Child Pornography and the Fictional and Non-Fictional Portrayal of Child Sexual Abuse

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I. INTRODUCTION

[*We are going to*] *tell their story, and* [*we are going to*] *tell it right.*

— Rachel McAdams as Sacha Pfeiffer in Spotlight[1]

The movie *Spotlight* was released back in 2015.[2] The movie portrayed how The Boston Globe and its "Spotlight" team of journalists unfolded a series of sexual abuses committed by Catholic priests to boys that had occurred in Boston, Massachusetts, from the 1970s to the 1990s.[3] The film tackled issues on how to inform the public of a hidden or often ignored controversy, as well as how to shake and urge institutions to act on it.[4] The movie portrayed not only the hardships of The Boston Globe's journalists in getting their stories, but also the dilemma on how they should tell the story, without harming the victims.

This dilemma still exists at present, where the activism against sexual abuse, particularly sexual abuse against children, is raging. In reporting instances of child sexual abuse, the view is not, and should not be limited to, telling the story itself. Many factors must be considered, and many questions should be raised such as — "Is mere consent to tell the story enough?" and "Is transforming the story into a work of fiction in order to tell it in full enough?"

This Essay looks into the issues surrounding the fictional and non-fictional depiction of child sexual abuse in written and visual media. This Essay begins with defining fiction and non-fiction works, while giving actual examples of works, written and visual, that were publicized. The Essay then provides a survey of laws and jurisprudence governing these works, i.e., the nature of child pornography and obscenity, then analyzes these works as to when can they be considered to have crossed the line of child pornography.

A. Fiction and Non-Fiction Materials

1. SPOTLIGHT (Participant Media, et al. 2015).
2. Spotlight (2015) – Plot, *available at* https://www.imdb.com/title/tt1895587/plotsummary (last accessed Feb. 1, 2019).
3. *Id.*
4. *Id.*

Fiction is defined as literature in the form of written or spoken language that "describes imaginary events and people."[5] Non-fiction, on the other hand, refers to a literary work that is informative or factual.[6] Fiction and non-fiction are traditionally distinguished in terms of the invited response from the audience or readers.[7] Fiction induces imagination or make-believe, while non-fiction allows the acquisition of beliefs.[8] Another traditional distinction is the confines of the story-telling, where non-fiction is constrained by actual events, while fiction is not.[9]

Recent philosophy has aimed to shed light on the commonalities of fiction and non-fiction. While fiction normally follows a narrative structure and thus induces a make-believe situation, vividly told non-fiction narratives likewise invite the response of imagination.[10] In relation to this, emotions do not require existential beliefs.[11] This is manifested in how both fiction and non-fiction have the capacity to stir emotions among the audience or readers, regardless of whether the elements of the story are believed to exist or not.[12] It has been said that there is no real difference between the motivations of the reader of fiction and non-fiction,[13] as both involve "transportation" or "an integrative melding of attention, imagery, and feelings, [that are] focused on story events."[14] This is especially true with regard to the historical and biographical categories of non-fiction.[15]

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5. OXFORD DICTIONARY OF ENGLISH 647 (2010 ed.).

6. *Id.* at 1207.

7. Derek Matravers, *Recent Philosophy and the Fiction/Non-fiction Distinction*, 37 COLLECTION & CURATION 93, 94 (2018) (citing KENDALL L. WALTON, MIMESIS AS MAKE-BELIEVE: ON THE FOUNDATIONS OF THE REPRESENTATIONAL ARTS 73 (1990)) & Stacie Friend, *Fiction as a Genre*, 112 PROCEEDINGS ARISTOTELIAN SOCIETY 179, 180 (citing WALTON, *supra* note 7, at 73).

8. *Id.*

9. Matravers, *supra* note 7, at 96.

10. Friend, *supra* note 7, at 183.

11. Matravers, *supra* note 7, at 94.

12. *Id.*

13. *Id.* at 96.

14. *Id.* at 96 (citing Melanie C. Green & Timothy C. Brock, *The Role of Transportation in the Persuasiveness of Public Narratives*, 79 J. PERSONALITY SOCIAL PSYCH., 701, 701 (2000)).

15. Matravers, *supra* note 7, at 96.

B. Portrayal of Child Sexual Abuse in Fiction and Non-Fiction

In modern media, child sexual abuse has been depicted in both fictional and non-fictional materials. In the genre of fiction, television series and movies have depicted sexual abuse in their storylines — some of which are disturbingly graphic in their portrayal.

The popular television series *Game of Thrones*[16] is known for its sexually explicit scenes and display of nudity. In its first season, Daenerys Targaryen — 13 years old in the book but 15 years old in the TV series — was raped multiple times by her husband, Khal Drogo.[17] The series emphasizes the rape of Daenerys during their wedding night and portrays a sense of victimhood by contrasting her tender and weak appearance with Khal Drogo's muscular features and massive size.[18] It faced criticisms for its depiction of sexual violence and exploitation, including child abuse.[19]

Another popular television adaptation of a novel is *13 Reasons Why*.[20] The series has been the target of consistent criticism for showing shocking rape scenes.[21] In the first season, Bryce Walker rapes Jessica Davis and Hannah Baker — both 17 years old — in separate episodes of the series.[22] The first scene shows how Bryce raped Jessica as the latter was just waking up from a state of unconsciousness.[23] Bryce takes advantage of Jessica's drunkenness and locks her boyfriend outside the room to rape her without any hindrance.[24]

16. GAME OF THRONES (Television 360, et al. 2011-17).

17. Mariah Larsson, *Adapting Sex: Cultural Conceptions of Sexuality in Words and Images*, *in* WOMEN OF ICE AND FIRE: GENDER, GAME OF THRONES AND MULTIPLE MEDIA ENGAGEMENTS 22 (Anne Gjelsvik & Rikke Schubart eds., 2016).

18. Miles Surrey, 'Game of Thrones' Is Being Condemned for Its Depictions of Sexual Violence, *available at* https://mic.com/articles/141786/game-of-thrones-is-being-condemned-for-its-depictions-of-sexual-violence#.x5xde2EhR (last accessed Feb. 1, 2019).

19. *Id.*

20. 13 REASONS WHY (July Moon Productions, et al. 2017).

21. Constance Grady, 13 Reasons Why says it's confronting tough truths about suicide and bullying. It's not., *available at* https://www.vox.com/culture/2018/5/23/17380304/13-reasons-why-season-two-controversy (last accessed Feb. 1, 2019).

