

[Bartłomiej Kozłowski](#)

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Should virtual child pornography be banned?

A defense of the United States Supreme Court decision

Probably no kind of expression is so much hated, as so called "child pornography". So, it is not strange, that many people were displeased with the U.S. Supreme Court decision holding, that "virtual child pornography" cannot be prohibited. But pejorative term "child pornography" – and emotions connected with this term - should not make us unable to understand decision of the Court, and to quiet consideration of arguments used to support of criminalization of so called "virtual child pornography" in light of free speech and free press clauses of the [First Amendment](#) to the [U.S. Constitution](#).

To understand the U.S. Supreme Court decision in the case [Ashcroft v. Free Speech Coalition](#) we must first to understand difference between "real" child pornography, which since long ago is prohibited in whole United States (and in virtually all civilized countries in the world) and so called "virtual" child pornography, which was question of controversy in this case. Although real and virtual child pornography can, at least in some instances, to look very like, they are in fact very different things. This difference lies not in what particular movie or photograph visually represent, but in question, how these materials are *produced*. A real child pornography is produced by filming or photographing sexual activity with a child. In case of virtual child pornography no real child is used. Sometime, an adult person which look like a legal child can be used for a pornographic purpose. Sometime, it can be product of pure imagination, without use of any real human being at all.

In 1982 case [New York v. Ferber](#) the United States Supreme Court held, that pornography in production of which children are used can be prohibited even if resulting products are not obscene. A reason behind the such ruling was that use of a child in production of pornography is harmful to physiological, emotional and mental health of the child used for such a purpose. But in case of virtual child pornography no child is used - let alone abused - for purpose of making pornography. So, the reasons on basis of which the U.S. Supreme Court said that child pornography is unprotected by the First Amendment are, in case of "virtual child pornography", simply void.

If no actual person is harmed by production and distribution of virtual child pornography what arguments can be made for prohibition of such materials too? Of course, some arguments have been made for prohibition of virtual child pornography. But are these arguments compatible with philosophy, upon which free speech and free press clauses of the First Amendment are based? And is prohibition of "virtual child pornography" a good way to making children more safe from pedophiles?

So look on these arguments. It is often said, that virtual child pornography should be prohibited as real child pornography, because it can encourage some people to molest children. As the U.S. Congress said when it enacted statute which Supreme Court held unconstitutional, virtual child pornography "whets appetites of pedophiles" and contribute in this way to sexual crimes against children. But is it good reason for its prohibition?

Of course, very important question in this case is problem of causal relationship between virtual child pornography and subsequent abuse of children in result of its influence. Is possible - even likely - that viewing of virtual child pornography can sometime encourage a pedophile to commit crime against a child. Is possible that it can support and even strength convictions and emotions that ultimately form the basis for his (and perhaps, but rarely, her) harmful behavior. But equally well, it might contribute to relieving of instincts which can lead to crime by inciting pedophile not to molest the child, but to masturbate. I think, that more likely is the second. But I cannot to said that the former is improbable.

But here is an important question. Should an expression be prohibited because it might in some way contribute to something wrong? When such prohibition is justifiable?

Of course, sometimes it is. Everyone is probably familiar with famous statement which the U.S. Supreme Court justice [Oliver Wendell Holmes](#) wrote in 1919 year case [Schenk v. United States](#): "*The most stringed protection of free speech would not protect a man in falsely shouting fire in theatre and causing a panic*". And in the case [Brandenburg v. Ohio](#) (decided in 1969) the U.S. Supreme Court held that the First Amendment do not protect speech, which is designed "to producing or inciting imminent lawless action" and, in given circumstances "is likely to produce or incite such action".

But these are examples of speech which connection with violence or another harmful action is very clear and direct. Yet no such argument can be made in case of "virtual child pornography". Even most ardent anti - porn fanatics do not claim that viewing pornography* lead to abuse of children (or women) in such way, as inciting frenzied mob (classical example of speech, that would be unprotected on basis of precedent [Brandenburg v. Ohio](#)) can lead to lynching or rioting. As [Justice Kennedy](#) wrote in his opinion in the case [Ashcroft v. Free Speech Coalition](#), although same link between virtual child pornography and actual instances of child abuse may exist, such causal link is contingent and indirect. As he wrote "*The Government shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse*".

