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I. INTRODUCTION

Perhaps no subject magnifies the current tension between social science and legal scholarship more than virtual child pornography.[1] Legal historians acknowledge that while social science research received little acknowledgement or deference in the development of American jurisprudence, social science has steadily become an increasingly important influence on contemporary law.[2] Despite these advances, the one topical area that has been particularly slow and historically unwilling to accept social scientific methods and theoretical structures has been free speech law.[3]

For many behavioral scientists, the virtual child pornography case *Ashcroft v. Free Speech Coalition* is another illustration of legal scholarship's unwillingness to give social scientific evidence sufficient consideration when attempting to explain human behavior.[4] However, these social scientists should not be completely discouraged by the Supreme Court's analysis. Notwithstanding the Court's collective belief that virtual child pornography does not cause general harm to children, the Court has left open a prime opportunity for social science to support its contrary conclusions, though in a more limited context.

This Comment will describe that possibility and articulate how a state-created civil cause of action for child victims harmed by virtual child pornography satisfies the underlying free speech concerns and legal formalism obstacles articulated by the Court in *Ashcroft*, while

1. For various perspectives regarding the interplay between communication effects and the law, see JEREMY COHEN AND TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW (1990); PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972); Clay Calvert, *Hate Speech and Its Harms: A Communication Theory Perspective*, 47 J. COMM. 4 n.1 (1997).

2. JEREMY COHEN AND TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW 43-45 (1990).

3. *See generally* Mathew Bunker & David Perry, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 COMM. L. & POL'Y 1 (2004) [hereinafter *Crossroads*]; MATHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY (2001).

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

simultaneously providing social science the opportunity to validate its findings in individual cases.

This Comment is divided into five parts. Following this introduction, the subsequent section will describe the legal framework of free speech jurisprudence, including a background on child pornography and virtual child pornography law. Part III will provide a theoretical and historical basis for understanding the role of social science research in current free speech law and describe that background in light of the Supreme Court's most recent child pornography and virtual child pornography cases. Part IV will provide an alternative means for addressing harm caused by virtual child pornography and address similar attempts in the areas of violence and discrimination. Part V will discuss the strengths of that alternative and specifically describe how this approach addresses the obstacles presented in *Ashcroft*. Finally, this Comment will close with a brief summary and conclusion articulating why there is a general need for providing judicial redress.

II. FREE SPEECH JURISPRUDENCE

It is often asserted that the language of the First Amendment is "exceptionally crisp and unambiguous."[5] Absent from the clause are the seemingly typical constitutional and historically malleable terms *necessary*,[6] *unreasonable*,[7] *excessive*,[8] *unusual*,[9] and *due*.[10] The First Amendment reads simply that Congress shall make no law "abridging the freedom of speech."[11] Notwithstanding this textual clarity, arguably no other constitutionally protected right has prompted such pervasive and well-known commentary and debate.[12]

Despite the simplicity of a literal interpretation of the First Amendment, courts have been unwilling to adopt such a blanket standard.[13] Rather, courts have created categorical exceptions to core free

5. William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 110 (1982) (asserting that "most of the principal affirmative restrictions on government power are far more ambiguous or equivocal").

6. U.S. CONST. amend. I, § 8.

7. *Id.* IV.

8. *Id.* VIII.

9. *Id.* VIII.

10. *Id.* V.; XIV.

11. *Id.* I.

12. Thomas C. Kates, Note, *Publisher Liability for "Gun for Hire" Advertisements: Responsible Exercise of Free Speech or Self Censorship?*, 35 WAYNE L. REV. 1203, 1204 (1989).

13. *See* Roth v. United States, 354 U.S. 476, 483, 485 (1957) *overruled by* Memoirs v. Massachusetts, 383 U.S. 413 (1966) ("In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . We hold that obscenity is not within the area of constitutionally protected speech or press."); Van Alstyne, *supra*

speech protections.

A. Categorical Free Speech Analysis

The categorical analysis begins with a threshold determination of whether the government is restricting speech based on its communicative impact.[14] If the regulation is based on the communicative impact, the court then determines whether the kind of speech at issue fits into a previously identified category or exception,[15] for example, speech that is considered obscene, or that advocates imminent lawless action.[16] Pursuant to that determination, the speech restriction will be evaluated under varying levels of scrutiny.[17] If the speech falls within one of these

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note 5, at 111-12. Van Alstyne asserts that the literal interpretism perspective failed because of numerous "irresistible counter examples":

> Possibly the best known counterexample is a variation of an instance used by Mr. Justice Holmes: a person knowingly and falsely shouting "Fire!" in a crowded theater for the perverse joy of anticipating the spectacle of others being trampled to death as the panicked crowd surges toward the theater exit. The counterexample could be: the mere oral statement of one person to another, offering to pay $5,000 for the murder of the offeror's spouse; a Congressman's bribe solicitation; an interstate manufacturer's deliberately false and misleading commercial advertisements; a witness committing perjury in the course of a trial; or a member of the public interrupting (by speaking) someone else already speaking at a city council meeting. The counterexample need not be more complicated than a simple, soft statement made to the president that he will be shot if he fails to veto a particular bill or grant a certain pardon.

Id. at 113-14 (internal citations omitted).

14. "[C]ommunication has its central interest in those behavioral situations in which a source transmits a message to a receiver(s) with conscious intent to affect the latter's behavior." GERALD R. MILLER, EXPLORATIONS IN INTERPERSONAL COMMUNICATION 92 (1976). Communicative impact is the degree to which this interest is accomplished.

15. If a kind of speech does not fit into a categorical exception it is often referred to as core speech. Core speech typically receives the most stringent First Amendment protection. Typically this class of speech includes political, religious, aesthetic, scientific, or philosophical speech. Van Alstyne, *supra* note 5, at 140; *see, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (identifying allegedly defamatory statements criticizing public officials as protected core political speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (addressing the wearing of a black armband by a student to protest the Vietnam War as protected core speech).

16. EUGENE VOLOKH, THE FIRST AMENDMENT, PROBLEMS, CASES AND POLICY ARGUMENTS 2 (2001).

17. As a result, First Amendment scholars note that a principal task of the courts has been to make categorical determinations which ultimately lead to the court balancing the "kinds and degrees of evil" against the "improbability of their occurrence" to determine which kinds of abridgments should receive exception status. *See* Van Alstyne, *supra* note 5, at 139-40. Van Alstyne uses the language of *Dennis v. United States*, 341 U.S. 494 (1951), to support the following conclusion:

> [T]he principal task of the courts as graduating the kinds and degrees of evil to be balanced against the improbability of their occurrence resulting from particular speech to determine whether the degree of abridgment was unavoidable and therefore permissible. Correspondingly, an increasingly fashionable view holds that it is important to graduate the kind of speech to be invaded.

See also Van Alstyne, *supra* note 5, at 139-40 (describing the contending schools [of thought] the past several decades as "introducing finer gradations of a particular sort [that] may appear both more

categories the restriction may be given little if any protection.[18] If the restricted speech falls outside of one of the exceptions[19] or if the court refuses to create a new exception, the restriction may still be constitutional so long as the restriction passes strict scrutiny.[20] The following subsection will identify those free speech exceptions relevant to the area of virtual child pornography.