22. 13 REASONS WHY, *supra* note 20.

23. *Id.*

24. *Id.*

The second scene shows Bryce sexually abusing Hannah in a Jacuzzi. Bryce takes a forceful grasp of Hannah to suppress any resistance, while he proceeds to rape her.[25] Both scenes show struggle and lack of consent on the part of the victims and graphic body movements of the rapist indicating that forceful sexual intercourse is transpiring.

There are also fictional materials that depict the sexual conduct of children or minors without the element of force. The movie *Call Me by Your Name*[26] is an adaptation of a novel by André Aciman. It is a romantic drama about Elio Perlman, a 17-year-old boy from Northern Italy, who falls in love with Oliver, the 24-year old assistant of his father.[27] Elio begins a sexual and intimate relationship with Oliver, an affair they kept secret from his family and friends. [28] The movie shows numerous graphic and romanticized sex scenes between the main characters despite Elio being only a minor.[29]

In the genre of non-fiction, there are works that portray real-life occurrences of child sexual abuse. The online news website, Rappler, launched the *Stolen* series, which tells the stories of sexual violence committed against children.[30] The stories are written from the perspective of the child victims. The first of the series was written by Patricia Evangelista and featured stories of two young survivors of online child sexual exploitation.[31] The material is heavily graphic and detailed in its narration of sexual abuse.

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25. *Id.*

26. CALL ME BY YOUR NAME (Frenesy Film Company, et. al. 2017).

27. Richard Brody, The Empty, Sanitized Intimacy of "Call Me By Your Name," *available at* https://www.newyorker.com/culture/richard-brody/the-empty-sanitized-intimacy-of-call-me-by-your-name (last accessed Feb. 1, 2019).

28. *Id.*

29. *Id.* For the Author, this relationship from the movie falls within the definition of child sexual abuse by taking advantage of one's influence over a child. The age and romantic experience of Oliver created an influence over Elio that had vitiated the latter's consent to have sexual intercourse with the former. *See generally* Malto v. People, 533 SCRA 643 (2007) & People v. Casio, 744 SCRA 113 (2014) (where the Supreme Court said that a child cannot give a valid consent).

30. *See, e.g.*, Patricia Evangelista, Stolen: Pretty Girls, *available at* https://www.rappler.com/newsbreak/204973-stolen-series-human-trafficking-stories-girls-philippines (last accessed Feb. 1, 2019).

31. Evangelista, *supra* note 30.

As previously mentioned, the 2015 biographical drama film *Spotlight* is another non-fictional work that depicts child sexual abuse.[32] In the movie, the team of Michael Rezendes and Sascha Pfeiffer uncovers stories of sexual abuse from the victims themselves and gathers evidence that pins the widespread abuse on the Catholic Church authorities.[33] The exposé is released in the form of articles, sparking the clamor for justice and accountability, as well as encouraging more victims to come out and tell their stories.[34]

II. SURVEY OF LAW AND JURISPRUDENCE

This Chapter provides a discussion of Philippine laws penalizing the depiction of sexual conduct, namely, the Anti-Child Pornography Act of 2009[35] for child pornography and Article 201 of the Revised Penal Code[36] for obscene materials. The Anti-Child Pornography Act of 2009 is then viewed in light of the Cybercrime Prevention Act of 2012[37] and the Budapest Convention on Cybercrime.[38]

This Chapter then looks into the legal definition of obscenity. In doing so, it is necessary to explore cases settled in the American jurisdiction. At the forefront is the case of *Miller v. California*,[39] which settled the guidelines in determining the existence of obscenity.[40] The Essay likewise provides an in-

32. Mark Kermode, *Spotlight review – exposing the sins of the fathers*, GUARDIAN, Jan. 31, 2016, *available at* https://www.theguardian.com/film/2016/jan/31/spotlight-review-boston-globe-catholic-child-abuse-scandal (last accessed Feb. 1, 2019).

33. *Id.*

34. *Id.*

35. An Act Defining the Crime of Child Pornography, Prescribing Penalties Therefor and for Other Purposes [Anti-Child Pornography Act of 2009], Republic Act No. 9775 (2009).

36. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 201 (1930).

37. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes [Cybercrime Prevention Act of 2012], Republic Act No. 10175 (2012).

38. Budapest Convention on Cybercrime, *opened for signature* Nov. 23, 2001, E.T.S. No. 185 [hereinafter Budapest Convention].

39. Miller v. California, 413 U.S. 15 (1973).

40. *Id.*

depth review of *New York v. Ferber*,[41] an American case which categorically declared that child pornography is unprotected speech, regardless of whether it is obscene.[42] The United States (U.S.) Supreme Court ruled that the *Miller* test is not sufficient to address the problem of child pornography.[43] The subsequent case of *Ashcroft* is also discussed after *Ferber*.

The next Section provides an examination on how obscenity had been defined by Philippine jurisprudence. The latest development among the long line of cases is *Fernando v. Court of Appeals*,[44] which recognized that previous rulings do not provide a clear definition and standard of obscenity.[45] It ultimately adopted the *Miller* test.[46]

The Australian case of *McEwen v. Simmons*[47] is also discussed insofar as fictional child pornography is concerned.

A. Philippine Laws

1. Anti-Child Pornography Act of 2009, Cybercrime Prevention Act of 2012, and the Budapest Convention on Cybercrime

Congress passed the Anti-Child Pornography Act of 2009, to protect children from exploitation and abuse related to child pornographic performances.[48] Section 3 (b) of the law defines child pornography as "any representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic[,] or any other means, of a child engaged or involved in real or simulated explicit sexual activities."[49] The law defines various acts connected to child pornography and penalizes the same.[50] These acts may be divided in two classes: the first class pertains

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

42. *Id.* at 764.

43. *Id.*

44. Fernando v. Court of Appeals, 510 SCRA 351 (2006).

45. *See* Fernando v. Court of Appeals, 510 SCRA.

46. *Id.* at 360-61.

47. McEwen v. Simmons & Anor, NSWSC 1292, Dec. 8, 2008, *available at* https://www.caselaw.nsw.gov.au/decision/549fd8223004262463bfb9e9 (last accessed Feb. 1, 2019) (Aus.).

48. Anti-Child Pornography Act of 2009, § 2.

49. *Id.* § 3 (b).

