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Criminal Realism: Virtual Child Pornography, Photorealism and the Legislation of the Virtual Animated Body

Introduction

In *The Society of the Spectacle* (1967), Guy Debord claimed that modernity had ushered in a new form of society—a society of “the spectacle”—a society dominated by the image.¹ The specific nature of this spectacle, however, has undergone a radical shift over the last quarter of a century. Photographically recorded images such as still photography and live-action film—the image forms that have dominated Western visual culture for the last one hundred years—have recently faced serious competition from digital image-making technologies. Indeed, from video games to military simulations, from virtual actors to medical imaging systems, the relationship between our bodies and virtual ones has become increasingly intertwined. A by-product of this ever-increasing intimacy, however, is the opening up of new areas of contestation and concern. The legal and political debate in the United States around the issue of virtual child pornography is one

example of the kind of controversy that can erupt at the intersection of the real and the virtual body.

Virtual child pornography, a pernicious by-product of recent technological advances in digital imaging, is a relatively new genre of pornography that features sexually explicit computer-generated images of children. By the mid-1990s virtual child pornography was identified as a global problem and countries such as Great Britain and Canada amended their child pornography laws to address both “actual” and “apparent” child sex images, criminalising indecent digital “pseudo-photographs.”² As P.J. Huffstutter, staff writer for the *Los Angeles Times* observed, “between the clearly fake world of pornographic cartoons and the clearly real realm of actual children engaged in lurid sexual acts sits the amorphous field of ‘virtual child pornography.’”³ In 1996, at the urging of conservative Utah Senator Orrin Hatch and others, Congress passed the Child Pornography Prevention Act (CPPA), a law that banned “virtual” child pornography, i.e. pornography created using digital images or computer animation rather than real children. In April 2002 the United States Supreme Court found this ban unconstitutional, a decision that reawakened public debate on this controversial and emotionally-charged issue.

In reviewing the testimony presented to Congress in support of the Child Pornography Prevention Act, the opinions written by Supreme Court Justices, and the popular media coverage that followed the April decision, one thing becomes abundantly clear: embedded within this desperate appeal for an effective means to combat the new digital dangers facing America’s children is an equally desperate call for a mechanism to control the production of a new and threatening kind of image—the criminal, the fake,

the counterfeit image. Running parallel to the fear of lost childhood “innocence” and the zealous condemnation of “degenerate” sexuality, we can detect a similar fear and condemnation regarding the status of the image, the body, and “reality” itself. This paper will argue that, as the late twentieth century saw the ostensible “objectivity” of the photographic replaced by the frustrating indeterminacy of the digital, virtual child pornography and the computer animated body became an important site in which a deep cultural anxiety about this shift was—and continues to be—played out.

U.S. Child Pornography Law and the Child Pornography Protection Act (1996)

As most readers are probably aware, pornography featuring consenting adults, although often controversial, is considered a legally protected form of expression in the United States under the First Amendment. According to *New York v. Ferber* (1982), however, pornography featuring children does not qualify for these same protections. The Ferber court argued that because the production of photographic or filmic pornography involving minors is an accurate, visual record of the sexual abuse of a child, in the eyes of the law the pornographic image acts as a form of crime scene evidence. According to the Ferber ruling, the “materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”⁴ Thus it follows that child pornography is illegal due to the State’s interest in protecting the children who are exploited in the production process.⁵

As indicated earlier, however, by the end of the 1980s the landscape of image production had radically changed. As William Mitchell suggests in *The Reconfigured Eye*, the easy availability of advanced digital imaging technology had spawned a new

mass medium.⁶ In addition, by the mid-1990s Hollywood productions such as *Terminator 2* (1991), *Jurassic Park* (1993) and *Forrest Gump* (1994) were astonishing audiences with the quality of their digital effects and the high degree of *perceptual* or *photographic realism* attained in their computer-animated sequences. It was in this context that the issue of virtual child pornography was brought before Congress.

