Outlawing Lolita: Testing the Constitutionality and Practicality of the "Victimless" Provisions of the Anti-Child Pornography Act of 2009

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I. INTRODUCTION

> Ladies and gentlemen of the jury, the majority of sex offenders that hanker for some throbbing, sweet-moaning, physical but not necessarily coital, relation with a girl-child, are innocuous, inadequate, passive, timid strangers who merely ask the community to allow them to pursue their practically harmless, so-called aberrant behavior, their little hot wet private acts of sexual deviation without the police and society cracking down upon them.
>
> — *Lolita*, Vladimir Nabokov[1]

A. Child Pornography and Vladimir Nabokov's Lolita

Pedophilia[2] is taboo in modern society. The specter of this baseness is definitely chilling to the collective human psyche, particularly to the targets of such pernicious behavior — innocent children regardless of age or gender. Even if the last century had generally shied away from referring to this nameless horror, none other than popular literature baptized it into the mainstream.

While Vladimir Nabokov cannot be accused of romanticizing pedophilia when he wrote and published *Lolita* in 1955, he certainly gave it another name, a popular euphemism acceptable in civilized conversations. The same name has certainly endured up until the present, but it is no understatement to say that *Lolita*, as part of modern parlance, has evolved in a way that Nabokov may not have imagined.

Modern times and technological advancements have changed how overt acts of pedophilia are committed against young children. Child

1. VLADIMIR NABOKOV, LOLITA 92-93 (Everyman's Library ed., Random House Inc. 1992) (1955).
2. BLACK'S LAW DICTIONARY 1246 (9th ed. 2009). There are two definitions provided: "1. A sexual disorder consisting in the desire for sexual gratification by molesting children, esp. prepubescent children. 2. An adult's act of child molestation." *Id.*

pornography,[3] in particular, has become the most popular "physical" manifestation of, in Humbert Humbert's words, this aberrant behavior short of coital relations.[4] And truth be told, child pornography has slipped out of conservative society's control.

B. The Internet

The Internet is a worldwide network of interconnected computers.[5] Its use in everyday life has evolved in scope to include objects ranging from the moderately curious to the patently illegal. The most widely recognized avenue of communication over the Internet is the World Wide Web, which gives users the power to find information and to retrieve them from certain designated sites.[6] *Reno v. American Civil Liberties Union* enunciates on the subject, thus —

> In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web 'pages,' are also prevalent.
>
> . . .
>
> The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.[7]

Hence, it certainly is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."[8]

Browsing the Web is far from complex.[9] A user ordinarily has the option of either typing the address of a certain page or entering selected keywords into a search engine if he is looking for a particular subject of interest.[10] Academic scholars certainly appreciated its ability to share vast amounts of information.[11] Institutions such as governments found an effective tool

3. *Id.* at 273. Child pornography is any "[m]aterial depicting a person under the age of 18 engaged in sexual activity. It is not protected by the First Amendment — even if it falls short of the legal standard for obscenity — and those directly involved in its distribution can be criminally punished." *Id.*

4. NABOKOV, *supra* note 1, at 92-93. Humbert Humbert is the protagonist of *Lolita* who becomes infatuated and sexually involved with a minor.

5. Reno v. American Civil Liberties Union, 521 U.S. 844, 849 (1997) (U.S.).

6. *Id.* at 852.

7. *Id.* at 853.

8. *Id.* at 852.

9. *Id.*

10. *Id.*

11. KIEREN MCCARTHY, SEX.COM V (2007).

utilized for communications.[12] For all others, the Internet has been serving a variety of functions, such as an avenue for shopping, talking about experiences, and even looking for sex.[13] Kieren McCarthy observes, thus —

> Websites were so easy and cheap to set up, and the profits so huge, [that] the Internet was soon awash with hundreds of thousands of porn sites. Then exhibitionists discovered the Internet, and suddenly there were tens of thousands of free pictures plastered all over the Web. The adult industry is nothing if not pragmatic, so it moved to where the money was — unusual types of pornography that people would pay for out of desire or curiosity.[14]

C. The Lolita Syndrome in the World Wide Web

The "Lolita syndrome" describes the manner by which advertisers and photographers have been accused of selling children as sexual objects.[15] In her 2008 book, *The Lolita Effect*,[16] M. Gigi Durham of the University of Iowa wrote that, "[t]he idea of the sexy little girl is a potent one in the adult imagination, and in recent years has become insistently present in mainstream, as well as alternative media."[17] The most popular of such alternative media is the Internet, through the use of websites. Commonly referred to as "Lolita sites," child pornography sites have been omnipresent, from private hosting domains to member communities.[18] According to *Reno*, such sexually profound material can take the form of texts, pictures, and chat, and "extends from the modestly titillating to the hardest core."[19] Elucidating further, *Reno* explains that —

> [t]hese files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search.
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> . . .

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12. *Id.*
13. *Id.*
14. *Id.* at 223.
15. Brenda M. Simon, *United States v. Hilton*, 14 BERKELEY TECH. L.J. 385, 385 (1999).
16. M. GIGI DURHAM, THE LOLITA EFFECT: THE MEDIA SEXUALIZATION OF YOUNG GIRLS AND WHAT WE CAN DO ABOUT IT (2008 ed.).
17. Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, at 15 (citing DURHAM, *supra* note 16).
18. Eric Hwang, *Child Pornography on the Internet*, 2002 UCLA J.L. & TECH. NOTES 7, 7 (2002).
19. *Reno*, 521 U.S. at 853.

> Though such material is widely available, users seldom encounter such content accidentally ... For that reason, the 'odds are slim' that a user would enter a sexually explicit site by accident.[20]

D. The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the Amber Alert Law

This growing phenomenon of child pornography being made more readily available in the Internet became the impetus for international initiative, which included the drafting of international covenants, particularly the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol).[21] The Optional Protocol expressed concern with "the growing availability of child pornography on the Internet and other evolving technologies."[22] Several countries have also enacted laws combating child pornography.[23] The United States (U.S.), in particular, has been persistent in its attempt to eradicate child pornography by continuously enacting legislation which criminalizes the various means and methods of committing the same.[24] Nonetheless, the U.S. Supreme Court, on occasion, has invalidated several provisions of anti-child pornography legislation for not passing constitutional muster, especially those restricting the freedom of speech.[25] The U.S. Congress, for better or for worse, has been continuously thwarted since the last decade, when it enacted the Child Pornography Prevention Act (CPPA) of 1996.[26] This was followed more recently by the Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003,[27] also known as the Amber Alert Law. At present, the Amber Alert Law still enjoys its status as a valid anti-child pornography legislation.[28] Because of this, it is reasonable to believe that child pornographers have moved their base of operations from countries

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20. *Id.* at 853-54.

21. G.A. Res. 54/236, at 6, U.N. Doc A/RES/54/236 (Dec. 23, 1999).

22. *Id.* whereas cl.

