

**Is the Prohibition on
Virtual Child Pornography
an Unjustifiable Limitation
of the Constitutional Right
to Freedom of Expression?**

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Introduction

The Films and Publications Act prohibits two types of child pornography.¹ The first type Real Child Pornography, involves actual children. This is the type of pornography that evokes a strong and near universal sense of moral outrage. It is not only that the material is offensive; it is the permanent record of a particularly vile form of child abuse.² Children that are involved in pornography are harmed via its creation; the distribution of the material is a further harm against their dignity and privacy. During the course of this paper I will discuss why the state is justified in instituting criminal sanctions for the production, distribution and possession of this type of child pornography.

The legislation also takes aim at another form of child pornography. This type does not involve real children. This Virtual Child Pornography is made up of a number of different types of erotic material. It includes paintings, cartoons, sketches and written descriptions

¹ S 1(a) of the Films and Publications Act, 1996
Child pornography includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of 18 years-

- (i) engaged in sexual conduct;
- (ii) Participating in, or assisting another person to participate in, sexual conduct; or
- (iii) Showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation;

S 1(f) of the Films and Publications Act, 1996
Sexual conduct includes-

- (i) male genitals in a state of arousal or stimulation;
- (ii) the undue display of genitals or of the anal region;
- (iii) masturbation;
- (iv) bestiality;
- (v) sexual intercourse, whether real or simulated, including anal sexual intercourse;
- (vi) sexual contact involving the direct or indirect fondling or touching of the intimate parts of a body, including the breasts, with or without any object;
- (vii) the penetration of a vagina or anus with any object;
- (viii) oral genital contact; or
- (ix) oral anal contact

² Suzanne Ost, *Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society*, Journal of Law and Society vol 29, No 3, September 2002, 41

of children involved in sexual conduct. It also includes depictions of adults, which are represented as being under the age of 18, engaged in sexual conduct. Digitally created images that resemble actual child pornography, but which do not make use of real children are also prohibited.

In this paper I highlight the key difference between Real and Virtual Child Pornography. After showing why the state is justified in prohibiting Real Child Pornography I will argue that those reasons do not provide a basis for the state to institute criminal sanctions against those that produce, distribute and possess Virtual Child Pornography. I will explain why the current prohibition on Virtual Child Pornography infringes the right to freedom of expression and argue that the infringement cannot be justified by the limitations clause.

Real Child Pornography

The state has a duty to uphold the right to freedom of expression, but it must also place appropriate restrictions on this right in certain circumstances. Real Child Pornography serves as a record of a particularly severe rights violation. The producers of child pornography actively participate in the sexual exploitation of minors. Younger children lack the capacity to fully appreciate the magnitude of what they are involved in, and cannot be considered consenting parties to sexual conduct. Real Child Pornography lasts as a haunting memory of abuse and a continual source of harm to the children that were involved in its production. The distributors of this material play a lesser but significant role in the perpetuation of this form of child abuse. They stimulate a market for Real Child Pornography and encourage its creation. By encouraging a greater demand amongst consumers they incentivise pornographers to increase the supply of materials. Consumers are not without blame in this process, since they provide the capital incentive for people to continue to produce and distribute Real Child Pornography. I would argue that there is a sufficient connection between the production, distribution and possession of Real Child Pornography and the abuse of real children to warrant the criminal sanctions against Real Child Pornography that are currently in place. This is a clear case where freedom of expression can be limited to prevent significant harm to children.

However the law ought to recognize that producers, distributors and possessors are not deserving of equal punishment. A possessor is not as intimately linked to the abuse of a child as the person that actually molests a child and films that molestation. I would suggest that a blanket punishment for the three categories of offenders is inappropriate since it fails to distinguish between the levels of harm caused by the offenders.³

Virtual Child Pornography

Virtual Child Pornography does “not involve, let alone harm, any children in the production process.”⁴ “The statute proscribes the visual depiction of an idea - that of teenagers engaging in sexual activity - that is a fact of modern society and has been a theme in art and literature throughout the ages.”⁵ The law specifically states that artistic films and publications are not exempted from prohibition if they constitute virtual child pornography.⁶ In order to illustrate the severity and extent of the prohibition I will

³ There is arguably a separate case for exempting couples that are above the legal age of consent but younger than 18 from being punished for producing erotic images of themselves.

