An Examination of Rationales for the Continued Prohibition of Virtual Child Pornography

James Houston Bales, Independent Scholar

Since approximately 2004, a single-panel comic strip has been floating around on the internet: A man with a shocked expression on his face seated at a computer exclaims "Calvin and Hobbes?" while the text above the image reads "Rule 34: There is porn of it. No exceptions."[1] Since its inception as a meme, it has grown from a joke about what unexpected depravities can be found on the internet to a full-fledged phenomenon mainstream enough for *South Park* to joke about on Comedy Central.[2] Fanart communities have long embraced the concept behind Rule 34, with the idea of pornographic embellishment of existing properties becoming popular enough to be commonly listed as one of the main types of doujinshi, or fan-created manga.[3]

In the West, the Tijuana Bibles of the 1920s and 1930s lampooned many popular characters, real and created, including the clearly high school-aged cast of the *Archie* comics and other invented and popular characters of dubious legal age.[4] But setting aside the questions of taste, copyright, and expression such images raise, focus instead on the oft-ignored speech balloon in the center of that comment: The content which has the cartoon man so shocked is, ostensibly, a pornographic image featuring, as his creator Bill Watterson describes him, the child Bill Watterson never was.[5]

This creates a problem where Rule 34 and fan-created content in the same vein runs afoul of the law. Passed in 2002, the PROTECT Act contains in its provisions this statement: "Nonrequired Element of Offense. – It is not a required element of any offense under this section that the minor

NB: The editors of *The Phoenix Papers* recognize that this is a delicate subject and caution readers to judge for themselves whether the material will adversely affect their mental and emotional health before reading this article. We welcome letters to the editor should anyone wish to respond to this or any other article.

[1] Rule 34, http://knowyourmeme.com/memes/rule-34.

[2] *South Park* Addresses Rule 34, Yaoi, And the Problem of Aggressive Acceptance, http://decider.com/2015/10/29/south-park-yaoi-rule-34/.

[3] What is Doujinshi, http://blog.fromjapan.co.jp/en/others/what-is-doujinshi.html.

[4] Oh Archie! Archie and the Tijuana Bible Scene, https://www.bleedingcool.com/2017/01/30/oh-archie-archie-tijuana-bible-scene/.

[5] About Calvin and Hobbes, http://www.calvinandhobbes.com/about-calvin-and-hobbes.

depicted actually exist."[6] Created in the aftermath of *Ashcroft v. Free Speech Coalition*, the PROTECT Act writes broad definitions that, especially when combined with subsection (c) listed above, are designed to recriminalize what *Ashcroft v. Free Speech Coalition* found to be protected speech: Non-obscene pornography in which no minors are involved.[7]

Before getting into the arguments, the nature of this subject matter and the arguments to come requires that certain concepts be defined before moving forward, lest the arguments lose their power through an assumption of support for concepts they do not support. Specifically, the concept of virtual child pornography needs a definite and limited definition. Returning to the PROTECT Act, subsection (a) outlines specific requirements for the offense the title calls "Obscene visual representations of the sexual abuse of children:"[8]

> Any person who. . . knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that depicts a minor engaging in sexually explicit conduct; and is obscene; or depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and lacks serious literary, artistic, political, or scientific value; or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.[9]

What this statute seeks to criminalize is defined in *Ashcroft* as "virtual child pornography."[10] Recognized by the Supreme Court as early as 1982's *New York v. Ferber* decision, virtual child pornography is generally understood to be encapsulated by the phrase "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting" in the language of the PROTECT Act.[11] Put a bit more simply, virtual child pornography is pornography born wholly from the imagination, depicting children, but without any real child involved at any stage of its creation. Limited in such a way, the question can then be asked whether the creation, possession, and distribution of such depictions can even be a crime at all.

At this point, it is prudent to note that nothing in this paper should be construed as a justification of actual child pornography. Focusing on the problematic intersection of harm and a victimless crime is impossible where a victim actually exists. The Supreme Court recognizes this same problem when applied to this subject: "As a permanent

[6] 18 USCA § 1466A(c) (West).
[7] *Ashcroft v. Free Speech Coal.*, 535 US 234, 238, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).
[8] 18 USCA § 1466A (West).
[9] 18 USCA § 1466A(a) (West). Subsection (b) uses the same language to criminalize possession.
[10] *Ashcroft*, at 236.
[11] *New York v. Ferber*, 458 US 747, 763, 102 S. Ct. 3348, 3357-58, 73 L. Ed. 2d 1113 (1982); 18 USCA § 1466A(a) (West).

record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being."[12] Any argument for the legalization of such records of abuse is not an argument that can be made within the scope of this paper, and thus it must be set aside in favor of a narrow focus on the questions surrounding legalization of virtual child pornography.

