

Criminal Law—Expert Testimony Not Required to Distinguish Pornographic Images of Real Children from Virtual Children—*United States v. Wilder*, 526 F.3d 1 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 626 (2008)

Preventing child abuse is an important government interest that justifies excluding child pornography, as a class of speech, from First Amendment protection.¹ Nonetheless, the First Amendment continues to protect computer-generated or virtual child pornography because its creation does not harm real children and therefore causes no child abuse.² In *United States v. Wilder*,³ the United States Court of Appeals for the First Circuit considered whether technical expert testimony is required to prove beyond a reasonable doubt that an image actually depicts a real child.⁴ The court reaffirmed its previous decisions that fact-finders are capable of determining whether an image is real or virtual without expert testimony.⁵

Federal agents conducting an investigation into online child pornography identified Darren Wilder as a subscriber to a pay-for-membership Web site named “Lust Gallery: A Secret Lolitas Archive” (Lust Gallery), which contained thousands of sexually explicit pictures of children.⁶ Lust Gallery subscription files and Wilder’s credit-card records showed that in March 2003, Wilder purchased a one-month subscription to Lust Gallery while on supervised release from a previous conviction for child pornography possession.⁷ In January 2004, agents obtained and executed a search warrant for Wilder’s home, discovering child pornographic images and video files on Wilder’s computer, which he had downloaded from Internet newsgroups and Web sites.⁸ Wilder’s computer also recorded over 14,000 image downloads from the newsgroup “Youth and Beauty,” thousands from another newsgroup named “Hussy,” and evidence of a posting Wilder made to the newsgroup “alt.sex.young” containing four images of child pornography.⁹

1. See *New York v. Ferber*, 458 U.S. 747, 757-58 (1982) (balancing First Amendment protections against governmental interest in protecting children); see also U.S. CONST. amend. I (prohibiting Congress from abridging freedom of speech).

2. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002) (applying First Amendment protections to sexually explicit images only “appear[ing] to be” of real child); see also *New York v. Ferber*, 458 U.S. 747, 763 (1982) (applying First Amendment protections to false depictions of children engaged in lewd sexual conduct).

3. 526 F.3d 1 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 626 (2008).

4. See *id.* at 11 (stating appellant argued expert testimony insufficient to prove depiction of children).

5. See *id.* (deciding evidence sufficient because expert testimony unnecessary).

6. See *id.* at 3 (detailing Web site’s contents).

7. See 526 F.3d at 3-4 (describing federal investigation).

8. See *id.* (detailing contents of seized computers and handwritten notes).

9. See *id.* at 4 (recounting appellant’s online activities).

The United States District Court for the District of Massachusetts convicted Wilder for possession, transmission, and receipt of child pornography in violation of 18 U.S.C. §§ 2252(a)(1)-(2) and 2252(a)(4)(B) and sentenced him to fifteen years in prison, followed by five years of supervised release.¹⁰ Wilder appealed to the United States Court of Appeals for the First Circuit, challenging his conviction on five separate grounds.¹¹ One of Wilder's claims asserted that the government did not present expert testimony regarding the authenticity of the images, and he therefore argued that the jury had no basis for finding that the images were not computer generated.¹² The court reiterated its previous holding that the government is not required to produce an expert witness to prove that the images depict real children and that the jury can determine whether the images are computer generated based solely on the images themselves.¹³

The necessity of the distinction between child pornography containing images of real children and computer-generated images is rooted in First Amendment jurisprudence.¹⁴ In *New York v. Ferber*,¹⁵ the Supreme Court held that the government's interest in protecting children from sexual abuse and exploitation justifies removing First Amendment protection from child pornography, even if the material is not obscene under the *Miller v. California*¹⁶ test.¹⁷ In addition to the adverse effects of participating in pornography, the image serves as a permanent reminder of that abuse.¹⁸

10. See *id.* at 3 (reviewing indictment and trial).

11. See 526 F.3d at 2-3 (detailing reasons for appeal). Wilder also unsuccessfully challenged his conviction on the grounds that the police issued a warrant to search and seize items at his home without probable cause, that the evidence was insufficient to support a finding of a knowing receipt of child pornography, that the evidence was insufficient to support a finding of knowing possession of child pornography, and that the evidence was insufficient to support a finding that the images depicted a minor engaging in sexually explicit conduct. *Id.*

12. See *id.* at 11 (presenting appellant's argument). Wilder argued that the expert testimony presented from a pediatric physician with no photographic expertise was insufficient because "it did not specifically exclude the possibility that the children in the images had been computer-generated." *Id.*