⁴ *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002), 3

⁵ *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002), 8

⁶ SCHEDULE 1, FILMS AND PUBLICATIONS ACT, 1996.
XX CLASSIFICATION FOR PUBLICATIONS

A publication shall be classified as XX if, judged within context(1) it contains a visual presentation, simulated or real of- (a) a person who is, or is depicted as being, under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity.

SCHEDULE 5, FILMS AND PUBLICATIONS ACT, 1996.
ART AND SCIENCE EXEMPTION FOR PUBLICATIONS

The XX or X18 classification shall not be applied in respect of a bona fide scientific, documentary, literary or, except in the case of Schedule 1(1)(a), an artistic publication, or any part of a publication which, judged within context, is of such a nature.

SCHEDULE 6, FILMS AND PUBLICATIONS ACT, 1996.
XX CLASSIFICATION FOR FILMS

A film shall be classified as XX if, judged within context, it contains a scene or scenes, simulated or real, of any of the following: (1) a person who is, or is depicted as being, under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity.

SCHEDULE 9, FILMS AND PUBLICATIONS ACT, 1996.
ART AND SCIENCE EXEMPTION FOR FILMS

The XX or X18 classification shall not be applicable to a bona fide scientific, documentary, dramatic or, except in the case of Schedule 6(1), an artistic film or any part of a film which, judged within context, is of such a nature.

endeavor to provide a short list of materials that would incur criminal sanction under the act. Paintings by the prominent and well respected artists Gustav Klimt⁷ and Egon Shiele.⁸ Numerous sculptures and sketches produced during the renaissance period. The most famous love story ever written, *Romeo and Juliet*, involves a relationship between two teenagers, one of whom is only 13 years old. Several adaptations of the play have been produced for film and some of them show the lovers involved in sexual conduct.⁹ The recent Oscar winning films *Traffic* and *American Beauty* both feature scenes depicting woman under the age of 18 involved in sexual conduct. All of these valuable and beautiful works of art are examples of child pornography as defined by the Act.

The examples that I have used provide a basis for the conclusion that virtual child pornography is drastically different from real child pornography and ought not to be regulated in the same manner.

Limiting the Right to Freedom of Expression

The Constitution guarantees the right to freedom of expression¹⁰ and our courts have recognized sexually explicit material as a form of expression that is covered by the right.¹¹ Therefore the prohibition of Virtual Child Pornography constitutes an infringement of this right, since the material is not an instance of material excluded by S 16(2) of the constitution. It must now be decided whether the infringement of the right can be justified with reference to the limitation clause in S 36.

⁷ *Mulher sentada*, (1916)

⁸ *Sitzender weiblicher Akt*, (1914)

⁹ *Romeo and Juliet* (B. Luhrmann Director, 1996)

¹⁰ S 16 (1) Everyone has the right to freedom of expression, which includes-

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to-

- (a) propaganda for war;
- (b) incitement of imminent violence;
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

¹¹ *Case v Minister of Safety and Security: Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC)

The clause states the following:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

In order to comply with the demands of the limitations clause the state must ensure that any limitation it makes on a right “is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”¹² Denise Meyerson argues that this prohibits the state from making use of arguments based on a particular conception of the good.¹³ Conceptions of the good encompass a range of views about what makes life valuable or meaningful. Religious beliefs are an example of a particular conception of the good. For example a Christian may understand a good life as a life devoted to the worship of Jesus Christ, while a Buddhist may believe that life is most meaningful when it aims at escaping the cycle of reincarnation. Given that our understanding of the world is limited it is not possible for anyone to prove that their particular religious views are true. Therefore it would be unfitting for the state to rely on contested religious views as a basis for limiting rights, even if those views are shared by the majority.