Therefore, question is whether such indirect and contingent relationship between expression and harmful behavior can be just reason for prohibiting of a speech in question?

The U.S. Supreme Court clearly said, that no. Virtual child pornography cannot be prohibited without violation of the First Amendment because "*the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it*". As Justice Kennedy wrote (citing the U.S. Supreme Court opinion in the case [Stanley v. Georgia](#) which held, that possession of

obscenity in private home cannot be prohibited for such a reason, that viewing obscenity can lead to crime) "government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. () First amendment freedoms are most in danger when government seeks to control thought or to justify its laws for that impermissible end. The right to think is beginning of freedom, and speech must be protected from government, because speech is beginning of thought".

But in Canada, the Canadian Supreme Court in very analogical case, question in which was constitutionality of the Canadian Criminal Code provision banning possession of child pornography - equally real, as fictional (Canadian statute in time of decision defined as child pornography also some purely written materials, that is writings which "*advocate or counsel sexual activity with a person under the age of eighteen years that would be an offence under Criminal Code of Canada*" – [the present definition](#) is yet more broad) - held, that even purely fictional "child pornography" can be prohibited for just such a reason. As Canadian Chief Justice [Beverley McLachlin](#) wrote in her opinion in the case [Her Majesty the Queen v. John Robin Sharpe](#), although proof of cause and effect relationship between possession of fictional child pornography and sexual abuse of children is uncertain, such concrete, scientific proof of link between possession of child pornography and sexual crimes against children is not necessary to uphold, as constitutional, the criminal code provision of child pornography. A sufficient reason, on basis on which Canadian Parliament was warranted to prohibit not only production and distribution (which were not direct question in that case) but also purely private possession of child pornography - even, if it has nothing to do with use of actual children in its production - was, in the Canadian Supreme Court opinion "reasoned apprehension of harm" which may flow from exposing some people to such a materials.

As we can see, the American approach to question which is subject of controversy here described is not common. Even the U.S. Supreme Court was partially divided upon the question, whether "virtual child pornography" should be constitutionally protected.

But I think that the Canadian approach to this question is potentially very dangerous. If one kind of expression (fictional child pornography) can be prohibited because it might be "reasoned apprehension" that it can contribute in some way to something wrong, why others kind of speech should be free from censorship when similar arguments can be made against them too? Many people, for example think, that violent scenes in movies, television programs and computer games are one of the contributing factors to real crimes. In Poland, for example, few years ago was on basis of such a reasoning proposed unusually broad and vague law against media violence. If enacted, it would be prohibiting, under penalty up to 1 year in prison production and distribution of all media products - such as movies, computer games, books and periodicals - which are directed to persons younger then eighteen years of life, if such products contain "violence" (defined as "depicting or describing of brutal, repulsive, terrific, or cruel scenes, which might endanger physical or psychological development of children or youths"), "vulgar presentation" (defined as "scenes, words, phrases or gestures which are commonly regarded as un censurable or offensive or such that are showing in malicious or contemptuous way a man, peoples or religious symbols and because of it might

harmfully influence a moral attitude, or understanding of social phenomena by children or youths") or, finally, an "obscenity" (which term is very rarely used in Polish, defined as "scenes, words, phrases or gestures describing or depicting sexuality of men or of a peoples in such a way, that it can endanger physical or psychological development of children or youths"). Such a law would be clearly unconstitutional in the United States. But if "reasoned apprehension of harm" is sufficient reason to banning some kind of expression, it can be difficult to say, for what reason such a law, if democratically enacted should be struck down as impermissible infringement of freedom of speech? (About this proposition see my article [Nowy Totalitaryzm? O projekcie „Ustawy o Zakazie Promowania w Środkach Masowego Przekazu” krytycznie](#) (A New Totalitarianism? About project of „Prohibition on Propagation of Violence in Mass Media act” critically).

