

## PROTECTING CHILDREN ON THE INTERNET: MISSION IMPOSSIBLE?

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### INTRODUCTION

Since the late 1970s when the scourge of child pornography first reached public consciousness, courts and legislatures have struggled to find

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the proper balance between First Amendment freedom of expression and protecting children from abuse and exploitation. Rapidly advancing technology has changed the ways in which crimes against children are committed, yet judicial and legislative action to address new technology has produced uneven results. Congress' first attempt at expanding the definition of child pornography to include computer-generated images that "appeared to be" child pornography or were advertised in a manner that "conveyed the impression" they involved minors was struck down by the Supreme Court.<sup>1</sup> Congress responded by enacting the "Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003" ("PROTECT Act") that bans, among other things, speech that "knowingly . . . advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe" that it is child pornography.<sup>2</sup>

The 2008 Supreme Court decision in *United States v. Williams* upheld the constitutionality of the PROTECT Act and ruled that offers to engage in illegal activity are excluded from First Amendment protection.<sup>3</sup> Accordingly, even if images of child pornography are computer-generated, the speech offering or seeking them can be proscribed. The Court rested its holding on an analogy between the PROTECT Act's pandering provision and other common inchoate offenses, such as attempt.

This Article examines one aspect of the *Williams* decision—its reliance on the doctrine of impossibility, a moribund area of attempt liability until its revival in the Internet age. Traditionally, courts made a division between factual impossibility (which was not a defense to attempt liability) and legal impossibility (which was a defense). In simple terms, factual impossibility occurs when a defendant fails to complete a crime because of a missing factual element, while legal impossibility results from a missing legal element. The classic case of legal impossibility involved a sting operation against a person who believed he was purchasing stolen goods. He successfully raised the defense of legal impossibility because the legal element required by the stolen property statute—stolen goods—was

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<sup>1</sup>In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002), the Court held that virtual child pornography was protected by the First Amendment because actual children were not involved in its production.

<sup>2</sup>18 U.S.C. § 2252A(a)(3)(B) (2006).

<sup>3</sup>128 S. Ct. 1830, 1841, 1846–47 (2008).

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missing. In comparison, the classic factual impossibility involved the would-be thief who picked an empty pocket.

The rationale behind differentiating the two scenarios is linked to outward behavior. Compare receiving property to reaching into a person's pocket property. From outward appearances, the former appears perfectly innocent, while the latter raises alarm. We can infer a bad intent much more readily from the pickpocket than from the person who receives property. Shielding legally impossible attempts stemmed from a distrust of prosecutorial methods to establish a defendant's blameworthy intent from outwardly innocent appearing behavior.

The impossibility doctrine's main difficulty was distinguishing between factual and legal impossibility. A number of modern courts and legislatures addressed the problem by declaring the difference was purely semantic and eliminated the impossibility defense, focusing instead on whether a crime would have been committed had the facts been as defendant believed them to be. The solution appeared to resolve the issue that had long bedeviled courts and scholars, and little effort was made by defendants to raise an impossibility defense.

The Internet Age revived debate about the two types of impossibility. As personal computers and online social networks grew in popularity, children were increasingly approached by sexual predators. Federal and state law enforcement agencies set up sting operations in which police officers would go online posing as minors and wait to be approached by predators. Defendants caught in these Internet sting operations claimed that it was legally impossible for them to be charged with attempting to commit crimes against minors when they were communicating with police officers. A number of courts agreed. Although most appellate courts have ultimately ruled that the issue is one of factual impossibility, lingering doubts persist.

This Article posits that the *Williams* Court properly upheld Congress' shift in focus from the images to the speech pandering them. The majority ruled that the inability to complete a crime because of a factual error is not a defense. Its reasoning should lay to rest lingering claims that child protection statutes require an actual child. Nevertheless, the Article explains that the *Williams* dissent essentially relied on legal impossibility in its finding that the PROTECT Act's pandering provision was unconstitutionally overbroad. In so doing, the dissent reflects the reluctance of many to accept the extent to which adults are seeking to harm children and how accessible the Internet has made children available to them. This Article cautions that the dissent has improperly revitalized the

legal impossibility defense, which is particularly dangerous in the Internet age.

Part One of this Article gives a brief overview of the child pornography laws. Part Two describes the background and reasoning of the *Williams* opinion. Part Three gives the history of the impossibility doctrine including an analysis of its use in *Williams*. Part Four proposes that the rationale behind impossibility doctrine supports the majority view that Congress properly banned the pandering or soliciting of what a person believes to be child pornography regardless of whether an actual child is depicted.

## I. BACKGROUND

### A. *The Beginning of the Legislative/Judicial Dance*

Following an increased public awareness of the scourge of child pornography in the late 1970s, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977.<sup>4</sup> The Act prohibited anyone from using a minor to engage in sexually explicit conduct for the purpose of producing a visual image of such conduct with the knowledge that it would be transported in interstate or foreign commerce.<sup>5</sup> This early federal legislation applied only to child pornography that was obscene and used for commercial purposes.