People are not only fallible when it comes to their religious beliefs; they often make mistakes about what makes life worth living. Therefore the state ought not to limit rights by resorting to a particular view about the good life. This does not mean that all conceptions of the good are equal or that they should be treated equally. For example if a group of people believed that eating the first born male at birth was a meaningful activity, the state would be justified in prohibiting their conduct. The state can found its prohibition on the basis that there is a “distinction between harms which all reasonable

¹² S 36(1) of the Constitution

¹³ Denise Meyerson, *Rights Limited: Freedom of Expression, Religion and the South African Constitution*, (Juta, 1997), 55

people would seek to avoid, and harms which are harms only against the background of a particular, intractably disputed conception of the good.”¹⁴ The first set of harms is neutral while the second set is non-neutral.¹⁵ A prohibition on eating the first born is a prohibition of a neutral harm, since all reasonable people would deem the activity to be harmful regardless of their particular conception of the good. Jehovah’s Witnesses believe that blood transfusions are harmful and they base this claim on their interpretation of the Old Testament. In general people that do not subscribe to that biblical interpretation do not consider blood transfusion to be harmful. This means that blood transfusions are an example of a non-neutral harm, since they are only harmful against the background of a particular conception of the good. Therefore the state would not be justified in prohibiting blood transfusions.

In order to justify its prohibition on Virtual Child Pornography the state cannot rely on arguments that show that the material is a non-neutral harm. Arguments in favour of the prohibition must be grounded in evidence that the material is a neutral harm. For example Feminists like Katharine Mackinnon make the claim that pornography degrades women and portrays them as inferior to men¹⁶, while Feminists like Camille Paglia dispute this view and hold the belief that pornography celebrates and empowers women.¹⁷ Neither of these interpretations of the message that pornography sends is entirely unreasonable. If the state were to pick sides in the dispute, it would be promoting a particular view about the representation of sexuality at the expense of another reasonable view on the matter. Since the dispute is not one which could be solved by using public reason, the state ought to remain neutral and concern itself with combating harms that are agreed by all reasonable people to be harms.¹⁸

I proceed by showing how the specific clauses of the limitations analysis interact with the prohibition of Virtual Child Pornography. I will limit my discussion of the reasons in

¹⁴ Meyerson, 57

¹⁵ Meyerson, 57

¹⁶ Meyerson, 96

¹⁷ Meyerson, 97

¹⁸ Meyerson 98

favour of the prohibition, to those reasons that are grounded in the prevention of neutral harms.

Nature of the Right

Allowing the free dissemination of beliefs, opinions and other forms of expression brings with it immense benefits. It allows for intellectual, cultural, artistic and scientific progress whilst provoking discussion and aiding the search for truth. Since we are not infallible we cannot know with certainty that a particular opinion is false. When we suppress opinions that are believed to be false we risk missing out on the truth.¹⁹ By stifling beliefs that are different from our own we lose the opportunity to “challenge, reconsider and perhaps reaffirm”²⁰ our own views.

Freedom of expression is the cornerstone of a functioning democratic state, since it gives people the opportunity to be exposed to a number of different viewpoints so that they can make informed and legitimate decisions about both their political and private lives.²¹ Furthermore without the right to freely express beliefs society would disintegrate into a state of stasis where there would be no substantial intellectual growth.

It must also be acknowledged that expression is a vital component of human development.²² When people are exposed to a range of conflicting opinions on a subject they are given the opportunity to exercise their rational faculties, weigh up the arguments on both sides and come to form their own view on the matter. Engaging in this process is fulfilling because it is an exercise in autonomous opinion formation.

Nature and Extent of the Limitation

The penalty for Virtual Child Pornography is currently a prison sentence of up to ten years for the production, distribution or possession of the material.²³ A 14 year old high

¹⁹ Meyerson, 78

²⁰ Jonathon Wolff, *An Introduction to Political Philosophy*, (Oxford University Press, 1996), 118

²¹ J De Waal *et al*, *Bill of Rights Handbook*, (Juta, 2001) 310

²² Meyerson, 81

²³ S 27 of the Films and Publications Act, 1996

school student could be imprisoned for a period of up to 30 years if she drew a cartoon or painted a picture of herself involved in sexual conduct, distributed copies to her friends and retained a copy for herself. It is not only existing works that would suffer the force of censorship.