13. See *id.* (noting stare decisis binds when sufficient evidence exists).

14. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002) (applying First Amendment protections where sexually explicit images only "appear to be" real child); *New York v. Ferber*, 458 U.S. 747, 757-58 (1982) (balancing First Amendment protections against governmental interest in protecting children). See generally Shepard Liu, *Ashcroft, Child Pornography and First Amendment Jurisprudence*, 11 U.C. DAVIS J.L. & PUB. POL'Y 1, 32 (2007) (analyzing *Ashcroft v. Free Speech Coalition*); Brian G. Slocum, *Virtual Child Pornography: Does It Mean the End of the Child Pornography Exception to the First Amendment?*, 14 ALB. L.J. SCI. & TECH. 637, 643-44 (2004) (detailing First Amendment child pornography protection origins); Chelsea McLean, Note, *The Uncertain Fate of Virtual Child Pornography Legislation*, 17 CORNELL J.L. & PUB. POL'Y 221, 224-25 (2007) (outlining early legislative and case history of child-pornography protection).

15. 458 U.S. 747 (1982).

16. 413 U.S. 15 (1973).

17. See *New York v. Ferber*, 458 U.S. 747, 759-61 (1982) (holding sexually explicit depiction of child need not be "patently offensive" to harm child); see also *Miller v. California*, 413 U.S. 15, 24-25 (1973) (setting guidelines for obscenity not protected by First Amendment).

18. See *New York v. Ferber*, 458 U.S. 747, 759 (1982) (presenting intrinsic relationship between child-pornography distribution and sexual abuse).

As technological advances facilitated the creation and modification of virtual images, Congress passed the Child Pornography Prevention Act of 1996 (CPPA).¹⁹ The CPPA prohibited child pornography if “such visual depiction is, or appears to be of a minor engaged in sexually explicit conduct” with the goal of removing both real and virtual images from the marketplace and thereby achieving the governmental purpose of protecting children from sexual abuse.²⁰ *Ashcroft v. Free Speech Coalition*,²¹ however, struck down the “appears to be” language as violating the First Amendment protection of virtual child pornography.²²

The Court’s ruling in *Free Speech Coalition* presented an evidentiary puzzle for prosecuting child-pornography-possession cases.²³ The Court stressed that the burden of proof still fell squarely on the government, regardless of whether the defendant claimed the images could have been computer generated, and it declined to establish a bright-line rule requiring technical expert testimony on the character of the image.²⁴ After *Free Speech Coalition*, all six circuits to consider this issue held that technical expert testimony is not required.²⁵

In response to *Free Speech Coalition*, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of

19. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 to -31 (codified as amended in scattered sections of 18 U.S.C.) (1996); S. REP. NO. 104-358, at 2 (1996) (positing technology could enable creation and modification of virtual images indistinguishable from child pornography); see also Richard Bernstein, Note, *Must the Children Be Sacrificed: The Tension Between Emerging Imaging Technology, Free Speech and Protecting Children*, 31 RUTGERS COMPUTER & TECH. L.J. 406, 412-13 (2005) (discussing legislative history of CPPA).

20. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 to -31 (codified as amended in scattered sections of 18 U.S.C.); S. REP. NO. 104-358, at 2-3 (1996) (presenting findings on harms caused by virtual child pornography). The Senate found that outlawing virtual possession helps eliminate the market for all child pornography). S. REP. NO. 104-358, at 2-3 (1996).

21. 535 U.S. 234 (2002).

22. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002) (holding “appears to be” provision of CPPA abridges substantial amount of lawful free speech).

23. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) (rejecting government’s assertion that CPPA creates affirmative defense); Susan S. Kreston, *Defeating the Virtual Defense in Child Pornography Prosecutions*, 4 J. HIGH TECH. L. 49, 52-67 (2004) (offering prosecutorial strategies for proving images depict real children); Audrey Rogers, *Playing Hide and Seek: How to Protect Virtual Pornographers and Actual Children on the Internet*, 50 VILL. L. REV. 87, 92-97 (discussing post-*Free Speech Coalition* trial strategies).

24. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255-56 (2002) (refusing to shift burden of proof to defendant).