In his testimony before the Senate Committee on the Judiciary in 1996, Senator Hatch explained, “The problem is simple: while federal law has failed to keep pace with technology, the purveyors of child pornography have gone high-tech and on-line.”⁷ Supporters of the bill painted a disturbing picture for the Senate Committee, one that capitalised on a range of cultural anxieties by conflating images of sexual predation and dangerous technology. Deploying hyperbolic and inflammatory rhetoric, they described paedophiles, lurking behind the monitors of their personal computers, fuelling the fires of their degenerate desire with fantasised, virtual images of children. In his testimony before the Senate Committee, Bruce Taylor, President and Chief Counsel of the National Law Center for Children and Families, reminded Committee members that much had changed in the fourteen years since the 1982 Ferber ruling:

In 1982 we did not have the wizardry of the Internet and World Wide Web... it was before “desktop publishing” reached every desk top, before we moved from the obviousness of “Max Headroom” to the not-so-obvious “Jurassic Park”... Someone who is knowledgeable can create child pornography with nothing more than a modern graphics program and his imagination.⁸

Reiterating this sentiment, Dee Jepsen, President of “Enough is Enough” (a non-profit women’s organisation opposing child pornography) noted, “All one has to do to confirm the ability of this new technology is review some of the film industry’s electronically-created action scenes.”⁹

With the high-quality realism produced in Hollywood computer animation as a reference point, proponents of the Bill argued that photorealistic virtual child pornography was just as dangerous as photographic or filmic pornography that uses actual children. Invoking the logic that criminal images lead to criminal acts, they suggested that although children were not actually harmed in the production of virtual child pornography, these images would encourage predators to live out their foul fantasies on real kids.¹⁰ Asserting a legal and moral equivalency between the “real” and the “realistic,” Taylor went so far as to state, “Tomorrow’s victims and their parents, and all of us, can see [that] child pornography is child pornography. It is irrelevant whether it is ‘real’ or ‘apparent,’ whether it is an actual crime scene photo or a realistic fake.”¹¹ Concurring with Taylor’s assessment, Senator Hatch concludes, “In short, the harm to our society is no less than it would be if this filth was produced using real children.”¹²

Although opposed by a wide range of groups—from librarians and law professors to artists and adult filmmakers—Congress passed the law in 1996, finding that

new photographic and computer imaging technologies make it possible to produce...visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.¹³

The CPPA amended the pre-existing definition of “child pornography” to include any visual depiction, “including any photograph, film, video, picture, or computer or computer-generated image or picture...of sexually explicit conduct, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct.”¹⁴

The constitutionality of the Child Pornography Prevention Act was challenged in a 1998 suit initiated by the Free Speech Coalition, a trade association of adult businesses,

as well as by a few independent artists. The plaintiffs argued that the language of the law was overly broad and that it would have a chilling effect on the production of works that *are* or should be protected by the First Amendment. This would include films featuring adults playing the role of minors, such as Sam Mendes' *American Beauty* (1999) or Franco Zeffirelli's *Romeo and Juliet* (1968).

In addition, as Donald W. Molloy (United States District Judge for the District of Montana) observed, the 1996 law did not simply update the law to keep pace with advances in technology, it fundamentally changed the course and scope of child pornography legislation.

The regulation direction shifted from defining child pornography in terms of the harm inflicted upon real children to a determination that child pornography was evil in and of itself... The new law sought to stifle the use of technology for evil purposes... Images that are, or can be, entirely the product of the mind are criminalized.¹⁵

Rather than criminalising the image that provides evidence of a criminal act, the new law criminalised the image that provides evidence of an unpopular desire.

In April of 2002 the United States Supreme Court agreed with Judge Molloy, stating that the ban on virtual child pornography was unconstitutional. The Majority Opinion issued by Justice Kennedy asserted that the Child Pornography Prevention Act prohibited speech that recorded no crime and created no victims by its production. He argued that the causal link the Government was asserting between the creation of the images and the instigation of actual child abuse was contingent and indirect and that the harm they were alleging "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."¹⁶ Kennedy rejected the supposition that virtual pornographic images of children should be outlawed simply

because they possessed the same aesthetic qualities (i.e. photographic realism) as photographs or live-action film. “Protected speech,” he wrote, “does not become unprotected merely because it resembles the latter.”¹⁷

In defence of the photographic

There are a number of interesting issues that one could explore in a critical analysis of the virtual child pornography debate. On one level, the controversy is evidence of a deep cultural anxiety around the figure of the child and contemporary constructions of childhood sexual innocence. On another level, the law provides a telling example of the extensive structural mechanisms our society develops for the control and regulation of sexuality and desire. It would also be interesting to explore the historically cyclical nature of the technophobic rhetoric used to condemn the new digital imaging technologies (rhetoric which, ironically, is quite similar to that used to describe the potential dangers of photography over one hundred and fifty years ago). This analysis, however, will focus on the way in which the legal furore that raged around virtual child pornography is an expression of a more general cultural anxiety regarding the shift from photographically recorded still and moving images to the digitally created image.