B. Child Pornography

The United States Supreme Court has determined that child pornography does not receive First Amendment protection and is, therefore, a categorical exception.[21] Under the current legal regime, both federal and state statutes outlaw the creation, sale, and possession of child pornography.[22] Because the Court has determined that child pornography is an exception that receives no free speech protection, controversy has primarily centered on what constitutes child pornography.[23] Child pornography is generally defined as sexually explicit material that features children under the age of seventeen.[24] The federal statute provides in whole that:

> "Child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical,

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moderate and less rigid in the measuring of protected speech").

18. VOLOKH, *supra* note 16, at 273-74.

19. Moreover, if the speech is commercial advertising it receives less protection. Cent. Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980). Speech is considered commercial if it proposes a commercial transaction. Bolger v. Youngs Drug Prods., 463 U.S. 60, 66 (1983). Once a court determines that speech is commercial the court must make a threshold determination of whether the speech is false or misleading. Bates v. State Bar, 433 U.S. 350 (1977) (providing that false and misleading advertising may be restricted by the government); *see also* Ibanez v. Fla. Dep't of Bus. & Prof. Reg., 512 U.S. 136 (1994). If the speech is commercial advertising but neither false nor misleading, the court applies a form of intermediate scrutiny sometimes referred to as the *Central Hudson* test. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). Under this test the speech may only be restricted if the restriction is justified by a substantial government interest that is directly advanced by the restriction and if the restriction is not anymore extensive than is necessary to advance that interest.

20. VOLOKH, *supra* note 16, at 2 (In order to pass strict scrutiny a restriction must establish that there is a compelling state interest and that the regulation substantially advances that interest, is not over inclusive, and does not burden a substantial amount of expressive conduct that does not implicate the interest.); *see also* Van Alstyne, *supra* note 5, at 140 (identifying the hierarchy of protected speech).

21. New York v. Ferber, 458 U.S. 747, 761 (1982).

22. 18 U.S.C. § 2251-2253 (2000).

23. Similarly, the debate with obscenity typically centers on what is and is not obscene. *See generally* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

24. *See* 18 U.S.C. § 2256(8) (Supp. 1999).

> or other means, of sexually explicit conduct, where - (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[25]

Although child pornography can be prohibited if it is considered obscene, it need not be obscene to be illegal.[26] Because of child pornography's unique effects on children, it is relegated under a different standard and analysis than general obscenity.[27] The Court first identified this separate standard in *New York v. Ferber*.[28]

In *Ferber*, the Court decided that child pornography should be an independent exception to free speech protection.[29] The Court reasoned that an exception was necessary given the state's previously recognized compelling interest to safeguard the physical and psychological well-being of children.[30] The Court supported this reasoning by finding that: (1) the production and dissemination of child pornography are related to the sexual abuse of children, (2) the underlying activity (sexual molestation and exploitation) is illegal, and (3) the societal and artistic value of child pornography is "de minimus."[31] Based on these findings and an identifiable compelling state interest, the Court concluded that the creation, distribution, and possession of child pornography could be banned regardless of free speech protection.[32]

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25. *Id*.; *see also* 18 U.S.C. § 2256(2) (Supp. 1999) (providing that "'sexually explicit conduct' means actual or simulated sexual intercourse . . . bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area"). In *New York v. Ferber*, 458 U.S. 747, 761 (1982), the Court upheld a statutory definition of child pornography as images that "visually depict" minors "performing sexual acts or lewdly exhibiting their genitals."

26. *Ferber*, 458 U.S. at 761.

27. If child pornography is obscene it can be prohibited under the Miller Standard. United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).

28. 458 U.S. 747 (1982).

29. *Id*.

30. *Id*. at 756-62. The court cited *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), for the proposition that "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens" and that "safeguarding the physical and psychological well-being of a minor is compelling."

31. *Ferber*, 458 U.S. at 756-66.

32. *Id*. The Court rejected the argument that the states' interests could be adequately addressed through the obscenity standard.

Eight years later, in *Osborne v. Ohio*, the Court made some additional observations that modified the *Ferber* rationale.[33] To begin with, *Osborne* identified a reasonable mistake of fact defense to the charges of possession or distribution that arguably limited prosecutorial power.[34] However, *Osborne* also noted harm to children in general as an additional state interest for precluding child pornography.[35] The Court specifically noted that "pedophiles use child pornography to seduce other children into sexual activity."[36] Some scholars identified this additional state concern as potential support for a broader reading of *Ferber*.[37] They were wrong.

C. Virtual Child Pornography

The technological imaging and computer science advances since *Ferber* and *Osborne* have made it increasingly possible to create life-like digital images of children performing sexual acts or lewdly exhibiting their bodies. These new computer generated simulacra are typically referred to as "virtual child pornography."[38] In 2002, the Court, recognizing a need for clarification, took the opportunity to determine the constitutionality of statutes banning these computer generated images.[39]

In *Ashcroft v. Free Speech Coalition*,[40] the Court addressed the constitutionality of the Child Pornography Prevention Act of 1996 (CPPA), a statute that prohibited possession or distribution of child pornography.[41] The act defined child pornography as any visual depiction that "is, or appears to be of a minor engaging in sexually explicit conduct" and, therefore, precluded the possession and distribution of virtual or computer-generated child pornography.[42] The statute relied on principles set out in *Ferber*, which, as noted above, banned child pornography because of the government's interest in protecting children.[43]

The government asserted that the CPPA's purpose, pursuant to

33. 495 U.S. 103, 112 (1990).
34. *Id*.
35. *Id*.
36. *Id*.
37. *E.g.*VOLOKH, *supra* note 16, at 168-69.
38. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 241 (2002).
39. *Id*.
40. *Id.* at 234, 235 (2002).
41. 18 U.S.C. § 2252A(a) (1996).
42. *Id*. at §§ 2252A(a)(6), 2256(8)(B) (Supp. V 1999).
43. *Id*.

Congressional findings, was to protect children by banning materials that threaten children.[44] Relying on social scientific research, Congress found that pedophiles often use the materials to encourage children to participate in sexual activity.[45] Moreover, Congress cited a number of studies that concluded that virtual child pornography, like actual pornography, would lead to an expansion in the creation and distribution of child pornography in general, resulting in an increase in the "sexual abuse and exploitation of actual children."[46] Finally, Congress pointed to a number of scientific findings that virtual child pornography would essentially whet the "sexual appetites" of potential pedophiles encouraging them to act on their perverted desires.[47]

The Court rejected these arguments and congressional findings supported by social and behavioral science research. The Court determined that virtual child pornography could not be included in the categorical exception of child pornography created by *Ferber*.[48]

The rest of this Comment will detail the Court's legal analysis and suggest an alternative means of addressing harm caused by virtual pornography. This Comment will also suggest what opportunities have been left open for social science, despite being essentially ignored and even rejected. However, in order to properly understand the Court's reasoning, the following section will provide a brief historical and theoretical background explaining why the judiciary has been reluctant to consider interdisciplinary research and theoretical models approaches when dealing with free speech issues.