Not only pornography and media violence could be banned under such an approach. Similar arguments can be used against radical political propaganda - like for example an anti-abortion rhetoric. It seems to me, that link between preaching that abortion is cruel murder of most innocent human being and such act of violence as - for example - bombing of abortion clinics and shooting to doctors is far more clear, than the link between virtual child pornography and sexual abuse of children - above all, abuse of a child can occur without influence of any kind of expression, while such acts of violence, that have been committed by some militant antiabortionists in obvious way has its basis in some particular ideas - ideas, which are, of course, transmitted by speech. This do not mean, of course, that there is a clear and direct connection between claiming that abortion is heinous crime and acts of violence (vast number of abortion opponents are not, I think, criminals) but it is obvious, that persons influenced by such a viewpoint are - at least statistically - more prone to commit such crimes, than people upon which such ideas do not have any influence (can we imagine a person shooting to an abortionist, if that person never heard about abortion?). If speech can be made a crime *"because it increases the chance that unlawful act will be committed at some indefinite future time"* (what is, of course, exactly what the U.S. Supreme Court prohibited - but what the Canadian Supreme Court surely allowed) prohibition of antiabortion rhetoric would be at least as justifiable, as prohibition of virtual child pornography. Equally well, under such an approach such political ideology like Marxism could be prohibited. Number of victims of violence, which have been done under influence of this philosophy is absolutely incomparable with eventual number of victims of pornography. And although communism as political system of the state in most countries have failed, extremist groups inspired by this philosophy still exist in western countries, plotting violent revolution and sometimes using or inciting violence on the streets. Of course, exactly this same can be said about, for example, propaganda against globalization, genetic experiments, or for animal rights. Would riots, which accompany conferences of such organizations as the International Monetary Fund, the World Trade Organization, the World Economic Forum and the World Bank occur if some people would not become convinced to the opinion that policies of these bodies leads to hunger, unemployment, poverty, economic depression, devastation of environment and even wars in some parts of the world? Would such crimes, as setting fire to fur stores or laboratories, when genetic experiments and experiments on animals are made occur if some people would not become convinced to the view that all genetic manipulations are deadly

danger for natural environment and human health and life, or under influence of some speeches, movies, articles and other forms of expression would not become exalted over the fate of animals used in laboratory experiments or killed for fur or food? Ultimately, under such reasoning convincing arguments could be made for prohibition of the Bible – above all, no other work of literature has been more often cited by perverts and criminals as source of inspiration or justification for many terrible crimes – ranging from religious wars, inquisitions, witches burnings, and pogroms of earlier eras to child abuses and ritual murders committed in contemporary times. And, if such deeds, like – for example – the antiabortion violence, are - in some part - the result of convictions which influence of the Scripture can engender in minds of some of its readers would not be the Bible a good candidate for prohibition, if sufficient ground for banning speech would be that it might increase the probability of harmful acts? Of course, this same argument in even greater degree could be made against, for example, the Islamic Koran. Nobody can convince me, that thoughts expressed in this book, and terrorist acts - such as the 11 09 2001 attacks - have nothing in common.

Of course it is probably not very likely that, for example, the Bible could be made illegal under the reasoning showed above (above all, it is not sufficiently unpopular). But above examples of kinds of speech, that could be censored on the basis of reasoning very similar to that, on which prohibition of virtual child pornography could eventually be supported clearly show, that such an approach constitute deadly danger to freedom of expression. The ACLU president [Nadine Strossen](#) put this point very well in [her article about "hate speech"](#).

