

A PROPOSED RESTRICTION ON THE FIRST
AMENDMENT:

PROTECTING CHILDREN FROM INTERNET
PEDOPHILES*

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For years, Jack McClellan, a forty-five-year-old Los Angeles native and self-proclaimed pedophile, maintained a virtual "how-to" website for pedophiles called "Seattle - Tacoma - Everett girl love."¹ The website's primary purpose was "to promote association, friendship; and legal, nonsexual, consensual touch (hugging, cuddling, etc) between men and prepubescent girls."² In addition to providing information about upcoming children's events and local attractions where little girls are easily viewable, the website also displayed non-sexual pictures of young girls. McClellan took these pictures in public places, but did not obtain the consent of the children's parents before posting them on his website.³

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¹ See The Internet Patrol, <http://www.theinternetpatrol.com/jack-McClellan/Jack-McClellan-Seattle-Tacoma-Everett-Girl-Love.html> (last visited Jan. 23, 2009) (a screenshot of McClellan's former website).

² *Id.*

³ See *id.*

In March 2007, several news stories on McClellan prompted local parents and community members to join together in an effort to shut down McClellan's website.⁴ Legally, however, the activists had no recourse: the site is protected speech under the First Amendment.⁵ Thus, the children whose pictures appeared on the website arguably became innocent victims of sexual predators, as visitors to McClellan's website used these pictures to mentally fulfill their sexual fantasies. Parents had no way to protect their children, since thoughts cannot be regulated—regardless of how little social value those thoughts may have.⁶

The website was eventually shut down by McClellan's internet service provider, but the website's legality remains intact—the First Amendment forbids any limitations on advocacy speech unless such speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁷ Since the Supreme Court has allowed restrictions on the right to free speech in only a handful of situations, it is unlikely that McClellan's website would fall into any of these categories.⁸

This Note advocates for legislative change: that it be unlawful to post pictures of children on websites that promote or encourage criminal or indecent behavior such as pedophilia and pornography, even if 1) the pictures are non-sexual and 2) the website's content is not unlawful or contains protected speech.

A law prohibiting these pictures is bound to be challenged in light of the 2002 Supreme Court decision in *Ashcroft v. Free Speech Coalition*.⁹ This Note will explore the First Amendment limitations on obscenity and child pornography and argue that a law limiting this new category of unprotected speech would be constitutional. In Part I, this Note will discuss the history of some of the areas of speech that are already excluded from First Amendment protection. In Part II, this Note will look more closely at the speech on Jack McClellan's website. In Part III, this Note will examine one example of proposed legislation that aims to criminalize websites like McClellan's and explain why such legislation, while possibly constitutional, will be ineffective in light of the very strict *Brandenburg* "imminent lawless action" standard. Finally, Part

⁴ See e.g., Zoe Fraley, *Pedophile Visits Local Events; Man Posts Girls' Photos on Web*, THE BELLINGHAM HERALD (Wash.), Mar. 27, 2007, at A1; Robert Shaffer & Dan Springer, *Seattle-Area Pedophile Has 'How-to' Web Site for Men Seeking Little Girl Activities*, FOXNEWS.COM, Mar. 30, 2007, <http://www.foxnews.com/story/0,2933,262700,00.html>.

⁵ U.S. CONST. amend. I.

⁶ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁸ Douglas E. Plocki, *Harm Advocacy Theory: Where to Draw the Line Between Free Speech and Criminal Advocacy*, 12 GEO. MASON U. CIV. RTS. L.J. 29, 35 (2002).

⁹ *Ashcroft*, 535 U.S. at 239-40.

IV of this Note will propose alternative legislation that should be more effective and still remain within the constitutional limits of the First Amendment.

I. THE EVOLUTION OF FIRST AMENDMENT PROTECTION

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."¹⁰ This right "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹¹ Although this freedom is one of the basic tenets of American society, it is not an absolute right.¹² As early as 1919, the Supreme Court began placing restrictions on First Amendment protection.¹³ Since then, the Supreme Court has developed a "series of pigeonholes into which various forms of expressive conduct are slotted."¹⁴ In other words, speech is grouped into three different categories: protected, unprotected, and somewhere in the middle.¹⁵

In 1942, the Supreme Court explained in *Chaplinsky v. New Hampshire* that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."¹⁶ According to the Court, some categories of speech, including

the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' . . . [whose] very utterance inflict injury or tend to incite an immediate breach of the peace[,] . . . are no essential part of any exposition of ideas, and are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,¹⁷

are categorically unprotected.