III. THEORETICAL HISTORY AND APPLICATION

A. Historical Tension

Arguably no area of the law fosters the tension between behavioral science and traditional legal thought more than free speech.[49] Many interdisciplinary scholars have criticized American legal jurisprudence because historically, it has been slow to accept and incorporate social

44. *Id*.

45. Congressional Findings, note 3, following § 2251; *see also* Osborne v. Ohio, 495 U.S. 103, 112 (1990).

46. Congressional Findings, notes 4, 10(B), following § 2251.

47. *Id*.

48. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 257-59 (2002).

49. For various perspectives regarding the interplay between communication effects and the law, see JEREMY COHEN & TIMOTHY GLEASON, SOCIAL RESEARCH IN COMMUNICATION AND LAW (1990); PAUL L. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972); Calvert, *supra* note 1, at 4.

scientific methods and theoretical structures.[50] These scholars primarily point to the rise of legal formalism as the most significant obstacle to non-legal scholarship contribution. Specifically problematic for the non-legal researcher was the Langdellian concept of formalism[51] that premised the belief that the law independently generates "definitive and wise legal rules" that "could be applied deductively to all later cases, without the need for the contributions of other disciplines."[52]

Although legal formalism has been challenged by legal realists,[53] legal criticalists,[54] and general postmodern legal movements,[55] and displaced in large part by recent courts' willingness to accept and import methods and theories from other disciplines,[56] First Amendment jurisprudence has been remarkably true to the original concept of Langdellian formalism by refusing to consider alternative social scientific research.[57]

One explanation for First Amendment jurisprudence's unique ability to withstand outer-disciplinary influence may be the philosophical underpinnings of the principle behind free speech. Some have referred to this philosophical perspective as the "autonomy" or independent theory of free speech.[58] This theory emphasizes that government should always treat people as if they were both rational and autonomous by allowing them unfettered access to information.[59] The concept of restricting information and, therefore choice, seems counterintuitive to Western systems of government.

The independent theory of free speech presupposes an empowered individual, a person that cannot be compelled to act pursuant to receiving

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50. *See* Bunker & Perry, *supra* note 3, at 1-3 (2004); *see generally* BUNKER, *supra* note 2.

51. Formalism as articulated by Harvard Law School Dean Christopher Columbus Langdell. *See* Bunker & Perry, *supra* note 3, at 2 (2004) (citing CHRISTOPHER COLUMBUS LANGDELL, LAW OF CONTRACTS vi (1871)).

52. Bunker & Perry, *supra* note 3, at 2 (2004) (citing LANGDELL, *supra* note 51, at vi).

53. For a discussion on legal realism and its effect on traditional legal formalism, see Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 Harv. L. Rev. 489 n.6 (1912); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986); OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1920).

54. *See generally* BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 606 (1993); BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 159-80 (1996).

55. *See generally* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995).

56. *See* Bunker & Perry, *supra* note 3, at 1-2 (2004) (citing BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 606 (1993) ("The dependence of law on politics is masked by a formal apparatus designed to create the impression that law is autonomous and neutral.")).

57. *See generally* Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 1969 (1994).

58. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 150 (1989).

59. *Id.*

a particular message. Nevertheless, it is also a belief currently under attack in sociological, psychological, and communication effects research.[60] Communications researchers have noted that the current trend of modern psychology and behavior science is a "drive toward determinism in which the appearance of agency [is] removed from explanations that instead depended upon transcendental social and material forces."[61]

Therefore, while courts typically deem legal formalism inadequate when considering economic, political or tort related action, courts are particularly hesitant to consider social science when it suggests that media messages control or influence human behavior. The Supreme Court's discussion and analysis in *Ashcroft* illustrates this tension.

B. Formalistic Analysis

As previously noted, in *Ashcroft* the Supreme Court declined to include virtual child pornography in the categorical exception of child pornography created by *Ferber*.[62] Although the Court struck down the CPPA statute for two reasons—breadth and absence of compelling state interest—only the latter finding was relevant to the Court's determination to not include virtual child pornography as one of the categorical exceptions from free speech protection.[63]

The Court based its analysis of harm and possible government preclusion of speech on two primary assumptions, both deeply rooted in the mode of legal formalism. First, the Court found that the specific harm at issue in *Ashcroft* was different than *Ferber*.[64] Second, and more relevant to the discussion of causation, the Court reasoned that in addition to being specifically distinguishable, the kind of harm was not sufficiently related or identifiable to fall under the same general state

60. As noted by Bunker and Perry, despite the historical perspective, current social science has focused on more deterministic models that essentially assert that individuals are not completely autonomistic but influenced heavily by the messages and information surrounding them. *Crossroads*, *supra* note 3, at 4 (citing John Lawrence Hill, *Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism*, 80 MARQ. L. REV. 289 (1997)).

Inherent in the argument is the concept of agency. On one hand there is the perspective that asserts that environment, whether genetic or physiological accounts for all human behavior. The other perspective is that whatever the environment or physiological influence the individual always has the ability to choose to do something different. Despite this spectrum and diametric perception, most lay persons feel that the truth lies somewhere between. *See Crossroads*, *supra* note 3, at 13-15 (2004).

61. *See Crossroads*, *supra* note 3, at 13-15 (2004).

62. New York v. Ferber, 458 U.S. 747, 773-74 (1982).

63. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250-54 (2002).

64. *Id*. at 250.

interest that justified state preclusion.[65]

1. Distinguishable specific harm

First, the Court concluded that "these images [virtual child pornography] do not involve, let alone harm, any children in the production process."[66] On the basis of this conclusion, the Court distinguished and limited *Ferber* to only those images that actually use a child in their creation.[67] Since virtual pornography doesn't require an actual child to create the image, *Ferber* is, in a general sense and according to legal formalism, inapplicable because it involves a different kind of harm. Notwithstanding this conclusion, the Court still had to address the argument that although the specific harm was technically different, both cause harm to children and, therefore, both are included in the more general interest of the state to protect a vulnerable group of individuals.[68]

2. The general state interest in protecting child victims

Having distinguished *Ferber* in terms of the specific harm that results from using a child to produce child pornography, the Court still needed to explain why the state's interest in protecting children was not sufficient in this case as it was in *Ferber*. The Court began its analysis with an unprecedented focus on causation rather than relying on pure legal formalism tactics. By doing so, the Court suggested a willingness to consider social scientific and behavioral research.

The Court emphasized that in *Ferber* the materials were "a proximate link to the crime from which it came."[69] With regard to the materials at issue in *Ashcroft*, the Court concluded that "virtual child pornography is not 'intrinsically related' to the sexual abuse of children, as were the materials in *Ferber*."[70] The Court provided that: "[w]hile the Government asserts that the images can lead to actual instances of child abuse, the *causal link is contingent and indirect*. The harm does not

65. *Id*.