50. *See* Anti-Child Pornography Act of 2009, §§ 4 & 15. Section 4 of the said law is as follows —

to those acts that relate to the creation and distribution of child pornography (i.e., paragraphs a, b, c, e, f, g, h, and i); and the second class pertains to the consumption of child pornography (i.e., paragraphs d and j). For a thing to be considered child pornography, the following must concur:

(1) There is a written, visual, and/or audio material;[51]

(2) The content of the material involves a real or simulated explicit sexual activity;[52] and

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Section 4. Unlawful or Prohibited Acts. [—] It shall be unlawful for any person:

(1) To hire, employ, use, persuade, induce[,] or coerce a child to perform in the creation or production of any form of child pornography;
(2) To produce, direct, manufacture[,] or create any form of child pornography;
(3) To publish, offer, transmit, sell, distribute, broadcast, advertise, promote, export[,] or import any form of child pornography;
(4) To possess any form of child pornography with the intent to sell, distribute, publish[,] or broadcast: Provided, That possession of three (3) or more articles of child pornography of the same form shall be prima facie evidence of the intent to sell, distribute, publish[,] or broadcast;
(5) To knowingly, willfully and intentionally provide a venue for the commission of prohibited acts such as, but not limited to, dens, private rooms, cubicles, cinemas, houses[,] or in establishments purporting to be a legitimate business;
(6) For film distributors, theaters and telecommunication companies, by themselves or in cooperation with other entities, to distribute any form of child pornography;
(7) For a parent, legal guardian[,] or person having custody or control of a child to knowingly permit the child to engage, participate[,] or assist in any form of child pornography;
(8) To engage in the luring or grooming of a child;
(9) To engage in pandering of any form of child pornography;
(10) To willfully access any form of child pornography;
(11) To conspire to commit any of the prohibited acts stated in this section. Conspiracy to commit any form of child pornography shall be committed when two (2) or more persons come to an agreement concerning the commission of any of the said prohibited acts and decide to commit it; and
(12) To possess any form of child pornography.

Id. § 4.

51. *Id.* § 3 (b).

> (3) The one engaged in the sexual activity, whether a natural person, a graphical representation of a person, or a computer-generated image of a person, is a child or is presented, depicted, or portrayed as a child.[53]

Under the law, the term "child" includes not only natural persons under 18 years of age or those who are above 18 but cannot take care of themselves but also:

> (1) a person regardless of age who is presented, depicted[,] or portrayed as a child as defined herein; and
>
> (2) computer-generated, digitally[,] or manually crafted images or graphics of a person who is represented or who is made to appear to be a child as defined herein.[54]

By virtue of the said provisions, the law applies to situations where no actual minor or even person is involved.[55] Section 3 (a) (1) punishes simulated child pornography or cases where an adult is depicting a child through storytelling elements.[56] Section 3 (a) (2) punishes virtual child pornography or situations where no actual human being is involved in the sexual act, but only virtually-created images of a child.[57] Hence, the law does not regard whether a material is a work of fiction or non-fiction; for as long as there is a portrayal of an explicit sexual activity of a child, there is child pornography.

Production and possession of child pornography is *malum prohibitum*, thus intent is immaterial.[58] This is supported by the straightforward language

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52. *Id.*

53. *Id.* The law does not distinguish whether the explicit sexual activity is consensual. *Id. See also* Benjamin Lawrence Patrick E. Aritao & John Stephen B. Pangilinan, *Online Sexual Exploitation of Children: Applicable Laws, Casework Perspectives, and Recommendations*, 63 ATENEO L.J. 185 (2018).

54. Anti-Child Pornography Act of 2009, § 3 (a). *But see* An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and for Other Purposes [Special Protection of Children Against Abuse, Exploitation and Discrimination Act], Republic Act No. 7610, § 3 (a) (1992).

55. Emmanuel Rey P. Cruz, *Outlawing Lolita: Testing the Constitutionality and Practicality of the "Victimless" Provisions of the Anti-Child Pornography Act of 2009*, 55 ATENEO L.J. 757, 768 (2010).

56. *Id.*

57. *Id.* at 769.

58. *See* Anti-Child Pornography Act of 2009, § 4 (b).

of Section 4 (b), which provides that it is unlawful "to produce, direct, manufacture[,] or create *any* form of child pornography."[59] When it comes to producing child pornography, no mention is made of the perpetrator's intent. Hence, the only relevant inquiry is whether child pornography, as defined in the law, is produced.

The scope of the Anti-Child Pornography Act of 2009 is also expanded in the digital sphere. Under the Cybercrime Prevention Act of 2012, one of the punished offenses is child pornography committed through a computer system,[60] to wit —

> Sec. 4. *Cybercrime Offenses* — The following acts constitute the offense of cybercrime punishable under this Act:
>
> ...
>
> (c) Content-related Offenses:
>
> ...
>
> (2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: Provided, [t]hat the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.[61]

In *Disini, Jr. v. Secretary of Justice*,[62] the petitioners therein questioned the constitutionality of several provisions of the Cybercrime Prevention Act of 2012, including Section 4 (c) (2) on child pornography.[63] The Court held that the Cybercrime Prevention Act of 2012 merely expands the scope of the Anti-Child Pornography Act of 2009 by covering identical acts committed through a computer system.[64] The aggravated penalty assigned by the law is a legislative prerogative based on the perceived danger of uncontrolled and incalculable spreading of child pornographic materials on the Internet. The Court upheld the constitutionality of Section 4 (c) (2).[65]

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59. *Id.* (emphasis supplied).

60. Cybercrime Prevention Act of 2012, § 4 (c) (2).

61. *Id.*

62. Disini, Jr. v. Secretary of Justice, 716 SCRA 237 (2014).

63. *Id.* at 311-12.

64. *Id.* at 312.

65. *Id.* at 313.

Notably, the Philippines has become the 57th member of the Budapest Convention last 20 February 2018.[66] The Senate unanimously ratified the Convention.[67] Senate Foreign Relations Committee Chair, Senator Loren Legarda, cited a UNICEF report and remarked that "[t]his [T]reaty is very important to protect our people from cybercrime especially since the country is the number one haven for those committing child pornography."[68] Article 9 of the Budapest Convention mandates each party to adopt legislative measures criminalizing child pornography under its domestic law.[69] As a whole, the Budapest Convention aims to promote common criminal policy and foster international cooperation.[70]

B. Article 201 of the Revised Penal Code

Depiction of sexual conduct may also be punished under the Revised Penal Code if the questioned materials show obscenity, immorality, or indecency. Article 201 of the said Code provides —

> Art. 201. Immoral doctrines, obscene publications and exhibitions and indecent shows. — The penalty of *prision mayor* or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:
>
> ...
>
> (2) (a) the authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same;
>
> (b) Those who, in theaters, fairs, cinematographs[,] or any other place, exhibit, indecent or immoral plays, scenes, acts[,] or shows, whether live or in film, which are prescribed by virtue hereof, shall include those which ... are contrary to law, public order, morals, and good customs, established policies, lawful orders, decrees[,] and edicts;

66. Argyll Cyrus Geducos, *PH now a Member of Budapest Convention on Cyercrime*, MANILA BULL., Mar. 6, 2018, *available at* https://news.mb.com.ph/2018/03/05/ph-now-a-member-of-budapest-convention-on-cybercrime (last accessed Feb. 1, 2019).