25. See *United States v. Salcido*, 506 F.3d 729, 733-34 (9th Cir. 2007) (per curiam), *cert. denied*, 128 S. Ct. 1918 (2008) (agreeing *Free Speech Coalition* does not require expert testimony); *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 437 (1st Cir. 2007) (noting no expert testimony requirement in *Free Speech Coalition*); *United States v. Irving*, 452 F.3d 110, 121 (2d Cir. 2005) (rejecting defendant’s claim government must present extrinsic evidence per *Free Speech Coalition*); *United States v. Farrelly*, 389 F.3d 649, 655 (6th Cir. 2004) (stating *Free Speech Coalition* did not establish expert-testimony requirement); *United States v. Stanina*, 359 F.3d 356, 357 (5th Cir. 2004) (per curiam) (stating *Free Speech Coalition* did not establish requirement for expert testimony), *cert. denied*, 543 U.S. 845 (2004); *United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir. 2003) (stating no expert-testimony requirement from *Free Speech Coalition*).

2003 (PROTECT).²⁶ PROTECT replaced the troublesome “appears to be” language with “is indistinguishable from” and modified the legislative intent from preventing sexual abuse to more effectively prosecuting offenders.²⁷ Until recently, many legal scholars presupposed these revisions might not pass the strict-scrutiny analysis required under the First Amendment, like the “appears to be” language in its predecessor CPPA.²⁸ In May 2008, the Supreme Court upheld a portion of PROTECT, dubbed the “pandering provision,” as not overbroad under the First Amendment.²⁹ Justice Souter opined in his dissent that the Court would be justified in reviewing this issue once technology progressed to a point in which real and virtual pornography is indistinguishable.³⁰ Nevertheless, as of 2008, the “virtual child” defense has yet to be successful.³¹

In *United States v. Wilder*, the First Circuit held that a rational jury could find beyond a reasonable doubt that the government proved that the images from Wilder’s computer depicted real, rather than computer-generated, children.³² Even though the government provided technical expert testimony in the precedential case *United States v. Rodriguez-Pacheco*,³³ the First Circuit reiterated that there is no per se rule requiring expert testimony to distinguish between real and virtual children.³⁴ The court noted that all other circuits have

26. See *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003*, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.); H.R. REP. No. 108-66, at 29 (2003) (Conf. Rep.), as reprinted in 2003 U.S.C.C.A.N. 683 (presenting findings regarding impact of *Free Speech Coalition* on child pornography prosecutions); Rogers, *supra* note 23, at 97-98 (discussing new congressional findings behind PROTECT).

27. See *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003*, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 U.S.C.); H.R. REP. No. 108-66, at 30 (2003) (Conf. Rep.), as reprinted in 2003 U.S.C.C.A.N. 683 (claiming requirement of proof that pornographic image depicts real child would result in defendants escaping prosecution).

28. See Rogers, *supra* note 23, at 100-02 (questioning constitutionality of “indistinguishable” language in PROTECT); Slocum, *supra* note 14, at 661-67 (discussing constitutionality of provision proscribing virtual child pornography in PROTECT); Bernstein, *supra* note 19, at 425-28 (discussing constitutionality of “is indistinguishable from” language in PROTECT); Kate Dugan, Note, *Regulating What’s Not Real: Federal Regulation in the Aftermath of Ashcroft v. Free Speech Coalition*, 48 ST. LOUIS U. L.J. 1063, 1090-99 (2004) (analyzing PROTECT treatment of constitutionality of “appears to be” language raised in *Free Speech Coalition*).

29. See *United States v. Williams*, 128 S. Ct. 1830 (2008). A jury in the United States District Court for the Southern District of Florida convicted Williams of promoting and possessing child pornography based on his offer to post pictures in an Internet chat room. *Id.* at 1838. The Eleventh Circuit reversed the promoting conviction, holding the statutory provision was constitutionally overbroad. *Id.* The Supreme Court reversed the Eleventh Circuit, acknowledging that the “pandering provision” of the PROTECT eliminated the First Amendment problems with the CPPA identified in *Free Speech Coalition*. *Id.* at 1846-47.

30. See *United States v. Williams*, 128 S. Ct. 1830, 1856 (2008) (Souter, J., dissenting) (stating future technological advances could require limits on expressive freedoms to protect children).

31. See *United States v. Williams*, 128 S. Ct. 1830, 1856-58 (2008) (Souter, J., dissenting) (highlighting no cases resulted in acquittal of defendants using virtual child defense).

32. See 526 F.3d at 11 (holding rational jury could find government met its burden).

33. 475 F.3d 434 (1st Cir. 2007).

