
Ronald W. Adelman
THE CONSTITUTIONALITY OF CONGRESSIONAL EFFORTS TO BAN COMPUTER-GENERATED CHILD PORNOGRAPHY: A FIRST AMENDMENT ASSESSMENT OF S. 1237

by RONALD W. ADELMAN†

I. INTRODUCTION

Child pornography continues to be a societal concern, despite repeated efforts to stamp it out. At both the state and federal level, the government vigorously investigates and prosecutes persons involved in the creation, distribution and possession of prohibited materials. The United States Supreme Court has encouraged the effort by giving the government considerable constitutional leeway in its fight. In New York v. Ferber, the Court upheld a statute barring the commercial manufacture, sale and distribution of child pornography. In Osborne v. Ohio, the Court took a significant step further by upholding a statute banning virtually all possession of child pornography, including possession in the possessor's home. Accordingly, participation in all aspects of the market in child pornography is now subject to prosecution.

† Copyright ©1996 by Ronald W. Adelman. Ronald W. Adelman received his J.D. from Fordham University School of Law in 1989 and is currently a candidate for the LL.M. degree at the Columbia University School of Law. This article was written in partial satisfaction of the requirements of that degree. The author would like to thank Irene M. Koch, Esq., for her assistance with this article.

3. Id. at 765. The Court upheld the statute because, inter alia, it "described a category of material the production and distribution of which is not entitled to First Amendment protection." Id.
5. Id. at 110-11.
6. See id. (where the Supreme Court extended the criminalization of child pornography from trafficking to mere possession); see, e.g., 1 U.S. DEP'T OF JUSTICE, ATTORNEY GEN-
Until now, the *sine qua non* of the illegality of child pornography has been the use of actual children in the creation of the pornographic images. Indeed, a state statute that was ambiguous in that regard was saved from constitutional oblivion only by use of a limiting construction.\(^7\) That limitation may soon disappear. Citing reports that wide dissemination of computer-generated images of child pornography (*i.e.*, images that are either entirely fabricated or altered by computer) will soon be practically feasible,\(^8\) Senator Orrin Hatch, on September 13, 1995, introduced the Child Pornography Prevention Act of 1995 ("Hatch Bill").\(^9\) The Hatch Bill would, for the first time, outlaw a "visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct."\(^10\)

Anticipating the enactment of a bill similar to that introduced by Senator Hatch, two commentators have attempted to assess the First Amendment validity of such a bill.\(^11\) Both conclude without hesitation that it would be held constitutional.\(^12\) However, both are analytically flawed. Their analysis is limited to selection of preferred dicta from *Ferber* and *Osborne*, and application of that dicta to the evils the authors themselves believe are inherent in computer-generated child pornography.

This article takes a different approach. Instead of predicting an outcome based on dicta that may have little relevance to the constitutionality of the Hatch Bill, this article sets out the First Amendment framework under which the Hatch Bill should be assessed.\(^13\) In addi-

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\(^7\) *Aman v. State*, 409 S.E.2d 645, 646 (Ga. 1991) (construing a statute outlawing "depiction of a minor" as limited to a photographic depiction of a "human being who was at that time a minor").


\(^10\) *Id.* § 3(5)(B) (emphasis added).


\(^12\) Johnson, supra note 11, at 326-27; Scheller, supra note 11, at 998-1000.

\(^13\) This article makes two stipulations about the computer-generated images at issue. First, the images in question, while sexually explicit, are not legally obscene. Obscene images can be prohibited with or without the inclusion of children. *Roth v. United States*, 354 U.S. 476, 485 (1957). Second, the images in question are wholly computer-generated, as opposed to computer-generated alterations of actual photographic images *(e.g., altering a photograph of a partially clothed child so that he or she appears to have been naked). Use of actual children, even in altered form, raises issues of exploitation that are not present with complete fabrications, thereby permitting an easier justification under the First Amendment for suppression of those images. This article addresses the more difficult First Amendment issues raised by complete fabrications. The first prosecutions under the Hatch
tion, this article explores the empirical findings Congress should make in support of the Hatch Bill to ensure the Bill’s survival of proper judicial scrutiny.

II. BACKGROUND

Child pornography using images of actual children has three characteristics which are objectionable to the vast majority of the population and to legislatures. First, this type of child pornography requires the participation of actual children in sexually explicit situations to create the images. Second, the dissemination of such pornographic images may encourage more instances of sexual abuse of children than would occur if the images did not exist. Third, such child pornography consists of images that are morally and aesthetically repugnant. Nevertheless, prohibitions on the creation, distribution and possession of these images raise at least a threshold First Amendment concern. As a result, such prohibitions require a compelling governmental interest.