During this same time period, states were also enacting their own bans on child pornography.<sup>6</sup> In contrast to early federal legislation, some states outlawed the production and distribution of child pornography without requiring that it be obscene. New York was one such state, and the challenge to its statute led to the 1982 landmark ruling in *New York v. Ferber*, where the United States Supreme Court ruled that child pornography was not protected by the First Amendment even if it was not obscene.<sup>7</sup> The Court reasoned that the “use of children as subjects of pornographic materials is harmful to the physiological, emotional, and

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<sup>4</sup>Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (codified at 18 U.S.C. §§ 2251–2253 (2006)). See generally ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY, FINAL REPORT 408–15 (1986); EVA J. KLAIN ET AL., CHILD PORNOGRAPHY: THE CRIMINAL-JUSTICE-RESPONSE 12 (NCMEC 2001).

<sup>5</sup> Protection of Children Against Sexual Exploitation Act § 2.

<sup>6</sup>See Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 928–29 (2001).

<sup>7</sup>458 U.S. 747, 758 (1982).

mental health of the child.”<sup>8</sup> It stressed that child pornography was “intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”<sup>9</sup> Second, the distribution network for child pornography has to be closed to prevent the production of such material.<sup>10</sup>

Following *Ferber*, Congress amended the original federal child pornography legislation in 1984 to remove the obscenity and commercial purpose requirements.<sup>11</sup> Although the Supreme Court had previously ruled that possession of obscene materials was protected by the First Amendment,<sup>12</sup> some states were enacting legislation that banned possessing and viewing child pornography. Constitutional challenges to these possession statutes provided the next opportunity for the Supreme Court to reaffirm the dual rationale of child pornography legislation. In *Osborne v. Ohio*, the Court ruled the mere possession or viewing of child pornography victimized children and the State could prohibit it.<sup>13</sup> The Court stated the ban on possessing or viewing child pornography was enacted “to protect the victims of child pornography; it hopes to destroy a market for the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 759. One could say the actual harm is inflicted in two ways: the abuse to the victim in its creation and the injury to the victim by publication of the images.

<sup>10</sup> *Id.*

<sup>11</sup> Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified at 18 U.S.C. §§ 2251–2253 (2006)). The production of child pornography was so clandestine that between 1978 and 1984, only one person was convicted for producing child pornography under the 1977 Act. See ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY, FINAL REPORT 604–05 (1986). Thus, the need to stop the flow of child pornography became the better route for prosecutors.

<sup>12</sup> See *Stanley v. Georgia*, 394 U.S. 557, 559 (1969). The *Stanley* Court reasoned that prohibiting the possession of obscene materials in one’s home was inimical to the very premise of the First Amendment’s protection against state interference with what a person thinks, reads or views in the privacy of his home. *Id.* at 564. The specifically rejected the State’s claim that it had a legitimate interest in banning the possession of obscene material because it may lead to sexual violence. *Id.* at 566. The *Stanley* Court stated not only was there no empirical evidence that supported the State’s claim, but crime prevention is better served by “education and punishment for violations of the law” than by criminalizing anticipatory conduct. *Id.* at 566–67. The *Stanley* Court also rejected the State’s contention that criminalizing possession was needed to support the State’s ban on the distribution of obscene materials, reasoning that this need did not justify a ban on what a person read or viewed in his home. *Id.* at 567–68.

<sup>13</sup> 495 U.S. 103, 110 (1990).

exploitative use of children.”<sup>14</sup> Congress shortly followed Ohio’s lead and passed the Child Protection Restoration and Penalties Enhancement Act of 1990, which banned the possession of child pornography.<sup>15</sup>

### B. Congress’ First Ban on Virtual Pornography

The advent of computer technology and the Internet led to congressional concerns that existing legislation was out of date. It enacted the Child Pornography Prevention Act of 1996 (CPPA) that expanded the definition of child pornography in two ways. First, it extended the definition to encompass an image that “is or appears to be, a minor engaging in sexually explicit conduct.”<sup>16</sup> Second, it included as child pornography materials that are “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.”<sup>17</sup>

Congress’ ban on pornographic images of such virtual children was based on congressional findings of compelling state interests in protecting actual children from all child pornography, whether depicting real or virtual children. The legislative history of the CPPA was premised on thirteen findings, including that pedophiles use images of child pornography to seduce actual children to engage in sexual conduct by reducing their inhibitions and desensitizing them.<sup>18</sup> Additionally, it found both real and virtual child pornography whetted the appetite of molesters by fueling their

<sup>14</sup> *Id.* at 109. The Court distinguished its ruling in *Stanley v. Georgia*, 394 U.S. 557, 568 (1969), which held that the private possession of adult obscene material was protected by the First Amendment. *Id.* The *Stanley* Court reasoned that prohibiting the possession of obscene materials in one’s home was inimical to the very premise of the First Amendment’s protection against state interference with what a person thinks, reads or views in the privacy of his home. *Stanley*, 394 U.S. at 564. The *Osborne* Court held that the State’s interest in protecting children by banning possession of child pornography outweighed a defendant’s First Amendment rights because of the harm inflicted to children by all involved in the child pornography chain. *Osborne*, 495 U.S. at 110.