Another sort of child pornography exists in the space between virtual child pornography and the records of abuse created in real child pornography, which I will term pseudo child pornography. Such images are discussed at length in *Internet Child Pornography and the Law: National and International Responses* by Yaman Akdeniz, although in relation to the laws of the United Kingdom. There, Akdeniz says the creation of pseudo child pornography is explicitly banned by statute, and Akdeniz gives an in-depth description of what the statute seeks to ban: "Psuedo-photographs are technically photographs, but they are created by a variety of ways including by computers by the use of photo/image software. For example, a child's face can be superimposed on an adult body or to another child's body together with the alteration of the characteristics of the body." [13] While Akdeniz goes on, expanding his definition to include virtual child pornography, the initial distinction he makes is quite important, especially when considered in light of Justice Kennedy's analogy to defamation in *Ashcroft*. Like child pornography, this paper will not argue for any legal protection for pseudo child pornography. Leaving aside England's logic, which is largely used to justify child pornography laws in general and creates no good, specific argument unique to pseudo child pornography, Justice Kennedy's logic for defamation as a justification for child pornography laws is possibly a better argument against pseudo child pornography than it is against general child pornography.

Generally, "[d]efamatory matter may include statements that would subject one to hatred, ridicule, obloquy, or contempt, or to statements which would reflect negatively on one's reputation for morality, integrity, or honesty, or to matter which tends to negatively affect one's financial status or standing in the community." [14] While a complete analysis of defamation as it relates to the world of pseudo child pornography is beyond the scope of this paper, it is safe to say that a young person could certainly suffer reputational harm or be subjected to a myriad of negative reactions if their picture were to be manipulated into pornography.

People over the age of consent clearly feel harmed by falsely manipulated images, as seen in Meryern Ali's 2014 lawsuit against Facebook over a jilted lover posting such manipulated images.[15] But it is another

[12] *Ashcroft*, at 249, citing *New York v. Ferber*, 458 US 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

[13] Yaman Akdeniz, Internet Child Pornography and the Law: National and International Responses, 20-21 (Ashgate 2008).

[14] Defamation: A Lawyer's Guide § 1:7.

[15] Woman files $123M suit against Facebook over photoshopped nude photos, https://arstechnica.com/tech-

paper altogether to make or refute that argument. For the purposes of this paper, it is enough that a pseudo child pornography case has someone who could be called a victim to remove it from the analysis of this problem.

With the topic limited in such a manner, a plain statement of the argument can finally be made: Virtual child pornography should be decriminalized, as real-world justifications and theories of criminal justice fail to support its continued criminalization. While not explicitly recognized in the Constitution, the United States has always quietly recognized a right not to be criminalized.[16] Implicitly recognized by the 5th and 8th Amendments to the Constitution, the right not to be criminalized is simply the right of personal autonomy, to do what one pleases as long as they bring no harm to another.[17] For an example of the right not to be criminalized at work, take a look at *Griswold v. Connecticut*.[18] In this case, the Supreme Court outlines the right to privacy, looking to the 1st, 3d, 4th, 5th, and 9th Amendments to extend to the people a right to privacy, which when described in terms of being "left alone" seems very much like a right not to be criminalized.[19] In our current climate of prison overcrowding and clogged court systems, such considerations are of extreme importance, as seen in situations like California's Proposition 47, which has led to the release of thousands of inmates.[20] This right not to be criminalized is important to note because while decriminalization in general is growing in popularity, a trend that can be noted in fields such as abortion and marijuana legalization, sex crimes remain one area where runaway criminalization is not only accepted, it is popular.[21] This popularity of sex offender creation and vilification flies in the face of the principles of criminal justice this nation was founded on, and should thus be resisted unless good reason can be shown for it.

But why this particular controversy? Many reasons set virtual child pornography apart as worthy of decriminalization. First is the distinct lack of public knowledge on this controversy. Returning to the old Rule 34 joke recounted earlier reveals an interesting

policy/2014/07/woman-files-123m-suit-against-facebook-over-a-photoshopped-revenge-porn/.