The testimony of Mr. Taylor, the lawyer cited previously, provides numerous examples of this anxiety. Taylor warns members of the House Judiciary Committee of the terrifying technological advances that await us. He describes computer images that “can and will be made to look so real that the eye cannot tell the difference” and virtual reality experiences designed to trick the eye and “fool the senses.”

It has been true up to this point in history that no painting or artistic skill or early computer graphics techniques could create an image that was imperceptibly

indistinguishable from an actual person engaged in past actions. The material could and did “speak for itself”... It is conceivable that the day is here or near when common knowledge proves that computers can do the sleight of hand that tricks the eye and confounds the mind of the viewer... The real and the apparent become...equally dangerous...¹⁸

Beneath the generalised technophobia of Taylor’s testimony—which speaks of a technological black magic, a digital sorcery all the more dangerous because of its easy availability and democratic nature—we can discern a very palpable fear regarding the possible effect new digital imaging technologies could have on his relationship to the image-world and everyday experience. For Taylor, the potential *indistinguishability* of the photorealistic digital image has initiated a disorienting loss of faith—a loss of faith in the evidentiary and indexical nature of the photographic, in the notion that vision can provide us with objective knowledge of and control over the world around us, and in his own ability to determine truth from fiction. Taylor’s fear and frustration is not solely with a world in which the paedophile eludes control, but a world in which seeing is no longer necessarily believing.

The persistent power of the photographic

The passion with which Taylor defends the ontological certainty of the photographic, while simultaneously warning about the dangers of the digital, is evidence of the continued power of the photographic in what some have called the *post-photographic* era. In contrast to the “magical” and deceptive digital technologies described by Taylor, Hatch, and other supporters of the CPPA, photographic technologies—including both the still and moving image¹⁹—have tended to possess an aura of objectivity and truthfulness. Media scholars such as Susan Sontag and William Mitchell have discussed the

ideological power that the photographic draws from its supposedly evidentiary and indexical nature.²⁰ Writing in 1973, Sontag asserts that photographic images have virtually unlimited authority in a modern society and the scope of this authority, she argues, “stems from the properties peculiar to images taken by cameras.”²¹ As William Mitchell so aptly describes

The photograph is fossilized light, and its aura of superior evidential efficacy has frequently been ascribed to the special bond between fugitive reality and the permanent image that is formed at the instant of exposure. It is a direct physical imprint, like a fingerprint left at the scene of a crime or lipstick traces on your collar.²²

The photograph is not only assumed to possess this special, indexical bond with reality (a bond that seems to ensure the “honesty” of the image), but it is also understood as having expanded our basic ability to perceive that reality. In his famous essay, “The Work of Art in the Age of Mechanical Reproduction” Walter Benjamin describes the camera’s ability to expand the human experience of perceptible reality and surgically explore this intricate world. For Benjamin, film and photography allowed a deepening of optical apperception.²³ “A different nature opens itself to the camera than to the naked eye....”²⁴ While psychoanalysis revealed new dimensions of depth in human consciousness, photography was able to isolate and make analysable “things which had heretofore floated along unnoticed in the broad stream of perception,”²⁵ opening up what Benjamin called the *optical unconscious*.

However, while the photographic camera created new and expanded access to the perceptible world, it also transformed the relationship between the perceiving subject and her reality. Sontag sees this relationship as bound up with notions of consumption, acquisition, possession and control. The photograph gives people an imaginary or

symbolic sense of possession over the thing, the person, the experience, or the place it depicts.²⁶ For Sontag, the world possessed through photographs is a world reduced to fragments of information, thin slices of time and space, which can then be classified, catalogued and filed away for future reference.²⁷

Reality as such is redefined—as an item for exhibition, as a record for scrutiny, as a target for surveillance. The photographic exploration and duplication of the world fragments continuities and feeds the pieces into an interminable dossier, thereby providing possibilities of control that could not even be dreamed of under the earlier system of recording information: writing.²⁸