66. *Id*. at 241. The Court apparently failed to consider "morphed" child pornography a subcategory of virtual pornography that begins with a real base image – and, therefore, actually includes, and thus harms, an actual child in its production.

67. *Id*. at 250, 254-55.

68. *Id*. at 250. Indeed, the Court cites *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (identifying the "importance of the State's interest in protecting the victims of child pornography" and identifying the State's interest in preventing child pornography from being used as an aid in the "solicitation of minors").

69. *Ferber*, 458 U.S. at 762.

70. *Ashcroft*, 535 U.S. at 250.

necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[71]

Despite these scientific conclusions, the Court never cited any social scientific research or independent study in support of its assertions.[72] It simply found *a priori* that the causal link between virtual child pornography and child harm is non-existent or too attenuated.[73] To make its point, the Court abandoned the legal realist (or interdisciplinary) approach altogether and retreated into an area of traditional comfort – legal formalism. It concluded that legal precedent and constitutional construction as a technical matter cannot support the government's position.[74]

A review of the Court's analysis in *Ashcroft* delineates the obstacles that must be overcome if virtual child pornography is to be regulated. First, it is clear that any statute banning or creating a cause of action that essentially regulates this area must withstand the challenges of legal formalism. Second, while the Court acknowledged causation and, therefore, also acknowledged a role for behavioral scientists, it is clear that the Court views this concession as an additional obstacle. Therefore, in addition to having to overcome the rigors of legal formalism, the proponent of the regulation must also establish an intrinsic link to the harm alleged.

IV. DISCUSSION: POTENTIAL POSSIBILITIES AND PREVIOUS ATTEMPTS

A. Potential Possibilities

A close review of the majority's position in *Ashcroft* indicates that those opposed to virtual child pornography might be able to pursue an alternative method of imposing liability on those creating virtual child pornography on the grounds that it leads to child abuse and sexual exploitation. In addition to statutory construction problems which arguably left the CPPA statute unnecessarily overbroad, the CPPA

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71. *Id*. (emphasis added).

72. The court does cite the research and findings of Congress when identifying the source of the government's arguments. *Id*. at 240.

73. *Id.* at 252 (providing that "[t]he evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question").

74. The majority concludes its arguments by summarizing its legal formalist position:

> In sum, U.S.C. § 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.

Id. at 256.

statute failed to overcome two primary obstacles. First, while the Court never properly supported its position, it acknowledged that the state must demonstrate a sufficient causal link to show a compelling interest. Second, pursuant to the demands of legal formalism, there must be precedent (either textual or case law) to support the state action.[75] Essentially the Court was telling law makers that the statute must satisfy both the social scientific demands of legal realism and the structural demands of legal formalism.

While this task may appear to be daunting, there appears to be at least one alternative that could satisfy both demands: a statutory tort claim based on common law principles of negligence for child victims that can establish case-specific causation. While this judicial redress approach is novel with regard to virtual child pornography, it has an interesting history in other areas of the law. The subsequent sections will review that history and highlight cases that may provide the legal precedent and theory needed to overcome *Ashcroft*'s legal formalism obstacles. Moreover, a review of these cases illustrates why judicial redress, rather than prior restraint, may be the most effective way to gain legal acceptance of social scientific research in the area of free speech.

The next section will address civil claims directed at creators of violent media messages intended for children, followed by a subsection describing attempts within the feminist movement to create a civil cause of action for women injured by pornography.

B. Civil Liability for Violent Media Messages

For over a century, lobbyists and child activists have encouraged government to regulate media violence.[76] Pursuant to this encouragement, media violence is controlled in one of two ways. First, Congress or an executive agency may regulate certain kinds of media content prior to their dissemination by creating uniform standards and guidelines.[77] Second, and more important to this discussion, media violence can be controlled through judicial redress by allowing

75. At the very least, the legal rule must be able to support itself without pursuing justification outside of the legal field, for example, social scientific support of causation. *See Crossroads*, *supra* note 3, at 2.

76. Beginning in 1884, state legislators passed laws prohibiting the distribution of magazines and newspapers primarily devoted to crime and horror stories. E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 FED. COMM. L.J. 317, 320-21 (1987) (citing Law of May 28, 1884, Ch. 380, 1884 N.Y. Laws 464; Law of April 13, 1886, Ch. 177, § 4, 1886 Iowa Laws 217; Law of March 6, 1885, Ch. 348, 1885 Maine Laws 291).

77. This is sometimes referred to as "pre-broadcast" control. Prettyman and Hook assert that this control may be more theoretical than practicably given the historic definitional and constitutional obstacles inherent in prior restraint. Prettyman & Hook, *supra* note 76, at 320-21.

individuals to bring claims against creators of violence if that violent content causes injury.[78]

Cases involving judicial redress against creators and distributors of violent media images fall into three main categories.[79] The first and largest category includes situations where an individual who has read or viewed violent material has followed the example of that material to inflict injury on others. The next category includes individuals that viewed violent media content and thereafter injured themselves. The final category includes cases where the basis of liability is not direct but imposed because the producer or creator facilitated an atmosphere or environment of violence where the harm was predictable. In each category a plaintiff asserts that the creator of the media content has been negligent. Therefore, to prevail on their cause of action, plaintiffs must establish: (1) the existence of a duty between the defendant and the injured person; (2) a breach of that duty; (3) an actual and proximate causal relationship between the defendant's conduct and the injury; and (4) actual damages from the injury.

1. Harm to others

Beginning in the 70s, lower federal and state supreme courts addressed liability for actions allegedly instigated by media depictions and messages. In *Weirum v. RKO General, Inc*,[80] a jury trial returned a $300,000 judgment against a radio station for contributing to the wrongful death of a man who was run off the road by teenage drivers listening to a disc jockey. The disc jockey had been encouraging listeners to locate a radio employee who was driving around the city giving away money and prizes.[81] The California Supreme Court affirmed the trial court verdict finding sufficient evidence of negligence because: (1) the radio had a duty to exercise ordinary care to prevent others from being injured as a result of their conduct; (2) the station created an unreasonable risk of harm to the motoring public; and (3) the risk of harm was foreseeable by the radio station.[82]

Despite this favorable precedent, later cases seeking judicial redress for media influenced action were less successful. In *Olivia N. v. National Broadcasting Co.*,[83] teens that had watched the NBC made for television

78. Prettyman & Hook, *supra* note 76, at 320-21.

79. ROBERT M. O'NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 145-65 (2001).

80. 539 P.2d 36 (Cal. 1975).

81. *Id.* at 38-39.

82. *Id.* at 39-41.