<sup>15</sup> 18 U.S.C. § 2252 (2006). The legislation banned the possession of three or more images of child pornography. *Id.* § 2252(c). Subsequent legislation banned possessing any images, but created an affirmative defense for possession of less than three images and took steps to destroy the images and reported them to the authorities. *Id.* § 2252A(5)(d).

<sup>16</sup> *Id.* § 2256(8)(B) (repealed 2003).

<sup>17</sup> *Id.* § 2256(8)(D) (repealed 2003).

<sup>18</sup> Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009–26; see Daniel S. Armagh, *Virtual Child Pornography: Criminal Conduct or Protected Speech?*, 23 CARDOZO L. REV. 1993, 1997 (2002).

fantasies and stimulating their desire to molest an actual child.<sup>19</sup> Congress found further the child pornography prosecutions would be increasingly difficult as images of virtual children become indistinguishable from actual victims of child pornography.<sup>20</sup> The ban on virtual pornography created a wealth of commentary<sup>21</sup> and a split between the circuits.<sup>22</sup>

### C. The Judicial Response: Ashcroft v. Free Speech Coalition

In 2001, the United States Supreme Court, in a 6–3 decision, resolved the debate by striking down the ban on pornography using virtual children, ruling that the “appears to be” language of the CPPA was overbroad and unconstitutional.<sup>23</sup> The majority opinion, written by Justice Kennedy, stressed that the premise of excluding child pornography from First Amendment protection was that it was intrinsically related to abuse of an actual child.<sup>24</sup> It concluded that direct harm is missing in virtual pornography, and therefore it cannot be banned.<sup>25</sup>

The majority rejected the government’s indirect harm arguments. It ruled that the risks of virtual pornography whetting the appetite of child molesters, or being shown by molesters to seduce children, were too remote to support abridging of constitutionally protected speech.<sup>26</sup> In addition, the majority disagreed with the government’s position that prohibiting virtual pornography is necessary to dry up the market for actual child pornography

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<sup>19</sup>Armagh, *supra* note 18, at 1997.

<sup>20</sup>Child Pornography Prevention Act § 121. Specifically, it found that “new photographic and computer imaging technologies, make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer” from images of actual children.

<sup>21</sup>See, e.g., Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439 (1997); David T. Cox, *Litigating Child Pornography and Obscenity Cases in the Internet Age*, 4 J. TECH. L. & POL’Y 1, 38 n.88 (1999).

<sup>22</sup>Four circuits upheld the CPPA. See generally United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999). The Ninth Circuit found the CPPA to be invalid on its face. Free Speech Coal. v. Reno, 198 F.3d 1083, 1097 (9th Cir. 1999).

<sup>23</sup>Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002).

<sup>24</sup>*Id.* at 249 (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)).

<sup>25</sup>*Id.* at 250–51.

<sup>26</sup>*Id.* at 251–54.

because they are part of the same market.<sup>27</sup> It also rejected the government's claim that advances in computer technology will make it increasingly difficult to distinguish between actual and virtual pornography, allowing real pornographers to escape prosecution.<sup>28</sup>

The majority also upheld challenges to the CPPA's pandering section prohibiting materials that conveyed the impression of a minor engaged in sexually explicit conduct.<sup>29</sup> The Court noted the provision prohibited possession of a sexually explicit film containing no minors merely because it was promoted as containing minors.<sup>30</sup> Thus, “[m]aterials . . . are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed.”<sup>31</sup> As such, the Court found the ban unconstitutionally overbroad because, it “does more than prohibit pandering. It prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain.”<sup>32</sup>

In her concurring and dissenting opinion, Justice O'Connor agreed that the “appears to be” language in the CPPA was overbroad because it could be used to infringe on images of youthful looking adults, but she would have upheld the ban on virtual child pornography that is “virtually indistinguishable from” actual child pornography.<sup>33</sup> She also agreed that the “conveys the impression” pandering provision was overly broad.<sup>34</sup> In his concurring opinion, Justice Thomas noted that should technology reach the point where the government is unable to distinguish between actual and virtual pornography, and therefore unable to prosecute the former, regulation of the latter would be permissible.<sup>35</sup>

Chief Justice Rehnquist, joined by Justice Scalia, agreed with Justice O'Connor that the government had a compelling interest in protecting children from the harm of sexual abuse and that technological advances will soon make it nearly impossible for the government to protect children from

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<sup>27</sup> *Id.* at 254. It noted the reverse—that allowing virtual pornography could in fact protect children by drying up the market of actual child pornography. *Id.*

<sup>28</sup> *Id.* at 254–55.

<sup>29</sup> *Id.* at 257.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 258.

<sup>33</sup> *Id.* at 263–64 (O'Connor, J., concurring in part and dissenting in part).

<sup>34</sup> *Id.* at 262.

<sup>35</sup> *Id.* at 259–60 (Thomas, J., concurring).