The chilling effect on speech, caused by the Act, would be enormous since the risk of being imprisoned, would deter people from producing or distributing anything that could result in a criminal sanction. This means that the prohibition would prevent new works of art from being created. Furthermore the process of defending oneself in court places a financial burden on the accused, even in cases where the accused wins the case, the legal costs involved in fighting a case can be crippling.²⁴ It is also possible that materials which fall outside the scope of the definition of child pornography proposed by the law would not be distributed since booksellers and video stores are unable to review all of the titles that are sent to them by publishers, for pragmatic reasons they may have to avoid stocking a large number of films and publication that contained sexual content, to avoid imprisonment.²⁵

One of the further problems with censorship is that it drives production of banned materials underground where they cannot be regulated at all. The prohibition of alcohol in America did not cease the consumption of liquor; it created room for criminal networks to take control of alcohol production and distribution. Prohibition gave criminals the financial resources to strengthen and expand their criminal empires. The

(1) (a) Any person shall be guilty of an offence if he or she-

- (i) is in possession of ;
- (ii) creates or produces or in any way contributes to, or assists in, the creation or production of;
- (iii) imports or in any way takes steps to procure, obtain or access; or
- (iv) knowingly exports, broadcasts or in any way distributes or causes a film or publication which contains child pornography or which advocates, advertises or promotes child pornography or the sexual exploitation of children.

S 30 (1A) of the Films and Publications Act, 1996

Any person found guilty of a contravention of section 27(1) may be sentenced to a fine or to imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.

²⁴ Strossen, 67-8

²⁵ Strossen, 68

forbidden fruit phenomenon means that the act of censoring material has the effect of increasing an individual's desire for that material. Furthermore if viewers are under the impression that the media that they are exposed to has gone through a filtering process to remove all inappropriate forms of expression, then they are less likely to be critical of the material that they consume. Societies that allow for a broad selection of opinions create an environment that strengthens people's analytical skills and trains them to question the views that are presented to them.²⁶

Importance of the Purpose of the Limitation and the Relation Between the Limitation and its Purpose

I have combined two sections of the limitations clause under one heading in order to discuss what the prohibition of Virtual Child Pornography aims to achieve and to assess whether prohibition will actually achieve those aims.

Firstly, it may be argued that since Virtual Child Pornography may be used to entice children to have sex with pedophiles, it ought to be prohibited. This argument fails on the basis that innocent objects like cartoons and candy may be misused by pedophiles to achieve the same end of seducing children, but we do not think that it would be appropriate to prohibit those items.²⁷ Furthermore, the prohibition would not be an effective way of preventing pedophiles from enticing children, since they would continue to entice children with innocent objects.

Secondly, in some cases it is not possible to distinguish Virtual Child Pornography from Real Child Pornography. This will be the case where adults are made to look younger than the age of 18 or where images are created through the use of digital imaging software, which does not make use of performers at all. It is therefore argued that in order to prosecute Real Child Pornographers it is necessary to prohibit the Virtual counterpart.²⁸ However, if it really is the case that a certain class of virtual images is

²⁶ Strossen, 263

²⁷ *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002), 13

²⁸ *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002), 16

indistinguishable from real images, “the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.”²⁹ It seems that virtual Child Pornography would have the positive effect of reducing the amount of Real Child Pornography being produced; it would in fact be saving children from suffering abuse. In essence what is being argued is that in order to prohibit unprotected forms of expression it is necessary to prohibit forms of expression that would otherwise be protected. However in the *Broadrick* case this type of argument was held to be an affront to the very principle of freedom expression. In the same way that it is better to let ten guilty people go free than to punish one innocent person, “the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.”³⁰

Thirdly, it is argued that Virtual Child Pornography will encourage pedophiles to abuse real children. In order to address this argument I will provide a discussion of the empirical evidence on the matter. There are four types of evidence that attempt to show the link between pornography and violence against third parties. Firstly, there are laboratory experiments that show how exposure to pornography affects the behavior of men. Secondly, studies that describe the factors that play a role in causing sex offenders to commit crimes. Thirdly, statistical data that seeks to correlate the availability of pornography to acts of sexual violence. Finally, there are anecdotal accounts that detail the role played by pornography in cases of sexualized violence. Such accounts are typically from testimonies made by victims and perpetrators of sexualized violence.³¹