[16] Dennis J. Baker, *The Right Not to Be Criminalized: Demarcating Criminal Law's Authority*, 1 (Ashgate 2011).

[17] *Id*., 9 and 12-13.

[18] *Griswold v. Connecticut*, 381 US 479, 484, 85 S. Ct. 1678, 1681, 14 L. Ed. 2d 510 (1965).

[19] *Id*.

[20] California prisons have released 2,700 inmates under Prop. 47, http://www.sfgate.com/crime/article/California-prisons-have-released-2-700-inmates-6117826.php.

[21] *Roe v. Wade*, 410 US 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); Marijuana Decriminalization and Its Impact on Use, http://norml.org/aboutmarijuana/item/marijuana-decriminalization-its-impact-on-use-2; Assembly to Pass Comprehensive Legislation to Combat Human Trafficking, http://assembly.state.ny.us/Press/20150316/; Jill S. Levenson et al., Public Perceptions about Sex Offenders and Community Protection Policies, 7 Analyses of Soc. Issues & Pub. Pol'y 2 (2007) available at: https://www.innovations.harvard.edu/sites/default/files/105361.pdf.

problem, even with Google set to filter explicit content, a pornographic image featuring Calvin and Hobbes is within the first five results when conducting an image search for "Calvin and Hobbes Rule 34." Such ignorance is not isolated to old internet jokes either: In a survey of adults conducted at crime watch meetings in two American cities, one-third of respondents agreed with the statement "downloading child pornography from a newsgroup is legal" and eight percent of respondents believed that "viewing computer-generated children in sexual situations is okay."[22] This ignorance is made all the more dangerous by the fact that this is not a crime that, like Colorado's old adultery statute repealed in 2013, is unenforced.[23] Instead, this is a crime that is used to exact extensive punishments from people who are ignorant of the law.

Take the case of Danny Borgos and John R. Farrar.[24] Inmates at the federal prison in Seagoville, TX, both men were found to be in possession of virtual child pornography inside the prison. Borgos had a 37-page comic book and Farrar had six images. For his images, Borgos received an additional ten years in federal prison on top of his original five-year sentence. Farrar's punishment is unknown at this time. Also instructive is the prosecution of Christopher Handley, an American collector of Japanese comic books known as manga, who has the distinction of being the first person prosecuted under the PROTECT Act for offenses stemming solely from possession of virtual child pornography. [25] Handley's prosecution is especially of interest because the items he was prosecuted for were not collected for their obscene nature, but were instead acquired for his larger manga collection. Indeed, these successful prosecutions under the PROTECT Act for marginal content seem to be the norm rather than outliers. In his analysis of child pornography prosecutions between 2002 and 2004, Akdeniz found three attempted uses of a virtual child pornography defense in three thousand child pornography prosecutions; none were successful. [26] Either these prosecutions represent a policy successfully enacted into law, or people making innocent mistakes concerning a law they do not understand.

The second reason virtual child pornography should be decriminalized is the distinct lack of a victim. Thus far, most of the reasoning behind the continued criminalization of virtual child pornography has been the same as that supporting the continued criminalization of all child pornography: The harm to the child. Julia

[22] Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet*, 98 (New York Univ. Press 2001).

[23] Bill To Repeal Of Colorado Adultery Law Signed [sic], http://www.denverpost.com/politics/ci_22850726/bill-repeal-colo-adultery-law-signed.

[24] Two Federal Prisoners Face Additional Time for Possession of Comics, http://cbldf.org/2015/11/two-federal-prisoners-face-additional-time-for-possession-of-comics/.

[25] US Manga Obscenity Conviction Roils Comics World, http://www.wired.com/2009/05/manga-porn/.

[26] Yaman Akdeniz, *Internet Child Pornography and the Law: National and International Responses*, 136 (Ashgate 2008).