The Ferber Court unanimously held that New York’s ban on “promoting a sexual performance of a child . . . less than sixteen years of age” was justified by a compelling governmental interest. That interest, the Court explained, was “that the use of children as subjects of por-

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14. For example, the Department of Justice found that child pornography is used as a method to seduce new child victims. Final Report, supra note 6 at 648-49; see also Osborne, 495 U.S. at 111 (concluding that encouraging the destruction of pornographic materials “is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity”).

15. For example, a recent Gallup poll found that nine out of ten Americans want magazines, movies and videos showing children in pornographic activities banned. Robert P. Hey, Uncle Sam and Private Citizens Go After Child Pornography, Christian Sci. Monitor, Sept. 28, 1987, at 5; see also Final Report, supra note 6 at 596-97; Ferber, 458 U.S. at 762-63 (reasoning that it is “unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work”).


17. Osborne, 495 U.S. at 108-11. Ultimately, the Ferber Court concluded that child pornography, as defined in the statute under scrutiny in that opinion, lay outside the protection of the First Amendment. Ferber, 458 U.S. at 763-64. The Court nevertheless engaged in “compelling interest” analysis to reach that conclusion. Id. at 756-63.

18. The statute defined “promote” as “to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise . . . .” Ferber, 458 U.S. at 751 (citation omitted).

19. Id. at 747.
nographic materials is harmful to the physiological, emotional, and mental health of the child." In other words, the Court focused on the first characteristic identified above: harm to the subjects. Distribution of pornographic images, the Court added, is "intrinsically related" to that harm in two ways:

First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

The Ferber Court did not address the other characteristics of child pornography identified in this article. However, in view of the finding of a compelling governmental interest in the first characteristic—harm to the subjects—such recitation would have been superfluous in any event.

In Osborne, the Ohio legislature sought to go further to protect the subjects of child pornography. Specifically, the Ohio statute banned all private possession and viewing of child pornography, including possession and viewing in the defendant's own home. The Osborne Court distinguished the purpose of the Ohio statute from the case of Stanley v. Georgia, where the Court struck down a law banning the private possession of adult obscene material on First Amendment grounds. The majority reasoned:

The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted [the statute] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

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20. Id. at 758.
21. Id.
22. Osborne, 495 U.S. at 103.
23. Id. at 106. The statute, however, contained exceptions for material "presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance," or that "[t]he person knows that the parents, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred." Id. at 106-07. The literal language of the statute referred to all images of children "in a state of nudity." Id. But the Ohio Supreme Court had construed the statute as limited to nudity constituting a "lewd exhibition or involv[ing] a graphic focus on the genitals." Osborne, 495 U.S. at 113 (citation omitted). By a 6-3 majority, the Supreme Court held that the state court's construction shielded the statute from overbreadth. Id. at 121-22.
The three dissenting Justices, however, reasoned that the Ohio law was unconstitutional for the same reasons as the statute in Stanley.\footnote{26} While Osborne, like Ferber, clearly relied upon the concerns of using actual children, dictum intimated the Court's willingness to defer to the second characteristic identified in this article: the connection between the dissemination of child pornography and the commission of additional acts of sexual abuse.\footnote{27} According to the Osborne majority, "encouraging the destruction of [child pornography] is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."\footnote{28}

That dictum has been cited as evidence that the Court will support a ban on computer-generated child pornography.\footnote{29} However, the Osborne dictum is an extremely weak foundation for drawing that inference. If nothing else, its reasoning is outweighed by Ferber's contrary dictum. Specifically, the Ferber Court noted "that the distribution of descriptions or other 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."\footnote{30} There is nothing in Osborne which even arguably undercuts that statement. Moreover, the Ferber Court held that the "nature of the harm to be combated"—distribution of child pornography—"requires that the state offense be limited to works that visually depict sexual conduct by children below a certain age."\footnote{31}

In the abstract, the clarity of these statements would lead to strong skepticism about the chances of the Hatch Bill surviving judicial scrutiny. On the other hand, the implicit message of Osborne, not to mention political common sense, indicates that the Court will not lightly strike down a law purporting to prevent child abuse. The Court should find the proper middle ground by requiring the Hatch Bill, which seeks to shield new subject matter from constitutional protection, to justify the compelling reasons for doing so.

\footnote{26} Id. at 140 (Brennan, J., joined by Marshall and Stevens, JJ., dissenting). The dissenting Justices believed that, just like the statute struck down in Stanley, the Osborne statute impermissibly extended the government's reach "to mere possession [of the illicit materials] by the individual in the privacy of his own home." Id. (quoting Stanley, 494 U.S. at 568).
\footnote{27} Id. at 111.
\footnote{28} Id.
\footnote{29} Johnson, supra note 11, at 327.
\footnote{30} 458 U.S. at 764-65; see also id. at 763 (reasoning that "if it were necessary [to use pornographic images of children] for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative") (internal citation omitted). The Hatch Bill would foreclose these alternatives.
\footnote{31} Id. at 764.
III. THE PROPER FIRST AMENDMENT ANALYSIS

Because computer-generated images of child pornography do not use actual children, the first characteristic cited above, that characteristic of child pornography is irrelevant to analysis of the Hatch Bill. The third characteristic cited above—moral and aesthetic disapproval of the images—is present, but is legally insignificant. Except for materials that have been determined to be either legally obscene or expressed in the heavily regulated contexts of broadcast and commercial speech, no modern Court has upheld censoring legislation on that basis.