The challenge with unprotected speech is not whether the government has the right to regulate the "category" of speech generally. Rather, the issue usually turns on whether the speech itself fits into the category of unprotected speech that can be regulated.¹⁸

¹⁰ U.S. CONST. amend. I.

¹¹ *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹² Plocki, *supra* note 8, at 35.

¹³ JOHN F. WIRENIUS, *FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH*, 73 (Holmes & Meier Publishers 2002) (2000).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

¹⁷ *Id.* at 572.

¹⁸ RUSSELL L. WEAVER AND DONALD E. LIVELY, *UNDERSTANDING THE FIRST AMENDMENT* 51 (2003).

A. Unprotected Speech: Obscenity and Child Pornography

Although *Chaplinsky* set the stage for placing obscenity in the "unprotected" category of speech, the Supreme Court did not officially decide the issue until the 1957 case *Roth v. United States*.¹⁹ Finding that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance," the Supreme Court held that "obscenity is not within the area of constitutionally protected speech."²⁰ Sixteen years later, in *Miller v. California*, the Supreme Court defined and provided the modern test for determining if speech falls into the category of "obscenity."²¹

In the early 1970s, Marvin Miller conducted an unsolicited mass mailing campaign to advertise the sale of pornographic books.²² The mailing contained four brochures, which promoted these pornographic books by displaying sexually explicit pictures of men and women engaging in a variety of sexual activities.²³ After recipients of the mailing complained to police, Miller was arrested and convicted for violating a California criminal statute that made it illegal to knowingly distribute obscene matter.²⁴

Miller appealed his conviction, arguing that the California statute limited his constitutional right to free speech.²⁵ The Supreme Court disagreed, and, in doing so, set forth the modern standard for determining what type of speech is obscene and thus may be regulated.²⁶ Acknowledging that obscene material is unprotected by the First Amendment, the Court stated that "[s]tate statutes designed to regulate obscene materials must be carefully limited" and must only be applied to "works which depict or describe sexual conduct."²⁷ Material is obscene, the Court went on to explain, if: (a) "the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."²⁸

Nine years after *Miller*, the Supreme Court faced a new chal-

¹⁹ *Roth*, 354 U.S. at 476.

²⁰ *Id.* at 484-85.

²¹ FREE SPEECH ON TRIAL: COMMUNICATION PERSPECTIVES ON LANDMARK SUPREME COURT DECISIONS 188 (Richard A. Parker ed., Univ. of Ala. Press 2003).

²² *Miller v. California*, 413 U.S. 15, 16 (1973).

²³ *Id.* at 18.

²⁴ *Id.* at 16-18.

²⁵ *Id.* at 18.

²⁶ *Id.* at 24.

²⁷ *Id.*

²⁸ *Id.* at 24 (citation omitted).

lenge in *New York v. Ferber*: whether a criminal statute prohibiting persons from knowingly promoting sexual performances by children under the age of sixteen or distributing material depicting such performances was constitutional.²⁹ The question thus became not whether child pornography was obscene, but rather, whether child pornography—even when it depicts images that are not, under *Miller*, obscene—can be denied First Amendment protection.³⁰

In *Ferber*, the defendant Paul Ferber was arrested and convicted for violating a New York state criminal statute after he sold two child pornography videos to undercover police officers.³¹ The New York Court of Appeals reversed the conviction, finding that the statute did not meet the *Miller* test for obscenity and thus would "prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment."³² The Supreme Court reversed, finding that statutes regulating child pornography are not unconstitutional under the First Amendment.³³ Although it conceded that the Court of Appeals's decision "was not unreasonable in light of [previous Supreme Court] decisions," the Court found that this case constituted the "first examination of a statute directed at and limited to depictions of sexual activity involving children."³⁴

Acknowledging that laws regulating child pornography run the risk of suppressing protected expression, the Court first explained that there are underlying policy reasons for providing states with "greater leeway in the regulation of pornographic depictions of children."³⁵ Some of these policy concerns include: (1) the state's compelling interest in protecting the physical and psychological well-being of children; (2) the intrinsic relationship between child pornography and the sexual abuse of the children; (3) the "economic motive" for producing the materials; and (4) the fact that the value of child pornography is "exceedingly modest, if not *de minimis*."³⁶

Despite the broad leeway given to states, the Court did put two minor restrictions on the category of child pornography that is unprotected by the First Amendment. First, the matter must "be

²⁹ *New York v. Ferber*, 458 U.S. 747, 749 (1982).