O'Connell Davidson, in an extreme example, likens pedophilia to necrophilia, and thus uses its impermanence to reason that it is a search for permanence that drives child pornography: "[n]ecrophiliacs, like paedophiles, must lose what they love. The dead body eventually decomposes and goes away, just as the child one day ceases to be a child and the once treasured union vanishes."[27] Davidson goes on to discuss notorious serial killer Jeffrey Dahmer's need to document his victims with photography before continuing the analogy:

> In the same way, storing tape recordings, film, and photographs of sexual acts of great violence being perpetrated on small children alongside images of milder molestation, perhaps also "ordinary" pictures of children seems to drain the children and the adults involved of any meaning beyond the paedophilic fantasy.
>
> These collections make paedophilia – the idea of sex which is unthinkable, impossible, forbidden – into a graspable object, and, as such, something that can be controlled and managed, ordered, arranged and rearranged, devoured and spat out by paedophilesm instead of something that consumes and then emits them.[28]

Davidson extends the harm to the child by broaching the idea that the parent-child relationship is something that, due to the nature of mutual reliance between parents and children spread across a generation – beginning first in the child's reliance on the parent and ending in the aging parent's reliance on the child – should be preserved from harm at all costs.[29] Described by Davidson as the child's "quasi-mythical power of social linkage," much is made of this relationship, as well as the fact that children are reliant upon parents to navigate the world through their parents, and are thus in a position vulnerable to exploitation.[30]

While Davidson's criticisms remain valid for her main premise, focusing on children in the global sex trade, her arguments ring hollow when applied to virtual child pornography. First, in her creation of an analogy to Dahmer, especially when considered in light of her argument that child pornography is consumptive in nature, Davidson is approaching child pornography from the perspective of a record of abuse. And when applied in that context, her argument is quite valid: Molesters often do use virtual child pornography to cement their activity into something lasting. But virtual child pornography is not a record of anything real. Perhaps an argument can be made for fantasy expression, but that is not the argument Davidson is making. She is arguing from a perspective of a record of abuse, and thus her argument fails to provide much justification for criminalization of virtual child pornography.

Likewise, her criticism of sexual exploitation of children is lacking. The connections she cites are largely based in myth. While Americans generally connect to

[27] Julia O'Connell Davidson, *Children in The Global Sex Trade*, 101 (Polity 2005).
[28] *Id*.
[29] *Id*., 18-19.
[30] *Id*.

extended family through history, nothing in that connection implies any favoritism for the parental generation.[31] In fact, the familial unit has a history of sustained fragmentation, rendering the logic of intergenerational links to be perhaps a bit of a spurious leap, at least when discussing the American family.[32]

In any event, neither justification put forward by Davidson alleges anything in relation to a nonspecific victim when no physical abuse has been perpetrated. Her arguments are focused on situations where real children are involved, and generally fail to justify any real reason for the continued criminalization of virtual child pornography.

Another reason for the decriminalization of virtual child pornography is a continuation of the analysis above: No argument used to justify its continued criminalization without a focus on a victim presents an adequate justification for criminalization. One book presents the abstract theory that creators of virtual child pornography might trade virtual images for the real thing, an idea Charles Patrick Ewing fleshes out further into an argument that a marketplace exists for child pornography, and that every entrant into the market helps to drive it via simple economics.[33] This argument falls apart almost immediately due to the observed effects of the internet on the general market for child pornography. In simple terms, there is no market anymore, either for trade or for money. "The typical offender received and/or distributed child pornography using a P2P file sharing program and not for financial gain. Most offenders used open P2P file sharing programs that did not require the offenders to trade images in order to receive new videos or images from another."[34] The economic argument continues to fail, as experts believe the market for child pornography of any kind has moved almost completely to an exchange model not even requiring an infusion of new content:

> One of the few studies of child pornography found no evidence to support a common assumption that possession of child pornography results in more production. In a national study of arrests for child pornography production at two different points in time (2000-2001 and 2006), researchers found no evidence that child pornography production is increasing or that child pornography producers were targeting younger victims or violent abuse. Perhaps more significantly, the data suggest that online distribution was not a motivation for [child pornography] production. Instead, a substantial number of [child pornography] producers appear to be creating images for their

[31] Steven Ruggles, The Transformation of American Family Structure, 103 Am. Hist. Rev. 105 (1994), http://users.pop.umn.edu/~ruggles/Articles/AHR.pdf.
[32] *Id*., 107
[33] Kerry Sheldon & Dennis Howitt, *Sex Offenders and the Internet*, 78 (John Wiley & Sons 2007); Charles Patrick Ewing, *Preventing the Sexual Victimization of Children: Psychological, Legal, and Public Policy Perspectives*, 108 (Oxford Univ. Press 2014).
[34] *Id*.