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sexual abuse.<sup>36</sup> In addition, according to the Chief Justice, the CPPA's prohibition on advertising and promoting did not reach any further than the "sordid business of pandering" that was already unprotected by the First Amendment.<sup>37</sup>

*D. Congress' Next Effort: The "Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003" or PROTECT Act*

Following *Free Speech Coalition*, Congress once again strove to triangulate among technology, the First Amendment, and protecting children. It found that technology existed "to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear to be computer-generated."<sup>38</sup> It found further that "technology will soon exist, if it does not already, to computer generate realistic images of children."<sup>39</sup>

Based on these findings, Congress enacted the PROTECT Act to amend existing child pornography laws and define child pornography as including images that are "indistinguishable from" that of a minor.<sup>40</sup> In a direct nod to Justice O'Connor, Congress defined the term "indistinguishable" to mean a depiction that is "virtually indistinguishable, in that the depiction is such

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<sup>36</sup> *Id.* at 267–68 (Rehnquist, C.J., dissenting). The Chief Justice found that the CPPA could have been interpreted to reach only what was previously unprotected speech. *Id.* at 268. According to the Chief Justice, the CPPA would only ban hard-core pornography involving actual sexual activity between youthful looking adult actors, not mere suggestions of sexual activity that are advertised or promoted as child pornography. *Id.* at 269. Furthermore, Chief Justice Rehnquist noted that Congress intended for the CPPA to only reach those computer-generated images that are easily mistaken for pictures of actual children engaging in sexual conduct. *Id.* The CPPA proscribed images that are virtually indistinguishable from pictures of actual children, not depictions of Shakespearean tragedies, as the majority purported. *Id.* at 269–70. In addition, the Chief Justice noted that actual movie producers never felt the chill of protected speech that the majority claimed would occur from the CPPA as evidenced by the Best Picture Oscars garnered by the films noted by the majority. *Id.* at 271.

<sup>37</sup> *Id.* at 271–72. Agreeing with Justice O'Connor, Chief Justice Rehnquist suggested that the provision could be constitutionally limited by requiring that a possessor know the material contains images of real minors engaged in sexually explicit conduct or virtually indistinguishable computer-generated image. *Id.* at 273.

<sup>38</sup> Prosecutorial Remedies and Tools Against Exploitation of Children Today Act (PROTECT Act) of 2003, Pub. L. No. 108-21, § 501(5), 117 Stat. 650, 676.

<sup>39</sup> *Id.*

<sup>40</sup> 18 U.S.C. § 2256(8)(B) (2006).

that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct.”<sup>41</sup> To fit within *Free Speech Coalition*’s mandate, the definition expressly excludes depictions “that are drawings, cartoons, sculptures, or paintings depicting minors or adults.”<sup>42</sup>

Congress also responded to the *Free Speech Coalition* Court’s rejection of the CPPA’s “conveys the impression” pandering provision by enacting a new offense that punished anyone who:

knowingly advertises, promotes, presents, distributes, or solicits through the mails . . . or in . . . interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct.<sup>43</sup>

Over some concerns about the proposed pandering provision,<sup>44</sup> the Senate Judiciary Committee reaffirmed that the pandering offense did not require proof that the materials offered or solicited actually existed:

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<sup>41</sup> *Id.* § 2256(11).

<sup>42</sup> *Id.* The PROTECT Act also amended the CPPA’s affirmative defense that the *Free Speech* Court found too narrow. First, Congress extended the affirmative defense beyond producers and distributors to those who possess child pornography. *Id.* § 2252A(d). Second, the affirmative defense allows defendants to prove that the images were created completely by computer graphics. *Id.* § 2252A(c). In addition, the PROTECT Act creates a new crime of obscene child pornography that provides for harsher penalties than ordinary obscenity. 18 U.S.C. § 1466A (2006).

<sup>43</sup> 18 U.S.C. § 2252A(a)(3)(B) (2006).

<sup>44</sup> S. REP. NO. 108-2, at 16, 23–24 (2003). Much of the concern was over the inclusion of “purported materials.” According to critics, this criminalizes speech even when no prohibited materials exist. *Id.* at 29, 32. A noted constitutional scholar, Frederick Schauer, opined that the Supreme Court had never accepted pandering as an independent offense, but that it might be an acceptable offense if it limited to commercial speech. Including “purported materials” the provision is less likely to be viewed as commercial speech and more likely to be unconstitutional. 149 CONG. REC. 4233 (2003). The *Williams* Court rejected all of Professor Shauer’s concerns. See *infra* notes 77–78 and accompanying text. Even the dissent found no difficulty with the “purported materials” language. See *infra* note 89 and accompanying text.

The crux of what this provision bans is the offer to transact in this unprotected material, coupled with proof of the offender's specific intent . . . . The provision makes clear that no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent.<sup>45</sup>

This view was in accord with the Department of Justice's position that no constitutional bar prevented Congress from enacting crimes such as attempt or conspiracy, and that the pandering provision fell with such inchoate offenses.<sup>46</sup>

The new law was challenged by Michael Williams, who was convicted of pandering sexually explicit photographs of his four-year-old daughter over the Internet. The next section describes the case in detail.