"Allowing speech to be curtailed on the speculative basis that it might indirectly lead to some possible harm in the future would inevitably unravel free speech protection. All speech might lead to some potential danger at some future point. As Justice Holmes put it "every idea is an incitement". Therefore, under such a watered - down approach, scarcely any idea would be safe, and surely no idea challenged status quo would be" - she wrote. And as we read further in her article "Until the 1960s, the U.S. Supreme Court did apply this relaxed, so called "bad tendency" approach to free speech. Over dissent by such respected Justices as Holmes and Brandeis, the Court allowed government to suppress any speech that might have a tendency to lead to some future harm. This approach endangered all critics of government policy and advocates of political reform. For example, during World War I era, thousands of Americans were imprisoned for peacefully criticizing United States participation in the war and other government policies. Likewise, at the height - or depth - of the Cold War, members of left - wing political groups were imprisoned for criticizing capitalism or advocating socialism". Prohibition of the "virtual child" pornography on the basis, that it can lead to abuse of children would be in essence a return to such a discredited approach - exactly like censoring "hate speech*" against which Nadine Strossen argued in the article cited above.

Beyond this, there is an important question: would be children safer from pedophiles, if all sexually explicit pictures of children would be eliminated? The one of problems with such kind of regulations, as law banning virtual child pornography is, that the "child porn" can, for pedophiles be lesser sexual stimulator than some kinds of expression commonly viewed as innocent. As New York University School of Law professor [Amy Adler](#) wrote in her article

["The Perverse Law of Child Pornography"](#) *"The problem for legal regulation (of child pornography) is that pedophiles often find stimulation from the very some pictures that non pedophiles consider innocuous, that we extol and value: consider the pedophilic magazine Paidika, a self-described online "Journal of Pedophilia". Its website depicts not grotesque sex acts with children, but pictures of kids that I could only call "cute". (...) "In fact certain pedophiles may prefer "innocent" pictures. According to some theorist, the stimulation of the picture may be inversely proportional to its overtly sexualized nature: it may be the very innocence - the sexual naiveté of the child subject that is sexually stimulating. Thus, the peculiar nature of pedophilic desire itself may make governance of child pornography an impossible task. One writer reports, that members of the North American Man Boy Association (NAMBLA - an organization for pedophiles, many of whom are in prison) find erotic stimulation by watching children on network television, the Disney channel, and mainstream films. As the writer put it: "I have found NAMBLA's "porn" and it was Hollywood". And if reason for prohibition of "virtual child pornography" is that it might encourages thoughts or impulses which can lead to child abuse, reason for banning such an expression, as mentioned above would be convincing as well. But is there a sane person which would be for such a prohibition? Where would we go under such an approach?*

Similar case we have with an argument, that "virtual child pornography" should be banned because pedophiles are using it for purpose of convincing children that sex is "fun" for them, and to enticing them in this way into sexual activity. Although this premise might, in itself, be true, proposition that "virtual child pornography" should be banned for such a reason would be leading to equally absurd results, as proposition that "virtual child pornography" should be prohibited because it might incite pedophiles to crimes against children. As Justice Kennedy wrote in decision of the U. S. Supreme Court in "virtual child pornography" case *"There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused"*. And, if I know, when pedophiles are using pornography for purpose of enticing children into sexual activity, they are most often using an "adult" pornography, in most instances even no close to being obscene. Yet "adult" pornography, if not obscene, is protected by the First Amendment. Should it be prohibited because it sometimes might be used for criminal purpose? If yes - why candies should not?

Finally, it was argued, that danger, which "virtual child pornography" cause to children is such, that – if it is legal – it might impede prosecutions of real child pornography. According to such a reasoning, a defendant in (real, not virtual) child pornography case can argue, that picture in question is not a picture of real person - and, in such kind of situation, because of general rule of criminal law, that doubts, which are not resolved must be decided for benefit of an accused (in Latin this rule is called *"In dubio, pro reo"*) — such a person, although really guilty of a crime, must be let to go free. But this reasoning, although, theoretically it have some appeal, has a very weak basis in real life. It was, as I know, only one child pornography case in the United States defendant in which attempted to convince the jury that the child pornography in question was merely virtual pornography - but the jury remained not convinced. And I think that the contrary argument can be made: legalization of virtual child

pornography, which is visually indistinguishable from the real child pornography may diminish production of the real child pornography - and sexual abuse of children, which production of such a pornography undoubtedly involves. If a market for sexually explicit pictures of children really exist, and there are some people, which make money because of existence of such a market, who of them will use a real child for production of pornography - risking many years in prison - if exactly this same product can be obtained in totally safe and legal way?