Laboratory Experiments

Laboratory experiments are conducted by exposing subjects to pornographic images and assessing the levels of sexual aggression that are caused by the exposure. Numerous studies have failed to produce reliable results that prove that being exposed to

²⁹ *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002), 16

³⁰ *Broadrick v Oklahoma*, 413 U. S., at 612 (1973)

³¹ Nadine Strossen, *Defending Pornography Free Speech, Sex and the Fight for Women’s Rights*, (Doubleday, 1996), 248

pornography causes sexual aggression.³² The experiments were only able to show that being exposed to pornography caused subjects to revise their beliefs about how common certain sexual practices were.³³

Studies on Sex Offenders

Studies that have been conducted on sex offenders show that those men have been exposed to less pornography than the average man.³⁴ Furthermore a large number of sex offenders “were raised with strict, antisexual, repressive attitudes.”³⁵ This seems to suggest that it is healthier for a person to be exposed to pornography in an environment that supports sexual expression as opposed to one that condemns such expression. It is obviously the case that some sex offenders were also users of pornography. However using this evidence to support the claim that using pornography causes one to rape is as fallacious as using evidence that shows that some rapists are soccer players and suggesting that playing soccer causes people to rape. The number of people that play soccer or view pornography that do not commit rape far outweighs the numbers that do.³⁶

Correlative Studies

Studies that show a relationship between an abundant use of pornographic materials and high levels of sexual violence would not in themselves show that consumption of such materials caused sexual violence. The chain of causality could run in the opposite direction. It could just as well be the case that sex offenders purchased pornography after committing their crimes in an effort to relive their actions. There could also be independent factors that cause high levels of consumption of pornography and sexual violence, like a disproportionately high number of young men in society.³⁷

³² Daniel Linz, Steven D. Pendrod, and Edward Donnertein, “The Attorney General’s Commission on Pornography: The Gaps between ‘Findings’ and Facts,” *American Bar Foundation Research Journal* 4 (Fall 1987): 713-36 cited in Strossen, 252

³³ Edward Mulvey and Jeffrey Haugaard, *Surgeon General’s Workshop on Pornography and Public Health* (Arlington, Virginia: US Department of Health and Human Services, 1986) cited in Strossen, 252

³⁴ Pally, *Sex and Sensibility*, 25-61 cited in Strossen, 260

³⁵ Strossen, 261

³⁶ Strossen, 257

³⁷ Strossen, 253

In addition to these problems there are numerous cases where there is an inverse relationship between the levels of violence and discrimination against women and the level of availability of pornography.³⁸ In countries like Japan, Denmark and Germany there are very low levels of violence against women despite the fact that pornographic materials are easily accessible in these countries. On the other hand in countries like Iran and China where women are frequently subjected to violence and discrimination, there are strict policies against pornography. This is not sufficient evidence to show that an increase in pornographic materials decreases violence against women, but it does show that there are independent factors that affect both sets of data. Tolerant environments that place fewer restrictions on freedom of expression tend to allow for more pornography to be produced but they also reduce the levels of violence and discrimination against women.³⁹

Anecdotal Accounts

Catherine MacKinnon cites a disturbing case where “a brother holds up pornography magazines as his friend’s gang-rape his sister, making her assume the poses in the materials, turning her as they turned the pages.”⁴⁰ It is shocking anecdotes like this one that have the power to sway our emotions and cause us to side with MacKinnon’s cause. Without trivializing the horrendous harms that were suffered by the girl who was gang raped a few things must be noted. First of all, the men that used the pornographic magazines could have done exactly the same thing if they used diagrams found in guides for newlyweds, sketches or written discussions of sexual positions found in religious texts like the Karma Sutra or in the sex advice section of women’s magazines. Such a large part of the causal explanation for why a man commits rape has to do with his dispositions and his psychological make up, “that it is likely that some similar crime would have suggested itself to him in due time.”⁴¹