The indexicality of the photographic (its existence as a “trace” or “material vestige” of its subject), the appearance of objectivity and non-intervention, and the fact that it lent itself to classification and cataloguing made the photograph particularly well suited for “high-modernist” institutions and disciplines such as biology, anthropology, medicine, journalism, criminology and the legal system.²⁹ The connection between photography and these institutions is important because it highlights the ideological and political power of this purportedly neutral image-form. It reminds us that the photographic is not simply a technology or type of image; it is a technologised mode of perception, a culturally determined mode of seeing that has shaped the relationship between late nineteenth- and twentieth-century viewing subjects and their world. Extending human vision, which since the Enlightenment has been the privileged mode for coming to know and understand the phenomenal world, photography has provided a powerful and influential mechanism for us to see, understand, and attempt to control our world and our reality. Indeed, despite a century of critical reflection on film and photography by media theorists that has called into question its appearance of objectivity, the photographic is still a powerful force in the cultural imaginary.

The challenge of the post-photographic

These reflections on the persistent ideological power of the photographic beg a few important questions. What happens when our machines of vision no longer give us access to “the truth” (or that which we accept as truth)? What happens when our technologies no longer bring us closer to “reality,” but rather obscure it, replacing that which has been posited as the “real” with an indistinguishable simulation? What happens when the image that was able to reassure viewers of the existence of a stable, comprehensible reality for one hundred and fifty years is replaced by an image that severs (or at least complicates) its ties to the phenomenal world and gives no such assurance? In other words, what happens when we move from the analogue to the digital, from the photographic to the post-photographic?

In *The Reconfigured Eye*, William Mitchell describes the implications of the shift from analogue to digital:

For a century and a half...chemical photography’s temporary standardization and stabilization of the process of image making served the purposes of an era dominated by science, exploration, and industrialization... But the emergence of digital imaging has irrevocably subverted these certainties, forcing us to adopt a far more wary and more vigilant interpretive stance... An interlude of false innocence has passed. Today, as we enter the post-photographic era, we must face once again the ineradicable fragility of our ontological distinctions between the imaginary and the real, and the tragic elusiveness of the Cartesian dream.³⁰

The sense of fear and anxiety regarding this challenge to the photographic, which is quite evident in Taylor’s comments, is not new, nor is it unique to the virtual child pornography controversy. For the last two decades film and media scholars, cultural critics, and theorists of new technology have been exploring the vast implications of this shift. In 1982 a minor scandal developed around the digitally altered image of the

pyramids at Giza featured on the February 1982 cover of *National Geographic*.

Apparently the pyramids were situated too far apart to fit on the magazine cover, so the original image was digitally altered to fit them on the page. Kevin Robins suggests that “alterations” and deceptions such as this affect the basic status of the photographic image.

He writes:

the status of the photographic document as evidence is thus called into doubt. Whole new vistas are opened up for the manufacture of fakes, fabrications and misinformation. The relationship between the photographic image and the “real world” is subverted.³¹

By 1990 even the *New York Times* was predicting that the reign of the photographic was ending, as well as the viewing subject it constructs. Suggesting that the time is near when readers of magazines and newspapers will know that they cannot rely on the image to be genuine, the columnist concludes, “In short, photographs will not seem as real as they once did.”³² The digital image is, as Peter Lunenfeld asserts, the “dubiative image,”³³ the image “inclined or given to doubt.”³⁴ However, because the *photorealistic* image has become virtually indistinguishable from the *photographic* image, its dubiousness has infected the photographic, undermining our faith in its veracity.

Although the shift from analogue to digital, from indexical to “dubiative,” has been framed in terms of loss, mistrust, and insecurity in the context of child pornography law, not everyone conceives of this shift as a negative development. Indeed, given the centrality of photography in various historical systems of domination—from the colonialist agenda of nineteenth-century anthropology to the racist logic of twentieth-century eugenics—there are many who think the digital image offers the possibility of demystifying the photographic, problematising its false truth claims and revealing the ways in which it, too, is a deeply dubious image. Rejoicing in the subversive potential of

the digital image, Mitchell sees the emergence of digital imaging as “a welcome opportunity to expose the aporias in photography’s construction of the visual world, to deconstruct the very ideas of photographic objectivity and closure, and to resist what has become an increasingly sclerotic pictorial tradition.”³⁵

However, Mitchell also observes that individuals embedded in the institutions whose viability is based on the reliability of the recording instrument, such as the criminal justice system, will vigorously defend the “hegemony of the standard photographic image.”³⁶ And, in fact, this is precisely what we see in the U.S. Government’s case supporting the Child Pornography Prevention Act. In an effort to deal with the dilemma posed by the indiscernibility of the digital, the CPPA attempts, both literally and figuratively, to criminalise the digital image and the aesthetic of photorealism.