67. *Id.*

68. *Id.* (citing United Nations International Children's Emergency Fund, *The State of the World's Children 2017: Children in a Digital World* 81, Dec. 2017).

69. Budapest Convention, *supra* note 39, art. 9.

70. *Id.* pmbl.

(3) Those who shall sell, give away[,] or exhibit films, prints, engravings, sculpture[,] or literature which are offensive to morals.[71]

Several Supreme Court decisions concerning criminal charges under Article 201 tried to settle the issue of whether a particular material is obscene.[72] This has paved the way for a legal definition of obscenity — one that has evolved through the years and with the help of American case law. Obscenity, as defined in case law, is discussed in later Sections.

C. Obscenity and Child Pornography in American Jurisprudence

The 1987 Philippine Constitution enshrines the right of every person to freedom of expression, and provides that no law shall be passed abridging this fundamental right.[73] However, the High Court has long pronounced that freedom of expression is not absolute. Obscenity is not within the ambit of constitutionally protected speech.[74]

The doctrine laid down by the U.S. Supreme Court in *Miller* provides the controlling standards in determining whether a particular material is obscene. In that case, Marvin Miller was prosecuted and convicted for mass mailing unsolicited sexually explicit books in violation of the California Penal Code.[75] These contained depictions of men and women engaged in sexual activities.[76] On appeal, the Court abandoned the *Memoir* test established in 1996, which required that materials be proved to be "utterly without redeeming social value."[77] This was perceived as putting an unrealistic burden on the prosecution to prove a negative. The Court, however, continued to recognize the inherent dangers of regulating the right to freedom of expression and found the need to limit the allowable coverage of statutes with regard to prohibiting works depicting sexual conduct, thus —

71. REVISED PENAL CODE, art. 201.

72. *See* People v. Kottinger, 45 Phil. 352 (1923); People v. Go Pin, 97 Phil. 418 (1955); People v. Padan y Alova, et al., 101 Phil. 749 (1957); Gonzales v. Kalaw Katigbak, 137 SCRA 717 (1985); Pita v. Court of Appeals, 178 SCRA 362 (1989); & *Fernando*, 510 SCRA.

73. PHIL. CONST. art. III, § 4.

74. *Miller*, 413 U.S. at 25.

75. *Id.* at 16-18.

76. *Id.* at 18.

77. *Id.* at 23 (citing Memoirs v. Massachusetts, 388 U.S. 413, 418 (1966)).

> The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[78]

The *Miller* test was eventually adopted by the Philippine Supreme Court, which will be discussed further in later Sections. In 1974, the U.S. Supreme Court extended the benefits provided by the *Miller* test to appellant Billy Jenkins, whose appeal from conviction was pending at the time the decision in *Miller* was promulgated.[79] Jenkins was convicted of distributing obscene materials in violation of a Georgia statute.[80] Applying the *Miller* test, the Court found that the questioned motion picture did not depict sexual conduct in a patently offensive way.[81] The film contained scenes indicating that sexual acts were happening, but at such times, the focus was not on the bodies of the actors nor their genitals.[82] The Court remarked that nudity is not enough to qualify as legally obscene if the material does not portray "patently offensive 'hard core' sexual conduct."[83]

The U.S. Supreme Court had a chance to further qualify the application of the *Miller* test with respect to a controversial category of speech — child pornography. In the case of *Ferber*,[84] a New York statute prohibiting the promotion and distribution of sexual performance by a child was subjected to judicial scrutiny.[85] Child exploitation and pornography had become a pressing national problem, which prompted the Congress to pass legislations specifically aimed at combatting it.[86]

New York is one of the 20 states that prohibited the distribution of materials depicting children engaged in sexual activities without requiring them to be characterized as "obscene."[87]

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78. *Miller*, 413 U.S. at 24.

79. Jenkins v. Georgia, 418 U.S. 153, 160-61 (1974).

80. *Id.*

81. *Id.*

82. *Id.* at 161.

83. *Id.* at 164 (J. Brennan, concurring opinion).

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

85. *Id.* at 749.

86. *Id.*

87. *Id.* at 750-51.

In 1977, the New York Legislature enacted Article 263 of its Penal Law.[88] Section 263.05 criminalizes as a class C felony the use of a child in a sexual performance, to wit —

> A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes[,] or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian[,] or custodian of such child, he consents to the participation by such child in a sexual performance.
>
> A '[s]exual performance' is defined as 'any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.'
>
> 'Sexual conduct' is in turn defined in Article 263.00 [ ] (3) [as] ... 'actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.'
>
> A performance is defined as 'any play, motion picture, photograph or dance' or 'any other visual representation exhibited before an audience.'
>
> At issue in this case is Article 263.15, defining a class D felony [—]
>
> 'A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs[,] or promotes any performance which includes sexual conduct by a child less than sixteen years of age.'
>
> To 'promote' is also defined [—]
>
> 'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer[,] or agree to do the same.[89]

Paul Ferber, an owner of a bookstore, was charged under the said law when he sold films explicitly showing young boys masturbating.[90] On trial, he was found guilty under Section 263.15, a provision that does not require the sexual performance to be obscene.[91] The New York Court of Appeals reversed Ferber's convictions on the ground that Section 263.15 violated the First Amendment protecting the right to freedom of expression.[92] The specific provision does not adopt an obscenity standard, which in effect,

88. Consolidated Laws of New York, Penal Law, art. 263 (1909) (U.S.).

89. *Ferber*, 458 U.S. at 750-51 (citing New York Consolidated Laws, Penal Law, arts. 263, 263.00(I), 263.00(3), 263.00(4), 263.05, 263.15 (U.S.)).

90. *Id.* at 751-52.

91. *Id.* at 752.