23. *See* AN ACT RESPECTING CRIMINAL LAW, § 163.1, R.S.C. 1985, c. C-46, as amended (Can.); PROTECTION OF CHILDREN ACT, 1978, c. 37, (Eng.); CRIMINAL CODE ACT, § 474.19 (1) (a) (i) (Cth) (Austl.); & KEIHŌ (PEN. C.) 1907, art. 175 (Japan).

24. *See generally* Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (2000) (U.S.) & Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003 [PROTECT Act of 2003], Pub. L. No. 108-121, 117 Stat. 650 (2003) (U.S.).

25. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002) (U.S.).

26. *See* Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256.

27. *See* PROTECT Act of 2003.

28. *See generally* United States v. Whorley, 550 F.3d 326 (3d Cir. 2008) (U.S.).

having strong anti-child pornography laws, such as the U.S., to countries having weak and ineffective ones, such as the Philippines.

This Note will refrain from a general discussion of child pornography, the Author recognizing that the abuse and exploitation of *actual children* (as opposed to virtual representations of children) in whatever context and through any pornographic medium, especially when disseminated through the Internet or the World Wide Web, is inherently evil and shocking to the conscience. Instead, the Author will focus on Philippine laws that combat child pornography in the Internet or the World Wide Web, specifically through an inspection and appreciation of the "victimless" provisions of Republic Act (R.A.) No. 9775,[29] or the Anti-Child Pornography Act of 2009.

Consequently, the Note shall first discuss the constitutional issues that surround R.A. No. 9775. It will pay particular attention to the constitutionality of the law's victimless provisions in relation to its counterpart U.S. anti-child pornography laws. These victimless provisions cover those relating to both simulated and virtual child pornography. Second, it will explore the practical problems concerning the law's implementation. Ultimately, a conclusion is to be drawn with regard to the law's constitutionality as well as its practicality.

II. THE ANTI-CHILD PORNOGRAPHY ACT OF 2009 (R.A. NO. 9775)

A. "Child Pornography Haven"

The Philippines became known as a "child pornography haven" because it lacks specific laws targeting child pornography.[30] While it is true that a host of general legislation,[31] particularly the provisions of R.A. No. 7160[32] or the

29. 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).

30. *House OKs bill against child pornography*, PHIL. DAILY INQ., Aug. 26, 2009, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20090826-222071/House-OKs-bill-against-child-pornography (last accessed Nov. 7, 2010).

31. *See* An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act No. 3815, art. 201 (1932) & An Act to Institute Policies to Eliminate Trafficking in Persons Especially Women and Children, Establishing the Necessary Institutional Mechanisms for the Protection and Support of Trafficked Persons, Providing Penalties for Its Violations, and for Other Purposes [Anti-Trafficking in Persons Act of 2003], Republic Act. No. 9208 (2002).

32. An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and for Other Purposes [Special

Special Protection of Children against Abuse, Exploitation and Discrimination Act, can be generally applied for the prosecution of child pornographers,[33] the lack of focus in the law and the lack of precision in its language provided loopholes for offenders to go scot-free.[34] This led to the enactment of R.A. No. 9775.

B. A Tale of Two Bills

Amidst public clamor and popular advocacy,[35] both the House of Representatives and the Senate, through the House Committees on Justice and Welfare of Children, and the Committees on Youth, Women and Family Relations, and Justice, respectively, submitted their own versions of bills addressing child pornography.[36] The House of Representatives of the 14th Congress, in its 3d Regular Session, passed House Bill (H.B.) No. 6440[37] on 26 August 2009.[38] Likewise, the Senate of the 14th Congress, in its 3d Regular Session, passed Senate Bill (S.B.) No. 2317[39] on 21 May 2008.[40] These Bills were later reconciled to become R.A. No. 9775.

1. House Bill No. 6440

H.B. No. 6440 places paramount importance on the promotion and protection of the physical, moral, spiritual, intellectual, emotional, psychological, and social well-being of the country's youth.[41] The bill is specifically tailored to protect children from sexual exploitation.[42]

Protection of Children Against Abuse, Exploitation and Discrimination Act], Republic Act No. 7610 (1992).

33. *Id.* art. V, § 9.

34. J. Camero & I. Yambot Jr., House wants to ban pornographic cartoon, *available at* http://www.congress.gov.ph/press/details.php?pressid=3253 (last accessed Nov. 7, 2010).

35. Kristine Servando, A 'worthier sex film' to watch, *available at* http://www.abs-cbnnews.com/lifestyle/06/03/09/worthier-sex-film-watch (last accessed Nov. 7, 2010).

36. Camero & Yambot Jr., *supra* note 34.

37. An Act Defining the Crime of Child Pornography, Prescribing Penalties Therefor and for Other Purposes, H.B. No. 6440, 14th Cong., 3d Reg. Sess. (Aug. 26, 2009).

38. *See generally* H.B. No. 6640.

39. An Act Prohibiting Child Pornography, Imposing Penalties for the Commission Thereof and for Other Purposes, S.B. No. 2317, 14th Cong., 1st Reg. Sess. (May 21, 2008).

40. *See generally* S.B. No. 2317.

41. H.B. No. 6440, § 2.

42. *Id.* § 2 (b) (1) & (2).

According to Representative (Rep.) Monica Prieto-Teodoro, one of the authors of the measure, "the bill penalizes the offenders who sell, offer, advertise, and promote child pornography; and have been found to possess, download, purchase, reproduce, or make available child pornography materials with the intent of selling or distributing them."[43] Also, Rep. Darlene Antonino-Custodio observed that "the Internet which is used for gaining knowledge is being used by some as a medium to gratify sexual desire."[44] The House of Representatives underscored the severity of child pornography by meting out heavy penalties under H.B. No. 6440.[45]

2. Senate Bill No. 2317

S.B. No. 2317 guarantees the "rights of every [c]hild from neglect, cruelty, and other conditions prejudicial to their development,"[46] particularly the exploitative use of children in pornography through whatever means.[47]

Senator Jamby Madrigal-Valade, in her sponsorship speech,[48] called upon her fellow senators to support the Bill for the interest of young Filipino children, stating that "there are sins that cry out to heaven for vengeance, and modern-day examples of moral turpitude and degradation that cannot be given the benefit of the doubt."[49] Senator Loren Legarda, in her co-sponsorship speech, observed that the Philippines is one of the leading producers of pornographic materials.[50] She also emphasized that the Bill "seeks to prohibit child pornography through the imposition of penalties and imprisonment."[51]

C. Legislative Intent?

One of the interesting features of H.B. No. 6440 during its conception and subsequent approval by the Joint Committees on Justice and Welfare of Children was its publicized intention to ban *Hentai*,[52] a pornographic

43. Camero & Yambot Jr., *supra* note 34.

44. *Id.*

45. *Id.*

46. S.B. No. 2317, § 2 (a).

47. *Id.* § 2 (b).

48. SENATE JOURNAL 84, 849, 14th Cong., 1st Reg. Sess., Senate Sess. No. 84 (June 2, 2008).

49. *Id.* at 850.

50. *Id.* at 853.