³⁸ Strossen, 254

³⁹ Strossen, 255

⁴⁰ Catherine A. MacKinnon, “The Roar on the Other Side of Silence”, cited in *Feminism and Pornography* edited by Drucilla Cornell, (Oxford University Press, 2000), 132

⁴¹ Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford University Press, 1987), 150

In their defense rapists have blamed their actions on the influence of pornography, in an effort to transfer responsibility from themselves onto the pornography industry. But it is not only pornography that has been blamed for the perpetration of violent acts. After watching the film *The Ten Commandments*, which showed a group of Hebrew women dancing around the golden calf in praise of it, a man in Germany became convinced that women were the root of all evil and he set out on a killing spree directed specifically at women. In another case a child attempted to murder his parents with a meat cleaver after watching a film based on Dostoyevsky's book *The Brothers Karamazov*⁴². Classical literature like the Odyssey is filled with extreme depictions of violence, as is the Bible. It is entirely possible for an individual to commit actions that are described in these texts.

“In arguing that exposure to pornography causes violent crimes against women, pro-censorship feminists dilute the accountability of men who commit these crimes by displacing some of it onto words and images, or onto those who create or distribute them.”⁴³ Rapists ought to be held accountable for their actions. The defense that “porn made me do it” unfairly transfers responsibility. MacKinnon has argued that showing porn to a man is like shouting kill to a dog, but this crude analogy flies in the face of evidence that people are rational agents that are capable of deliberating about the material that they view and the opinions that they hear.⁴⁴

Unfortunately there will always be a few individuals that are highly susceptible to the influence of words and images. Placing restrictions on pornographic materials would burden those that enjoy them and it is likely that those individuals that would otherwise have been susceptible to the influence of pornography will be influenced by something else. “If we attempted to ban all words or images that have been blamed for inspiring or inciting particular crimes by some aberrant or antisocial individual, we would end up with little left to read or view.”⁴⁵

⁴² Strossen, 257-8

⁴³ Strossen, 268

⁴⁴ Strossen, 272

⁴⁵ Strossen, 257

MacKinnon's claim that "there is no evidence that pornography does no harm"⁴⁶ is not a reasonable basis for the suppression of pornography. If we were to use her standard as a basis for censorship then we could substitute any word for the term pornography to justify censoring it. For example on this account the fact that there is no evidence that Bible stories cause no harm would be a good reason to prevent further production and distribution of the Bible.⁴⁷

The ultimate aim of the legislation is to protect children from harm. This is an admirable aim that is achieved by prohibiting Real Child Pornography. However the purpose is not achieved by prohibiting Virtual Child Pornography. I have demonstrated that virtual Child Pornography is unconnected to the abuse of real children. This means that the limitation on the right to freedom of expression is also unconnected to the prevention of child abuse.

Less Restrictive Means

It is evident that the costs of adopting the law would be heavy and it is not clear that there would be any benefit in doing so either. As Judge Barker once proclaimed "to deny free speech in order to engineer social change in the hope of accomplishing a greater good for one section of our society erodes the freedoms of all."⁴⁸ I have argued that the current definition of child pornography is too broad since it includes both real and virtual child pornography. If the section were completely struck down as being unconstitutional, we would be in the unfortunate position of leaving Real Child Pornography unregulated. In a recent Supreme Court decision in America the court struck down legislation that is similar to our own on the basis that it was unconstitutional.⁴⁹ It is for this very reason that

⁴⁶ Catharine MacKinnon, *Only Words* (Cambridge, Mass.: Harvard University Press, 1993), 37 cited in Strossen, 246

⁴⁷ Strossen, 248

⁴⁸ *American Booksellers Association v Hudnut*, 598 F Supp 1316, 1317 (D. Ind. 1984) cited in Strossen, 80

⁴⁹ The Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (CPPA) was struck down in *Ashcroft v. Free Speech Coalition* 535 U.S. 234 (2002)

there is an imperative to amend the current law so that it no longer prohibits Virtual Child Pornography but that it continues to prohibit Real Child Pornography.

The Act's purpose is to protect people, especially children from harm, and it can achieve this purpose without unduly infringing the right to freedom of expression by only prohibiting Real Child Pornography. This can be achieved by reformulating the existing definition of child pornography. The following definition should be used in place of the one currently found in S 1 of the Films and Publication Act.