Counterfeit Realism

After reviewing the testimony before Congress, the text of the law, as well as the various judicial responses, it becomes apparent that the 1996 Child Pornography Prevention Act was an attempt to establish a legal threshold for digital realism (beyond which the image becomes dangerous and therefore criminal). Although overtly designed to curb the sexual abuse of children, digital photorealism is, in fact, the prime target of the CPPA.

According to this law a sexually explicit animated cartoon made using traditional methods (such as cel animation) would remain a protected form of speech; however if the animator chose to depict the same material using photorealistic computer animation

techniques it would be considered a criminal image. Critiquing the logic of this law, Judge Molloy observes:

The danger with [the State's] analysis is that it suggests that the more realistic an imaginary creation is, the less protection it is entitled to under the First Amendment. This is not because of any harm caused in its creation, rather it is because of the consequences of its purported reality.³⁷

Ironically, the rhetoric of hyperrealism that is deployed by the entertainment industry to promote new films and video games featuring the latest computer animation technologies is used by opponents of virtual child pornography to condemn those same technologies. The *photographic realism* lauded as an aesthetic and technological triumph in entertainment circles is, in the legal milieu, re-figured as kind of *criminal realism*.

Bruce Taylor's testimony illustrates one strategy used by the State to conceptualise the criminality of this aesthetic. In his presentation to the Senate Committee, Taylor explicitly discusses the photorealistic digital image as a form of counterfeit. In fact, he goes so far as to invoke federal counterfeiting and false representation statutes applicable to money, stamps, and passports in relation to photorealistic images and "apparent" or "counterfeit child pornography."³⁸ The qualities of the photoreal image that seemed to provoke the most anxiety in Taylor, Hatch, Jepsen and others—namely its indistinguishability, dubiousness, and potential for deception—are captured by the legal concept of the counterfeit.

To counterfeit is to make a realistic copy of something in order to defraud or deceive; an essential component of the offence is its ability to make people think or experience the counterfeit *as if it were real*. Proponents of the CPPA argued that virtual child pornography possesses such a deceptive capacity. "If a computer generated counterfeit picture of a child engaged in sex is so good a fake that you cannot tell by

looking at it, then police, courts, and indeed paedophiles and seduced children would also be unable to know the difference.”³⁹ For Taylor, the deception of the counterfeit image functions on two different levels. On the one hand, the counterfeit image deceives the “unsuspecting” viewer—the seduced child, the police, and the court. On the other hand, the counterfeit image allows the complicit viewer—the paedophile—to engage in a kind of self-deception that the CPPA ultimately hopes to eliminate. I would suggest that what is so deeply offensive to Taylor about these counterfeit images is that they allow the paedophile to experience them as if they were real, turning their dangerous fantasies into a kind of phenomenal reality.

Innocence Lost: The dangerous image/imagination

In addition to the literally criminal status attached to digital photorealism in this law, the criminalisation of digital imaging technologies also occurs on a rhetorical level. A powerful correspondence emerges in the discursive constructions of the paedophile and the digital image, both of which are described as morally corrupt and potentially dangerous. The same rhetoric used to condemn the individual is used to condemn the image. Degenerate in its apparent compliance with a deviant imagination, dangerous in its invisibility and ubiquity, predatory in its attack on our faith in photographic veracity, the criminal image is merged with the criminal mind.⁴⁰

In a similar manoeuvre, the body of the child and the photographic image are also coupled in the rhetoric of the virtual child pornography debate. Nostalgic conceptions of childhood innocence are mapped onto the supposedly more innocent and more honest media of live-action film and chemical photography.⁴¹ Marvelling at the disturbing power

of contemporary technology to produce customised pornography, Senator Hatch notes, “Computers can even be used to alter perfectly innocent pictures or videos of children, to create visual depictions of those children engaging in sexual conduct.”⁴² Interestingly, Hatch seems to be concerned for both the innocence of the children as well as the innocence of the pictures that are threatened by the technology-wielding paedophile. Fighting to defend what Mitchell astutely identified as the “false innocence” of the photographic, proponents of the CPPA posit both the child and photograph as victims of virtual child pornographers.

