however, involved images that featured actual minors, *not* computer-generated images or altered photographed of adults that appeared to be minors.[52] In other words, the objects in question in that case—photographs of an actual minor—that possibly could be used to seduce other minors to engage in child pornography required illegal conduct for their creation. The images regulated by the CPPA, in contrast, do not require illegal conduct for their creation.

B. *Behind the Seduction: Evil Images*

When one realizes that many lawful items, objects and forms of protected speech can be used as part of the seduction or enticement process, yet only a narrow category of heretofore protected images are subjected to regulation under the CPPA, the true aim of Congress becomes transparent. As the Ninth Circuit wrote in the *Free Speech Coalition* decision, the CPPA is based on little more than "a determination that child pornography [is] evil in and of itself . . . ."[53] The enticing images doctrine, in other words, is barely more than a cloak designed to mask this reality.

Accepting the Congressional argument that virtual child pornography may whet the appetite of pedophiles and perverts for either the consumption of real child pornography or actual sexual

49. *Id.* at 649.

50. 495 U.S. 103.

51. *Id.* at 111.

52. *Obsorne* involved four photographs that depicted "a nude male adolescent posed in a sexually explicit position." *Id.* at 107.

53. 198 F.3d at 1089.

contact with minors,[54] the appetite or desire or fantasy is *not* the same as the conduct itself. No reasonable person doubts that the production of real child pornography or its consumption should be regulated. Real children are harmed in its creation. Likewise, no reasonable person doubts that acts of sexual abuse of minors should be unlawful. Real children are harmed in this behavior. But the viewing of simulated images created by computer generation is just that—a fantasy, however offensive it may be. The Supreme Court has made it clear that speech cannot be regulated merely because it is offensive.[55] The nearly 30-year-old dicta in *Cohen v. California*[56] that it is "often true that one man's vulgarity is another's lyric"[57] is as accurate today as it was in 1971. Until the offensive fantasy of viewing imaginary children or even the equally offensive act of masturbating over those images takes the form of unlawful conduct with a child or a conspiracy to commit that conduct with real children, it should not be regulated. Adoption of the enticing images doctrine has the potential to mask the regulation of speech simply because the ideas or images it conveys are offensive.

One might argue, however, that the Court should not protect virtual child pornography because it has very little, if any, social value or redeeming purpose,[58] in line with the judicial reasoning that restricts obscene speech. Under the *Miller* obscenity standard, speech is held to be obscene if it "lacks serious literary, artistic, po-

54. Congress found that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children." S. REP. NO. 104-358, at 2 (1996). The Ninth Circuit, however, observed that "[f]actual studies that establish the link between computer-generated child pornography and the subsequent sexual abuse of children apparently do not yet exist." 198 F.3d at 1093.

55. "If 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." Texas v. Johnson, 491 U.S. 397, 414 (1989).

56. 403 U.S. 15 (1971).

57. *Id.* at 25.

58. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (stating that some "well-defined and narrowly limited classes of speech" including speech that is "lewd and obscene" fall out outside the scope of First Amendment protection because they are of "such slight social value").

litical, or scientific value."[59] Although the *Miller* test does not apply to child pornography, one might argue that the computer-drawn images are in themselves artistic creations. They are art rendered via new technologies. The creator uses computer packages to morph images, a process that might be described as artistic.

C. *The Slippery Slope of Enticement*

The CPPA furthermore illustrates the slippery slope danger of adopting the enticing images doctrine. If one class of speech can be said to somehow entice children into illegal conduct, then surely Congress will continue to expand the definition of child pornography, sweeping up and regulating more and more forms of previously protected speech that allegedly influence children. The Ninth Circuit, for instance, suggested that even cartoon images and drawings of minors might entice children into sexually explicit conduct.[60] One thus can imagine yet another piece of federal legislation, drafted by an ever-eager-to-please-parents Congress, that would regulate these images if the United States Supreme Court upholds the CPPA.