51. *Id.*

52. *See* Mark McLelland, A Short History of 'Hentai,' *available at* http://intersections.anu.edu.au/issue12/mclelland.html (last accessed Nov. 7, 2010). *Hentai* is defined as "a Sino-Japanese compound term widely used in

cartoon of Japanese origin.[53] Rep. Prieto-Teodoro justified this by saying that "[child pornography] can be in forms of visual depiction, audio representation[,] and written text or materials that advocate explicit sexual activity with a child."[54]

While S.B. No. 2317 adopted definitions similar to those of H.B. No. 6440, the Senate did not publicly hold out the intention to ban *Hentai.* The Senate, however, assented to the "additional" definition of the term "Child" to possibly apply to a person, regardless of age, who is presented, depicted, or believed to be a child, such as "legal-age models in pigtails with a balloon or lollipop while surrounded by stuffed animals."[55] Senator Miriam Defensor-Santiago justified this by saying that "while the law seeks to protect children, the extended definition punishes the depravity of the viewer."[56]

As can be gleaned from the drafting of the abovementioned bills, there are actually two considerations which both the House of Representatives and the Senate had in mind in legislating what would eventually become R.A. No. 9775. First, it can be observed from the intent to ban *Hentai* that the aimed prohibition would extend to pornography involving virtual representations of a child. Second, the assent to the "additional" definition of the term "Child" reveals the intent to punish even cases which involved only the simulation of children. Consequently, these aims were incorporated and were manifested in R.A. No. 9775 when it was finally enacted into law, as provided in the expanded definition of a "Child" found therein.

D. Definitions of "Child Pornography" and "Child" in R.A. No. 9775

1. Child Pornography

Section 3 (b) of R.A. No. 9775 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."[57]

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modern Japanese to designate a person, action or state that is considered queer or perverse, particularly in a sexual sense." It can also refer to "a specific genre of Japanese manga and animation that features extreme or perverse sexual content." *Id.*

53. Camero & Yambot Jr., *supra* note 34.

54. *Id.*

55. SENATE JOURNAL 5, 90, 14th Cong., 2d. Reg. Sess., Senate Sess. No. 5 (Aug. 5, 2008).

56. *Id.*

57. Anti-Child Pornography Act of 2009, § 3 (b).

Section 4 (j) of the law provides that "[i]t shall be unlawful for any person … [t]o willfully access any form of child pornography."[58] Section 4 (l) also provides that "[i]t shall be unlawful for any person … [t]o possess any form of child pornography."[59]

Section 4 (j) is punishable with the penalty of *prision correccional* in its medium period and a fine of not less than ₱100,000.00 but not more than ₱250,000.00.[60] Further, Section 4 (l) is punishable with the penalty of *arresto mayor* in its minimum period and a fine of not less than ₱50,000.00 but not more than ₱100,000.00.[61]

The definition of child pornography is further rehashed in the Implementing Rules and Regulations (IRR) of R.A. No. 9775.[62] The Philippines substantially follows the definition in the Optional Protocol,[63] to which it declared compliance as a signatory.[64] It is interesting to note that the definition of child pornography in the Amber Alert Law[65] is similar to

58. *Id.* § 4 (j).

59. *Id.* § 4 (l).

60. *Id.* § 15 (g).

61. *Id.* § 15 (i).

62. Rules and Regulations Implementing the Anti-Child Pornography Act of 2009, § 3 (c) (2009).

63. G.A. Res. 54/236, *supra* note 21, art. 2 (c). Child pornography means "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes." *Id.*

64. *See* Anti-Child Pornography Act of 2009, § 2 (c).

65. PROTECT Act of 2003, § 502 (a). This Section provides:

> (8) 'child pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where —
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

Id.

the proposed definitions in H.B. No. 6440,[66] S.B. No. 2317,[67] and R.A. No. 9775.

The definitions in the aforementioned instruments, laws, and bills reflect a more or less common understanding of what child pornography is. While the definition of child pornography is not a point of contention because of its seeming universality, the same is not true for the definitions of a "Child" and a "Minor," which identifies the subject of protection. This dissimilarity becomes the turning point of R.A. No. 9775's application.

2. Child

The Optional Protocol did not offer a definition for the term "Child."[68] Neither was the term qualified in the said Protocol. The CPPA, instead of using the term "Child," used the term "Minor" to identify the "victim."[69] Presently, the Amber Alert Law also uses the term "Minor" to identify the subject of protection.[70] Thus, in the Amber Alert Law, the subject of the law's protection is clear.

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66. H.B. No. 6440, § 3 (b). This Section provides that "child pornography" refers to "any public or private representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes." *Id.*

67. S.B. No. 2317, § 3 (b). This Section provides —

> Child Pornography — refers to any visual, written material or audio representation, whether or not it is made by electronic or mechanical means, or an actual presentation of a Child:
>
> (1) Engaged in real or simulated explicit sexual activity; or
>
> (2) Showing his or her sexual parts or anal region, the dominant characteristic of which depicts a sexual purpose.

Id.

68. *See* G.A. Res. 54/236, *supra* note 21.

69. Child Pornography Prevention Act of 1996, 18 U.S.C. § 121 (2). This Section defines an "identifiable minor" as a person

> (i)
>
> (I) who was a minor at the time the visual depiction was created, adapted, or modified; or
>
> (II)whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
>
> (ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature.

Id.

70. PROTECT Act of 2003, § 106 (D). This Section provides that the term "minor" means "any person under the age of eighteen years." *Id.*

The same may not be true in the case of R.A. No. 9775. Section 3 (a) of the said law defines a "Child" as "a person below eighteen (18) years of age *or over*, but is *unable to fully take care of himself/herself from abuse, neglect, cruelty, exploitation*[,] *or discrimination because of a physical or mental disability or condition*."[71] This extended definition can also be seen in R.A. No. 7610.[72]

But R.A. No. 9775 did not stop there. It took two steps further when it included in the definition of a "Child" two other persons (or non-persons) which are neither "Children" nor "Minors."[73] Hence, within the law's contemplation are instances where there really are no actual children involved. Such is manifest in the law's "victimless" provisions, as will be discussed in the immediately succeeding section.

III. THE "VICTIMLESS" PROVISIONS IN THE ANTI-CHILD PORNOGRAPHY ACT OF 2009

A victimless crime is one that is considered to have no direct victim.[74] This usually takes place when only consenting adults are involved.[75] The first instance applies to situations where there is no *actual child* involved. In the context of R.A. No. 9775, this refers to situations involving simulated child pornography. The second instance applies to situations where there is no *real person*, a minor or otherwise, who will directly suffer from the "crime." This, in turn, when seen in the context of R.A. No. 9775, refers to circumstances relating to virtual child pornography. Consequently, the "victimless" provisions actually reflect the intent of the legislators as has been mentioned, that is, to extend punishment even to simulated and virtual pornographic depictions of children.

A. The Simulated Child

Section 3 (a) (1) of R.A. No. 9775 states that for its purpose, a "Child" shall also refer to a person regardless of age who is presented, depicted or portrayed as a child as defined herein.[76] This basically refers to situations where one over the majority age of 18 will be depicted as a child through storytelling elements such as costumes or plotlines. There is no "real" child, or one who is under 18 years old, but only an adult simulating such child.