³⁰ KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 107 (Jack Stark ed., 2004).

³¹ *Ferber*, 458 U.S. at 751-52.

³² *Id.* at 752.

³³ *Id.* at 747, 765-66.

³⁴ *Id.* at 753.

³⁵ *Id.* at 756.

³⁶ *Id.* at 756-64.

limited to works that *visually* depict sexual conduct of children below a specified age.³⁷ Second, the "category of 'sexual conduct' proscribed must also be suitably limited and described."³⁸ Even with these limitations, however, *Ferber* implied that child pornography, on the whole, had such little societal value that there would be few, if any, permissible uses of such material.

Despite this overarching implication, the Supreme Court rejected a prohibition of "virtual child pornography" when it decided *Ashcroft v. Free Speech Coalition*.³⁹ The case addressed the constitutionality of the Child Pornography Prevention Act of 1996 (CPPA), which extended the prohibition on child pornography to "sexually explicit images that appear to depict minors but were produced without using any real children."⁴⁰ This material, known as "virtual child pornography," is created by "using adults who look like minors or by using computer imaging."⁴¹ Finding the CPPA unconstitutional, the Court distinguished this material from the child pornography at issue in *Ferber*.⁴²

The Court reasoned that, in *Ferber*, New York state's child pornography act was upheld because of the state's interest in protecting the children exploited by the production process.⁴³ The Court explained that "[w]here the images are themselves the product of child abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content."⁴⁴ Unlike the child pornography in *Ferber*, the Court found that virtual child pornography did not present the same issues because the material does not depict an actual child.⁴⁵ In other words, no child is harmed or abused in the production of virtual child pornography.⁴⁶ Thus, the Court implies that for virtual child pornography to be unprotected speech, it is not enough that the material merely depicts sexually explicit behavior of children; the material must also be categorized as "obscene" under the standard set forth in *Miller*.⁴⁷

In finding the CPPA unconstitutional, the Court addressed a critical policy concern raised by the legislature: that even though

³⁷ *Id.* at 764.

³⁸ *Id.* at 764.

³⁹ *Ashcroft*, 535 U.S. 234 (2002).

⁴⁰ *Id.* at 239.

⁴¹ *Id.* at 239-40.

⁴² *Id.* at 240.

⁴³ *Id.* at 249.

⁴⁴ *Id.*

⁴⁵ *Id.* at 240.

⁴⁶ *Id.* at 250 ("In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*.").

⁴⁷ *Id.* at 240.

these virtual images do not involve children in the production process, they still pose a threat to children because they can "[whet] the appetite of pedophiles," increasing the possibility of sexual abuse and exploitation of actual children.⁴⁸ In response, the Court explained that "the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."⁴⁹ Here, the Court believed that the threat was too indirect, depending upon "some unquantified potential for subsequent criminal acts."⁵⁰ Nevertheless, the Court did acknowledge that "the government may suppress speech for advocating the use of force or a violation of law . . . if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'"⁵¹ While in this case, the Court felt that no such incitement existed, it left the door open for other instances in which such governmental regulation may be permitted.

B. Protected Speech: Political Activism and Advocacy

Unlike obscenity and child pornography, political activism and advocacy are considered protected speech. In 1969, the Supreme Court set forth the modern standard for determining when such political activism and advocacy crossed the line from protected to unprotected.

In the late 1960s, Clarence Brandenburg was convicted for violating Ohio's Criminal Syndicalism statute, which made it illegal to "advocate . . . duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."⁵² Brandenburg, the leader of a Ku Klux Klan ("KKK") group in Ohio, was arrested after addressing a group of armed, hooded KKK members and making derogatory remarks about African Americans and Jews.⁵³ "If our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race," Brandenburg campaigned, "it's possible that there might have to be some revengeance."⁵⁴

Brandenburg challenged the constitutionality of the statute,

⁴⁸ *Id.* at 253.