92. *Ferber*, 458 U.S. at 752.

would prohibit the promotion of materials under constitutional protection.[93] While the State has an interest in protecting children, the New York statute was held to be unduly discriminatory against portrayals of children engaged in sexual activity, as other types of dangerous content are not similarly prohibited.[94] It was also found to be overbroad for covering materials that portray adolescent sex in a non-obscene manner such as educational sources.[95] The New York Court of Appeals assumed that the *Miller* test serves as the standard in determining whether a form of expression is constitutionally protected or not.[96] It posited that "non-obscene adolescent sex"[97] cannot be treated as an exception to this standard.[98]

The U.S. Supreme Court reversed the ruling of the New York Court of Appeals. The Court posed the issue of whether the State has more freedom in prohibiting works that depict children engaged in sexual activities or exhibit their genitalia in a lewd manner, to which it answered in the affirmative.[99] The Court looked into the reasoning behind the exclusion of obscenity from constitutional protection. In *Chaplinksy v. New Hampshire*,[100] obscene materials were observed to play "no essential part of any exposition of ideas, and are of such slight social value."[101] Any benefit arising from such materials are outweighed by the interest in public order and morality.[102] The Court explained that

> [t]he *Miller* standard, like its predecessors, was an accommodation between the State's interests in protecting the 'sensibilities of unwilling recipients' from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are

93. *Id.* (citing People v. Ferber, 52 N.Y. 2d 674, 678 (1981) & People v. Ferber, 422 N.E.2d 523, 525 (1981)).

94. *Ferber*, 458 U.S. at 755.

95. *Id.* at 752.

96. *Id.* at 753.

97. *Id.*

98. *Id.*

99. *Id.*

100. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

101. *Id.* at 572.

102. *Id.*

> persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.
>
> *First*. It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological wellbeing of a minor' is 'compelling.' 'A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.' Accordingly, we have sustained legislation aimed at protecting the physical and emotional wellbeing of [the] youth even when laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, the Court held that a statute prohibiting [the] use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In Ginsberg v. New York, [...] we sustained a New York law protecting children from exposure to non[-]obscene literature. Most recently, we held that the Government's interest in the 'wellbeing of its youth' justified special treatment of indecent broadcasting received by adults as well as children.
>
> The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying the passage of New York laws reflect this concern [—]
>
> '[T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.'[103]

The Court gave credence to the legislative effort and intent to combat child pornography. The legislative judgment on the harmful effects of child pornography to children's health are unquestioned and deemed enough to justify its removal from constitutional protection.[104] Moreover, targeting only the production of child pornographic materials is not enough to combat child sexual exploitation; impeding the distribution of such materials is likewise necessary.[105] The Court pointed out two ways by which the distribution of pornographic materials is "intrinsically related"[106] to child abuse: first, these serve as a permanent record of the children's participation

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103. *Ferber*, 458 U.S. at 756-57 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982); Princess v. Massachusetts, 321 U.S. 158, 168 (1944); Ginsberg v. New York, 390 U.S. 629 (1968); & FCC v. Pacifica Foundation, 438 U.S. 726 (1978)).

104. *Ferber*, 458 U.S. at 759.

105. *Id*. at 760.

106. *Id*. at 759.

in sexual acts;[107] second, the distribution network fuels the production of pornographic materials and aids child sexual exploitation.[108] It is only sensible and practical to target the markets of these materials through legislative and penal measures.[109] The advertising and selling of child pornography provides economic benefits to those who produce the materials.[110]

Ferber did not argue against the State's prohibition of the distribution of child pornography.[111] Rather, he contended that the coverage of prohibition should only cover materials that are obscene under the *Miller* test.[112] In this regard, the Court stated that relying on the *Miller* test and general definitions of obscenity is not sufficient to address the problem of child pornography.[113] The State has a compelling interest in safeguarding the well-being of minors, and thus, has a greater leeway in regulating pornographic depictions of children and prosecuting the promotion of sexual exploitation of children.[114] In other words, child-pornographic material need not be taken as a whole nor assessed by whether it appeals to the prurient interest of average persons.[115] It also need not be patently offensive and contain hard core sexual acts, nor lack serious literary, artistic, political, or scientific value in order to warrant prohibition.[116] The Court added that it is "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance."[117]

While the U.S. Supreme Court categorically excluded child pornography from constitutional protection, it was adamant to add that the illegal acts punished must be well-defined in the legislation.[118] In effect, the test for child pornography is different and separate from the test for

107. *Id.*

108. *Id.*

109. *Id.* at 760.

110. *Ferber*, 458 U.S. at 760.

111. *Id.*

112. *Id.*

113. *Id.* at 761.

114. *Id.*

115. *Id.*

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

117. *Id.* at 762.

118. *Id.* at 764.

obscenity in *Miller*.[119] As applied in the case of *Ferber*, the questioned prohibition in Section 263.15 sufficiently describes a category of material not covered by constitutional protection[120] as well as what constitutes sexual conduct.[121] The Court clarified that the State can pass legislations proscribing the distribution of a category of material like child pornography, as such is unprotected speech.[122]

In the subsequent case of *Ashcroft v. Free Speech Coalition*,[123] the U.S. Supreme Court decided whether the prohibition on "victimless" child pornography violates the right to free speech.[124] In striking down the prohibition, the U.S. Supreme Court said that victimless or fictional depiction of a child engaging in explicit sexual activity is not *per se* obscene under the *Miller* Test, and the material contemplated by the prohibition is not similar to the one contemplated by *Ferber*.[125] The U.S. Supreme Court further said that "[t]he [g]overnment cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question."[126] It also explained that the law is overbroad, i.e., while the State may legally prohibit an act, this prohibition goes beyond that interest by unduly limiting the speech of law-abiding adults.[127] It even made a list of literary materials which show minors engaging into sexual activity and showed how absurd it is to prohibit these materials even if they have gained social acceptance.[128]

D. Obscenity in Philippine Jurisprudence

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119. *Id.*

120. *Id.* at 765.

121. *Id.* The term "sexual conduct" includes actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. *Ferber*, 458 U.S. at 765.

122. *Id.* at 765-66.

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

124. *Id.* at 239-40. A "victimless" child pornography means that no actual child was used in the creation of the pornographic material. *See* Cruz, *supra* note 61, at 768-69.

125. *Ashcroft*, 535 U.S. at 251.

126. *Id.* at 252.

127. *Id.* at 252-53.

128. *See Ashcroft*, 535 U.S. at 247-48.