71. Anti-Child Pornography Act of 2009, § 3 (a) (emphasis supplied).

72. *See* Special Protection of Children Against Abuse, Exploitation and Discrimination Act, § 3 (a).

73. *See* Anti-Child Pornography Act of 2009, §§ 3 (a) (1) & 3 (a) (2).

74. BLACK'S LAW DICTIONARY 1703 (9th ed. 2009).

75. *Id.*

76. Anti-Child Pornography Act of 2009, § 3 (a) (1).

The question, thus, is this — is it within the plenary power of Congress to legislate against "victimless" instances of pornography when the participants are consenting adults, for the sake of punishing the depravity of the viewer?

B. The Virtual Child

Section 3 (a) (2) of R.A. No. 9775 states that for its purpose, a "Child" shall also refer to "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."[77] Thus, there is child pornography when there is

> [a]ny representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of [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] engaged or involved in real or simulated explicit sexual activities.[78]

It can be seen that this definition covers *Hentai* as previously discussed. In this Section, the law pertains to virtual child pornography done through any technological medium. No actual, living children are involved, and only virtually-created or drawn images are depicted.

The issue at this juncture is this — can there be "victimless" provisions in R.A. No. 9775 which are construed to apply to virtual child pornography such that punishment is meted even when there are really no actual children, or persons involved?

IV. FACTUAL BACKDROPS: SIMULATED CHILD PORNOGRAPHY AND VIRTUAL CHILD PORNOGRAPHY

The questions thus presented necessitate an inquiry into relevant cases on the matter. Since the U.S. has been persistent in its battle against child pornography, a review of U.S. jurisprudence on both kinds of pornography is in order.

A. Prosecution of Simulated Child Pornography

Simulated child pornography is protected expression under the First Amendment, which was merely declared in *New York v. Ferber*[79] but squarely tackled in *Ashcroft v. Free Speech Coalition*.[80] This is usually done through the

77. Anti-Child Pornography Act of 2009, § 3 (a) (2).

78. *Id.* § 3 (b).

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

80. *Ashcroft*, 535 U.S. 234.

employment of youthful-looking adults beyond the statutory age of 18 years.[81]

1. *United States v. U.S. Dist. Court for Cent. Dist. of California, Los Angeles, Cal.*

In 1984, Traci Lords, then 16 years of age, was hired to appear in the film *Those Young Girls*.[82] The film showed Lords engaging in sexually explicit conduct.[83] The talent agents who hired Lords were prosecuted for producing a film that depicts a minor engaging in sexually explicit conduct.[84] The Court remarked that "[i]n most prosecutions of child pornography[,] the subject unmistakably is a child."[85] Thus, as far as 1988, in accordance with *Ferber*, it was established that "[b]ecause most prosecutions involve subjects who are unmistakably children, producers of pornography are unlikely to be prosecuted for hiring someone who, though appearing youthful, is not unmistakably a child."[86]

B. Prosecution of Virtual Child Pornography

A Congress Press Release considered *Hentai* to be child pornography material and thus, one may be penalized by the mere possession of such material.[87] While the anti-child pornography law does not directly ban *Hentai*, the law's extensive prohibition to include cartoons and video games may render all *Hentai* producers, traders, and users seriously liable for any content that shows child pornography as broadly defined by the law.[88]

1. *United States v. Whorley* (Circuit Court Decision)

On 30 March 2004, a woman in the Virginia Employment Commission resource room (a public resource room maintained by the Virginia Employment Commission for employment-related purposes) informed a Commission employee that Dwight Edwin Whorley was looking at what

81. *See Ashcroft*, 535 U.S. 234.

82. United States v. U.S. Dist. Court for Cent. Dist. of California, Los Angeles, Cal., 858 F.2d 534, 536 (1988) (U.S.).

83. *Id.*

84. *Id.*

85. *Id.* at 546.

86. *Id.*

87. Camero & Yambot Jr., *supra* note 34.

88. Philippines enacts law against child pornography, *available at* http://www.stairwayfoundation.org/stairway/component/content/article/1-whats-going-on/98-philippines-enacts-law-against-child-pornography (last accessed Nov. 7, 2010).

appeared to be child pornography on a Commission computer.[89] Afterwards, the office manager and two other supervisors went to the resource room and saw Whorley standing in front of the printer holding papers in his hand, such documents revealing depictions of Japanese anime-style cartoons of children engaged in explicit sexual activity with adults.[90] Numerous copies of anime-style cartoons were also found by the Commission employees on the computer that Whorley had been using.[91] The 20 cartoons depicted prepubescent children engaging in vivid sexual conduct with adults.[92] Whorley was subsequently convicted of violating the Amber Alert Law.[93] In this case, the Amber Alert Law was explicit in its provisions, with the *Miller* test[94] expressly written in the provisions concerned, and considered to be elements of the crime.[95]

2. Application to Virtual Child Pornography

By virtue of the "additional" definitions of "Child" in Sections 3 (a) (1) and 3 (a) (2),[96] the subject of protection can also be a "person regardless of age who is presented, depicted or portrayed as a child."[97] According to Section 3 (k) of R.A. No. 9775, a "person" refers to any natural or juridical entity.[98] Thus, the subject of protection can only be a "[natural entity] regardless of age who is presented, depicted or portrayed as a child"[99] or a "[natural entity] who is represented or who is made to appear to be a child [through] computer-generated, digitally or manually crafted images or graphics."[100] To construe the definitions in Sections 3 (a) (1) and 3 (a) (2) as applying to a juridical entity, or even a non-person in this case would, in statutory construction, be considered as stretching the limits and logic of the law, which would give a statute a meaning that would lead to absurdities.[101]

89. *Whorley*, 550 F.3d at 330.

90. *Id.*

91. *Id.* at 330-31.

92. *Id.* at 331.

93. *Id.* at 339.

94. *See* Miller v. California, 413 U.S. 15 (1973) (U.S.). The Miller Test will be further discussed in Section V of this Note.

95. *See generally* PROTECT Act of 2003.

96. *Id.*

97. *Id.* § 3 (a) (1).

98. *Id.* § 3 (k).

99. *Id.* § 3 (a) (1).

100. Anti-Child Pornography Act of 2009, § 3 (a) (2).

101. *See* RUBEN E. AGPALO, STATUTORY CONSTRUCTION 147 (5th ed. 2003).