> own use and not for distribution or trading.[35]

If destroying the market incentive for child pornography is the purpose for anti-child pornography legislation of any stripe, it appears to have done so. The internet has effectively destroyed the commercial market for child pornography that existed before the inception of child pornography legislation due to its open and free access to any media someone is willing to share. When looking at these market forces in the context of virtual child pornography, the trade market is nonexistent, having been destroyed by free exchange. Thus, the nonexistent marketplace invalidates the argument that virtual child pornography somehow helps to support the market for real child pornography.

Ewing identifies another theory often used to justify a continued prohibition of virtual child pornography, termed the "hands-on argument."[36] This argument is simple: That users of child pornography of any kind are more likely to abuse real children. This is a simple argument that fails on its face as soon as any research is applied. Studies from Canada, Britain, and Switzerland of convicted contact sex offenders and child pornography all show minimal levels of recidivism among the child pornography offenders, especially when compared to the contact offenders. The Swiss study reported the highest rate of recidivism after a conviction with about four percent of child pornography offenders re-offending in any way.[37] The British and Canadian studies reported similar numbers. In the Canadian study, six percent of those studied had another child pornography offense, while one, total, had a future contact sexual offense.[38] The British study showed a re-offense rate of four percent for child pornography users, compared to a twenty-nine percent rate for those found guilty of a contact offense originally.[39] Another study conducted by psychologists with the aim of determining the probability of re-offending found some very surprising results about child pornographers.

> [Child pornography] offenders appear to comprise a subgroup of sex offenders characterized by taxonomic heterogeneity. Those apprehended with child pornography have a sexual interest, if not a sexual preference, for children, and, given prevailing DSM criteria, are frequently diagnosable as pedophiles… Paradoxically, this group of pedophiles, as noted, is at low risk to commit hands-on sexual assaults of children.[40]

A corollary to this argument is the general argument that viewing pornography makes a person more likely to act based on the fantasies portrayed in the material they view. But as Sheldon and Howitt point out, research supporting this argument, where it exists, is slim and can be interpreted to support either side of the argument.[41] As a

[35] *Id*., 109.
[36] *Id*., 110.
[37] *Id*., 111.
[38] *Id*., 110.
[39] *Id*., 111.
[40] *Id*., 113.
[41] Sheldon and Howitt, 9-10.

justification for continued criminalization, this is a weak argument, especially when virtual child pornography is considered. According to the research, persons using child pornography are extremely unlikely to actually engage in any kind of child abuse. The argument for criminalization based on an escalating offense just is not supported by the evidence, which illustrates that child pornography offenders are unlikely to escalate their offense.

Another argument used to justify criminalization of child pornography is termed "The Grooming Argument."[42] This argument, like the Hands-On argument, is simple: That child molesters will use images of child pornography to normalize abuse in the minds of their victims and diminish the likelihood of reporting. This argument suffers from two chief problems. Firstly, as detailed above, child pornography offenders are extremely unlikely to have a contact offense of any kind. "Paradoxically, this group of pedophiles, as noted, is at low risk to commit hands-on sexual assaults of children." [43] This is not to say such an offender is nonexistent, but no data exists to support such a contention beyond anecdotal evidence from people already in trouble for a contact offense. One survey of 290 child pornography possessors revealed that 76.6 percent of responders had never shared child pornography with a child, and, while the lesser responses ranged from once to occasionally, there was no indication of any frequent sharing of such material with children.[44]

As previously discussed, there exists little justification in terms of real-world reasons for the continued criminalization of virtual child pornography. The real-world justifications can be broken down into two basic categories: Those that support the continued criminalization of child pornography but fail to provide any reason to justify criminalization of virtual child pornography, and those that can provide no justification for either argument. Davidson's argument of harm to the child presents the best logic that can continue to support the criminalization of child pornography in general. Yet it still fails to justify the criminalization of virtual child pornography due to the lack of a child to harm in a virtual environment: When viewed as a record of abuse, there is no reason to support criminalization when no abuse has occurred.

The other arguments discussed here fall into the second category: Arguments that do not support the continued criminalization of any form of child pornography. Davidson's argument for the integrity of the familial bond is weak at best, relying on a familial construction that, if it ever existed, was a fleeting moment in history that has long since passed. The marketplace argument may have been relevant thirty or forty years ago, but advances in technology have long since invalidated the marketplace as any justification for policy; any remaining vestiges of a commercial market for child pornography are minimal and are likely untouched by any virtual creation. The hands-on argument fails as well, as all the data indicate the exact opposite: That child pornography consumers are actually less likely to molest children. The grooming

[42] Ewing, 113.
[43] *Id*.
[44] *Id*., 114.

argument shows the same sort of data deficiency. Actual molesters just do not fit into the same mold as consumers of child pornography.