Many images may whet a child's sexual appetite when used in conjunction with the words of a convincing pedophile or other sexual predator. If an innocent image of a young girl wearing a bikini, cut from a swimwear or department store catalog or perhaps simply taken at a public beach, is attractive to a minor, for instance, it may help convince the minor to put on a bikini and pose for pictures. Once in the bikini, the child pornographer then might simply use words to coax the child along into poses that are increasingly sexually provocative until they constitute child pornography under federal law.[61] Should the original picture of the

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59. Miller v. California, 413 U.S. 15, 24 (1973).

60. *See supra* note 47 and accompanying text.

61. In *United States v. Knox*, a federal appellate court held that a lascivious exhibition of the genitals or pubic area may constitute unprotected child pornography under federal law "even when those areas are covered by an article of clothing and are not discernable." 32 F.3d 733, 754 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995). In *Knox*, all of the young children "wore bikini bathing suits, leotards, underwear, or other abbreviated attire while they were being filmed." *Id.* at 737. Despite the absence of nudity, the images were held to be child pornography in part because the "photographer would zoom in on the children's pubic and genital area and display a close-up view for an ex-

young girl in the bikini—the bait, essentially, that lured the girl into child pornography—be left unprotected by the First Amendment? If one accepts the enticing images rationale for banning speech—that otherwise lawful images that may be used to seduce or entice children into unlawful conduct are illegal—then the answer must be yes, it should be left unprotected.

The next section suggests that the notion of prohibiting images because they are enticing underlies current calls for censorship in areas other than child pornography. The CPPA merely is one manifestation of the propensity to regulate images because of their potential allure to minors.

II. HERE, THERE, EVERYWHERE: BEWARE THE ENTICING IMAGES

Efforts to restrict images of cartoon camels[62] and costumed cowboys[63] in cigarette advertisements are largely based on the premise that they entice or seduce vulnerable children to purchase an unlawful product for minors' consumption. The $206 billion settlement reached in November, 1998 between forty-six states and the tobacco industry, in fact, bans the use of cartoon characters in cigarette advertisements.[64] The Federal Trade Commission even

tended period of time." *Id.* at 737.

62. The Joe Camel character was created more than 20 years ago in 1974 by Nicholas Price, a British artist, for a French advertising campaign for Camels that later appeared in other countries during that decade. Stuart Elliott, *Joe Camel, a Giant in Tobacco Marketing, Is Dead at 23*, N.Y. TIMES, July 11, 1997, at D1. The cartoon figure came to the United States in 1988 on the 75th anniversary of the Camel brand. *Id.* The figure "has come to symbolize the ongoing controversy about the appropriateness of using trade characters that appeal to children to advertise adult products." Lucy L. Henke, *Young Children's Perceptions of Cigarette Brand Advertising Symbols: Awareness, Affect, and Target Market Identification*, J. ADVERTISING, Winter 1995, at 13. He often is erroneously identified as Old Joe. Claude R. Martin, Jr., *Ethical Advertising Research Standards: Three Case Studies*, J. ADVERTISING, Sept. 1994, at 17. Old Joe, in fact, was the original camel pictured on packages of Camel brand cigarettes. Elliott, *supra*, at D4.

63. The Marlboro Man character has been used by Philip Morris since the 1950s. RICHARD KLUGER, ASHES TO ASHES 214 (1996). The "Marlboro Country" campaign, in which the Marlboro Man is often pictured in cowboy-like activities, portrays "Marlboro smokers [as] rugged and capable." *Id.* at 444. The advertising executives who created the Marlboro Man were "trying to portray a rugged, vigorous and self-contained man, alone and not under the supervision of anyone." PHILIP J. HILTS, SMOKESCREEN 67 (1996).