However unorthodox, even absurd, an interpretation that would deviate from the one previously laid out can be, a similar though not identical construction is certainly not unprecedented. The Supreme Court of New South Wales, in a 2008 decision, on the question of whether Australian anti-child pornography laws extend to the "children" of the family from *The Simpsons*, which are cartoon characters, ruled in the affirmative.[102] The Australian Court ratiocinated that "the word 'person' included fictional or imaginary characters[,] and the mere fact that the figure depicted departed from a realistic representation in some respects of a human being did not mean that such a figure was not a 'person.'"[103] This prompted comic book artist Neil Gaiman to remark that "the Judge might have just [inadvertently] granted human rights to cartoon characters."[104]

As juxtaposed with *United States v. Kutzner*,[105] Steven Kutzner pleaded guilty to the charge of violating the Amber Alert Law for possessing 70 animated pornographic image files showcasing minors engaging in sexually explicit activity,[106] including sexually explicit images illustrating the child characters from *The Simpsons* animated television series, which are aged 10, eight, and a baby.[107] In this case, the basis for the criminal culpability of Kutzner was *not* the fact that the virtual child pornography in question can be construed as "persons," but the fact that the said virtual child pornography fails to satisfy the *Miller* standards as set out in the Amber Alert Law.[108] This reiterates the notion that virtual child pornography is not *per se* obscene as will be emphasized in the succeeding section.

V. THE FREEDOM OF SPEECH CONUNDRUM

From an examination of the U.S. cases, it thus seems that the resolution of the questions earlier posed involve treading into freedom of speech considerations. This is further supported by the use of the *Miller* standards in the invalidation of certain anti-child pornography advocacies.

In the Philippines, particularly during the Committee deliberations on S.B. No. 2317, Sen. Aquilino E. Pimentel noted that "democratic countries

102. *McEwen v. Simmons & Anor* [2008] NSWSC 1292 (Austl.).

103. *Id.*

104. Neil Gaiman, the word 'person' included fictional or imaginary characters, *available at* http://journal.neilgaiman.com/2008/12/word-person-included-fictional-or.html (last accessed Nov. 7, 2010).

105. United States v. Kutzner, A Plea Agreement Between the United States of America and Steven Kutzner, *available at* http://reason.com/assets/db/12876937541067.pdf (last accessed Nov. 7, 2010).

106. *Id.* at 5.

107. *Id.*

108. *Id.* at 7.

have no defense against pornography when accessed through the Internet."[109] While he extolled the effort to put restriction to Internet access, he observed that "there has always been a hue and cry against government censorship."[110] In reply, Sen. Madrigal claimed that "criminalizing possession of child pornography materials is not really a curtailment of any kind of freedom because there is no excuse for it."[111] As regards the curtailment of free speech, Sen. Madrigal mentioned certain Supreme Court rulings providing that obscenity is not within the ambit of constitutionally-protected free speech.[112] Nevertheless, it seems that neither simulated nor virtual child pornography is *per se* obscene.

A. Obscenity Cases in Philippine Jurisprudence

1. *People v. Kottinger*

Six postcards of non-Christian inhabitants of the Philippines, most of them children, clad in their native dress, were found in the possession of J.J. Kottinger as proprietor of a business.[113] The Court acquitted Kottinger from the charge of violating Section 12 of Act No. 277 or the old Libel Law,[114] holding that "obscene" means "offensive to chastity and decency; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed."[115] Since the pictures in question merely portray persons as they actually live, without attempted presentation of persons in odd postures or dress, the Court held that they are not obscene or indecent.[116]

2. *People v. Go Pin*

Go Pin exhibited paintings, pictures, and sculptures of women in the nude.[117] He pleaded guilty to a violation of Article 201[118] of the Revised Penal Code (RPC).[119] The Supreme Court ruled thus —

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109. SENATE JOURNAL 6, 125-26, 14th Cong., 2d Reg. Sess., Senate Sess. No. 6 (Aug. 6, 2008).

110. *Id.* at 126.

111. *Id.*

112. *Id.*

113. People v. Kottinger, 45 Phil. 352, 356 (1923).

114. An Act Defining the Law of Libel and Threats to Publish a Libel, Making Libel and Threats to Publish Libel Misdemeanors, Giving a Right of Civil Action Therefor, and Making Obscene or Indecent Publications Misdemeanors, Act No. 277, § 12 (1901).

115. *Kottinger*, 45 Phil. at 358.

116. *Id.* at 360.

117. People v. Go Pin, 97 Phil. 418, 419 (1955).

> If 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.[120]

3. *People v. Padan y Alova, et al.*

Marina Padan y Alova and Cosme Espinosa y Abordo performed sexual intercourse in the presence of many spectators.[121] Padan y Alova pleaded guilty to a violation of Article 201 of the RPC.[122] The Supreme Court held that

> [a]n 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

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118. REVISED PENAL CODE, art. 201. This Article 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:
>
> (1) Those who shall publicly expound or proclaim doctrines openly contrary to public morals;
>
> (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 (1) glorify criminals or condone crimes; (2) serve no other purpose but to satisfy the market for violence, lust or pornography; (3) offend any race or religion; (4) tend to abet traffic in and use of prohibited drugs; and (5) are contrary to law, public order, morals, and good customs, established policies, lawful orders, decrees and edicts;
>
> (3) Those who shall sell, give away or exhibit films, prints, engravings, sculpture or literature which are offensive to morals. (As amended by P.D. Nos. 960 and 969).

Id.

119. *Go Pin,* 97 Phil. at 418.

120. *Id.* at 419.

121. People v. Padan y Alova, et al., 101 Phil. 749, 750 (1957).

122. *Id.* at 751.

> 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.[123]

4. *Gonzales v. Kalaw Katigbak*

The motion picture *Kapit sa Patalim* was classified "For Adults Only."[124] The petition for certiorari failed solely on the ground that there are not enough votes for a ruling that there was a grave abuse of discretion in the classification of *Kapit sa Patalim*.[125] The Supreme Court, citing the U.S. Supreme Court, said that —

> '[S]ex and obscenity are not synonymous'[126] ... Further: 'Obscene 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 material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life[,] has 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.'[127]

5. *Pita v. Court of Appeals*

Pinoy Playboy, a magazine published and co-edited by Leo Pita, was among the magazines seized and burned by the Anti-Smut Campaign initiated by the Mayor of the City of Manila.[128] Pita filed a case for injunction seeking to restrain the confiscation of the magazines or from otherwise preventing the sale or circulation of the same.[129] The Supreme Court granted the petition.[130] The Court held that

> there is no challenge on the right of the State, in the legitimate exercise of police power, to suppress smut provided it is smut. For obvious reasons, smut is not smut simply because one insists it is smut.[131]
>
> ...
>
> Undoubtedly, 'immoral' lore or literature comes within the ambit of free expression, although not its protection. In free expression cases, this Court

123. *Id.* at 752.

124. Gonzales v. Kalaw Katigbak, 137 SCRA 717, 721 (1985).

125. *Id.* at 728.

126. *Id.* at 726 (citing Roth v. United States, 354 U.S. 476, 487 (1957) (U.S.)).

127. *Id.* at 726-27 (citing *Roth*, 354 U.S. at 487).

128. Pita v. Court of Appeals, 178 SCRA 362, 365 (1989).

129. *Id.* at 366.

130. *Id.* at 372.