Revised Definition of Child Pornography

Child pornography includes any actual photograph or film of a person who is under the age of 18-

- (i) Engaged in sexual conduct;
- (ii) Participating in, or assisting another person to participate in, sexual conduct; or
- (iii) Showing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to a sexually exploitative infringement of that person's dignity.

Furthermore the act can take measures to regulate particular forms of Virtual Child Pornography that are offensive, without the use of criminal sanctions. A degree of caution must be taken when it comes to regulating offensive material, given the range of materials that people find offensive.⁵⁰ People suffer genuine offence at the sight of garish clothing; homosexual kissing and poor table manners yet few of us would be in favour of regulating depictions of these things. However there does seem to be a case in favour of regulating sex in public, making loud noises in the middle of the night or the desecration of religious symbols. The model that I will be using strikes a balance between competing interests to determine the content and extent of what should be regulated.

⁵⁰ Feinberg, 25

Regulating Offensive Material

I will now provide an account of Joel Feinberg's framework, that I will use to determine the manner and extent of regulation that is appropriate to the offending material. The regulatory model works by balancing the seriousness of the offence against the reasonableness of the offence. Further procedures determine which offending parties interests ought to be taken into account and they distinguish between different types of offensive material.

The Seriousness of the Offence

The seriousness of the offence can be determined by examining the following three factors. Firstly, the intensity, durability and extent of the repugnance produced. Secondly, the effort required to avoid making contact with the offensive material. Thirdly, whether the viewers of the material "willingly assumed the risk of being offended."⁵¹

The Reasonableness of the Offence

The reasonableness of the offending party's conduct can be determined by examining the following four factors. Firstly, the personal importance of the material to the offending party. Secondly, the social value of the material. Thirdly, the motive of the party causing the offence. Fourthly, "the availability of alternative times and places where the conduct in question would cause less offence."⁵²

Mere Offence and Profound Offence

Joel Feinberg makes an important distinction between material that is merely offensive and material that is profoundly offensive. Merely offensive material has the following four characteristics. Firstly, the experience triggered by the material is of a trivial nature. Secondly, the offence must be perceived for to it have an affect and it constitutes an affront to one's physical senses. Thirdly, the offence is experienced in a personal way, which means that the offended party thinks of herself as being personally wronged by the

⁵¹ Feinberg ,26

⁵² Feinberg, 26

offending party. Fourthly, the offence is thought to be wrong because of the unpleasant states that it causes, not because it is thought to be inherently wrong.⁵³

Profoundly offensive material has the following four characteristics. Firstly, it is experienced in a serious and often shattering way. Secondly, the idea of the conduct occurring is offensive in itself and one does not need to perceive it to be offended. Thirdly, the offence cannot be avoided by staying out of physical contact with the material. Fourthly, the offence is of an impersonal nature, which means that the conduct does not directly target the offended party and can be understood as an affront to the offended party's moral beliefs.⁵⁴

The Offended Parties' Interests

One final consideration must be taken into account before a decision can be reached on how to regulate the offending material. It must be determined which offended parties should be given consideration and I will do this by looking at four categories of people. Firstly, all observers of the material. Secondly, all captive observers. Thirdly, people that are offended by the bare knowledge that the material is being produced or distributed in a specific location that they cannot observe. Fourthly, any offended party that has the bare knowledge that making the material legal will result in it being produced and distributed somewhere.⁵⁵

The problem with considering the people in the first group is that the category includes those that willingly assumed the risk of being offended and still chose to view the material, which means that the group is too broad. The people in the second group would not only refer to people that are strapped down and forced to watch hours of the offending material. It would include people that do not choose to be exposed to offending materials that cannot be reasonably avoided, like those subjected to billboards or other forms of advertising that depict the material. I would argue that the interests of people in this group are the most important of the four, since they are innocent parties that hold widely shared interests. I would argue that placing a large amount of importance on

⁵³ Feinberg, 57-8

⁵⁴ Feinberg, 58-9

⁵⁵ Feinberg, 61

interests of those people in the third group would cause an excessive burden to those that value the offending conduct. It must be noted that those that are offended by the thought of their interracial neighbors engaging in sexual acts behind closed doors, would fall under this third group. Those in the fourth group could accurately be described as abnormally sensitive and this on its own would constitute a reasonable basis for paying less attention to their concerns, but there is an even more pressing reason for not regulating material with them in mind. Carrying out the demands of this group would be a major imposition on personal privacy.⁵⁶ Regulation would require police officers to burst into bedrooms to make sure that no one was doing anything offensive, a scenario that was all too familiar in South Africa during Apartheid.