64. *See* Joseph P. Shapiro, *Industry Foes Fume Over the Tobacco Deal*, U.S. NEWS & WORLD REP., Nov. 30, 1998, at 30 (observing that "[t]obacco companies will be

attacked the Joe Camel advertising campaign used by R.J. Reynolds Tobacco Company to sell Camel cigarettes as an unfair trade practice given the character’s appeal to children.[65] It eventually dropped those charges, however, in 1999 in light of the settlement.[66]

The Joe Camel controversy presents a clear case of the enticing images doctrine at work. An otherwise lawful image—a cartoon character—is prohibited because it entices children to engage in illegal conduct: underage smoking. This should sound very familiar. In the case of the CPPA, it will be recalled, an otherwise lawful image—a computer-generated fictitious picture—is prohibited because it entices children to engage in illegal conduct: child pornography. Although child pornography is a far more serious crime than underage smoking, it is the power of the image in both cases that allegedly must be harnessed, reined in, and ultimately prohibited.

The similarity between these two cases suggests the slippery slope danger described earlier. If the use of cartoons to sell cigarettes allegedly constitutes an unfair trade practice, then government prohibition of cartoons that depict sexual conduct cannot be far behind. The Ninth Circuit even noted in *Free Speech Coalition* that an X-rated cartoon movie from 1972, *Fritz the Cat*, depicted a cartoon cat’s “adventures in group sex.”[67] It observed that “[c]artoons or other images cannot be constitutionally distinguished from other fictional images based upon the quality of the realism.”[68] Consider the popular and now decade-old animated television series, *The Simpsons*. Its cartoon characters appeal to children, yet the show often features or involves issues that amuse or interest adults.

And then consider the current round of bashing violence in the entertainment industry in the wake of the shootings in April, 1999

banned from using cartoon characters—which attract young smokers – in ads”).

65. Stephen Labaton, *Out of work for a year, R.J. Reynolds Tobacco’s cartoon endorser now faces Government charges*, N.Y. TIMES, Nov. 9, 1998, at C8.

66. *FTC Drops Joe Camel Case In Light of State Settlement*, WALL ST. J., Jan. 28, 1999, at B18.

67. 198 F.3d at 1094.

68. *Id.*

at Columbine High School near Littleton, Colorado.[69] Like the above mentioned movement to ban cartoon characters that hawk cigarettes and the CPPA's mandate to prohibit childless child pornography in order to curb sexual abuse of minors, the enticing images doctrine once again drives the call for restrictions of media images.[70] This time it is fictional-yet-violent images in movies, on television, and in video games that somehow seduce or entice young people to engage in illegal behavior. Fortunately for First Amendment advocates and Hollywood movie moguls, little concrete action has happened to date to move the enticing images doctrine from the realm of theory into practice in this area. In June, 1999, the House of Representatives rejected a measure that would have made it a crime to expose children to certain graphic images, and by the end of 1999 no bills concerning entertainment violence had been passed in Congress.[71] The only definitive action to date has been a study ordered by President Bill Clinton in June, 1999 and currently being conducted by the Federal Trade Commission into the marketing of entertainment violence to children.[72] That report is not due until the end of 2000.[73]

Across the media content of virtual child pornography, cartoon images selling adult products, and violent movies and video games, the thesis that drives the move for regulation of speech is the same: fictional images seduce and entice children to engage in illegal conduct. Blame, in brief, is foisted on the media for crimi-

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69. "After two weeks of finger pointing in the wake of the Littleton tragedy, many Americans think the media's use of violent images is to blame and the government should impose restrictions." Ann Oldenburg & Mike Snider, *Entertainment in the Cross Hairs*, USA TODAY, May 4, 1999, at 1D. Howard Kurtz, media reporter for *The Washington Post*, observed that within hours of the shootings, commentators and politicians cast blame on violent movies, violent computer games, and the Internet. Howard Kurtz, *Let the Blame Begin*, WASH. POST, Apr. 26, 1999, at C1.