83. 74 Cal. App. 3d 383 (1977), *application for stay denied sub nom.* Nat'l Broad. Co. v. Niemi, 434 U.S. 1354 *cert. denied*, 435 U.S. 1000 (1978), *aff'd*, 126 Cal. App. 3d 488 (1981) *cert.*

movie *Born Innocent* copied an "artificial rape" scene when they sexually assaulted a nine-year old girl.[84] In *Zamora v. Columbia Broadcasting System*, a fifteen-year old sued the three major television networks asserting that his massive exposure to television resulted in his "subliminal intoxication" of violence.[85] He argued that this intoxication and desensitization to violence led him to kill his next-door neighbor.[86]

Zamora and *Olivia N.* are indicative of media liability cases decided in the late seventies and early eighties. During this time period, judges consistently sided with the entertainment industry, basing their holdings primarily on two areas of concern. First, state tort law did not impose an actionable special duty on a creator, producer, or distributor of a media product. Correspondingly, courts were reluctant to make foreseeability judgments that would impose a more general duty allowing for more general theories of liability. Second, even if a duty did exist, the courts felt that civil damages could possibly unduly burden the free expression of those involved in creative works. The courts often resolved the latter issue to avoid having to make a determination on the issue of duty.

An interesting example of this rationale comes from the Supreme Court of Massachusetts in *Yakubowicz v. Paramount Pictures Corp.*[87] In *Yakubowicz*, teenager Michael Barrett stabbed and killed Martin Yakubowicz in a Boston subway car immediately after watching the Paramount movie *The Warrior*.[88] Barrett's attack on Yakubowicz imitated the film's most violent scene.[89] What made this scenario particularly troubling was the fact that Paramount was keenly aware of the movie's violent potential even before it was released to the general public.

Violence and rioting erupted immediately following the screening of the movie in two separate California locations with movie-goers damaging substantial amounts of property.[90] Apparently in response to the violent reaction following the screenings, Paramount took the extraordinary and additional precaution of warning the Boston, Massachusetts movie theater that violence was a possibility and offered to reimburse the theater for extra security guards while the film ran.[91] Paramount even offered to release the theater owner from contractual

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denied, 458 U.S. 1108 (1982).

84. *Id*. at 386.

85. 480 F. Supp. 199 (S.D. Fla. 1979).

86. *Id*. at 200.

87. 536 N.E.2d 1067 (Mass.1989).

88. *Id*. at 1069-70.

89. *Id*. at 1070.

90. *Id*. at 1069.

91. *Id*.

liability if he was concerned that showing the film would pose a risk to persons or property.[92]

Despite this knowledge, Paramount ran national advertising and promotions of the film focusing on graphic images of "violent carnage and bloodshed."[93] Even more disturbing was Paramount's decision to release the film in Boston during the mid-winter school break to maximize profits by targeting school age children.[94] Nevertheless, the Massachusetts high court found Paramount's undisputed knowledge of the movie's likely potential to incite violence irrelevant. The court acknowledged that the producers and movie theater had a "duty of reasonable care to members of the public including the [stabbed teen]."[95] But the court concluded that duty was not breached because movies with violence had artistic merit and were clearly protected by the First Amendment.[96] The court's ruling reflected its concern about the possible effect liability would have on the movie industry.

The trend arguably began to reverse in the early to mid nineties.[97] In *Rice v. The Paladin Enterprises, Inc.*,[98] the Fourth Circuit Court of Appeals held that the publisher of a book which contained step-by-step instructions on how to be a hit man and commit murder could be civilly liable for the deaths of a mother and her quadriplegic son killed by a third person who followed the book's instructions.[99] The court specifically rejected the argument that the book was protected under the First Amendment after finding the elements of negligence. The court concluded:

> Indeed, to hold that the First Amendment forbids liability in such circumstances as a matter of law would fly in the face of all precedent of which we are aware, not only from the courts of appeals but from the Supreme Court of the United States itself. Hit Man [the book] is, we are convinced, the speech that even Justice Douglas, with his unrivaled

92. *Id*. at 1070.

93. *Id*. at 1069.

94. *Id*.

95. *Id*. at 1070-71.

96. *Id*. at 1071.

97. Arguably the trend could be traced back to the end of 1989. In *S & W Seafoods Co. v. Jacor Broad. of Atlanta*,194 Ga. Ct. App. 233 (1990), a radio talk show host verbally insulted a restaurant and its manager on the air and the manager sued for damages. The appellate court determined that the First Amendment did not protect the radio personality's exhortations simply because nobody acted upon the exhorted action. The court held that a jury could reasonably conclude that the talk show host's comments could likely lead to illegal action and, therefore, received no First Amendment protection.

98. 128 F.3d 233 (4th Cir. 1997).

99. *Id*.

> devotion to the First Amendment, counseled without any equivocation "should be beyond pale" under a Constitution that reserves to the people the ultimate and necessary authority to adjudge some conduct–and even some speech–fundamentally incompatible with the liberties they have secured unto themselves.[100]

A year later in *Byers v. Edmondson*,[101] a Louisiana appellate court reversed a trial court's summary judgment decision that movie producers and creators could not be held liable for teenagers copying a murder scene from *Natural Born Killers*. The appellate court disagreed with the trial court's conclusion that it would be impossible for the plaintiff to establish enough foreseeability or knowledge to satisfy the requisite level of intent.[102]

2. Harm to oneself

The cases that fall into this category appear to have the strongest link between the message and the action. In *Shannon v. Walt Disney Productions, Inc.*,[103] an eleven-year old boy watched the Mickey Mouse Club, which featured a sound effects segment where an actor showed how filling a balloon with air and adding a BB pellet created the sound of a car "peeling out."[104] Despite program warnings, the boy attempted to reproduce the trick. Unfortunately, the balloon broke; the pellet penetrated the boy's eye and caused him to become partially blind.[105] The boy's family sued Disney.[106]

Similarly, in *DeFilippo v. National Broadcasting Corp.*,[107] a thirteen-year old boy watching the Tonight Show then starring Johnny Carson observed Carson perform a stunt where a blindfolded Carson dropped through a trap door with a hangman's noose around his neck.[108] Despite warnings that this was "not something you want to go out and try," the boy tied a noose to a water pipe and attempted to imitate the stunt.[109] Several hours later, with the television still tuned into NBC, the boy's

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100. *Id*. at 267.

101. 712 So. 2d 681 (La. Ct. App. 1998).

102. *Id*. at 691-92.

103. 156 Ga. App. 545 (1980), *rev'd*, 247 Ga. 402 (1981); *see also*, Note, *Children—Defense of "Pied Piper" Injury Cases*, 30 DEF. LAW J. 473 (1981); Note, *Broadcast Negligence and the First Amendment: Even Mickey Mouse Has Rights*, 33 MERCER L. REV. 423 (1981).

104. *Id*.

105. *Id*.

106. *Id*.

107. 446 A.2d 1036 (R.I. 1982).

108. *Id*. at 1037-38.