The Philippine Supreme Court has had the occasion to assess the legal definition of obscenity, while reviewing pertinent cases in relation thereto. In the case of *Fernando v. Court of Appeals*,[129] the Court gave an overview of the definitions and tests of obscenity that have been applied in Philippine jurisdiction. Gaudencio Fernando and Rudy Estorninos were convicted by the Regional Trial Court for violating Article 201 of the Revised Penal Code.[130] In a surveillance operation and raid, the police found them selling and distributing pornographic materials.[131] The question resolved by the Supreme Court was whether the appellate court erred in affirming Fernando and Estorninos' conviction, to which it answered in the negative.[132] The Court ruled that pursuant to the role of *parens patriae*, the State has the right to protect the public from obscene, immoral, and indecent materials.[133] Obscenity is a form of unprotected speech, and laws such as Article 201 of the Revised Penal Code may be passed in order to regulate it.[134] Under the said provision, the prosecution should prove that: "(a) the materials, publication, picture[,] or literature are obscene; and (b) the offender sold, exhibited, published[,] or gave away such materials."[135]

The Court harked back to the case of *People v. Kottinger*, where obscenity was first legally defined, to wit —

> There the Court defined obscenity as something which is offensive to chastity, decency[,] or delicacy. The test to determine the existence of obscenity is whether the tendency of the matter charged as obscene, is to deprave or corrupt those whose minds are open to such immoral influences and into whose hands a publication or other article charged as being obscene may fall.[136]

Additionally, *Kottinger* provided a second test —

> 'That which shocks the ordinary and common sense of men as an indecency.' However, *Kottinger* hastened to say that whether a picture is obscene or indecent must depend on the circumstances of the case, and

129. Fernando v. Court of Appeals, 510 SCRA 351 (2006).

130. *Id.* at 356.

131. *Id.* at 354-55.

132. *Id.* at 357.

133. *Id.* at 358.

134. *Id.*

135. *Fernando*, 510 SCRA at 358.

136. *Id.* (citing *Kottinger*, 45 Phil. at 356).

> that ultimately, the question is to be decided by the judgment of the aggregate sense of the community reached by it.[137]

A few decades later, in *People v. Go Pin*,[138] the Court, in ruling on the case, took into consideration the principal purpose of the materials alleged to be obscene. Materials that depict women in the nude for commercial purposes rather than art were held to be obscene.[139] The Court elaborated that

> [i]f such pictures, sculptures[,] and paintings are shown in art exhibits and art galleries for the cause of art, to be viewed and appreciated by people interested in art, there would be no offense committed. However, the pictures here in question were used not exactly for art's sake but rather for commercial purposes. In other words, the supposed artistic qualities of said pictures were being commercialized so that the cause of art was of secondary or minor importance. Gain and profit would appear to have been the main, if not the exclusive consideration in their exhibition; and it would not be surprising if the persons who went to see those pictures and paid entrance fees for the privilege of doing so, were not exactly artists and persons interested in art and who generally go to art exhibitions and galleries to satisfy and improve their artistic tastes, but rather people desirous of satisfying their morbid curiosity, taste, and lust, and for the love [of] excitement, including the youth who, because of their immaturity, are not in a position to resist and shield themselves from the ill and perverting effects of these pictures.[140]

Considering that the accused profited from exhibiting indecent and immoral materials, his conviction for violating Article 201 of the Revised Penal Code was affirmed.[141]

In *People v. Padan y Alova, et al.*[142] the accused showcased completely naked performers who engaged in lascivious conduct and sexual intercourse in front of a paying audience.[143] In affirming the conviction for violating Article 201 of the Revised Penal Code, the Court added a test of "redeeming feature"[144] by holding that

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137. *Fernando*, 510 SCRA at 360.

138. People v. Go Pin, 97 Phil. 418 (1955).

139. *Id.* at 419.

140. *Id.*

141. *Id.* at 420.

142. People v. Padan y Alova, et al., 101 Phil. 749 (1957).

143. *Id.* at 750.

144. *Id.* at 752.

> an actual exhibition of the sexual act, preceded by acts of lasciviousness, can have no redeeming feature. In it, there is no room for art. One can see nothing in it but clear and unmitigated obscenity, indecency, and an offense to public morals, inspiring and causing as it does, nothing but lust and lewdness, and exerting a corrupting influence [e]specially on the youth of the land.[145]

In *Gonzales v. Kalaw Katigbak*,[146] the Court still used contemporary community standards, but took a different approach — by looking at the dominant theme of the questioned material and evaluating it as a whole to determine whether such appeals solely to prurient interest.[147] It was a case of first impression where the petitioners invoked their right to freedom of expression against the exercise of power by the Board of Review for Motion Pictures and Television.[148] The latter classified the motion picture *Kapit sa Patalim* as "For Adults Only" and ordered the deletion of certain scenes therein.[149] The constitutionality of the standard used by the Board in arriving at its decision was put in question.[150] Moreover, the petitioners asserted that the Board's order to delete scenes was arbitrary and without basis, infringing on the right to freedom of expression.[151]

In resolving the case, the Court cautioned against the restriction of the said right. Motion pictures are materials that form public opinion.[152] Although not an absolute freedom, "[p]ress freedom ... may be identified with the liberty to discuss publicly and truthfully any matter of public concern without censorship or punishment."[153]

As the Court stated, "[c]ensorship or previous restraint certainly is not all there is to free speech or free press ... [i]t is, however, except in exceptional circumstances, a *sine qua non* for the meaningful exercise of such right."[154] There is a heavy presumption against the validity of prior restraint. The Court reiterated that "[t]he test ... to determine whether freedom of

145. *Id.*

146. Gonzales v. Kalaw Katigbak, 137 SCRA 717 (1985).

147. *Id.* at 726.

148. *Id.* at 721.

149. *Id.*

150. *Id.*

151. *Id.* at 722.

152. *Gonzales*, 137 SCRA at 723.

153. *Id.* at 723-24 (citing Reyes v. Bagatsing, 125 SCRA 553, 560 (1983)).

154. *Gonzales*, 137 SCRA at 724.

expression may be limited is the clear and present danger of an evil of a substantive character that the State has a right to prevent. Such danger must not only be [cl]ear but also present."[155]

The Court cited the U.S. case of *Roth v. United States*[156] to expound on the constitutional guarantee of free speech and press, to wit —

> All ideas having even the slightest redeeming social importance [—] unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion [—] have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[157]

Despite the premium placed on these fundamental rights, "the law ... frowns on obscenity [—] and rightly so."[158] However, the challenge remains in determining whether or not a material is obscene.