131. *Id.*

> has consistently been on the side of the exercise of the right, barring a 'clear and present danger' that would warrant State interference and action.[132]

6. *Fernando v. Court of Appeals*

Gaudencio Fernando and Rudy Estorninos were convicted of a violation of Article 201 of the RPC.[133] A search of Fernando's store revealed copies of magazines with nude obscene pictures and copies of VHS tapes containing pornographic shows.[134] The Supreme Court affirmed such conviction, opining that, "[t]here is no perfect definition of 'obscenity' but the latest word is that of *Miller v. California*[135] which established basic guidelines."[136] Thus, U.S. jurisprudence was expressly adopted by our Supreme Court in adjudicating obscenity cases.[137]

B. The Standard in Miller v. California

Miller has provided for fundamental guidelines in deciding whether a particular material is obscene or not, which are:

(1) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[138]

C. The Impact of New York v. Ferber and Ashcroft v. Free Speech Coalition

1. *New York v. Ferber*

Paul Ferber is the owner of a Manhattan bookstore devoted mainly to the sale of sexually oriented products.[139] He sold two films which almost exclusively show young boys masturbating to an undercover police officer.[140] As a result, Ferber was charged with two counts of violating New

132. *Id.* at 372-73.

133. Fernando v. Court of Appeals, 510 SCRA 351, 353-54 (2006).

134. *Id.* at 355.

135. *Miller*, 413 U.S. 15.

136. *Fernando*, 510 SCRA at 360-61.

137. *See Gonzales*, 137 SCRA at 726-27 & *Fernando*, 510 SCRA at 360-61.

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

139. *Ferber*, 458 U.S. at 751-52.

140. *Id.* at 752.

York laws controlling the distribution of child pornography.[141] Ferber questioned the constitutionality of those laws.[142] The U.S. Supreme Court, recognizing that the class of materials involved "bears so heavily and pervasively on the welfare of children engaged in its production,"[143] considered pornography depicting actual children as outside the protective ambit of the First Amendment.[144]

The U.S. Supreme Court recognized that

> [t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children … First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.[145]

In addition, the U.S. Supreme Court said that, "[t]he care of children is a sacred trust … The public policy of the state demands the protection of children from exploitation through sexual performances."[146]

Lastly, which is of relevance to the discussion of R.A. No. 9775, the U.S. Supreme Court, in the context of the *Miller* test, made a distinction, to wit —

> As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. The First Amendment interest is limited to that of rendering the portrayal somewhat more 'realistic' by utilizing or photographing children.[147]

From this statement, the following can be appreciated: first, *Ferber*'s rationale as regards child pornography was based upon how it was made, not on what it conveyed;[148] second, *Ferber* did not maintain that child pornography is by definition without worth;[149] third, *Ferber* not only referred to the difference between actual and virtual child pornography, but also

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141. *Id.*

142. *Id.*

143. *Id.* at 764.

144. *Id.*

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

146. *Id.* at 757.

147. *Id.* at 763.

148. *Ashcroft*, 535 U.S. at 236.

149. *Id.*

relied on it as a support to strengthen its holding;[150] and lastly, *Ferber* provides no support for a statute that abolishes the difference and makes the alternative mode punishable as well.[151]

Thus, the holding in *Ferber* seems to be antithetical to the "additional" definitions of a "Child" in Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775.

2. *Ashcroft v. Free Speech Coalition*

Prior to 1996, Congress defined child pornography as having the nature of those at issue in *Ferber*, referring to images made using actual minors.[152] The Free Speech Coalition (FSC), a California trade association for the adult-entertainment industry, assailed the CPPA for adding three other prohibited kinds of speech.[153] The FSC averred that its members did not make use of minors in their sexually explicit works, yet they believed that some of these materials might fall within the ambit of the CPPA's broadened definition of child pornography.[154] The other respondents consisted of a publisher of a book championing the nudist lifestyle, a painter of nudes, and a photographer concentrating in erotic images.[155]

The U.S. Supreme Court said that the questioned Provisions[156] do not depend at all on how the image is created.[157] The Section captures a range of portrayals, sometimes called "virtual child pornography," which include

> computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a 'picture' that 'appears to be, of a minor engaging in sexually explicit conduct.' The statute also prohibits Hollywood movies, filmed without any child actors, if a jury

150. *Id.*

151. *Id.*

152. *Id.* at 241.

153. *Id.* at 243.

154. *Ashcroft*, 535 U.S. at 243.

155. *Id.*

156. Child Pornography Prevention Act of 1996, 18 U.S.C. § 2256 (8) (B). This Section provides:

> (8) 'child pornography' means any visual depiction ... where —
>
> ...
>
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.

157. *Ashcroft*, 535 U.S. at 241.

> believes an actor 'appears to be' a minor engaging in 'actual or simulated … sexual intercourse.'[158]

The U.S. Supreme Court ruled that these images do not involve nor even harm any children in the creation process.[159] Moreover, for the U.S. Supreme Court to sustain the validity of the CPPA, it must pronounce simulated child pornography and virtual child pornography as unprotected speech.[160] Refraining from doing so, it thus declared the prohibitions of the CPPA applying to simulated child pornography and virtual child pornography overbroad and unconstitutional.[161]

D. Philippine Jurisprudence vis-à-vis the Miller Test

Except for *Kottinger*, none of the jurisprudential scenarios involve materials with actual children. *Kottinger*, assuming it is similar, did not resolve the issue on the fact that there is no child pornography; it resolved the issue based on the standard of obscenity, which was expressly written and proscribed in the old Libel Law, Act No. 277.[162] Also, none of these facts contemplate materials which were possessed in the privacy of one's home; these cases deal with materials which were commercial in character, that is, intended for public consumption and profit.[163] From these cases, it is possible to easily draw the fine line between art and obscenity.[164] Lastly, the principles laid out in these cases are fairly dated, except for the *Miller* test adopted in *Gonzales* and *Fernando*.[165]

Given these, the facts and principles laid out in these cases may not be effective precedents in adjudicating anti-child pornography under R.A. No. 9775. This is especially so when the "victimless" provisions, as applied to private acts involving willful access and possession of materials proscribed under Sections 3 (a) (1) and 3 (a) (2), are violated through the Internet. One can say that the saving grace of this line of cases is the end result of adopting the *Miller* test.

The important question is, can the standards of obscenity laid out in these cases, or in *Miller* for that matter, be construed as adopted in Sections 3 (a) (1) and 3 (a) (2)? Obviously, the *Miller* test is not expressly written in

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158. *Id.*

159. *Id.*

160. *Id.* at 251.

161. *Id.* at 256.

162. *Kottinger*, 45 Phil. at 361.

163. *See Kottinger*, 45 Phil. 352; *Go Pin*, 97 Phil. 418; *Padan y Alova*, 101 Phil. 749; *Gonzales*, 137 SCRA 717; *Pita*, 178 SCRA 362; & *Fernando*, 510 SCRA 351.

164. *See generally Go Pin*, 97 Phil. 418.

165. *See Gonzales*, 137 SCRA at 726-27 & *Fernando*, 510 SCRA at 360-61.