109. *Id*.

family found his body hanging from the pipe.[110]

In both *Shannon* and *DeFilippo*, the plaintiffs structured their arguments around *Weirum v. RKO General, Inc.* However, both courts limited the *Weirum* holding to its facts and held that traditional tort law did not necessarily provide a sufficient cause of action. Both courts provided that this was not a situation where the media creator acted unreasonably since the audiences in both cases were warned not to try the act at home. Moreover, pursuant to the warnings, it would be impossible for the plaintiffs to establish that the defendants had not exercised a duty of reasonable care.[111] The courts also acknowledged a fear that allowing liability for widely disseminated programming like the Tonight Show or the Mickey Mouse Club would have a chilling effect on popular broadcasting.[112]

In addition to the television and movie industry, claimants began targeting the music industry. In 1984, John McCollum killed himself after listening repeatedly to an Ozzy Osbourne song titled *Suicide Solution*.[113] The song's lyrics encouraged listeners to "get the gun and try it–shoot, shoot, shoot."[114] McCollum used a gun on himself and his parents found him dead with the tape still running.[115] After reviewing the lyrics that never used the word suicide, the court concluded that the song was nothing more than a philosophical discussion of depression.[116] The court concluded that any reference to suicide was too abstract to be directly linked to McCollum's death.[117]

In *Herceg v. Hustler Magazine, Inc.*,[118] a fourteen-year old boy read an article entitled *Orgasm of Death* describing auto-erotic asphyxia which combined orgasm with hanging in order to cut off the blood supply to the brain.[119] Despite warnings in the article, the young teen attempted to follow the directions and killed himself.[120] Although the court found for the defendant media corporation by relying on the disclaimer that auto-erotic asphyxia was a dangerous activity, the dissent, written by Judge Edith Jones, opened the door for potential liability. It

110. *Id*.

111. *Id*. at 1041.

112. DeFilippo v. NBC, 446 A.2d 1036, 1037-39 (R.I. 1982); Shannon v. Walt Disney Prods., Inc., 156 Ga. App. 545, 548 (1980).

113. Ozzy Osbourne, *Suicide Solution*, on BILZZARD OF OZZ (Jet Records/CBS Records 1980).

114. Waller v. Osbourne, 763 F. Supp. 1144, 1145-46 (M.D. Ga. 1991).

115. *Id*.

116. *Id*. at 1151.

117. *Id*.

118. 814 F.2d 1017, 1025 (5th Cir. 1987).

119. *Id*. at 1018.

120. *Id*. at 1019.

asserted that states should be able to "fashion a remedy to protect its children's lives when they are endangered by suicidal pornography."[121] The article in *Hustler* was not a "bona fide competitor in the marketplace of ideas."[122] Rather, Jones asserted that the appeal of the article was non-cognitive and, therefore, something that should be regulated similarly to tobacco, alcohol or drugs.

3. Environmental or atmospheric liability

Beginning in the seventies, several lawsuits took an indirect approach to judicial redress by attempting to hold creators, distributors, and producers liable for creating an environment likely to result in harm.[123] In *Bill v. Superior Court*, Jocelyn Vargas was shot as she left a San Francisco movie theater after watching the movie *Boulevard Nights*.[124] Her claim against the producer and distributor was unique in that she asserted that it was the act of showing the movie, not its content, which caused the harm.[125] She argued that the defendants owed a duty of care to those within and outside the theater and that this duty was breached by their failure to warn those individuals of a likely disorder and possible harm.[126]

Although the court noted the novelty of the assertion, it concluded that it could not treat the claim differently based on the two distinct acts since the same "chilling effect" was achieved under both theories and, therefore, was barred under First Amendment jurisprudence. Despite this failure, these novel arguments first presented in *Bill* arguably inspired others and were eventually incorporated into the secondary effects analysis that courts now use for justification in sexually oriented business zoning laws. While local governments cannot ban sexually explicit businesses (some involving the dissemination of media images) based on their content, they can regulate the businesses because of the secondary effects the businesses could have on the surrounding neighborhood. However, it should be noted that the reasoning is similar to *Bill* in that the problem is not with the image itself but with the environment the image creates when disseminated.[127]

121. *Id.* at 1025.

122. *Id.* at 1026.

123. *Id.*

124. 137 Cal. App. 3d 1002, 1004 (1982).

125. *Id.* at 1005.

126. *Id.* at 1006.

127. The premise that virtual pornography could be regulated pursuant to the secondary effects it causes is a real possibility. The argument is that the attraction to virtual child pornography is based on sexual and physical stimulus and not any information inherent in the content of the image. Virtual

C. State Civil Rights Claims for Discrimination Caused by Pornography

Independent of the tort claims cited above, another area of legal scholarship has attempted to create a cause of action for disseminating allegedly harmful material. Media legal activists and scholars in the feminist movement as early as the seventies began lobbying for statutes and ordinances creating a civil claim against pornographers who contribute to the physical harm of a victim of sexual violence.[128] The concept driving the theory was that pornography subordinates women as a class, thereby constituting illegal sex discrimination. In 1983, the activists were first successful in passing a variation in Minneapolis, Minnesota.[129] The Minneapolis ordinance contained four causes of action: "coercion into pornography, forcing pornography on a person, assault or [physical attack] due to specific pornography, and trafficking in pornography."[130] Each cause of action was based on the discriminatory impact on women.

Although the initial motivation of the statute centered on combating pornography's subordination of women as a group, the ordinance was passed, at least in part, because of pornography's demonstrably destructive effects on individual women and the harm caused by the consumption of pornography. The debate surrounding the proposed ordinance was fierce and after a mayoral veto,[131] public hearings were held with testimony from women who had survived injury caused by pornography.[132] This testimony was powerful and provided the impetus needed to pass the ordinance.

However, the ordinance's effective life was short-lived. In *American Booksellers Ass'n v. Hudnut*,[133] the plaintiff and free speech proponents asserted that the ordinance violated the First Amendment because it was

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child pornography is more analogous to tobacco, alcohol or drugs in that it is consumed not for information but for effect. A prime example is sexually oriented businesses that are not regulated pursuant to their content but for the environment effects that inevitably occur.

128. *See* CATHARINE A. MACKINNON, *The Sexual Politics of the First Amendment* (1986), *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 175-76 (1987).

129. *See* Penelope Seator, *Judicial Indifference to Pornography's Harm:* American Booksellers v. Hudnut, 17 GOLDEN GATE U. L. REV. 297, 299 n.9 (1987) (describing the public hearings and debate surrounding the passing of the Minneapolis ordinances including a detailed account of testimony of survivors of harm caused by pornography).

130. *See* Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 801-02 (1991) (articulating and discussing the theory and elements of Minneapolis's ordinance).

131. *See* Seator, *supra* note 129, at 299 n.8 (discussing the mayoral veto of the Minneapolis ordinance).

132. MIMI H. SILBERT & AYALA M. PINES, PORNOGRAPHY AND SEXUAL ABUSE OF WOMEN IN MAKING VIOLENCE SEXY: FEMINIST VIEWS ON PORNOGRAPHY 113, 115 (Diana E.H. Russell ed., 1993).

133. 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

overbroad and directly conflicted with speech that was constitutionally protected.[134] The United States Court of Appeals for the Seventh Circuit agreed and held that the ordinance violated pornographers' First Amendment right to free speech. The majority opinion provided that the "unhappy" and discriminatory effects of pornography include directed aggression, rape, battery, domestic violence, and discrimination. Despite this acknowledgment, the majority concluded that "this simply demonstrates the power of pornography as speech," and the need to insulate and protect it.[135] Nevertheless, the Seventh Circuit did provide activists some hope by openly acknowledging that pornography threatens individuals' rights to physical safety.