If real-world considerations do not present a compelling argument for the decriminalization of virtual child pornography, some theory of justice must. But a utilitarian analysis of such an offense does not support continued criminalization.

In its most basic form, utilitarianism is the concept of the most good for the most people. A more detailed definition of the concept can be stated thusly:

> In the notion of consequences the Utilitarian includes all of the good and bad produced by the act, whether arising after the act has been performed or during its performance. If the difference in the consequences of alternative acts is not great, some Utilitarians do not regard the choice between them as a moral issue. According to Mill, acts should be classified as morally right or wrong only if the consequences are of such significance that a person would wish to see the agent compelled, not merely persuaded and exhorted, to act in the preferred manner.[45]

As a legal principle, this translates into a balancing act performed between not only the good and the ill to the individual, but the good and ill to society as well. As illustrated by Tom Stacey:

> Utilitarians identify at least four major potential benefits of criminal punishment: Specific deterrence, general deterrence, incapacitation, and rehabilitation. Specific deterrence exists when punishment deters the punished offender from committing criminal acts in the future. General deterrence refers to a punishment's effect of deterring not the offender herself but rather others who are similarly situated from committing the same or similar criminal acts in the future. . . Incapacitation refers to the effect of imprisonment or the death penalty of removing the offender from society, thereby preventing her from committing offenses. Finally, rehabilitation refers to the punishment's possible effect of reforming the offender so she does not commit future offenses.[46]

Under a utilitarian logic, virtual child pornography should not be a crime. While good arguments can be made for its specific deterrent effect, the general deterrent effect is woefully out of balance with the results achieved. The same goes for incapacitation and rehabilitation; while good arguments can be made on both fronts, a larger utilitarian context leads to certain questions about whether the current course of action is the best one.

As the data from Ewing's examination of the issue indicate, the current state of child pornography prosecution is quite successful at the utilitarian goal of specific deterrence. Recidivism among general child pornography offenders is extremely limited.

[45] Utilitarianism, http://www.utilitarianism.com/utilitarianism.html.

[46] Tom Stacey, *Criminal Law: Cases and Materials*, 22 (Jayhawk Ink, 2014).

If the goal of a well-crafted law is to deter people from committing the same offense again, then the current state of child pornography prosecutions is good. Equally good is the logic for rehabilitation; according to Ewing's data, child pornography offenders do not reoffend. The problems from a utilitarian perspective arise in the fields of general deterrence and incapacitation.

For general deterrence to work, the knowledge of the law must be something the average person understands and can make an informed decision around. In this field, the law is anything but clear. Recall the story of Handley recounted earlier. While Borgos and Farrar may not garner much sympathy due to their status as inmates, Handley represents an interesting example, especially in fandom communities and to manga consumers. Prosecuted for his indiscriminate collecting, Handley's case represents two obstacles to any general deterrent purpose: The lack of a clear standard and the interaction of the law with a culture it is not prepared to accommodate.

Put simply, the PROTECT Act is not a well-written law. Consisting of six subsections, the law first outlines two offenses that are identical in most senses, with the difference stemming from the "intent to distribute" language in subsection (a) that is lacking in subsection (b). The law loses any semblance of clarity when it incorporates the *Miller* test. While the incorporation of this test allows the PROTECT Act to withstand constitutional challenges, it creates a continued failing where general deterrence is concerned. The law hinges on either a finding of obscenity or artistic merit. Both are standards with no inherent predictability, obscenity being subject to the moral whims of an ever-evolving community and merit being subject to the whims of taste and politics. Perhaps the only forms of virtual child pornography that can truly be predicted to be compliant with the law are items with scientific value. If so, the logic behind the law is in conflict with the holding in *Ferber*, where the court specifically held that "We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem."[47]

The general deterrent purpose of the law is also undermined by the global economy. Of note in Handley's case is the fact that Handley was not importing illicit items from Japan. Everything he purchased and imported was legal in its place of origin. Japan has always had a different view on this question than does the West. In Japan, a genre of virtual child pornography, lolicon, has found a niche, legally, as an expression of masculine frustration with overtones of ownership.[48] The key aspect to note here is not just its legality in Japan, but its expression of something overt and noticeable in Japanese culture in this moment. If one is, as Handley was, immersed in another culture through the global reach of the internet and FedEx, questions of legality and obscenity can get quite muddy, leaving the general deterrent

[47] *New York v. Ferber*, 458 US 747, 761, 102 S. Ct. 3348, 3357, 73 L. Ed. 2d 1113 (1982).