⁴⁹ *Id.*

⁵⁰ *Id.* at 250.

⁵¹ *Id.* at 253 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

⁵² *Brandenburg*, 395 U.S. at 444 (quoting OHIO REV. CODE ANN. § 2923.13).

⁵³ *Id.*

⁵⁴ *Id.* at 446 (part of the speech was as follows: "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken").

arguing that it violated his rights under the First Amendment.⁵⁵ The Court agreed with *Brandenburg*, reversing the conviction and holding that the statute punished mere advocacy and assembly with others, a clear violation of the First Amendment.⁵⁶ The Court explained that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁵⁷

In the years following *Brandenburg*, the Court embraced this broad First Amendment protection. In the cases that followed, speech was protected where it merely advocated force or violence, but no such force or violence actually ensued or was imminent.⁵⁸

One of the limitations of the *Brandenburg* test is that it only applies to "advocacy of the use of force or law violation."⁵⁹ With this limitation, it has become important to differentiate between "advocacy" and other types of speech, such as aiding and abetting, and true threats, which do not receive the protection of the strict *Brandenburg* standard.

For example, in *Rice v. Paladin Enterprises*, the defendant was arrested after his book, *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*"), was found in the apartment of a hitman who had been hired to kill a man's ex-wife and eight-year-old son.⁶⁰ There were so many similarities between the crime and the instructions provided in *Hit Man* that the only issue in the case was whether *Paladin Enterprises*, the book's publisher, could avoid civil liability for aiding and abetting because the First Amendment barred the imposition of liability upon a publisher for assisting in the commission of criminal acts.⁶¹

In addressing the issue, the Court explained that

⁵⁵ *Id.* at 445; see OHIO REV. CODE ANN. § 2923.13.

⁵⁶ *Id.* at 449.

⁵⁷ *Id.* at 447 (emphasis added).

⁵⁸ See WERHAN, *supra* note 30, at 56-66. In the years leading up to *Brandenburg*, the Court offered a variety of standards for determining when advocacy speech was protected under the First Amendment. *Id.* Some commentators believe that with *Brandenburg*, the Court "finally aligned First Amendment doctrine with the constitutional standing of freedom of speech as a fundamental right that courts must protect in all but the narrowest of circumstances." *Id.* at 66. See also, e.g., N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982); Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) (finding that an Indiana statute prohibiting recognition on the voting ballot of political parties that advocate the overthrow of the government by force or violence unconstitutional); Hess v. Indiana, 414 U.S. 105 (1973) (holding where defendant's statements were not directed at any particular person, he was not advocating for imminent lawless action).

⁵⁹ WERHAN, *supra* note 30, at 65.

⁶⁰ *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997).

⁶¹ *Id.* at 241-42.

the law is now well established that the First Amendment, and *Brandenburg's* 'imminence' requirement in particular, generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because 'culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes.'⁶²

The court concluded that the speech at issue in *Hit Man* did not resemble the type of "mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence," which deserved First Amendment protection under *Brandenburg*.⁶³ Instead, it found that this speech provided "detailed, instruction assistance to those contemplating or in the throes of planning murder" and was therefore unprotected under the First Amendment.⁶⁴

Additionally, the Ninth Circuit recently held that threats of violence are not protected under the First Amendment in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*.⁶⁵ There, the court found that the publication of certain anti-abortion posters and websites was not constitutionally protected under the First Amendment, where similar publications had resulted in a pattern of deadly violence.⁶⁶ The Ninth Circuit explained that "threatening a person with violence" does not receive the same constitutional protection as the mere advocacy of violence generally.⁶⁷

II. "SEATTLE - TACOMA - EVERETT GIRL LOVE"⁶⁸

"Seattle - Tacoma - Everett girl love" was a haven for local Seattle pedophiles. The website was what some people called a "virtual instruction manual and resource guide for pedophiles."⁶⁹ In addition to providing links to online calendars of family-friendly events and attractions in western Washington,⁷⁰ the site's founder, Jack McClellan, rated the events based on their ability to

⁶² *Id.* at 246 (citations omitted).

⁶³ *Id.* at 249 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (emphasis added)).