## II. *UNITED STATES V. WILLIAMS*

### A. *Background*

Michael Williams, an admitted child pornographer, was caught in an Internet sting operation.<sup>47</sup> Williams had posted in the public area of a chat room the following message: "Dad of toddler had 'good' pics of her an [sic] me swap of your toddler pics, or live cam."<sup>48</sup> A federal undercover agent and Williams then engaged in private chats and swapped non-pornographic photographs.<sup>49</sup> After the initial exchange, Williams told the agent the following: "I've got hc [hard core] pictures of me and dau, and other guys eating her out—do you? ?"<sup>50</sup> Following a series of exchanges, Williams posted a message in the public part of the chat room that contained a hyperlink to seven images of child pornography.<sup>51</sup> Federal agents traced the photos and messages to Williams and executed a search warrant of his

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<sup>45</sup> S. REP. NO. 108-2, at 12 (2003).

<sup>46</sup> See H.R. REP. NO. 107-526, at 23 (2002).

<sup>47</sup> United States v. Williams, 128 S. Ct. 1830, 1837 (2008).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> United States v. Williams, 444 F.3d 1286, 1288 (11th Cir. 2006), *rev'd*, 128 S. Ct. 1830 (2008).

<sup>51</sup> *Williams*, 128 S. Ct. at 1837.

home.<sup>52</sup> They seized two computer hard drives that contained at least twenty-two pornographic images of mostly pre-pubescent children.<sup>53</sup>

The government charged Williams with one pandering count under the new PROTECT Act provision described above,<sup>54</sup> and one count of possession of child pornography.<sup>55</sup> Williams filed a motion to dismiss the pandering charge on the grounds of vagueness and over breadth.<sup>56</sup> While the motion was pending, Williams agreed to plead guilty to both counts, while reserving his right to challenge the constitutionality of the pandering count.<sup>57</sup> Following the district court's denial of defendant's motion to dismiss, it sentenced Williams to concurrent sixty-month terms on the pandering and possession counts.<sup>58</sup>

### B. The Eleventh Circuit Ruling

The Eleventh Circuit reversed the pandering conviction, holding the statute overbroad and vague under a strict scrutiny analysis.<sup>59</sup> First, it found it problematic that the statute prohibited the pandering of materials "purported" to be child pornography, even if no images existed.<sup>60</sup> It warned that "any promoter—be they a braggart, exaggerator, or outright liar"—who claims to have child pornography could be subject to up to twenty years in prison, even if the images are completely legal.<sup>61</sup> Second, the Eleventh Circuit noted that the First Amendment protected speech that advocated illegal activity as long as it did not incite it.<sup>62</sup> Accordingly, the Court found

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1837–38.

<sup>54</sup> 18 U.S.C. § 2252A(a)(3)(B) (2006). *See supra* note 39 and accompanying text.

<sup>55</sup> Title 18, § 2252A(a)(5)(B).

<sup>56</sup> *United States v. Williams*, 444 F.3d 1286, 1289 (11th Cir. 2006), *rev'd*, 128 S. Ct. 1830 (2008).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* The pandering count has a sixty-month minimum mandatory sentence. Title 18 § 2252A(b)(1). The possession count allows for a sentence up to 120 months. *Id.* § 2252A(b)(2).

<sup>59</sup> *Williams*, 444 F.3d at 1298–1300. The court upheld the possession sentence. *Id.* at 1309. *See generally* Stephen T. Fairchild, *Protecting the Least of These: A New Approach to Child Pornography Pandering Provisions*, 57 DUKE L.J. 163 (2007).

<sup>60</sup> *Williams*, 444 F.3d at 1298.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

“the non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech.”<sup>63</sup>

Third, the Eleventh Circuit found it “particularly objectionable” the pandering provision criminalized speech that “reflects the belief” that materials constitute child pornography, regardless of the actual nature or existence of the underlying material.<sup>64</sup> This allows liability to be based on “deluded” beliefs that images are of real children or are lascivious.<sup>65</sup> Thus, a person who is sexually excited by perfectly legal images could be punished under the statute. According to the Eleventh Circuit, “[w]e cannot . . . outlaw those legal and mainstream materials and we may not outlaw the thoughts conjured up by those legal materials.”<sup>66</sup> Accordingly, it rejected the Government’s position that the pandering provision be regarded as a simple inchoate offense that only punishes those who have the specific intent to traffic in child pornography.<sup>67</sup>

Finally, the Eleventh Circuit found the pandering provision was constitutionally vague because it was not at all clear about what was meant by the “in a manner that reflects the belief, or that is intended to cause another to believe” language.<sup>68</sup> Conjuring a number of hypotheticals where ambiguously labeled photos could snare the predator but also the innocent grandparent, the court stated that Congress has given law enforcement too much discretion to determine whether a person has violated the statute.<sup>69</sup> The court pointed out again that the statute did not require actual child

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1298–99 (citing 18 U.S.C. §§ 2252A(a)(3)(B)(ii) (Supp. IV 2004)).