[48] Catherine Burns, *Sexual Violence and the Law in Japan*, 32-33, (Routledge Curzon 2005).

effect of a law designed to control such things diminished, to say nothing of the remaining land mine for other collectors and consumers in America.

Until now, this paper has concerned itself strictly with the federal statutes governing virtual child pornography. But when considering general deterrence, the entire body of effective law a person must consider should be taken into account. In 2014, forty-nine states had their own statutes governing mere possession of child pornography – Nebraska is the sole exception.[49] On the subject of virtual child pornography, these statutes are as diverse as Alaska's, which carves out a specific exception for virtual child pornography, and Ohio's, which is written broadly enough to encompass not only visual materials, but written material as well.[50] A full accounting of the laws of all fifty states is beyond the scope of this paper, but their interaction in the mechanics of general deterrence must be noted, since the state one is in matters if the federal government declines prosecution or if the charge is one in a list of state charges. For this paper, it will be enough to say that in this modern, interconnected age, the varying laws of fifty-one separate state and federal jurisdictions in one nation alone complicate matters when trying to make an informed decision about one's conduct under the law, much less the added complications of international distribution.

Another thought worth noting on the subject of general deterrence is that the law as it is constructed encourages harm. Drawing a distinction between child pornography and its record of abuse and virtual child pornography with its genesis in the imagination is perfectly fine when working in a theoretical space, such as a research paper. Practice is rarely as neat. Here, the example of Borgos is instructive. Without causing any harm, Borgos' sentence was trebled. Under a general deterrent logic, such a punishment is counter-productive. Ideally, a general deterrent would channel would-be offenders into areas with less harm. But in this instance, the lesser harm offense, possession of virtual child pornography, was punished more severely than possession of actual child pornography. Since the law makes no meaningful distinction preferring the less harmful offense, the general deterrent logic is undermined, as there is no incentive either by carrot or stick to reduce criminal activity to a less harmful level.

Just as the general deterrent purpose of the PROTECT Act and similar laws is undermined by their attempt to encompass as much as possible, so, too, is the incapacitory purpose of the law undermined by an attempt to encompass as much as possible. Ewing catalogs the reactions of federal judges to the state of sentencing, referencing a 2010 survey of federal trial judges: "69 percent of those who responded said penalty ranges for receipt of child pornography were too high; 70 percent said penalty ranges for possession offenses were too high." [51] While the incapacitation purpose of the law is served in placing people in prison to prevent continued offenses, this purpose should be balanced

[49] Ewing, 103.

[50] Alaska Stat. Ann. § 11.61.127 (West); Ohio Rev. Code Ann. § 2907.321 (West).

[51] Ewing, 106.

against the rehabilitative purpose, especially since the expense of housing an inmate is so high. And, as Ewing's other research indicates, the recidivism rate for users of child pornography is extremely low, making them excellent candidates for release. Thus, the mandatory minimums, as indicated by the surveyed trial judges, are out of alignment with the rehabilitative purpose of the law, and serve little justifiable reason for continued incarceration under an incapacitation theory. After all, if rehabilitation works, a utilitarian should recognize that a productive member of society serves more good than an incarcerated drain.

Finally, the harm principle does not support the continued criminalization of virtual child pornography. An element of the retributivist approach to criminal justice, Tom Stacey describes the harm principle thusly:

> [F]or a retributivist, the gravity of the wrong depends partly on the degree to which the offender has infringed upon the rational autonomy of another person. Other things equal, homicide is worse than theft because homicide completely and forever extinguishes an individual's freedom to make rational choices about how to live his life. In contrast, theft merely deprives a person of some of the means he relies upon in making those choices and limits those choices.[52]

While Stacey couches his argument in terms of autonomy, he is articulating the harm principle in a nutshell: The criminal law should endeavor to punish those who inflict more harm – or more deprival of autonomy – more harshly than those who inflict less harm. This principle clearly illustrates the strongest argument in favor of the decriminalization of virtual child pornography, running like a thread through the entirety of this paper: Virtual child pornography produces no harm. Never is the rational autonomy of another impacted in a negative way by the use of virtual child pornography.