70. In June 1999, President Bill Clinton ordered the Federal Trade Commission and Justice Department to conduct a $1 million study of the marketing practices of the entertainment industry for violent products such as video games. *Clinton Launches Probe of Violent Entertainment for Children*, BUFFALO NEWS, June 1, 1999, at A2.

71. Amy Wallace, *Is Hollywood Pulling Punches?*, L.A. TIMES, Dec. 26, 1999, at 5.

72. Faye Fiore, *Media Violence Gets No Action from Congress*, L.A. TIMES, Nov. 20, 1999, at A1.

73. *See* Faye Fiore, *FTC Tunes into Violence in Children's Media*, L.A. TIMES, Oct. 17, 1999, at A18 (noting that the report is due "by the end of next year").

nal conduct. As a society, the United States long has feared the perceived powerful effects of media images on children, dating back to the advent of motion pictures and the Payne Fund Studies conducted from 1929 to 1932 to determine the influence of movies on children.[74] The urge to censor thus is nothing new.[75] The enticing images doctrine simply provides the legal principle or rationale for restricting the images that, correctly or incorrectly, we fear may tempt, sway and, ultimately, corrupt children.

III. ENTICEMENT V. INCITEMENT: IS THERE A DIFFERENCE?

The incitement to unlawful conduct rule under *Brandenburg*, described earlier in the Introduction, punishes speech only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[76] This standard represents a significant threshold. As Professor Erwin Chemerinsky writes, "a conviction for incitement under *Brandenburg* only is constitutional if several requirements are met: imminent harm; a likelihood of producing illegal action; and an intent to cause imminent illegality."[77] The incitement test, as applied by United States Supreme Court, involves speech that advocates action.[78]

In contrast, it is hard to tell at this stage what it means when one says that a message entices or seduces. Clearly the images of virtual child pornography regulated by the CPPA do not "advocate" illegal conduct when viewed standing alone. The images merely suggest a very realistic portrayal of illegal conduct involving minors. The image of Joe Camel, standing by itself, does not advocate smoking—the text is necessary to do this—but merely portrays it. Thus it may be that one important difference between

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74. *See generally* SHEARON A. LOWERY & MELVIN L. DEFLEUR, MILESTONES IN MASS COMMUNICATION RESEARCH 21-43 (3d ed. 1995) (describing the Payne Fund Studies).

75. *See* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 4 (1992) (observing that "governments in all places at all times have succumbed to the impulse to exert control over speech and conscience. Censorship is a social instinct").

76. 395 U.S. at 447.

77. CHEMERINSKY, *supra* note 8, at 813.

78. *See* Hess v. Indiana, 414 U.S. 105, 108-9 (1973) (holding that the speaker in question was protected under a *Brandenburg* analysis because "it cannot be said that he was advocating, in the normal sense, any action").

the enticement and incitement standards is that the latter bans speech that *advocates* while the former bans speech that merely *portrays*.

But all images portray something or someone, so there must be something more to the enticing images doctrine than a mere portrayal requirement. It is images that portray something in an enticing or seducing manner that are at stake. But, again, many images make conduct look attractive or appealing to many people. Some movies that portray violent conduct make it look attractive, especially when the violent behavior is rewarded. Surely a doctrine that protected only negative—as opposed to enticing or alluring—images of illegal conduct, however, would be unconstitutional, given the presumption that viewpoint-based laws are invalid under the First Amendment.[79]

Is this enticing images doctrine little more than an updated version of the now-abandoned "bad tendency" test in which speech could be punished if it might at some indefinite point have an undesirable consequence?[80] This test is so amorphous that it allows vast discretion in interpretation that threatens uneven enforcement by courts. If the justification for restricting fictional images is that they entice illegal behavior, then the meaning of the word "entice" should be precisely defined.

Does entice, for purposes of the enticing images doctrine, simply mean *appeal*? Does it mean *allure*? Does it mean *seduce*? The different interpretations—some clearly more relaxed than others—must be carefully explored by courts, including the United States Supreme Court if it grants certiorari to consider the CPPA cases.