⁶⁴ *Id.* at 249.

⁶⁵ *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

⁶⁶ *Id.* at 1064.

⁶⁷ See, e.g., N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982).

⁶⁸ Seattle - Tacoma - Everett Girl Love, <http://www.theinternetpatrol.com/Jack-McClellan/Jack-McClellan-Seattle-Tacoma-Everett-Girl-Love.html#> (last visited Mar. 16, 2009) (a screen shot of one of the original websites). Please note that none of the pictures are posted on this screenshot, and none of the links work.

⁶⁹ Fraley, *supra* note 4.

⁷⁰ *Id.*

attract young girls.⁷¹ He also posted photographs of girls from these events, without obtaining parental consent.

On March 27, 2007, the *Bellingham Herald*, a local newspaper in western Washington, ran an article on McClellan's website, prompting a frenzy of media attention.⁷² In response, the site's internet service provider, Network Solutions, shut down the site, deeming "it in violation of the company's standards."⁷³ McClellan eventually left Seattle and resurrected the site in Los Angeles—renaming it "Los Angeles girl love"—this time without pictures.⁷⁴

Despite the knee-jerk reaction that McClellan's website should be illegal, the site is actually fully protected under the First Amendment. Not only is it unconstitutional to control individual thoughts,⁷⁵ but it is also completely legal to take pictures of people in public places and publish the pictures on the Internet without their consent.⁷⁶

Additionally, it would be difficult to argue that McClellan's website falls into the category of unprotected speech seen in *Rice*, discussed *supra* in Part I.C.2. Unlike the speech in *Rice*, McClellan's website did not provide step-by-step instructions for how to commit a crime. His website provided instructions on how to engage in *legal* activities—no matter how perverse the public may consider them to be. Thus, in order to criminalize McClellan's behavior, the courts must either find that his website was "directed to inciting or producing imminent lawless action," or, that it fell into some other category of unprotected speech because of an underlying interest that the state has a right to protect.⁷⁷

In August 2007, California State Assemblyman Cameron Smyth introduced California Assembly Bill No. 534 to the state legislature. According to Assemblyman Smyth, the proposed bill aims to stop surrogate stalkers like McClellan from endangering chil-

⁷¹ *Self-Proclaimed Pedophile Admits He'd Have Sex With Little Girls If It Were Legal*, FOXNEWS.COM, July 31, 2007, <http://www.foxnews.com/story/0,2933,291630,00.html>.

⁷² Fraley, *supra* note 4; see, e.g., Shaffer & Springer, *supra* note 4; Carla Hall, *Self-Proclaimed Pedophile Has Parents On Edge; Authorities are Concerned But Have No Grounds to Arrest the Man. Two Lawyers Seek a Restraining Order*, L.A. TIMES, Aug. 2, 2007, at B3; Jennifer Steinhauer, *Parents' Ire Grows at Pedophile's Unabashed Blog*, N.Y. TIMES, July 28, 2007, at A1.

⁷³ Fraley, *supra* note 4.

⁷⁴ Zoe Fraley, *Web-site Pedophile Moves to California; Man Now Reviews LA-Area Events*, THE BELLINGHAM HERALD, June 2, 2007.

⁷⁵ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.")

⁷⁶ Steinhauer, *supra* note 72 (quoting Eugene Volokh, a law professor and First Amendment expert at the University of California, Los Angeles, who said that "[t]he general rule is pictures of people in public are free for people to publish.")

⁷⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

dren.⁷⁸ As amended on September 5, 2007, the bill provides that:

(a) Any person who publishes information describing or depicting a child, the physical appearance of a child, the location of a child, or locations where children may be found with the intent that another person will use the information to commit a crime against a child and the information is likely to aid in the imminent commission of a crime against a child, is guilty of a misdemeanor, punishable by imprisonment in a county jail for not more than one year, a fine of not more than five thousand dollars (\$ 5,000), or by both a fine and imprisonment.

(b) For purposes of this section, "publishes" means making the information available to another person through any medium, including, but not limited to, the Internet, the World Wide Web, or e-mail.

For purposes of this section, "child" means a person 14 years of age or younger.

For purposes of this section, "information" includes, but is not limited to, an image, film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, or any other computer-generated image.