Recall the earlier real-world justifications for criminalizing child pornography in general, or virtual child pornography specifically: They either revolved around incorrect assumptions, outdated data, or on the assumption that there was a real person wronged in the creation of the image. In child pornography, the images create a record of abuse for later and eternal consumption; recall Davidson's Jeffrey Dahmer analogy. Virtual child pornography creates nothing of the sort.

In fact, the continued prohibition of virtual child pornography may even cause harm. Recall again the cartoon character's hapless encounter with Rule 34, or Handley. Both are instances of conduct assumed to be innocent that could, or in Handley's case did, run the unwitting computer user or Japanophile afoul of a hard to predict law. The law is not written to be predictable, relying on the amorphous concept of obscenity or the fickle tastes of a local community. The law is especially ill-equipped to handle the local community's intersection with a wider world of different values and strange ideas. Like Handley, a revulsion to something culturally significant

[52] Stacey, 24.

but new and strange to another culture can lead to a horrendous result.

Another method in which the law creates harm is in the way it penalizes something that could potentially be used to prevent harm. An internet survey of "boy-attracted pedosexual males" determined that 84 percent of respondents found child pornography to be a sufficient substitute for seeking out boys in the real world, and the same proportion explicitly said that using child pornography did not increase their urge to seek out boys in the real world.[53] This benefit was derived from something terrible, the record of abuse left from the abrogation of another's autonomy. But the survey results point to another possibility. What reductions could be made in the exploitation of children if virtual child pornography, created explicitly from the imagination, were available to help people with such urges control their lust?

An additional point that should be noted from this examination speaks directly to manga consumers and consumers of Japanese culture, especially in this modern age of immediate availability of digital products and the unprecedented access to markets with different laws from the United States. Be aware of the legality of what you are viewing where you are viewing it, especially on the internet. While many aggregators of fanart use disclaimers and site rules to discourage the posting of virtual child pornography, the immense popularity of characters that are underage or even appear to be underage leads to no shortage of available virtual child pornography – a fact that can be seen in rule34.paheal.net's database that aggregates user-submitted Rule 34 content and returns 365 images for the search "Eric Cartman," an eight year old character from Comedy Central's *South Park*[54] – all of which per the PROTECT Act as applied in Handley's case would be highly illegal. Creators of such content should check with qualified counsel in their state to ensure they are not running afoul of either state or federal laws with their fanart, and owners of fanart sites should be more vigilant in the enforcement of their rules against virtual child pornography, lest they find themselves a test case.

There is plenty that remains beyond the scope of this project. While the solution this paper gestures towards would look something like the Alaska statute mentioned earlier, some explicit abrogation of liability for the possession and production of virtual child pornography, such a solution is likely unworkable due to the popular opinion that sex offenders deserve everything a state legislature wants to give them, and sex offenders that involved children receive even less sympathy. A real solution would probably look more like the path that led to the PROTECT Act, a series of challenges to Congress's reasoning before the court, culminating in a major decision that would start the entire process over again. Another question worthy of its own paper is the myriad examinations that could be made of state statutes. Nebraska's lack of a statute makes an excellent control for the examination of the effects various statutes have had. Finally, opening the door to fan-created art of underage characters reveals an

[53] Ewing, 112.

[54] rule34.paheal.net. Full citation omitted. Search at your own risk.

entire world for future exploration, with implications of copyright laws, the rights of the underage to produce and possess what would be obscenity for an adult as the sexting revolution rolls on, and the specter of the Internet above it all, bringing a global element to these examinations. All are avenues for other papers.

Virtual child pornography should be decriminalized, as real-world justifications and theories of criminal justice fail to support its continued criminalization. Real-world rationales both that support the continued criminalization of child pornography and virtual child pornography fail to illustrate any compelling reason for continued criminalization. A utilitarian analysis indicates some interesting points for continued criminalization, but any benefit a utilitarian reasoning would have for continued criminalization is lost in the questionable general deterrent and incapacitation values, which owe their problems to short-sighted political realities. A retributivist perspective is especially damning, as the harm inflicted by the law does not seem to be proportionate to the harm inflicted by the act; the law may even inflict much more harm than the act it seeks to punish.