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79. *See generally* Calvert, *supra* note 26, at 76-77 (describing viewpoint-based laws).

80. Anthony Lewis writes in *Make No Law*:

> In legal terms, speech with a 'bad tendency' was speech that might someday have undesirable social consequences. The rule did not define either the time frame or the kind of consequences with any specificity. In practice, what was condemned as having a 'bad tendency' was speech that judges thought right-thinking people would consider morally or politically offensive.

ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 68 (1991).

A. *Words v. Images*

One variable that might affect which standard, enticement or incitement, is the appropriate test for deciding whether a restriction on speech is lawful is the *form* of the speech. In particular, should it make a difference if the speech takes the form of *images* or if it takes the form of *words*? Is one standard—enticement or incitement—more appropriate or better suited for evaluating restrictions on one form of speech than the other?

The nascent enticing images doctrine embodied in both the legislative history of the CPPA and the settlement agreement to ban cartoon characters like Joe Camel clearly applies to images, *not* to words. The CPPA does *not*, for instance, prohibit stories that might, if written in a manner that targets children, make sexual activity sound alluring or appealing to a young boy or girl.[81] Likewise, the tobacco settlement agreement does *not* ban text-based advertisements for cigarettes that might be composed in a manner enticing to a young child. The images are what is feared in these cases. Somehow we embrace the timeworn cliche that "seeing is believing" and transform it, under the enticing images doctrine, to "seeing leads to doing." But "reading" or "hearing" apparently are something that we don't fear to the same extent. This is an implicit premise for restricting images, but not words, that may entice unlawful conduct.

If one accepts the argument that images are more powerful than words and that, therefore, a less stringent enticement standard should be employed to evaluate prohibitions of specific images, then the result is a radically dichotomized First Amendment jurisprudence. One set of standards applies for speech in the form of images, and another set applies for speech in the form of words. We already make distinctions about the scope and extent of First Amendment protection for speech based on the *medium* on which

81. This is not to deny that the government may constitutionally shield minors from purchasing literature that is sexually explicit but not obscene under adult standards. *See* 492 U.S. at 126 (citing Ginsberg v. New York, 390 U.S. 629, 639-40; 458 U.S. at 756-57). The CPPA is readily distinguished, however, because it does more than restrict minor's access to speech—it completely bans virtual child pornography for *both* adults and children.

it is transmitted and conveyed.[82] The enticing images doctrine would simply make another distinction about the protection speech receives, this time depending on its *form*, not simply its *medium*.

This would prove highly unworkable, however. Most speech—television, movies, advertisements—combines *both* images and words. A simple binary jurisprudence of words/images thus would not be possible. A third, hybrid category would need to be created. This would further complicate an already complex and muddled body of constitutional law, all of which militates against creating a new First Amendment principle—the enticing images doctrine—that applies only to speech in the form of images.

On the other hand, we live in a society increasingly dominated by the visual image, not by the printed word, and perhaps a new doctrine specially tailored to address harms allegedly caused by images is necessary. Visual literacy—the ability to interpret, understand, and unpack visual messages—is essential today, almost as much as the ability to read. Whether a new legal test also is essential, however, is a different matter.

B. *Children v. Adults*

Another variable, in addition to the form of the message, that could influence courts when determining whether to adopt either the enticement or incitement standard is the nature of the intended audience. More specifically, one way of justifying the adoption of an enticement standard is to argue that it applies *only when children are the audience* at which the speech in question is targeted. Because children are perceived as more vulnerable and susceptive to media messages than adults,[83] a more relaxed standard for prohibition of speech will suffice. In this vein, one also might argue that when *adults* are the primary or target audience, only the more

82. *See* Reno v. ACLU, 521 U.S. 844, 868-70 (1997) (describing the justifications for regulating the broadcast medium more closely than other media, including the Internet).