Regulating Virtual Child Pornography

I will now use the model that I have presented to determine how virtual child pornography should be regulated. It must of course be noted that not all forms of Virtual Child Pornography are offensive. Recognized works of art like those produced by renaissance painters, or films like *American Beauty* are only considered offensive by extremely prudish members of our society. In this section I will therefore only be considering those forms of virtual Child Pornography that are indistinguishable from Real Child Pornography but do not make use of real children. I think those forms of the material are widely regarded as aesthetically disgusting and offensive.

Categorizing the Nature of the Offence in Virtual Child Pornography

The material produced by virtual child pornographers is most accurately described as profoundly offensive. Firstly, because the offense that it causes is particularly severe. Secondly, one does not need to be in contact with it to feel offended, but being in contact with the material would only exacerbate the situation. Thirdly, the offense is of an impersonal kind.

⁵⁶ Feinberg, 66

The Seriousness of the Offence

The extreme nature of the content ensures that the intensity of the repugnance caused would be large. However the seriousness of the offence can be reduced by taking regulatory measures to limit the extent and durability of the offence, as well as making it easy for people to avoid contact with the material if they wish to do so. For example displaying images of virtual child pornography on billboards across a city would increase the severity of the offense since it would target a large captive audience, while restricting promotion of the material to adverts placed in sex shops or pornographic websites would reduce the severity of the offense. Books containing the material could be adequately marked and sealed to prevent people from stumbling across them unwittingly and being offended.

The Reasonableness of the Material

The material is of great personal value to virtual child pornographers since they derive their livelihood from distributing it. It is also important to those that buy the material since they derive pleasure from watching or reading it. Any regulation of the material would constitute a limitation on freedom of expression and there is social value in allowing expression to go unhampered, but this does not mean that no regulation ought to be permitted. Feinberg states that “unpopular, unorthodox and extreme opinions no less than any others need their spokesmen, in order that our chances of discovering truths and making wise decisions be increased.”⁵⁷ Virtual Child Pornography embodies attitudes that have political content, which play a role in the marketplace of ideas and are thus worthy of a degree of protection. The material is undoubtedly unpopular but at least some of it is motivated by an interest in reforming social values.

Conclusion

I began by drawing a distinction between Real Child Pornography, which involves the use of real children and Virtual Child Pornography, which does not make use of children but depicts or describes them engaged in sexual activity. I argued that the state is justified in prohibiting Real Child Pornography because of the severe harm that it causes to the

⁵⁷ Feinberg, 38

children that are used to produce it. I argued that a prohibition on Virtual Child Pornography could not be based on a particular conception of the good, since the state has a duty to base its reasons for limiting rights on neutral harms. I examined the importance of the right to freedom of expression by demonstrating its role in a functioning democracy, the search for truth and the personal development of citizens. I argued that the prohibition is a severe infringement on the right because of the penalty that it imposes and the chilling effect it has on expression. I examined a series of arguments that aim to show that Virtual Child Pornography results in some form of harm. My assessment of the empirical evidence demonstrates that a sufficient link can not be drawn between the consumption of pornography and harm to others. I proceeded to argue that less restrictive measures can be taken by the state. The first measure involves redefining the current legal definition of child pornography so that it only refers to Real Child Pornography. The second involves a nuisance regulation of Virtual Child Pornography that strikes a balance between the interests of those that are offended by the material and those that produce and value the material. In light of the above arguments it must be concluded that the current prohibition on Virtual Child Pornography is an unconstitutional violation of the right to freedom expression, which cannot be justified by the limitations clause.

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