Beyond this symbolic or rhetorical association, however, a more intimate and seemingly *ontological* connection is forged between the photograph and the child. This ontological linkage can be seen most clearly in discussions of the morphing technology Hatch referenced above. The ban on morphed images—photos of actual children that are digitally altered to appear as if they are engaged in sexually explicit acts—was not challenged by the Free Speech Coalition’s appeal. The 2002 Supreme Court ruling, while overturning the ban on totally virtual, digital child pornography, upheld the ban on the digitally morphed photographic image. According to the High Court, the rationale for distinguishing between the morphed image and the fully virtual image is that although no children are abused in the creation of either image, the specific children who are represented in morphed images may suffer subsequent harm due to the fact that it *appears* to be a record of a prior act. Although there is evidence to suggest that such subsequent harm is a possibility, thus justifying the perpetuation of this ban, I would suggest that this is not the only motivation. The ban not only protects the child, but the remnants of the photographic as well.⁴³

As discussed earlier, the indexical quality of the photograph—its almost physical connection to the object it depicts—has long engendered a sense of intimacy, a sense of closeness and proximity between image and object. In his famous essay “The Ontology of the Photographic Image,” Andre Bazin describes the photographic process as involving a transfer of reality from the original object to its copy; this process allows the image to, in an almost literal or material sense, *become* the original.

Only a photographic lens can give us the kind of image of the object that is capable of satisfying the deep need man has to substitute for it something more than a mere approximation, a kind of decal or transfer. The photographic image is the object itself, the object freed from the conditions of time and space that govern it.⁴⁴

For Bazin, photographic indexicality allows the image to, in a sense, become the object itself.⁴⁵ Reiterating Bazin’s point, John Berger has argued that the tenacious adherence of the referent to the photograph is a definitive characteristic of the medium. In the case of the morphed photograph, it is the body of the child that tenaciously adheres to the photograph. Ultimately, what I am suggesting is that, in the emotionally loaded visual and conceptual space of the morphed pornographic image, there is an ontological collapsing of the photographic and the child. Although the child is not actually harmed in the production of the morphed image, the indexical nature of the photograph summons the body of the child, establishing a material and emotional proximity between the two. The digital manipulation of the photograph is experienced as not only a violation of the photographic, but also a violation of the child itself.

Conclusion

The ban on the morphed image provides yet another illustration of the fact that the CPPA was not only designed to protect children, but to defend the photographic's claim as the aesthetic of the "real" and to safeguard viewers from the unsettling possibilities of the digital. As the animated body encroaches upon the real body and as the digital image encroaches upon the photographic, we are seeing an attempt to legislate and control the shifting relationships between these bodies and images. In this case, as I have argued, we see these anxieties being dealt with through a criminalisation of new imaging technologies and the *counterfeit realism* they produce. As Harris Mirkin observes, while some countries have used the threat of forbidden political ideas as the impetus to place controls on new technologies, "In the United States attempts at control have focused on sexual images, and the issue is being used to bring the structure of the new information technologies under the control of regulators."⁴⁶ Thus, while this legislation may represent a justifiable attempt to deal with the impact that new technologies may have on our ability to protect children and prosecute criminals, we must also understand that this legislation is an important arena in which our society is determining its relationship to its new technologies and a powerful forum in which a means for controlling those technologies and their products will be decided.

Notes

¹ Guy Debord, *Society of the Spectacle* (Detroit: Black & Red, 1970).

² The British act defined “pseudo-photograph” as “an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.” Testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families. Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237*, 4 and 5 June 1996.

³ P.J. Huffstutter, “Virtual Porn: Born of Digital Wizardry,” *Los Angeles Times* (April 17, 2002), A1, 14.

⁴ *New York v. Ferber*, 102 U.S. Supreme Court (1982).

⁵ Of course, the notion that the photograph can somehow exist as unquestionable evidence is already a problematic notion. Take for example the case in which a parent’s photograph of a naked child is interpreted as “evidence” of abuse.

⁶ William Mitchell, *The Reconfigured Eye: Visual Truth in the Post-Photographic Era* (Cambridge, Massachusetts: The MIT Press, 1992), 17.