<sup>65</sup> *Id.* The federal statute defines child pornography to include, in addition to images of minors engaged in sexually explicit conduct, the “lascivious exhibition of [a minor’s] genitals or pubic area.” 18 U.S.C. § 2256(2)(A)(v) (2006).

<sup>66</sup> *Williams*, 444 F.3d at 1299–1300. It also found that legislative findings did not explain how the pandering of otherwise legal material could support the state’s compelling interest in protecting children from sexual exploitation. *Id.* at 1303. It rejected what it claimed to be the government’s attempt to resurrect both market deterrence and market proliferation theories that restricting materials pandered as child pornography will protect children. *Id.* at 1303–04. It noted that “Congress has failed to articulate specifically how the pandering and solicitation of legal images, even if they are promoted or believed to be otherwise, fuels the market for illegal images of real children engaging in sexually explicit conduct.” *Id.* at 1303.

<sup>67</sup> *Id.* at 1304–05.

<sup>68</sup> *Id.* at 1306–07.

<sup>69</sup> *Id.*; see *infra* note 177 and accompanying text.

pornography be traded and that this absence made the statute impermissibly vague.<sup>70</sup>

The United States Supreme Court granted certiorari, and in May 2008 reversed the Eleventh Circuit in a 7–2 opinion.

### C. The Supreme Court Ruling

#### 1. The Majority

The majority opinion authored by Justice Scalia<sup>71</sup> acknowledged the Internet has allowed child pornography to proliferate despite previous legislative efforts, and upheld the constitutionality of the PROTECT Act pandering provision as a “carefully crafted” response.<sup>72</sup> The Court noted unlike the statutes it construed in *Ferber*, *Osborne*, and *Free Speech Coalition*, the PROTECT Act provision does not require the actual existence of child pornography because rather than targeting the underlying material, it “bans the collateral speech that introduces such material into the child pornography distribution network.”<sup>73</sup> The Court made clear that “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.”<sup>74</sup>

The Court found five features of the pandering provision important to its analysis. First is that it has a *scienter* requirement.<sup>75</sup> The statute is limited to those who act “knowingly.” Second, its operative language—“advertises, promotes, presents, distributes, or solicits”—all have a transactional connotation.<sup>76</sup> While noting this element prevents punishment for abstract advocacy of illegal activity,<sup>77</sup> the Court stressed that the transaction need not be commercial.<sup>78</sup> Third and fourth, the statute conditions the culpable transactions to those undertaken, “in a manner that reflects the belief or that is intended to cause another to believe” that they

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<sup>70</sup> *Id.* at 1307.

<sup>71</sup> Chief Justice Roberts and Justices Stevens, Kennedy, Thomas, Breyer and Alito joined in the majority. Justice Stevens also filed a concurring opinion joined by Justice Breyer.

<sup>72</sup> *United States v. Williams*, 128 S. Ct. 1830, 1846–47 (2008).

<sup>73</sup> *Id.* at 1838–39.

<sup>74</sup> *Id.* at 1842.

<sup>75</sup> *Id.* at 1839.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1842 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969)).

<sup>78</sup> *Id.* at 1840.

involve child pornography.<sup>79</sup> The Court found that the first condition (“in a manner that reflects the belief”) protects against overbroad application because it contains subjective and objective elements.<sup>80</sup> A defendant must actually believe he is offering child pornography, and his statement or action must lead a reasonable person to understand the defendant thinks he is offering child pornography.<sup>81</sup> The Court explained the second condition (“is intended to cause another to believe”) contains only a subjective component: the defendant must intend another to believe the material to be child pornography and must advertise, promote, present, distribute or solicit the material in a manner that he thinks will cause that belief in another person.<sup>82</sup> Fifth, the statute’s definition of “sexually explicit conduct” fell well within constitutionally approved definitions.<sup>83</sup>

The Court dismissed the Eleventh Circuit’s concern that prosecutors could use this provision to punish someone based on deluded beliefs or who mistakenly distributed virtual child pornography as real child pornography.<sup>84</sup> Noting that the Act created an inchoate offense, the Court stated “offers to deal in illegal products or otherwise engage in illegal activity do not acquire First Amendment protection when the offeror is mistaken about the factual predicate of his offer.”<sup>85</sup> The Court reasoned that factual impossibility is not a defense to other inchoate offenses such as attempt or conspiracy, and should not be a defense to the new pandering provision.<sup>86</sup> Instead, like the would-be drug dealer who mistakenly sells the wrong substance or the traitor who seeks what he believes to be privileged documents, culpability should be measured according to the circumstances as defendant believed them to be rather than what they were in fact.<sup>87</sup> Thus, even if no child pornography exists, as long as the defendant is offering or seeking illegal material (and not just engaging in abstract advocacy) he falls outside of the First Amendment.

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1840–41 (noting that the statute’s definition went beyond the “sexual conduct” language it upheld in *Ferber*).