The standard used to be to take an isolated part of a material and assess its effect on "particularly susceptible persons."[159] In later decisions, the test has been

> whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity.[160]

The Court proceeded to clarify that sex is not the same as obscenity.[161] Rather, it should be understood that

> [o]bscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny [the] material the constitutional protection of freedom of speech and press. Sex ... has

155. *Id.* at 725.

156. Roth v. United States, 354 U.S. 476 (1957).

157. *Gonzales*, 137 SCRA at 725 (citing *Roth*, 354 U.S. at 484-85.).

158. *Gonzales*, 137 SCRA at 725.

159. *Id.* at 726.

160. *Id.* (citing *Roth*, 354 U.S. at 488-89).

161. *Gonzales*, 137 SCRA at 726.

> indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.[162]

The Court dismissed the petition and held that the Board did not commit grave abuse of discretion.[163] According to Executive Order No. 876,[164] the Board is to use "contemporary Filipino cultural values"[165] as the basis in classifying works The basic principles of statutory construction dictate that when there are two possible interpretations of a law, the Court should, as much as possible, side with the one that sustains the constitutionality of the questioned statute. Nonetheless, with regard to the portrayal of sex and obscenity, the Court put emphasis on the duty of the State to put arts and letters under its patronage; artists should be given a wide latitude to freely express themselves.[166]

Notably, in the latter case of *Pita v. Court of Appeals*,[167] the Court recognized that previous rulings did not provide a clear definition and standard of obscenity. The Court in *Pita* opined that the cases of *Go Pin* and *Padan y Alova* gave the courts too much discretion by allowing judges and Justices alike to base their judgment on their own subjective views regarding obscenity and art.[168] However, the Court took the opportunity to present the latest guidelines on obscenity as laid down in *Miller*:

> (1) whether to the average person, applying contemporary standards would find the work, taken as a whole, appeals to prurient interest;
>
> (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

162. *Id.* at 726–27 (citing *Roth*, 354 U.S. at 487).

163. *Gonzales*, 137 SCRA at 729.

164. Office of the President, Amending Executive Order No. 868 Which Reorganized the Board of Review for Motion Pictures and Television, Executive Order No. 876, Series of 1983 [E.O. No. 876, s. 1983] (Feb. 18, 1983).

165. *Gonzales*, 137 SCRA at 727 (citing E.O. No. 876, s. 1983, 3 (c)).

166. *Gonzales*, 137 SCRA at 727.

167. Pita v. Court of Appeals, 178 SCRA 362 (1989).

168. *Id.* at 370.

(3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[169]

Obscenity is an issue that may be adjudicated in proper proceedings, and it "[should] be resolved on a case-to-case basis and on [his or her] Honor's sound discretion."[170] Even with the *Miller* test as a guide, the courts are not given the unbridled discretion in deciding what is "patently offensive."[171] Still, in *Fernando v. Court of Appeals*,[172] the Court emphasized that

> [n]o one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct. Examples included (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[173]

E. McEwen v. Simmons

While the Supreme Court has yet to lay down case doctrines in application of child pornography to "victimless" materials, the Australian case of *McEwen v. Simmons* had the occasion of ascribing a wide meaning to persons covered by anti-child pornography laws.

In *McEwen*, the Supreme Court of New South Wales declared that fictional or imaginary characters representing minor persons were covered by child pornography statutes.[174] The plaintiff was convicted of possessing child pornography and using his computer to access the same, in violation of the provisions in the Crimes Act 1900 and the Criminal Code Act 1995, respectively.[175] The materials concerned explicitly depicted sexual conduct of child characters from the animated series *The Simpsons*.[176] Although the ages of the characters were uncertain, they appeared to be pre-pubertal.[177]

169. *Id.* at 371 (citing *Miller*, 413 U.S. at 24).

170. *Pita*, 178 SCRA at 377.

171. *Id.* at 371 (citing *Miller*, 413 U.S. at 24).

172. Fernando v. Court of Appeals, 510 SCRA 351 (2006).

173. *Id.* at 361 (citing *Miller*, 413 U.S. at 25).

174. *McEwen*, NSWSC 1292, ¶ 38.

175. *Id.* ¶ 1.

176. *Id.*

177. *Id.*

The genitalia of the characters were also recognizably human.[178] The Court looked into the definitions found in the relevant statutes to decide whether fictional characters depicted as persons are within the meaning of the laws.

In Section 91 FB (1) of the Crimes Act 1900, "child abuse material" refers to

> [M]aterial that depicts or describes, in a manner that would in all the circumstances cause offence to reasonable persons, a person under (or apparently under) the age of 16 years:
>
> (a) engaged in sexual activity, or
>
> (b) in a sexual context, or
>
> (c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).[179]

Meanwhile, in Section 473.1 of the Criminal Code Act —

> [C]hild pornography material means:
>
> (a) material that depicts a person, or a representation of a person, who is, or appears to be, under 18 years of age and who:
>
> (i) is engaged in, or appears to be engaged in, a sexual pose or sexual activity (whether or not in the presence of other persons); or
>
> (ii) is in the presence of a person, who is engaged in, or appears to be engaged in, a sexual pose or sexual activity; and does this in a way that reasonable persons would regard as being, in all the circumstances, offensive.[180]

The Court in *McEwen* gave a wide meaning to the term "persons"[181] in light of the perceived legislative intent to suppress a perceived risk of harm to children — regardless of whether the pornographic depictions involve actual or imaginary human beings.[182] The cartoon figures subject to review of the Court were seen to represent actual human beings, making them fall

178. *Id.*

179. *Id.* ¶ 8 (citing Crimes Act 1900 No. 40 (NSW), pt. 3, div. 15A, §§ 91 FB & 91 H (3) (1900) (as amended) (Aus.)).

180. *McEwen*, NSWSC 1292, ¶ 10 (citing Criminal Code Act 1995, § 473.1 (1995) (Aus.)).

181. *McEwen*, NSWSC 1292, ¶ 26.