Accordingly, the Hatch Bill can be justified, if at all, by a sufficient showing that dissemination of even fabricated images of child pornography will lead to additional acts of sexual abuse, the second characteristic cited above. Senator Hatch's statement introducing his Bill makes no reference whatsoever to such evidence, although it does contain a conclusory assertion that child pornography of any type "encourages the activities of pedophiles and can be used to seduce even more young victims." This is insufficient. "When the Government defends a regu-

32. See, e.g., Miller v. California, 413 U.S. 15, 26 (1973) (holding that "at a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection").
33. According to the Supreme Court, the First Amendment has special meaning when applied to the broadcasting context. See, e.g., F.C.C. v. Pacifica Found., 438 U.S. 726, 747 (1978) (concluding that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection"); F.C.C. v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 799 (1978) (concluding that broadcast speech is different than other types of speech because regulation of broadcasts is essential because of interference with broadcast signals); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) (reasoning that the interest of the public outweigh the First Amendment interests of broadcasters); Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969) (holding that there is no "unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish").
34. See, e.g., Pacifica, 438 U.S. at 745-47 (reasoning that speech may not be suppressed simply because society deems it offensive).
35. Even such a factual showing would arguably fail to justify the Hatch Bill on First Amendment grounds. In American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986), the court accepted arguendo the findings in support of the Indianapolis anti-pornography statute that pornography tended to promote the "subordination" of women, including such evils as lower pay, sexual abuse and rape. The Court nevertheless held that, because "these unhappy effects depend on mental intermediation," pornography was still simply speech. Id. at 329. The same reasoning might apply here. On the other hand, the Supreme Court held that the governmental interest in suppressing private possession of child pornography (however that term is properly defined) is greater than the interest in suppressing private possession of adult obscenity. Osborne, 495 U.S. at 108-09 (distinguishing Stanley, 394 U.S. at 557). By analogy, a court reviewing the Hatch Bill may be willing to rely on effects that require "mental intermediation."
lation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'37 In other words, the advancement by Congress of a compelling interest is not enough, no matter how valid that interest may be in the abstract, without proof that the regulation "will in fact advance those interests."38

In the normal course of review of the constitutionality of a statute, the Supreme Court will afford the legislature extreme deference in considering the "essentially factual" assessments made with respect to the enactment of the statute.39 Judicial review under the First Amendment is an exception to that rule. The precise extent to which the Court will second-guess legislative factual findings is not entirely clear.40 In fact, some of the Court's pronouncements on the subject appear to contradict themselves in the course of the same statement. For example:

That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law.41 The most obvious translation of that statement is: "we will defer to legislative judgments when deference is due; when deference is not due, we will not defer." That ambiguity cannot be comforting to Congress, to litigating parties, or to other interested persons.

One potentially useful working definition, however, comes from the opinion in Landmark Communications, which addressed a law barring disclosure of confidential judicial disciplinary hearings.42 Summarizing a line of First Amendment cases dealing with efforts to limit out-of-court statements concerning pending trials and grand jury investigations, the Court deduced:

The 'working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished,' and that a 'solidity of evidence' is necessary to make the

37. Turner Broadcasting Sys., Inc. v. F.C.C., 114 S. Ct. 2445, 2470 (1994) (quoting Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434, 1455 (D.C. Cir. 1985)).
38. Id.
40. Compare Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) (noting that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake") with Turner Broadcasting, 114 S. Ct. at 2471 (agreeing in the First Amendment context that "courts must accord substantial deference to the predictive judgments of Congress").
41. Turner Broadcasting, 114 S. Ct. at 2471 (quoting Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 129 (1989)).
42. Landmark Communications, 435 U.S. at 829.
requisite showing of evidence. 'The danger must not be remote or even probable; it must immediately imperil.'

Justice Stewart's concurring opinion noted that: "There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." He nevertheless agreed with the majority that the perceived problem did not justify the legislative solution.

Similarly, the prevention of acts of sexual abuse of children is a highly compelling governmental interest. Nevertheless, the limitation on speech inherent in the Hatch Bill should dictate that it be backed by a "solidity of evidence" for it to be constitutional.