In the end, I will come to the argument, that pictures, which 1996 amendment to federal child pornography statutes made criminal cannot have any positive value for society. Such an argument is very dubious for me - not because I think that virtual child pornography is a good thing - but because such an argument is in war with First Amendment. Firstly - who - and in which way can decide for legal purposes, which pictures, speeches and like have - and which have not - positive societal value? Deciding such a question necessarily must be based (at least in part) on purely personal tastes and prejudices of deciding person. Beyond this, a particular feature of contemporary First Amendment law is that it protect very bad speech - like, for example, so called "hate speech" or advocacy of crime (unless such advocacy has purpose and capacity of inciting or producing imminent lawless action) - that is, speech about which an argument, that it have not positive values for society would be far more easy to present, that argument, that it have such a value. It is true, that there is in the First Amendment law (extremely dubious, for me - and, should we remember, non supported by substantial minority of the Supreme Court justices) an "obscenity" exception, which is based - at least in part - upon the argument, that such an expression is lacked of any values. According to U.S. Supreme Court, an "obscenity" can be suppressed because "*it is not essential part of exposition of any ideas*". But an obscenity exception to the First Amendment do not give any arguments for prohibition of non obscene virtual child pornography (real child pornography is prohibited for reasons totally different from reasons, upon which prohibition of "obscenity" is based.) If this part of federal child pornography statutes, which the U.S. Supreme Court find unconstitutional would be in force, argument, that, for example, incriminated work has serious artistic, literally, political or scientific value would not be - unlike in an obscenity cases - a defense against prosecution. And, as Justice Kennedy wrote in the Court opinion, works of unquestionable artistic value would be endangered by this law. Beyond this, a work - unlike in an obscenity case - had not to be appreciated as whole. Single explicit scene could be reason for putting author, producer and even possessor of incriminated movie or photograph behind bars for many years. Finally - unlike in an "obscenity" case - it would not be matter, whether work in question "appeal to prurient interest of its audience", and whether it is "patently offensive" according to contemporary societal standards. Although kind of expression, which the Child Pornography Prevention Act of 1996 attempted to criminalize is commonly called "virtual child pornography", a movie about horror of sexual abuse of a child could be recognized a crime under the Child Pornography Prevention Act as well. Would it be in real interest of children? Would be it good way of fighting sexual abuse of children by adults? Above all, it is rather difficult to fight what someone perceive as evil, if is not possible to speak freely about it.

So, it might be a case for position exactly contrary to one taken by critics of the Supreme Court decision in *Ashcroft v. Free Speech Coalition*: allowing pictures of fictional sexual exploitation of fictional children do not only not endanger the real children but, it might be, in some degree, helpful in fighting abuse against them. It is because role, which art can play in convincing people about and, therefore, combating a social ill.

Such was an argumentation of [Findlaw](#) commentator [Marci Hamilton](#), in her defense of Supreme Court ruling. As she wrote: "*The problem for critics of Ashcroft v. Free Speech Coalition is that total suppression the government sought in CPPA of non - obscene images of child sexuality will not make our social ills - such as incest or abuse of children by trusted adults - go away. Indeed, a total bad like CPPA makes it more difficult to constrictively work out these demons.*

Art - in movies or online - is the safest means by which we can address underbelly of our culture. We need movies and books and paintings, so what we can think through the most difficult issues intellectually, and grapple with them emotionally as well. In a culture that encourages and recognizes the right to hold any belief one desires, art's hard work of testing and challenging ideas is an invaluable element of the process by which individuals choose the beliefs to which they will adhere, and those that they will reject.