182. *Id.* ¶ 41.

within the scope of the statute.[183] The depiction of a person is a question of fact and is a necessary element of the offense.[184] The mere fact that the representation departed from realistic imagery in some ways does not take it out of the definition of "persons."[185]

The child pornography laws applied by the Court in *McEwen* draw similarities to the Philippines' Anti-Child Pornography Law of 2009. The latter also does not require an actual child for one to perpetrate the crime of child pornography.[186] Likewise, it does not require real sexual activities to constitute child pornography; real and simulated explicit sexual activities are both contemplated in the law.[187]

F. Media Practice

Under the Code of Ethics of Media Practitioners in the Philippines,[188] when a journalist or a media personnel has doubts as to the language that he or she has to use in his or her work, he or she must consider decency.[189] Hence, if he or she finds himself or herself in a situation where an informant consented to the full narration of the latter's story, the former must not write the narration in full outright, but he or she must evaluate the content first, i.e., whether it is appropriate and legal to show everything in full or it is sufficient to only show the essence of the informant's testimony.

III. ANALYSIS

A. On the Character of Child Pornography

It is not clear in Philippine jurisprudence whether child pornography is considered as an obscene material or as a species of its own. However, other jurisdictions' treatment of child pornography is persuasive.

This Author is of the opinion that child pornography is not obscenity but a species of its own. Child pornography is inherently dangerous to the

183. *Id.*

184. *Id.* ¶ 40.

185. *Id.* ¶ 36.

186. *See* Anti-Child Pornography Act of 2009.

187. *Id.*

188. Presidential Communications Operations Office, Code of Ethics for Media 27, *available at* https://pcoo.gov.ph/wp-content/uploads/2016/06/buk1_code_of_ethics_for_media.pdf (last accessed Feb. 1, 2019).

189. *Id.*

welfare of children, and the prohibition on child pornography is within the power of the State as *parens patriae*.

This position is rooted in the fact that in prosecuting child pornography cases, it is not necessary that the author intended to make something obscene or that a reasonable person must find it appealing to prurient interest. What matters is that the material depicts a child engaging in explicit sexual activity. Societal perspective need not even be presented as evidence because common sense or public morals presumes that society despises the explicit depiction of a child engaging in sexual activity. Thus, child pornography has inherently no redeeming social value. For a material to be qualified as child pornography, it must only satisfy the requisites mentioned above.

The table below illustrates the comparison between Child Pornography and Obscenity as regards their substance —

<table>
<tr><th>Child Pornography</th><th>Obscenity</th></tr>
<tr><td rowspan="2">The content of the material involves a real or simulated explicit sexual activity</td><td>The average person, applying contemporary standards would find the work, taken as a whole, appeals to prurient interest</td></tr>
<tr><td>The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law</td></tr>
<tr><td>The one engaged in the sexual activity, whether a natural person, a graphical representation of a person, or a computer-generated image of a person, (a) is a child or (b) is presented, depicted, or portrayed as a child.</td><td>The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.</td></tr>
</table>

Now, how can one harmonize the rulings in *Ferber*, *Ashcroft*, and *McEwen* in the Philippine Context considering that these jurisprudence are equally persuasive? Considering the socio-political climate of the Philippines and its *parens patriae* and international law obligations, the rulings of *Ferber* and *McEwen* should be adopted by Philippine courts. Although there is a reality that the Philippine's Bill of Rights is patterned to the U.S. Constitution's, this reality does not mean that Philippine courts should

always adopt the rulings of U.S. courts. There are other things to be considered.

The U.S. is the only country in the world that did not ratify the United Nations Convention on the Rights of a Child (UNCRC).[190] This fact determines whether a State has an obligation to make a child's best interest a primary consideration in every State-action, including judicial decisions, that concerns a child.[191] U.S. does not have this obligation, but the Philippines and Australia have because the two are signatories of UNCRC.[192] Thus, in determining whether it is proper to prohibit materials that explicitly shows a child engaging in sexual activity, the U.S. Court can simply brush aside the reality that these materials may affect children and rule in favor of an adult who want to write something that is potentially harmful to a child.

As regards the argument in *Ashcroft* that the law is overbroad in prohibiting the existing literary works portraying a child engaged in sexual activity, the answer is simple — these materials are not covered by the prohibition because they are created and distributed prior to the enactment of the penal law.[193]

B. Crossing the Line of Child Pornography

The next question that has to be answered is — when does the portrayal of child sexual abuse cross the line of child pornography?

While Philippine jurisprudence is silent on the matter, based on the discussion above, it is clear that when a material shows explicit sexual activity of a child, it is child pornography. Thus, a material that merely talks about an act of child sexual abuse may nevertheless be considered child pornography if the manner in which it was written demonstrates an explicit sexual activity. As a matter of example, these statements "AAA, a child, was raped by BBB multiple times," "BBB forced himself to AAA," and "BBB raped AAA multiple times by inserting his penis to the latter" do not constitute child pornography; but if the material explicitly describes the way the perpetrator grabbed the hand of the victim, how the perpetrator enjoyed

190. Sarah Mehta, There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US, *available at* https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens (last accessed Feb. 1, 2019).

191. United Nations Convention on the Rights of a Child, *entered into force* Sep. 2, 1990, 1577 U.N.T.S. 3, art. 3, ¶ 1.

192. *See* Mehta, *supra* note 231.

193. *See* PHIL. CONST. art. III, § 22.

the rape done to the victim, and other details that have become irrelevant in finding whether child sexual abuse exists, it qualifies as child pornography.

In fictional and non-fictional depiction of child sexual abuse, most likely the intent of the author, producer, screenwriter, composer, or director is noble, e.g., to ignite something in the mind of the reader, viewer, or listener to protect children from abuse. However, the method of how child sexual abuse is depicted may fall under the class of child pornography because the words used by the creator constitute the explicit portrayal of a child engaged in sexual activity.

In non-fiction, even though the informants consented to the full narration of their stories, the consent given does not warrant the actual and full narration of the abuse because the consent of the person whose story is being narrated is not material in finding whether a material falls under the definition of child pornography.

IV. CONCLUSION

In studying the conundrum surrounding child pornography laws, there are points where legal, moral, and practical dilemmas may arise, such as the portrayal of child sexual abuse that would amount to child pornography or the portrayal's propriety. This Essay merely provided an opinion over the matter — at the end of the day, the courts have the final answer to the question. The absence of any ruling on the matter, however, is not an excuse not to ask oneself — "Is it decent to show how many times a pedophile raped a child in a very detailed manner, how he shouted while doing it, and how he satisfied his morally shocking fetishes when the author of a literature merely intended to show the prevalence of abuse?" Finally, by putting the victims' stories out in the public (thereby making it almost permanent) in a detailed manner, the author must ask — "Am I truly setting them off their chains or am I simply replacing their chains with longer ones?"