R.A. No. 9775 as an element of any crime, much less in Sections 3 (a) (1) and 3 (a) (2).[166] While the U.S. Supreme Court dispensed with the necessity of adopting the *Miller* test for pornography produced with actual children,[167] the U.S. Supreme Court still made a distinction between pornography produced with actual children as compared to simulated or virtual child pornography.[168]

E. Testing the "Victimless" Provisions of R.A. No. 9775

The primary overbreadth problem with the CPPA identified in *Ashcroft* was that it "proscribe[d] a significant universe of speech that [was] neither obscene under *Miller* nor child pornography under *Ferber*."[169] The U.S. Supreme Court has frequently ruled that statutes that prohibit conduct only with respect to material that is obscene under the *Miller* test are not overbroad.[170]

The U.S. Supreme Court opined that the following factors rendered the CPPA problematic: first, the CPPA includes within its scope images that appear to portray a minor engaging in sexually explicit acts in the absence of any regard to the *Miller* requirements;[171] second, the CPPA "covers materials that need not appeal to the prurient interest;"[172] third, the CPPA proscribes speech regardless of its "serious literary, artistic, political, or scientific value;"[173] and fourth, under the CPPA, images are proscribed so long as the persons appear to be under 18 years of age.[174] These are similar concerns with the provisions of R.A. No. 9775.

The U.S. Supreme Court also said in *Ashcroft* that "[t]he Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving [that] his speech is not unlawful."[175] While the burden of proof may be imposed on the producer of the material in question, this can only be done after prosecution had begun, and on pain of a felony conviction.[176] Under the CPPA, the producer must prove that his

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

167. *Ferber*, 458 U.S. at 747.

168. *Id.* at 764-65.

169. United States v. Schales, 546 F.3d 965, 972 (2008) (citing *Ashcroft*, 535 U.S. at 240) (U.S.).

170. *Id.*

171. *Ashcroft*, 535 U.S. at 246.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 255.

176. *Id.*

conduct falls within the bounds of the law, for example, when the materials were produced using only adults.[177] Nevertheless, the burden is heavier on the person accessing the materials and possessing the same, since there can be no way of establishing the identity, or even the existence, of such adult actors.[178] These points should be kept in mind in light of the opinion of Sen. Madrigal that since it might be possible for the law to "be used by extreme conservatives to suppress art," the burden of proving that the work is indeed, "art," lies with the artist.[179]

The points raised by the U.S. Supreme Court which made the CPPA overbroad and unconstitutional are present in Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775. First, these provisions, which extend to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements, cover materials that need not appeal to the prurient interest, potentially prohibit speech despite its serious literary, artistic, political, or scientific value, and prohibit images so long as the persons appear to be under 18 years of age.[180] Second, Congress, while putting the burden on the artist to prove that the materials in question are "art," that is, protected speech, it did not even make an affirmative defense available under R.A. No. 9775, since it also criminalizes what would have been lawful conduct under the mantle of freedom of speech.

From the information and legal precepts already assessed and presented, the Author submits that Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775, proceeding from a plain reading of its provisions, are overbroad and unconstitutional. This primarily results from the blanket prohibition on virtual and simulated child pornography, which, in addition to having no definite victims, suffers from the absence of certain standards as set by the *Miller* test. Without adopting the latter in the formulation of the law, R.A. No. 9775 then proceeds to render punishable acts which otherwise would be considered as protected speech.

What then are the possible solutions that will save the law from unconstitutionality? The Author submits two approaches. First, Congress can amend the law and incorporate standards such as the *Miller* test in order to prevent the blanket prohibition on simulated and virtual child pornography, which as discussed above, are not *per se* obscene. Whether or not they can be prohibited depends on whether they pass whatever standards Congress will formulate. Second, Congress does not amend the law and leaves it to the Supreme Court, as the final interpreter of the law, to apply its provision in conjunction with the *Miller* test or other accepted obscenity standards. These

177. *Ashcroft*, 535 U.S. at 255.

178. *Id.*

179. SENATE JOURNAL 6, *supra* note 109, at 125.

180. *See* Anti-Child Pornography Act of 2009, §§ 3 (a) (1) & 3 (a) (2).

standards may not be expressly written into the law but they will find life in the Supreme Court's decisions.

VI. PRACTICAL CONSIDERATIONS

Assuming that Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775 passes constitutional muster, or in the alternative, are construed by the Supreme Court of the Philippines as embodying the *Miller* standards, the Author submits that the "victimless" provisions of the Anti-Child Pornography Act of 2009 still suffers from another vice, namely, feasibility of prosecution. Its practical aspects leave much to be desired, and are difficult to prosecute, even improbable of proper implementation.

A. Duties of Internet Service Providers (ISPs) and Internet Content Hosts (ICHs)

1. Internet Service Providers

An ISP is defined as "a person or entity that supplies or proposes to supply, an internet carriage service to the public."[181] R.A. No. 9775 explicitly obligates ISPs to report to the Philippine National Police (PNP) or the National Bureau of Investigation (NBI) within seven days from discovery, any form of child pornography being committed through its server or facility.[182] Also, evidence must be preserved for purposes of investigation and prosecution.[183] Lastly, upon the request of proper authorities, the particulars of users who accessed or sought to access an internet address which contains any form of child pornography shall be given by the ISP.[184]

Interestingly, R.A. No. 9775 declares that "[n]othing in [Section 9] may be construed to require an ISP to engage in the monitoring of any user, subscriber or customer, or the content of any communication of any such person."[185] Also, "no ISP shall be held civilly liable for damages on account of any notice given in good faith in compliance with [Section 9]."[186]

2. Internet Content Hosts

An ICH is defined as "a person who hosts or who proposes to host internet content in the Philippines."[187] R.A. No. 9775 gave ICHs different duties from that of ISPs. According to the Anti-Child Pornography Act of 2009, an

181. Anti-Child Pornography Act of 2009, § 3 (g).

182. *Id.* § 9, ¶ 1.

183. *Id.* § 9, ¶ 2.

184. *Id.* § 9, ¶ 3.

185. *Id.* § 9, ¶ 1.

186. *Id.*

187. Anti-Child Pornography Act of 2009, § 3 (g).

ICH shall "[n]ot host any form of child pornography on its internet address;"[188] "report the presence of any form of child pornography, as well as the particulars of the person maintaining, hosting, distributing or in any manner contributing to such internet address, to the proper authorities" within seven days;[189] and "[p]reserve such evidence for purposes of investigation and prosecution by relevant authorities."[190] Also, an ICH is likewise obligated, upon request of the authorities, to furnish the particulars of users who accessed or sought to access an internet address that contains any form of child pornography.[191]

3. Penalties and Sanctions for ISPs and ICHs

An ISP who shall knowingly, willfully, and intentionally violate this provision shall be subject to the penalty of a fine of not less than ₱500,000.00 but not more than ₱1,000,000.00 for the first offense.[192] For a subsequent offense, it shall be a fine of not less than ₱1,000,000.00 but not more than ₱2,000,000.00 and revocation of its license to operate.[193] As for an ICH, the imposable penalty shall be *prision correccional* in its medium period and a fine of not less than ₱1,000,000.00 but not more than ₱2,000,000.00 for the first offense.[194] For a subsequent offense, it shall be a fine not less than ₱2,000,000.00 but not more than ₱3,000,000.00 and revocation of its license to operate and immediate closure of the establishment.[195]

On the one hand, the obvious practical hurdle with respect to the responsibility given to ISPs is the possible lack of information of ISPs as to the particulars of users who gained or attempted to gain access to an internet address which contains any form of child pornography,[196] since R.A. No. 9775 does not require an ISP to engage in the monitoring of any user, subscriber or customer, or the content of any communication of any such person.[197] Also, R.A. No. 9775 possibly charges ISPs with the discretion to "determine" whether the material the user gained or attempted to gain access to is actually child pornography. This is difficult given the way "child" is defined in Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775. Thus, ISPs are

188. *Id.* § 11, ¶ 1 (a).