Any parent or legal guardian of a child about whom information is published in violation of subdivision (a) may seek a preliminary injunction enjoining any further publication of that information.⁷⁹

While Smyth's proposed legislation seems constitutional, the bigger issue is whether this legislation would be sufficient to find that McClellan's website, or others like it, is illegal. Below, I will discuss the reasons that I believe this legislation is not sufficient and propose an alternative, constitutional means to avoiding such behavior in the future.

III. THE PROPOSED LEGISLATION IS CONSTITUTIONAL BUT INSUFFICIENT

Smyth's proposed legislation makes it a crime to publish information about children with the "intent that another person use the information to commit a crime against a child and the information is likely to aid in the *imminent commission* of a crime against a child."⁸⁰ This language appears to codify the Court's

⁷⁸ See H.R. 534, 2007 Leg., 110th Sess. (Ca. 2007), available at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0501-0550/ab_534_bill_20080927_chaptered.pdf.

⁷⁹ Assem. B. 534, 2007-08 Gen. Assem., Reg. Sess. (Cal. 2007).

⁸⁰ *Id.* (emphasis added).

holding in *Brandenburg*—that a state can forbid or proscribe advocacy of the use of force or violating the law where “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁸¹ Given the Court’s clear direction that it is constitutional to prohibit such speech, it seems likely that Smyth’s legislation would be deemed constitutional under the First Amendment.⁸²

The problem with the proposal, however, is that to date, the courts have applied the *Brandenburg* standard with extreme scrutiny. In fact, it is arguable that there are no cases that hold that “advocacy” speech has risen to the level of imminent lawless action such that it is undeserving of First Amendment protection. Rather, as the cases discussed *supra*, Parts I.C.2 & 3, show, those courts that have found “inciteful” speech to be unprotected, did so outside of the *Brandenburg* doctrine. Instead, these cases found the speech to be unprotected because it “aided and abetted a crime” or contained “threats of violence.”⁸³ What this makes clear is that courts are unwilling to invoke the *Brandenburg* standard unless the advocacy speech rises to an extraordinarily egregious level. Under this analysis, Smyth’s legislation will not likely have its intended impact on child welfare.

“Seattle-Tacoma-Everett girl love” promoted “association, friendship; and legal, nonsexual, consensual touch (hugging, cuddling, etc) between men and prepubescent girls.”⁸⁴ In *Planned Parenthood*, a pattern of “action – murder” had developed from the defendant’s previous behavior.⁸⁵ The Ninth Circuit found that in light of this pattern, there was an incredibly high likelihood that the defendant’s subsequent similar behavior would lead to imminent lawless action of a specific individual.⁸⁶ Thus, the court decided that the defendant’s actions transcended the bounds of protected political speech or advocacy.⁸⁷

Certainly it could be argued that McClellan’s website provides the tools and resources for child predators to commit lawless acts. But in *Ashcroft*, the Supreme Court rejected this argument as a valid reason for banning virtual child pornography.⁸⁸ There the

⁸¹ *Brandenburg*, 395 U.S. at 447 (emphasis added).

⁸² See also *Show Some Restraint*, L.A. TIMES, Aug. 10, 2007, at A-22, available at <http://www.latimes.com/news/la-ed-mcclellan10aug10,0,2835206.story> (suggesting that Smyth’s legislation would probably be constitutional).

⁸³ See *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1058 (9th Cir. 2002); *Rice v. Paladin Enterprises*, 128 F.3d 233, 233 (4th Cir. 1997).

⁸⁴ See *Seattle - Tacoma - Everett Girl Love*, *supra* note 68.

⁸⁵ *Planned Parenthood*, 290 F.3d at 1085.

⁸⁶ *Id.* at 1085-86.

⁸⁷ *Id.* at 1086.

⁸⁸ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

Court held that while virtual child pornography may whet pedophiles’ appetites and encourage them to engage in illegal conduct, “the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct.”⁸⁹ Given the Court’s stance in *Ashcroft*, the Court will need to invoke a new category—or limit the reach of *Ashcroft*—in order to criminalize the behavior seen on McClellan’s website.