Perhaps encouraged by this silver lining, other municipal governments began imposing restrictions on pornography based on civil rights principles supported by individual effects. Similar ordinances were placed before lawmakers in Los Angeles, California and Cambridge, Massachusetts but didn't pass.[136] Bellingham, Washington, by voter referendum, passed a law similar to the Minneapolis ordinance which was later declared unconstitutional in a suit the city chose not to defend.[137]

The federal government even entered the fray by proposing the Federal Pornography Victim's Compensation Act of 1991. The Act would have created a federal cause of action against pornographers for victims who could establish that pornography had substantially caused harm and that pornography had a reasonably foreseeable connection with their discriminatory injuries.[138] The Act never reached a vote in Congress.

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134. *Id*. at 328-33.

135. *Id*. at 329.

136. *See* Morrison Torrey, *The Resurrection of the Anti-Pornography Ordinance*, 2 TEX. J. WOMEN & L. 113, 114 (1993) (discussing the history behind pornography ordinances in Minnesota, California, and Massachusetts); *Anti-Pornography Law Defeated in Cambridge*, N.Y. TIMES, Nov. 12, 1985, at A16, col. 6 (ordinance targeting pornography defeated by vote of 13,031 to 9,419).

137. Village Books v. City of Bellingham No. 88-1470 (W.D. Wash. Feb. 9, 1989); *see also* Margaret A. Baldwin, *Pornography and the Traffic in Women: Brief on Behalf of Trudee Able-Peterson, et al., Amici Curiae in Support of Defendant and Intervener-Defendants*, Village Books v. City of Bellingham, 1 YALE J.L. & FEMINISM 111, 112-13 (1989) (discussing the resolution of the Bellingham ordinance and court action). *See* Morrison Torrey, *The Resurrection of the Anti-Pornography Ordinance*, 2 TEX. J. WOMEN & L. 113, 114 (1993).

138. Pornography Victim's Compensation Act, S. 983, 102d Cong., 1st Sess. § 3(a) (1991); Stephanie B. Goldberg, *1st Amendment Wrongs: A New Approach To Fighting Pornography Says Free Speech Has Nothing To Do With It*, CHICAGO TRIBUNE, Mar. 17, 1993 (Tempo), at 1 (discussing federal anti-pornography legislation); Charley Roberts, *Senators Debate Porn Bill*, THE LOS ANGELES DAILEY J., Mar. 13, 1992, at 5 (describing the bills' proponents' strategy for passage); Henry J. Reske, *Feminists Back Anti-Porn Bill*, A.B.A. J. June, 1992, at 32.

V. A PROPOSITION TO HOLD VIRTUAL CHILD PORNOGRAPHY CREATORS LIABLE

Proponents of a state tort claim can learn from the failures and limited success of plaintiffs in the violence cases and feminists civil rights efforts. Both sets of cases provide valuable insight on how to overcome the legal formalism and social scientific bars articulated in *Ashcroft*.

The subsequent discussion will describe how controlling virtual child pornography through judicial redress satisfies the formalism obstacles in *Ashcroft*. Following that description will be a discussion of why virtual child pornography is a more suitable topical area for judicial redress than the violence or general pornography cases cited above, particularly from a legal formalist perspective. Finally, the section will conclude with a discussion of the opportunities social science will have pursuant to a state-initiated civil cause of action.

A. Overcoming Formalism and Causation

As noted in Part III, *Ashcroft* articulated two primary obstacles for activists hoping to regulate virtual child pornography: legal formalism and social scientific proof of causation. The Court's legal formalism problems in *Ashcroft* primarily focused on the distinguishable harm asserted by the government. First, the Court found that the specific harm at issue in *Ashcroft* was different than *Ferber*.[139] Second, the Court reasoned that not only was the harm specifically distinguishable, but the kind of harm was not sufficiently related or identifiable to fall under the same general state.[140]

By attempting to regulate creators and producers of virtual child pornography through judicial redress rather than by categorical prior restraint, drafters of a statutory redress claim automatically avoid the specific legal formalist problems identified in *Ashcroft*.

To begin with, similarity of harm is irrelevant so long as there is actual harm accompanied by a breach of duty and causation. Nevertheless, formalistic issues exist that need to be addressed when utilizing judicial redress. The subsequent subsections will address those issues while explaining why virtual child pornography is a better suited topic for judicial redress than violence or general pornography.

139. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250-51 (2002).

140. *Id*. at 250.

B. Narrowly Tailored Holdings

Since common law theories of tort liability are tailored to deal with the facts of a specific case, a state created form of judicial redress based on those theories, but limited to acts of molestation and exploitation compelled by virtual child pornography images, may provide the narrowly drawn holding necessary to pass current constitutional scrutiny. For that reason, a statutory tort cause of action is the most likely means for holding producers and creators of virtual child pornography responsible for their harmful actions. Additionally, a cause of action that encourages narrow holdings comports well with the formalistic concerns articulated in *Ashcroft*.

The wording of the statute would have to be carefully drafted to avoid many of the over breadth problems that arose with the CPPA and civil rights feminist discrimination cases. Nevertheless, a state cause of action based on the common law principle of negligence would have one key advantage–precedent. State legislators could point to *Weirum*, *Rice*, and *Byers* as authority for premising that, in particular circumstances, civil liability claims are not precluded by free speech concerns. Moreover, a basis for reliance would satisfy at least one of the legal formalist concerns posited in *Ashcroft*.[141]

Finally, because a state-articulated negligence tort claim would necessarily be dependent upon the facts of a given case, the concern for adverse or slippery slope precedent would be of no consequential concern. Indicative of this unnecessary concern is the wide spectrum of cases with different outcomes and various modes of analysis found in the violence cases. The cases are too fact specific to provide any meaningful precedent, except possibly the broad notion that liability is a possibility.[142] Having a cause of action so deeply rooted in the specific actions of the involved parties would alleviate many of the legal formalism concerns of creating a precedent subject to abuse.

C. Negligence Tort Claims

Historically, claims involving the elements of negligence have been

141. In *Ashcroft* the formalist assertion was that there was no precedent or textual basis for a finding that virtual child pornography should be included as a categorical exception to core speech. In this case, a challenged statute creating a cause of action could point to *Weirum*, *Rice*, and *Byers* as precedent and satisfy the formalist concern. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (2002).

142. Prettyman & Hook, *supra* note 76, at 344 (Because theories of tort liability are "tailored to deal with the facts of a particular case, judicial redress . . . may provide the most narrowly drawn [holdings].").

one of the means by which media producers and creators are held responsible for risky conduct. While negligence has been recognized as an independent cause of action imposing liability for more than a hundred years, this was not always the case.[143] The use of negligence as a basis for liability[144] coincided with the technological advances of the industrial revolution.[145] As means of producing became more complex and automated, a worker plaintiff's old forms of action became increasingly inadequate to address the harm that was being caused.[146] To fairly compensate those injured and deter newly created risky conduct, courts began to impose liability based on negligence principles.[147] Similarly, in light of the computer imaging boom, computer enthusiasts can now do what was once considered impossible. As such, producers and creators of computer images can now engage in new kinds of "risky conduct" including the creation of virtual child pornography.