⁷ Statement of Senator Orrin G. Hatch. Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237*, 4 June 1996.

⁸ Testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families. Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237*, 4 and 5 June 1996.

⁹ Statement of Dee Jepsen, President, “Enough is Enough!” Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237*, 4 June 1996.

¹⁰ They also argued that the images would be used to seduce children. Apparently showing children pornography is a common way that sexual predators convince their young victims to participate in the acts, making them feel that it is acceptable behaviour.

¹¹ Testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families. Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237*, 4 and 5 June 1996.

¹² Statement of Senator Orrin G. Hatch. Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237*, 4 June 1996.

A final argument made by supporters of the CPPA was that legalising virtual child pornography would make prosecuting child pornographers more difficult, supplying defendants with an automatic reasonable doubt defence. The government would be required to prove, beyond a reasonable doubt, that the images used to convict child pornographers are depictions of actual children in order to disprove the possibility that the images were computer-generated (and thus legal). To support their argument they cite a 1995 case (*United States v. Kimbrough*) in which a defence witness provided expert testimony asserting that computers had the ability to create images that were “undetectably identical to actual child pornography and, therefore, the jury could not be sure that the pictures in that case were of actual children.”

¹³ S. 1237, 1995, Date of Introduction September 19, 1995, Date of Version, August 1, 1996, Section 2, Findings.

¹⁴ S. 1237, 1995, Date of Introduction September 19, 1995, Date of Version, August 1, 1996, Section 3, Definitions.

¹⁵ Opinion of Donald W. Molloy, United States Court of Appeals for the Ninth Circuit, on *The Free Speech Coalition, Plaintiffs-Appellants, v. Janet Reno, Attorney General, United States Department of Justice, Defendants-Appellees* (Argued March 10, 1998, Filed December 17, 1999).

¹⁶ Opinion of Justice Kennedy, 122 Supreme Court of the United States, on *John D. Ashcroft, Attorney General, et al., Petitioners v. The Free Speech Coalition et al.*, (Argued October 30, 2001, Decided April 16, 2002.)

¹⁷ Ibid.

¹⁸ Testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families. Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237*, 4 and 5 June 1996.

¹⁹ At this point I feel the need to clarify the terms of my analysis. My use of the term *photographic* includes both still photography and motion pictures, i.e. all images captured through the processes of chemical photography. In what follows I will outline certain qualities of the photographic, for example its indexicality, its alleged objectivity, and its easy appropriation by regulatory institutions such as the criminal justice system. Although I think it is important to make this more general argument about the power of the photographic in the popular imagination, it is also important to acknowledge the historical, technical, and experiential specificities of various photographic media.

²⁰ For more on the indexical nature of photography and film, see Andre Bazin, "The Ontology of the Photographic Image," in *What is Cinema? Vol. 1* (Berkeley: University of California Press, 1967); Roland Barthes, *Camera Lucida: Reflections on Photography* (New York: Hill and Wang, 1980); and Bill Nichols, *Representing Reality: Issues and Concepts in Documentary* (Bloomington: Indiana University Press, 1991).

²¹ Susan Sontag, *On Photography* (New York: Anchor Books Doubleday, 1977), 153.

²² Mitchell, 24.

²³ Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction," in *Illuminations*, ed. Hannah Arendt (New York: Schocken Books, 1955), 235.

²⁴ Ibid, 236.

²⁵ Ibid, 235.

²⁶ Sontag, 9.

²⁷ Sontag writes, "the world becomes a series of unrelated, freestanding particles...The camera makes reality atomic, manageable, and opaque...Photography implies that we know about the world if we accept it as the camera records it."(23)

²⁸ Sontag, 156.

²⁹ Mitchell, 8 & 16.

³⁰ Mitchell, 225.

³¹ Kevin Robins, “The Virtual Unconscious in Postphotography,” in Timothy Druckrey, ed., *Electronic Culture: Technology and Visual Representation* (Aperture Foundation, Inc., 1996), 156.

³² Mitchell, 17.

³³ Peter Lunenfeld, *Snap to Grid: A User’s Guide to Digital Arts, Media, and Cultures* (Cambridge, Massachusetts: The MIT Press, 2000), 61.