IV. AN ALTERNATIVE PROPOSAL: A NEW CATEGORY OF UNPROTECTED SPEECH

“Seattle – Tacoma – Everett girl love” can be separated into two distinct parts—the written content that discussed pedophilia activities and thoughts, and the pictures of children taken in public places. Individually, each part is constitutionally protected speech. As Justice Kennedy wrote in *Ashcroft*, “[t]he government cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts. . . . The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”⁹⁰ Forbidding McClellan from posting his pedophilic thoughts, by themselves, would be an unconstitutional limit on free speech rights.

Likewise, the pictures on McClellan’s website depicted fully-clothed children in non-sexual positions. In *Ferber*, the Court held that the visual depiction of sexual conduct of children below a certain age was categorically unprotected by the First Amendment.⁹¹ But the pictures on McClellan’s website were not sexually explicit. In fact, they were just the opposite—they were pictures of children engaging in innocent childhood acts like playing sports and spending time with their families. Taken on their own, these pictures were protected speech.

Instead, the issue must turn on whether these pictures, in tandem with the protected-speech *content* on McClellan’s website, create a different, unprotected type of speech that states should be permitted to regulate. I believe that they do.

The *Ferber* Court established a new category of unprotected speech: child pornography, regardless of whether it met the *Miller* test for obscenity.⁹² There, the Court explained that there were underlying policy concerns for providing states with “greater leeway in the regulation of pornographic depictions of children.”⁹³

⁸⁹ *Id.* (quotations and citations omitted).

⁹⁰ *Id.*

⁹¹ *New York v. Ferber*, 458 U.S. 747, 747 (1982).

⁹² *Id.*

⁹³ *Id.* at 756.

Two of these policy concerns are of particular relevance here: (1) the state's compelling interest in protecting the physical and psychological well-being of children; and (2) the intrinsic relationship between child pornography and the sexual abuse of children.⁹⁴ The Court went on to explain that

a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, [the Court has] sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.⁹⁵

The Court's decision in *Ferber* established that a state has broad power to protect children from the psychological and physical damage of sexual abuse.⁹⁶ *Ferber*, however, and later, *Osborne v. Ohio*, focused specifically on the state's power to prohibit the production of images that visually depict children in sexually explicit positions.⁹⁷ In *Osborne*, the Court upheld the constitutionality of a state statute that prohibited the possession of any material that shows a minor in a state of nudity.⁹⁸ The Court emphasized the need to protect the victims, explaining that "[t]he materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."⁹⁹

Unlike the pictures in *Miller*, which were considered unprotected speech because they were "obscene,"¹⁰⁰ the pictures in *Ferber* and *Osborne* were unprotected merely because they showed sexually explicit pictures of children.¹⁰¹ For example, if two pictures depict the exact same non-obscene (under *Miller*) sexual position but one is a picture of a child, and one is an adult, the adult picture will be protected speech and the child picture will be unprotected speech. The issue with child pornography is not the impact of the picture on its viewers, but rather the impact of the picture

⁹⁴ *Id.* at 756-59.

⁹⁵ *Id.* at 757 (quotations and citations omitted).

⁹⁶ *Id.*

⁹⁷ See *id.* at 747; *Osborne v. Ohio*, 495 U.S. 103 (1990).

⁹⁸ *Osborne*, 495 U.S. at 106; see Rev. Code Ann. § 2907.323(A)(3) (Supp. 1989).

⁹⁹ *Id.* at 111, 113-14 (further explaining that the statute does not prohibit the possession of photographs where children are *merely* nude. Rather, the prohibition is on photographs where children are nude, and "where such nudity constitutes a lewd exhibition or involves photographic focus on the genitals." But while this qualification still excludes *mere* nude photographs, it still expands the category of unprotected child pornography, suggesting that the Court's standards for defining material as "child pornography" are significantly less strict than the standards for determining "obscenity.").

¹⁰⁰ See *Miller v. California*, 413 U.S. 15, 15 (1973).

¹⁰¹ See *Osborne*, 495 U.S. at 103; *New York v. Ferber*, 458 U.S. 747, 747 (1982).

on its subjects.