189. *Id.* § 11, ¶ 1 (b).

190. *Id.* § 11, ¶ 1 (c).

191. *Id.* § 11, ¶ 2.

192. *Id.* § 15 (k).

193. Anti-Child Pornography Act of 2009, § 15 (k).

194. *Id.* § 15 (j).

195. *Id.*

196. *Id.* § 9, ¶ 3.

197. *Id.* § 9, ¶ 1.

possibly given an unfair license to report "felonies" without corresponding responsibility, since "no ISP shall be held civilly liable for damages on account of any notice given in good faith."[198] In addition, the nature of an ISP as a business which holds itself out to public use would make it very hard to link or ascribe a particular material accessed over the Internet to a particular person.

On the other hand, the duties given to ICHs are more practical than those given to ISPs, since an ICH undoubtedly has access or control over online content and has necessary information as to the particulars of users. However, the same concern applies — ICHs may be charged with the discretion to "determine" whether the material concerned is actually child pornography, which admits of difficulties, since Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775 makes such determination difficult.

B. The Lack of Standards for Prosecution

Under Rule V, Section 12 (d) of the IRR of R.A. No. 9775, the PNP shall have the role and responsibility to "[u]ndertake surveillance and investigation of persons suspected to be engaged in child pornography on its own or when public interest may require."[199] Under Rule V, Section 12 (e), the Commission on Human Rights (CHR) shall have the role and responsibility to "[i]nvestigate and recommend for prosecution violations of [R.A. No. 9775]."[200] Under Rule V, Section 12 (b), the Department of Justice (DOJ) shall have the role and responsibility to "[e]nsure the immediate investigation and prosecution of persons for violation of the Act, in accordance with the Rules of Criminal Procedure and other applicable laws, rules and regulations."[201]

Curiously, while R.A. No. 9775 criminalizes the willful access and possession of simulated and virtual "child pornography" in Sections 3 (a) (1) and 3 (a) (2), neither R.A. No. 9775 nor its IRR qualifies or provides a standard for what can be considered "willful access" of child pornography. Is the mere existence of child pornography in the computer memory or temporary files folder considered as willful access, or does one have to "consciously" save the said child pornography material in one's computer? Similarly, is the presence of child pornography in the computer memory or temporary files folder already considered as possession? Is "possession" in an e-mail address, for example, similarly the criminal possession contemplated by the law? But assuming these can be answered in the affirmative, how

198. *Id.*

199. Rules and Regulations Implementing the Anti-Child Pornography Act of 2009 [IRR of Anti-Child Pornography Act of 2009], rule V, § 12 (d) (i).

200. *Id.* § 12 (e) (ii).

201. *Id.* § 12 (b) (i).

would the police, or the Government for that matter, decide which cases to prosecute, especially in the absence of complaining victims?

1. Qualitative Standards?

Should offenders be prosecuted for the nature of the materials or the gravity of the offense in question? Given the possible limitations on the time and resources of the prosecuting authority, it is possible that more perverse materials or graver offenses in the Internet would take priority as they demand more immediate action. Notwithstanding, it would seem that the offenses linked to Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775 pale in comparison to offenses involving actual children and vulnerable adults. If this is the case, then the prosecuting authority is better off devoting time and resources to offenses involving actual children and vulnerable adults.

2. Quantitative Standards?

Should offenders be prosecuted for the quantity of the materials in question? If so, it is possible that offenders engaged in commercial activities involving child pornography in the Internet are more prone to prosecution than private offenders. After all, if child pornography materials are produced in commercial quantities, it would be easier to draw the line between "art" and "obscenity." Also, the production of child pornography would be greatly hampered, if not eradicated. However, this perspective can be myopic in the long run, since it is possible that there are offenders merely engaging in commercial activities linked to Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775 while there are private offenders engaging in acts involving actual children and vulnerable adults. In this case, such a standard would not solve the problem that Congress meant to address.

3. Discretionary Standards?

If all else fails, how should the prosecuting authority choose which offenders to prosecute? Should offenders be prosecuted at the discretion of the prosecuting authority? Should known pedophiles be prosecuted first, as opposed to the casual and curious purveyor of child pornography? Are foreign persons and entities more pernicious to the national interest than local persons or entities? The questions would be endless, and these compound to the absence of existing standards in R.A. No. 9775.

C. The "Victimless" Provisions: Stand-alone Prosecutions, Safety Nets to Ensure Punishment, or Just Plain Posturing?

From the previous discussion, it is not difficult to opine that offenses linked to Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775 might be difficult to prosecute, given the constitutional and practical considerations involved. In this case, what alternative purpose do the "victimless" provisions serve? Two

possibilities present themselves. First, it might serve as a safety net to ensure that those who engage in child pornography involving actual children and vulnerable adults, if not susceptible of prosecution for the graver offenses, would not escape punishment. Second, it might be a simple message to producers and consumers of child pornography in the Philippines: "even the simplest and most negligible of these acts will not escape punishment; therefore, it is time to stop, or else be punished." These alternatives are admirable, no doubt, but it may serve to have a chilling effect on protected speech and possibly expose those engaged in legitimate activities to criminal prosecution and subsequent imprisonment.

VII. CONCLUSION

Child pornography in the Philippines is definitely a concern which warrants specific legislation in order to ensure the safety of actual children and vulnerable adults from acts which are detrimental to their well-being and inimical to their growth as citizens. Congress should be lauded for being perspicacious in addressing this societal bane. However, Congress should also take into consideration that the Philippines is a democratic country, which enjoys freedoms such as those of speech and expression. While it is within the plenary power of Congress to ensure the safety of actual children and vulnerable adults, it is a different matter when criminal legislation produces a chilling effect on constitutionally-protected speech. It may also have a detrimental effect on the anti-child pornography campaign, since would-be offenders or actual offenders can attack the provisions of R.A. No. 9775. These considerations aside, a test case would be ideal and necessary to let the Supreme Court decide on the validity of Sections 3 (a) (1) and 3 (a) (2) of R.A. No. 9775. In addition, and assuming that the law passes the test of constitutionality, practical aspects relating to its implementation should also be reassessed if the aim of the law is to be accomplished.