<sup>84</sup> *Id.* at 1843.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (citing MODEL PENAL CODE § 5.01 cmt. (1985)).

The Court further rejected the Eleventh Circuit's finding that the statute was void for vagueness. It explained a statute is not void simply because there may be close cases with respect to the sender or receiver's intent. It noted that "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."<sup>88</sup> In other words, what constitutes child pornography is not ambiguous; rather whether the sender intended to present images as child pornography may be at issue, but that do not invalidate the statute. The Court also rejected the dissent's position, as further discussed below, that it was overruling *Free Speech Coalition*.<sup>89</sup> It stressed that an offer to trade in virtual pornography was still protected as long as it was offered and sought as such.<sup>90</sup> It rejected the dissent's position that the statute exempts those who mistakenly offer virtual pornography as depicting real children by again stressing that "[t]here is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts."<sup>91</sup>

## 2. The Dissent

Justice Souter, joined by Justice Ginsburg, agreed with the majority that the Act is constitutional in one situation: if the proposals to distribute or obtain child pornography are unrelated to any extant image.<sup>92</sup> In this instance, the factual impossibility of completing the transfer is not a defense to prosecution because proposing an illegal transaction is not protected by the First Amendment.<sup>93</sup> However, the dissent was greatly troubled by the statute's application to proposals about existing photographs. Because the existing image may be entirely computer-generated child pornography, the dissent argued that the Act punishes proposals to transfer constitutionally protected material.<sup>94</sup>

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<sup>88</sup> *Id.* at 1846; *see infra* note 176 and accompanying text.

<sup>89</sup> *Id.* at 1844.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 1845.

<sup>92</sup> *Id.* at 1849 (Souter, J., dissenting). This position is in stark contrast to the Eleventh Circuit position that was most troubled by the statute's application to "purported material." *See United States v. Williams*, 444 F.3d 1286, 1298–99, 1307 (2006), *rev'd*, 128 S. Ct. 1830 (2008).

<sup>93</sup> *Williams*, 128 S. Ct. at 1852 (Souter, J., dissenting).

<sup>94</sup> *Id.* at 1849.

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According to Justice Souter, since virtual child pornography is protected speech, the Act cannot criminalize any proposals regardless of what the offeror or solicitor believes about the images. He explained:

We should hold that transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a complete series of intended acts that simply do not add up to a crime, owing to the privileged character of the material the parties were in fact about to deal in.<sup>95</sup>

He rejected the majority's reliance on the Act's *scienter* requirement that the defendant believe he is dealing in child pornography or inducing another to so believe because the Act does not require the belief to be a correct and therefore "prohibited proposals may relate to transactions in lawful . . . pornography."<sup>96</sup> Similarly, he rejected the rule that a proposal to commit crimes is not protected speech because it "rests on the assumption that the proposal is actually to commit a crime, not to do an act that may turn out to be no crime at all."<sup>97</sup>

Justice Souter found the majority's ruling to be an "unjustifiable extension of the classic factual frustration rule."<sup>98</sup> In contrast to a person who shoots an unloaded gun with the intent to kill someone, he argued that proposals to trade images that turn out to be of a virtual child cannot amount to a punishable attempt:

[N]o matter what the parties believe, and no matter how exactly a defendant's actions conform to his intended course of conduct in completing the transaction he has in mind, if there turns out to be reasonable doubt that a real child was used to make the photos, or none was, there could be, respectively, no conviction and no crime.<sup>99</sup>

He could find no justification for allowing prosecutions when photos could turn out to be virtual.<sup>100</sup> According to Justice Souter, the

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<sup>95</sup> *Id.* at 1854.

<sup>96</sup> *Id.* at 1851.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1852.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1855–56.

constitutionally privileged nature of virtual pornography distinguishes it from the run-of-the-mill mistaken drug dealer.<sup>101</sup> He rejected the majority's analogy to a mistaken spy who trades in unclassified documents, which also are constitutionally privileged, by reasoning that punishing would-be traitors will not cause lawful speech to be suppressed because unclassified documents will continue to be published, whereas punishing would-be child pornographers will diminish the availability of virtual child pornography.<sup>102</sup> While virtual pornography has little intrinsic value, he stated it should not be suppressed particularly since the Court took pains in its previous child pornography cases to set the boundaries between protected and unprotected speech.<sup>103</sup>

Justice Souter predicted prosecutors would avoid the difficulty of proving a defendant knowingly traded in actual child pornography as required under *Ashcroft* by simply charging defendants with pandering, thus "dispensing with the real-child element in the underlying subject."<sup>104</sup> To avoid an "end-run" around the First Amendment, he stated there "ought to be no absolute rule on the relationship between attempt liability and a frustrating mistake."<sup>105</sup> Instead, Justice Souter proposed that until the time comes that a jury is unable to distinguish between virtual and real child pornography (and therefore the government cannot meet its burden of proving beyond a reasonable doubt that the defendant knew the pornography was real), a defendant's mistaken belief that he is dealing in real child pornography should be irrelevant.<sup>106</sup>

### III. FACTUAL AND LEGAL IMPOSSIBILITY: A "SEMANTICAL THICKET"<sup>107</sup>

The majority and dissenting opinions in *Williams* epitomize a classic battle about the definition and scope of the impossibility doctrine. The dissent essentially ruled that regardless of a person's intent or belief that he was pandering or soliciting actual child pornography, since the images could be virtual and therefore lawful, no attempt to violate the provision

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<sup>101</sup> *Id.* at 1853.