34. See 526 F.3d at 11 (noting stare decisis binds court to *Rodriguez-Pacheco*, which held expert

reached similar conclusions in light of *Free Speech Coalition*.³⁵

Although producing virtual child pornography indistinguishable from real child pornography may be a technical possibility, the First Circuit properly allowed a lay person to determine whether an image is real or virtual.³⁶ Wilder posited that computer-generated images might not be distinguishable from real images, but presented no evidence either supporting this claim or asserting that the images on his computer were in fact virtual in origin.³⁷ While experts disagree about the degree of availability or prevalence of virtual child pornography on the Internet, the circuits that have considered the issue agree that fact-finders are capable of determining whether an image represents a real child without technical expert testimony.³⁸

Free Speech Coalition established First Amendment protection for virtual child pornography and affirmed that the burden of proof lies with the government, but it did not establish a bright-line rule requiring expert testimony to rule out computer generation of every sexually explicit image appearing to depict a minor.³⁹ Although the method of producing pictures has changed, the reasoning in *Nolan* is still sound twenty years later.⁴⁰ The First Circuit correctly upheld and reaffirmed that the government need not prove ways in which an image was not produced.⁴¹

As digital-imaging technology advances, the current evidentiary standard will become inadequate to maintain First Amendment protection of virtual child pornography.⁴² Requiring expert testimony on the origin of an image likely will be insufficient because digital images created with a camera, computer, or combination would have no distinguishing characteristics, even to an expert.⁴³ Therefore, prosecutors might choose to abandon the child-

testimony not required). In *Rodriguez-Pacheco* the First Circuit revitalized its holding in *United States v. Nolan*, 818 F.2d 1015 (1st Cir. 1987), from the pre-digital photography age, as still valid in light of *Free Speech Coalition*. See *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 444 (1st Cir. 2007) (maintaining burden of proof on government). The court held that the government need not “rule out every conceivable way the pictures could have been made other than by ordinary photography.” *Id.*

35. See 526 F.3d at 11 n.7 (noting all circuits adopted governmental burden of proof).

36. See *id.* at 11 (stating pornography image status determined by trier of fact).

37. See *id.* at 10-11 (reciting defendant’s argument of insufficient evidence).

38. See *id.* at 13-14 (Stahl, J., concurring) (questioning whether child pornographers access similar advanced technological resources as movie studios); see also Bernstein, *supra* note 19, at 408-10 (discussing imaging technology history); Kreston, *supra* note 23, at 60-62 (identifying technical challenges creating virtual images); *supra* note 25 (collecting cases).

39. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) (rejecting government’s assertion creating affirmative defense).

40. See *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 444 (1st Cir. 2007) (refusing to assume pictures made using technology).

41. See *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 444 (1st Cir. 2007) (quoting *United States v. Nolan*, 818 F.2d 1015, 1020 (1st Cir. 1987)).

42. See *United States v. Williams*, 128 S. Ct. 1830, 1856-58 (2008) (Souter, J., dissenting) (stating *Ferber* open to reevaluation if technology sufficiently advanced); Slocum, *supra* note 14, at 690-91 (proposing presumption alternative for virtual child-pornography cases).

43. See Timothy J. Perla, Note, *Attempting to End the Cycle of Virtual Pornography Prohibitions*, 83 B.U.

pornography-possession statutes, instead relying on the pandering provision of PROTECT that the Supreme Court upheld as not overbroad under the First Amendment.⁴⁴ Conversely, the Supreme Court might revisit *Ferber* and *Free Speech Coalition* and redefine the protected class of speech.⁴⁵

In *United States v. Wilder*, the First Circuit decided whether expert testimony is required to distinguish real from virtual child-pornography images. Relying on *United States v. Rodriguez-Pacheco*,⁴⁶ the court reaffirmed that the trier of fact is capable of determining the origin of the images, holding that First Amendment jurisprudence does not require technical expert testimony. Despite disagreement among the circuits about whether technology is capable of producing a virtual image that is indistinguishable from a real child, the First Circuit's holding is in agreement with the other circuits that have considered the issue. While technological advances may prompt a different result in the future, the First Circuit's decision is proper at this time.

Gretchen L. Duhaime

L. REV. 1209, 1218-19 (2003) (describing digital image creation and storage). *But see* Kreston, *supra* note 23, at 60-62 (suggesting time and effort required to create digital images still distinguishable from real images).

44. *See* *United States v. Williams*, 128 S. Ct. 1830, 1846-47 (2008) (upholding "pandering provision" of PROTECT as not overbroad under the First Amendment).

45. *See* *United States v. Williams*, 128 S. Ct. 1830, 1856-58 (2008) (Souter, J., dissenting) (stating *Ferber* open to re-evaluation if technology sufficiently advanced).

46. 475 F.3d 434 (1st Cir. 2007).