83. *See Clinton Launches Probe of Violent Entertainment for Children*, *supra* note 70, at A2 (ordering the Federal Trade Commission's current investigation into the marketing of entertainment violence, President Bill Clinton remarked that "[t]he boundary between fantasy and reality violence, which is a clear line for most adults, can become very blurred for vulnerable children").

stringent incitement standard will apply.

This dichotomized jurisprudence—one standard for adults, one for children—would comport with what First Amendment scholar Rodney Smolla calls a "Child's First Amendment."[84] This principle permits "regulation of speech implicating children in ways that would be impermissible for adults."[85] One justification for adopting such a principle, Smolla observes, is sheltering children.[86] The enticing images doctrine, viewed in this light, suggests that we should shelter children from images that may entice, seduce or otherwise lead them into unlawful behavior. The *Brandenburg* incitement standard, in contrast, would be the guiding principle under the "Adult" version of First Amendment jurisprudence.

When it comes to restricting the display of sexually explicit images or, for that matter, any other offensive or allegedly harmful speech, there is perhaps no better judicially or legislatively accepted justification than protecting minors.[87] The greater leeway courts give to legislative restrictions designed to protect minors might, then, provide sufficient room for adopting the enticing images doctrine as a watered-down version of incitement standard when children are the intended audience. Yet the United States Supreme Court also has made it clear that even a compelling interest in protecting children "does *not* justify an unnecessarily broad suppression of speech addressed to adults."[88] Thus, when the intended audience for images is adults, the incitement standard would apply.

But the actual application of this audience-based dichotomy would prove extremely difficult. Why? Consider who the intended audience is for the virtual child pornography regulated by

84. SMOLLA, *supra* note 75, at 328.

85. *Id.*

86. *Id.*

87. *See* 521 U.S. at 875 (considering the constitutionality of the Communications Decency Act, the Supreme Court observed that it has "repeatedly recognized the government interest in protecting children from harmful materials"). Lower courts have followed the Supreme Court's lead in this respect. *See* Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996) (holding that the government has "a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts").

88. 521 U.S. at 875 (emphasis added).

the CPPA. Is it adults, such as pedophiles and molesters, as well as others simply curious to see what this new form of pornographic speech looks like? Or is it children, the group to whom the pedophiles and sexual abusers allegedly show the images to entice them into sexually explicit conduct? It is more likely that far more adults with aberrant sexual fetishes view this material than do children. Indeed, a certain group of adults crave this material to fulfill its perverse desires and pleasures.[89]

The question of intended audience would likely plague other areas of potential application for the enticing images doctrine. This wrinkle further hinders its usefulness as yet another legal tool added to the already crowded First Amendment tool box.

CONCLUSION

The CPPA cases now in the federal court system provide an opportunity for the United States Supreme Court to embark on or, alternatively, to leave behind, a new and potentially troublesome First Amendment doctrine. The justification for prohibiting or regulating otherwise lawful fictional images because they may entice or seduce minors to engage in some unlawful activity could easily lead down a slippery slope of increasing censorship of expression,[90] moving beyond virtual child pornography and cartoon characters to other types of speech.

This article has identified numerous flaws with the enticing images doctrine. The definitional difficulties in defining enticement and seduction must be carefully considered should the nascent doctrine of enticing images be fully embraced by the judiciary. Likewise, the problem of distinguishing between enticement and incitement—the differences between these two tests, whether one applies only to images and the other to words, whether one applies when children are the intended audience and the other when adults constitute the receiver—needs to be addressed. Now is a

89. *See* S. REP. NO. 104-358, at 2 (1996) (finding that "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out with children").

90. The concept of a slippery slope refers to the idea that a "proposed stopping point is no stopping point at all." Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 48 (1998).

propitious time for the Supreme Court to address these issues, given both the seriousness of child pornography and the alleged harm that these virtual images may cause, on the one hand, and freedom of speech and the harm that may befall it under the enticing images doctrine, on the other.