Pursuant to the theory of negligence, when a person's conduct creates an unreasonable risk of harm, that person has a duty to act with the care of a reasonable prudent person under the circumstances.[148] Over time it was determined that a person's conduct creates an unreasonable risk of harm when the magnitude of the risk is outweighed by the social utility of the act.[149] In cases dealing with violence and the media, courts have constantly struggled with this balance. For example, in *Shannon*, *DeFilippo*, *Olivia N.*, and *Zamora*, the various courts had difficulty assessing the social utility of the general act that contained the violence (for example, television comedy, children's programming and the movie industry). Notwithstanding this difficulty, virtual child pornography is much better suited for a balancing test than the violence cases cited above. On at least three occasions, the Supreme Court has acknowledged that child pornography itself was of de minimus social value.[150]

143. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 28, at 160-61 (5th ed. 1984) (discussing the requisite duty and degree of care imposed to protect against unreasonable risk).

144. It has been asserted that negligence is merely one way of committing any other tort, and in and of itself it had no particular legal significance. *See* SALMOND, LAW OF TORTS 21-26 (6th ed. 1924).

145. W. PAGE KEETON ET AL., supra note 143, § 28 at 161 ("[Negligence' rise as a cause of action] coincided markedly with the Industrial Revolution.").

146. W. PAGE KEETON ET AL., *supra* note 143, § 28 at 161 ("It was greatly encouraged by the disintegration of the old forms of action, and the disappearance of the distinction between direct and indirect injuries found in trespass and case.").

147. *See* RESTATEMENT (SECOND) OF TORTS § 282 (1963) (providing that the purpose of the tort of negligence is to protect individuals from unreasonable risks of harm).

148. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928) (providing that a defendant's conduct must create sufficient risk to plaintiff to justify the imposition of liability).

149. *Id.*

150. New York v. Ferber, 458 U.S. 747, 756-62 (citing *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

Additionally, careful statutory construction can narrow the definition of virtual child pornography to avoid possible conflicts with mainstream motion picture and television producing. Accordingly, if properly defined, the social utility of virtual child pornography is so slight, if existing at all, that the magnitude of the risk to children will consistently outweigh its utility. Thus, opponents of child pornography will likely prevail and a duty will be imposed on the media to take due care in making films.

Finally, negligence principles are well suited for this purpose since case law has consistently established that courts dealing with negligence frequently evaluate public policy factors such as who or what will bear the cost of the liability, whether the liability will deter dangerous or risky conduct, if there is a need for fiscal compensation by a group of individuals likely to be harmed, and whether the action precluded is one that society finds morally repugnant.[151] In each situation, virtual child pornography presents a strong case for allowing the imposition of liability. First, the potential victims are children, a discreet and insular class that does not have representation in our government and cannot protect themselves, unlike consumers of virtual child pornography who can vote and have the financial means to influence legislation. Second, because most child murderers, molesters, and abusers are not deep financial pockets, child victims and their families almost always bear the brunt of the costs associated with life long therapy and counseling that they typically need. Meanwhile, producers and creators of virtual child pornography profit financially by wetting the appetite of these perpetrators and by encouraging them to act without any threat of being held financially liable. Moreover, the sexual exploitation of children is widely held to be one of the most repugnant and despicable crimes a person can commit.

D. Causation and the Role of Social Science

To receive judicial redress pursuant to a claim based on principles of negligence, a plaintiff will have to establish duty, breach, causation, and actual harm. Therefore, behavior science must play a significant role in finding the intrinsic link between the image content and action to establish causation. More importantly, social science will be called upon to identify foreseeability, a key element in the determination of duty. As has been previously addressed, when a person's conduct creates an

151. *See* W. PAGE KEETON ET AL., *supra* note 143, §4, at 20, 25; *id.* § 2, at 10; *see also*, Edith L. Pacillo, Note, *Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography*, 28 SUFFOLK U. L. REV. 123, 141-42 (1994).

unreasonable risk of harm, that person has a duty to act with the care of a reasonable prudent person under those circumstances.[152] The determination of whether a person's conduct was reasonable is dependent on the foreseeability of the particular act allegedly causing the harm. This question can only be determined through non-legal research. Consequently, social science has the critical task of establishing potential risk and, therefore, duty. Without social science, the plaintiff would never get the opportunity to prove that the case specific facts caused the harm the plaintiff incurred.

VI. CONCLUSION

Under contemporary constitutional rationale, a narrowly drawn cause of action based on principles of common law tort liability and dependent on case specific circumstances is currently the most likely means of holding producers of virtual child pornography responsible for their harmful actions.

The statutory aspect would satisfy many of the legal formalism concerns articulated in *Ashcroft* by providing the historic and precedent-supported common law elements needed to successfully bring a claim. Additionally, because an important aspect of two of those elements, duty and causation, necessarily requires determination of the foreseeability and causation of the conduct influencing injury, social science would have a substantial role in helping a prospective plaintiff successfully litigate a claim. Furthermore, because one of those elements is causation, the general causation concern articulated in *Ashcroft* would be alleviated since every case is based on its particular facts, and would have to establish the requisite relationship between consumption and that specific harm. Finally, by referring to the Supreme Court's determination that child pornography images in general are of de minimus social value, a careful drafter of legislation defining virtual pornography could avoid potential arguments that judicial redress could result in an unnecessary "chilling effect" precedent.

In conclusion, whether or not one agrees with the holding of *Ashcroft*, one thing is certain: the *Ashcroft* decision will result in an increase of images depicting children being sexually exploited. Additionally, more people will have access to virtual child pornography. As such, the contrary and largely behavioral scientific assertions that virtual child pornography results in increased child abuse and sexual exploitation will be tested. In a way, social science will get what it has

152. *See Palsgraf*, 162 N.E. at 101 (providing that a defendant's conduct must create sufficient risk to a plaintiff to justify the imposition of liability).

seemingly wanted–an opportunity to prove itself. The theoretical and practical models of interdisciplinary research asserting that virtual child pornography causes harm to children will either be proven or displaced. But at what price?

If social science is right, and the United States Supreme Court is wrong, this great societal experiment will not be without casualties. Children, the most vulnerable group in society, with the most to lose, and with no direct political voice, will effectually become the lab rats. Unfortunately, without judicial redress remedies, conducting this societal test would be paramount to conducting a free laboratory test at the forced physical, emotional, and psychological expense of our children – society's greatest natural resource. What will happen if Justice Kennedy's words are misguided and "the evil in question" does depend on a relationship between action and speech? What if virtual child pornography is intrinsically linked to the sexual exploitation of children? Given the current framework, the only answer for any government that cares even minimally for children is judicial redress.