³⁴ Lunenfeld, 61

³⁵ Mitchell, 8. Paul Willeman offers a compelling response to Mitchell’s celebration of the subversive potential of the digital image, as well as an alternative position on the politics of the photograph in “Reflections on Digital Imagery: Of Mice and Men” (*New Screen Media: Cinema/Art/Narrative*, London: British Film Institute, 2002). Willeman discusses the negative political implications of the loss of the indexicality associated with photography and cinema, however from a very different perspective than the proponents of the CPPA. Dai Vaughan suggests that photography’s link to the material world can act as an “impediment to the word of authority.” “It is surely not fortuitous,” he writes, “that the age of the chemical photograph has broadly coincided with that of mass democratic challenges to entrenched power.” Willeman notes suggests that the draining away of the indexical dimension of the image through digital manipulation is anti-democratic because “it makes the administrative control of ‘meaning’ easier by facilitating the control of the flow of information... Photochemical images will continue to be made, but the change in the regime of ‘believability’ will eventually leech all the resistance that reality offers to ‘manipulation’ from even those images”(20).

³⁶ Ibid.

³⁷ Opinion of Donald W. Molloy, Unites States Court of Appeals for the Ninth Circuit, on *The Free Speech Coalition, Plaintiffs-Appellants, v. Janet Reno, Attorney General, United States Department of Justice, Defendants-Appellees* (Argued March 10, 1998, Filed December 17, 1999).

³⁸ This notion of a counterfeit realism—a criminal aesthetic—is quite interesting in terms of what it suggests about the State’s understanding of “reality,” the relationship between image and reality, and its own desired role and rights in the process of image/reality production. Quite predictably, the argument that “reality” can be counterfeit reiterates a commitment to an objective, stable conception of “the real.” Reality, according to this logic, has the existential status of an object; like a dollar bill, this “reality” can be copied or forged and, importantly, be regulated by the State. Moreover, the testimony supporting the CPPA suggests a privileged relationship between the photographic image and reality. According to the CPPA the digital image is a fake, a forgery, a counterfeit because it “appears to be” a photograph or, in other words, it “appears to be” “real.” Within the logic of this argument, the photographic is posited as the legal aesthetic of “the real.”

³⁹ Testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families. Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237, # Congress, which session, 4 and 5 June 1996.*

⁴⁰ I would argue, however, that this connection is not simply metaphoric, rather the law places digital image-making technology in a metonymic relationship with the criminal. The image becomes the part that stands in for the whole. It is the part that our legal system—frustrated by its inability to control the paedophile’s thoughts, desires, and experiences—turns to in order to defend its own definitions of an acceptable reality.

⁴¹ This association between the photograph and honesty/morality is long-standing. Edward Weston, an American photographer, wrote: “Only with effort can the camera be forced to lie: basically it is an honest medium...” (Sontag, 186).

⁴² Statement of Senator Orrin G. Hatch. Senate Committee on the Judiciary, *The Child Pornography Prevention Act of 1995: Hearing on S. 1237*, 4 June 1996.

⁴³ For more on the political/ideological analysis of morphing, see Vivian Sobchack, ed., *Meta-Morphing: Visual Transformation and the Culture of Quick-Change* (Minneapolis: University of Minnesota Press, 2000).

⁴⁴ Andre Bazin, "The Ontology of the Photographic Image," in *What is Cinema? Vol. 1* (Berkeley: University of California Press, 1967), 14.

⁴⁵ Roland Barthes reiterates the material connection between image and object/child, but he formulates this physical intimacy in a slightly different way. Barthes writes: "The photograph is literally an emanation of the referent. From a real body, which was there, proceed radiations which ultimately touch me... A sort of umbilical cord links the body of the photographed thing to my gaze..." (*Camera Lucida: Reflections on Photography*, New York: Hill and Wang, 1980, 81). In this evocative description of photographic spectatorship, Barthes deploys the potently sensuous and emotionally charged metaphor of the umbilicus to describe the relationship between referent, representation, and viewer. Like the umbilical cord that forms the nourishing physical bond between mother and child, the photograph, for Barthes, forms a sensuous connection between viewer and object. Once again, a complicated correspondence is made between child and photograph.

⁴⁶ Harris Mirkin, "The Prohibited Image: Child Pornography and the First Amendment," in *Porn 101: Eroticism, Pornography, and the First Amendment* (New York: Prometheus Books, 1999), 514.