IV. THE LINK BETWEEN COMPUTER-GENERATED CHILD PORNOGRAPHY AND SUBSEQUENT SEXUAL ABUSE OF CHILDREN

Factual studies concerning the link between computer-generated child pornography and subsequent sexual abuse of children do not yet exist. This is hardly surprising, given that the technology needed to create such images is still not readily available. Advocates of a law like the Hatch Bill have instead relied on the findings of the 1986 Final Report of the Attorney General's Commission on Pornography ("Final Report"). Specifically, these advocates rely upon the Final Report's finding that child pornography has been used "to lure children to engage in sexual activity." There are three problems with reliance on the Final Report in this context, however, which are addressed here in ascending order of significance. First, the Final Report addressed its findings only to actual moving or still photographic images. Standing alone, this is likely to be only a minor problem. It is relatively easy to infer from proof that children are swayed by images of actual children the conclusion that they will also be swayed by lifelike computer-generated images. Indeed computer-generated images may be even more dangerous than photographic ones. It will soon be possible to create realistic sexually explicit images of a child's friends or siblings in an effort to convince that child that en-

43. Id. at 845 (citations omitted).
44. Id. at 848 (Stewart, J., concurring)
45. Id.
46. Id. at 845 (quoting Pennekamp v. Florida, 328 U.S. 331, 347 (1946)).
47. Johnson, supra note 11, at 315-16.
49. Scheller, supra note 11, at 998 nn. 71-72; see also Johnson, supra note 11 at 327-28 nn. 138-41.
50. See generally, FINAL REPORT, supra note 6.
gaging in sexual acts is acceptable.51

Second, the structure of the Final Report's discussion of child pornography demonstrates that the use of sexually explicit photos or films of children to lure other children played a relatively small part in the Commission's view of the overall problem.52 The Final Report gives little space and weight to the issue. Even more telling, the Final Report observed that "there [also] seems to be significant use of adult sexually explicit material for the same purpose," but concluded that "we do not want to take the phenomenon as sufficient" to justify additional restrictions on adult material.53 Thus, evidence of the use of sexually explicit materials in the seduction of children, according to the Final Report, was insufficient by itself to justify the suppression of such materials. Therefore, it is somewhat disingenuous to rely on the Final Report's findings without referring to this limitation.

Third, the Final Report specifically considered the issue of sexually explicit fictional depictions of children, and determined that such depictions fell outside the category of "child pornography."54 The basis for the limitation of suppression to images that used actual children, according to the Report, "is evident from the very nature of the outrage child pornography engenders—anger over the sexual abuse of children used in its production."55 As a result, there is strong argument that the Final Report stands for precisely the opposite result of the conclusion for which the advocates of the suppression of computer-generated child pornography have cited it. It may well be that a similar Commission meeting in 1996 would conclude that the suppression of computer-generated images is necessary, but that result cannot be presumed. At the very least, analyses relying on the Final Report should report those findings accurately.

In light of the foregoing, there is currently an extremely weak empirical showing that computer-generated child pornography will be used to induce participation by children in sexual conduct. The conclusion that the existence of child pornography leads to additional acts of sexual abuse certainly has logical force. On the other hand, the conclusion that the existence of child pornography leads to a decrease in such acts (by providing pedophiles with an alternative outlet) also has logical force. If the latter conclusion is true, there is a positive reason to permit com-

51. Johnson, supra note 11 at 327.
52. Final Report, supra note 6, at 649-50. Instead, the Report placed greater focus on the repeated victimization of children by distribution of the material amongst adults. Id.
53. Final Report, supra note 6, at 411 n. 74.
54. Id. at 405; see also id. at 596 (noting that while sexually explicit portrayals or accounts "might be deemed 'obscene,' and although they deeply offend modern sensibilities regarding the rearing and protection of children, they are not 'child pornography' in the specific legal and clinical sense that term has acquired over the past fifteen years").
55. Id. at 597.
puter-generated child pornography (but not pornography using actual children) as the lesser of two evils. On the current record, both conclusions are speculative. One conclusion, however, is not speculative: the Hatch Bill will criminalize the activity of many computer users who will never engage in acts of sexual abuse. That outcome may prove necessary in order to prevent acts of sexual abuse of children by other persons. Such an outcome should not rest on speculation, however, but on solid evidence establishing the necessary link.

V. CONCLUSION

Computer-generated child pornography is several years away from becoming a widespread practical reality. That gives Congress, acting on behalf of a concerned public, a window of opportunity in which to make a determination regarding the link between child pornography and additional acts of child sexual abuse based on facts, rather than on the speculation that supports the Hatch Bill. If the Hatch Bill becomes law based only on such speculation, Congress risks having a valuable law declared unconstitutional due to insufficient findings and risks enacting a law that, by "burn[ing] the house to roast the pig," unnaturally creates a class of criminals. For the sake of both the First Amendment and potential victims of sexual abuse, Congress should think before it acts in this matter.