For example, we are barely at the beginning of dealing with monstrous action taken by trusted and revered Catholic priest. How will we come to with the abuse revealed in the recent scandal?

First, of course, there must be concrete steps taken to secure the safety of children - specifically, legal and church reform centered on protecting children from any future abuse. But assuming that that the new structures are indeed put in place, what happens next? Do we blithely return to path of contentment and relegate the topic of child abuse to the headlines of 2002?

No. It's too late for that. We must face those demons in order to vanquish them, and the motion pictures that inevitably will depict these tragedies offer us a low-cost, free-risk means of doing so. If an artist cannot depict the child being abused, she cannot accurately depict the monster who would abuse him. We need desperately need the opportunity art provides in order to more fully understand and, frankly, to fully condemn such actions.

Those criticizing the Court have the indisputably right moral instinct: to protect children from all harm. However, they do not serve children's interest well if they expect society simple to forgive and forget the harm that is inflicted on children on a regular basis in this society (and certainly not only by the Catholic Church).

So long as real children are not used in creation of works depicting child sexual acts, and real children are not exposed to these works once they are completed, the harm to children will be minimal - especially as compared to the harm to the adults' marketplace of ideas by censoring such images. In their rush to shield children, critics of Court's recent decision forget that some depictions of children engaged in sex will be employed by artists whose viewpoint is sympathetic to child and unsympathetic to the abuser, and these depictions will make the children advocates point far more forcefully and viscerally than a hundred dry brochures would have. In this case, a picture may be worth a thousand appeals for funds.

It has taken this culture a long time to begin to protect children from predators - in part because topic was so taboo. We should not repeat the mistakes of the past and assume that because child sexual abuse is rightly anathema. Instead, let the topic be brought into the sunshine - where its ugly parameters can be accurately assessed, examined, and dealt with.

I hate the abuse of children, as do the member of the Court. But I welcome the artist who will help us to come to terms with our living nightmares, and I believe in their First Amendment right to include such materials in their artworks. Let the market - not the government - determine that which is valuable in art and healing" ([see the whole article](#)).

So, making criminal the pictures of fictional child sex would be step in wrong direction. The United States Supreme Court, deciding, that such materials cannot be prohibited, made very right thing.

*On question, whether pornography should be prohibited, if an argument, that its influence on some persons can lead them to commission of crimes could be convincingly made, see my article "[Pornografia i gwałty – usprawiedliwienie dla cenzury?](#)" ("Pornography and rapes – a justification for censorship?").

*I touched the question of "hate speech" in several articles which I put on [my internet site](#), for example in "[Faszyści do pierdła?](#)" ("Fascists to prison?"), also in articles "[Jeszcze raz o wolności słowa i hate speech](#)" (Yet again about freedom of speech and *hate speech*), "[Od zakazu 'mowy nienawiści' do totalitaryzmu i tyranii: o logice praw przeciwko 'hate speech'](#)" (From ban on "hate speech to totalitarianism and tyranny: about the logic of laws against "hate speech"), "[Tych przepisów trzeba się czepiać! Przeciwko artykułom 256 i 257 kodeksu karnego](#)" (These regulations should be attacked! Against articles 256 and 257 of [polish penal code](#)), "[Co nie usprawiedliwia zakazków \(m.in.\) pornografii i 'hate speech'?](#)" (What does not justify prohibitions of (among others) pornography and 'hate speech?'), and "[Internet bezpieczny – czy wolny? \(a może i taki, i taki?\)](#)" (Internet safe, or free (and, perhaps such and such?), "[Znieść zakazy mowy nienawiści!](#)" (Abolish hate speech bans!), "[Dlaczego zakazy 'mowy nienawiści' są bez sensu?](#)" (Why hate speech bans are senseless?), "[Zakazy wypowiedzi: droga \(w najlepszym wypadku\) donikąd](#)" (Speech prohibitions: a way (in the best) to nowhere) and "[O czym zwolennicy zakazów 'hate speech' powinni pomyśleć](#)" (What supporters of the bans of 'hate speech' should think about).

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