There is an implication that the reason child pornography is categorically unprotected—regardless of whether it is obscene under *Miller*—is that child abuse is inherent in the *creation* of the child pornography. In other words, children must be sexually abused in order to create child pornography. This argument is further supported by the Court's decision in *Ashcroft*.¹⁰² There, the Court distinguished the pictures in *Ferber* from those at issue in *Ashcroft*, which used "virtual" images to depict children in sexual situations.¹⁰³ The Court reasoned that since no "actual" children were injured in the production of those pictures, "virtual" child pornography needed to reach the standard of obscenity set forth in *Miller* before being considered unprotected speech.¹⁰⁴ What this case made clear, once again, was that the issue was the impact of the picture itself on the child.

This leaves open the possibility of a new category of unprotected speech. Defining this category is particularly tricky. In order to avoid overbreadth problems, the category cannot be drawn too broadly. Thus, limiting the speech to "speech that physically or emotionally harms children" would be too broad, since it would be difficult to determine what type of speech would actually cause physical or emotional harm to children. However, given the Court's longstanding interest in protecting children from sexual abuse—evident in its decisions in *Osborne* and *Ferber*—limiting the speech to "speech that physically or emotionally harms children through sexual abuse" might be better-suited for the purposes addressed here.¹⁰⁵

Under this new category, McClellan's website would be unprotected speech under the theory that non-sexual pictures of actual children can be injurious to those children if published on a website whose primary objective is to promote pedophilia. In order to avoid an overbreadth problem, the category must be limited to situations in which the publication of the picture exposes the child to sexual abuse merely because of the context in which the picture is published.

A statute prohibiting this type of speech might look like this:

Any person who publishes a sexual or non-sexual picture of a

¹⁰² *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 234 (2002).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Some might argue that limiting the category to sexual abuse does not adequately cover the group that the category tries to protect. For example, if a picture of a child witnessing a crime is published in a newspaper, there is potential for that child to be physically or emotionally harmed as a result of the publication of that photo. However, since this Note is limited to prohibiting non-sexual pictures of children on pedophilia-related websites, the category will be limited to sexual abuse for the purposes of this discussion.

child on a website whose content is devoted to the promotion of sexual relations between adults and children – regardless of the legality of the content on the website – without the permission of the child's parent, is guilty of a misdemeanor, punishable by imprisonment in a county jail for not more than one year, a fine of not more than five thousand dollars (\$5,000), or by both a fine and imprisonment.

In *Ferber*, the Court found that the “distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children . . . [because] . . . the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.”¹⁰⁶ Additionally, in *Osborne*, the Court stated that “[t]he materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come.”¹⁰⁷ These cases thus acknowledge that the subject of a child pornography picture can experience abuse after the act of the picture being taken.

Jack McClellan's website provides an example of how the publication of a non-sexual picture of a child can result in the sexual abuse of that specific child. McClellan posted these pictures on a website aimed at providing information to sexual predators in a confined, local area of Seattle. While McClellan himself claimed that he never touched any of these children, the website did not discriminate against viewers—it was viewable by all, including child molesters. Thus, these children were put in harm's way simply because they engaged in innocent activities at their local park or school and happened to be photographed by McClellan.

Even if, however, none of these girls are physically molested as a result of McClellan's website, they will likely be subjected to emotional harm as a result of the publication of these pictures. When these girls get older and learn that their pictures were published on McClellan's website—a place where many sexual predators, including McClellan, likely thought about them in sexual ways—the psychological impact on these girls may be substantial. This is exactly the type of harm from which *Ferber* gave states broad leeway to protect children. Prohibiting this category of unprotected speech would thus not only be constitutional, it would also serve a legitimate state interest.

¹⁰⁶ *Ferber*, 458 U.S. at 759.

¹⁰⁷ *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

V. CONCLUSION

The First Amendment right to freedom of speech is a qualified right. Case law supports the proposition that the government has the ability to limit this right in order to protect legitimate state interests, such as child safety. Jack McClellan's website proves to be a paradigm of the type of speech that the government is entitled to restrict.

Though proposed legislation in California aims to restrict speech similar to that on McClellan's website, a closer examination of the proposal shows it will do little good, given the Supreme Court's strict limitations on the “imminent lawless action” standard. A better proposal, as I have suggested above, is legislation that restricts the use of non-sexual pictures of children on websites (or other materials) whose content, though also protected speech, exposes the child to sexual abuse merely because of the context in which the picture is published. Based on the case law, I believe this legislation would be constitutional, even in light of *Ashcroft*.

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