<sup>102</sup> *Id.* at 1853–54.

<sup>103</sup> *Id.* at 1854.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1858.

<sup>107</sup> United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001).

was possible. This analysis falls squarely within the legal impossibility doctrine, even though the dissent never used the phrase.<sup>108</sup> This section explains the history and rationale of the impossibility defense and how *Williams* fits within its contours.

### A. Background

A multitude of reasons and circumstances can lead to the failure of a defendant to consummate a substantive crime. The impossibility doctrine in attempt law considers a distinct type of failure—those that stem from some mistake on defendant's part as to a crime's attendant circumstances, rather than an interruption in defendant's actions.<sup>109</sup> A historical reluctance to punish defendants for unconsummated crimes led to the late development of attempt as a crime.<sup>110</sup> This reluctance stemmed from a fear of punishing for thoughts alone when no outward harm occurred. It also led to the first formulation of the impossibility doctrine that barred any culpability for impossible attempts on the grounds that only those attempts that failed by interruption should be punished.<sup>111</sup> Although the English courts ultimately abandoned such a sweeping impossibility rule, the development of two types of impossibility rested on a discomfort with inchoate offenses.

Two schools of thought have emerged in assessing attempts.<sup>112</sup> The objectivist theory of attempts requires that the act manifest criminality without regard to the actor's mens rea.<sup>113</sup> In other words, "a neutral third-party observer could recognize the activity as criminal even if he had no special knowledge about the offender's intention."<sup>114</sup> Criminality is manifested if the act causes social harm by raising apprehension, fear, or alarm in the community.<sup>115</sup> The actor's mens rea is of lesser concern than

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<sup>108</sup> See *supra* notes 93–105 and accompanying text.

<sup>109</sup> See *supra* subpart Introduction.

<sup>110</sup> See Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 480–81 (2004); Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 854 (1928).

<sup>111</sup> See Rogers, *supra* note 110, at 493.

<sup>112</sup> GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 116, 138 (1978).

<sup>113</sup> *Id.* at 138–39.

<sup>114</sup> *Id.* at 137–39.

<sup>115</sup> Thomas Weigend, *Why Lady Eldon Should be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 264 (1977).

the outward appearance of the actor's conduct.<sup>116</sup> The objectivist school tends to limit attempt liability because of its focus on actions rather than intentions.<sup>117</sup> In contrast, subjectivists focus on the actor's intent—if he intends to commit a crime he is dangerous and should be punished, even if he fails.<sup>118</sup> His actions merely confirm his intent.<sup>119</sup> Subjectivist theory tends to expand culpability because the defendant's bad intent governs.<sup>120</sup>

### B. Factual Impossibility

Factual impossibility exists when a defendant's efforts to commit a crime fail because a factual or physical circumstance necessary for the crime to be completed is missing. To use a classic example, had the pocket been full of money, the defendant pickpocket would have successfully completed his attempt and would have stolen the money. In other words, the attempt could have been carried out successfully had the facts been as defendant intended. Therefore, the defendant will be guilty of attempt culpability under the virtually undisputed rule that factual impossibility is not a defense.<sup>121</sup> Even under a restrictive objectivist approach, defendant's actions manifest harm.

### C. Legal Impossibility

According to one prominent scholar, "Legal impossibility exists if the actor's goal is illegal, but commission of the offense is impossible due to a factual mistake . . . regarding the *legal* status of some attendant

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<sup>116</sup>Mens rea is relevant only after the act is deemed harmful on its face. If the defendant intended to commit a crime, objectivists deem that he should be punished, but he did not so intend—it just looked that way—he should not be punished. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 379 (3d ed. 2001).

<sup>117</sup>FLETCHER, *supra* note 112, at 138.

<sup>118</sup>*Id.*

<sup>119</sup>*Id.*; DRESSLER, *supra* note 116, at 379.

<sup>120</sup>FLETCHER, *supra* note 112, at 139.

<sup>121</sup>See United States v. Hamrick, 43 F.3d 877, 885 (4th Cir. 1995) (en banc) (joining other circuits in holding factual impossibility is not a defense to an attempt crime); United States v. Contreras, 950 F.2d 232, 237 (5th Cir. 1991) ("[F]actual impossibility is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be."); Grill v. State, 651 A.2d 856, 858 (Md. 1995) ("[F]actual impossibility is not a defense to a criminal attempt charge."); see also MODEL PENAL CODE § 5.01 cmt. at 307–17 (1985); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 632 (3d ed. 1982); DRESSLER, *supra* note 116, at 399.

circumstance that constitutes an element of the charged offense.”<sup>122</sup> The controversial but classic finding of legal impossibility occurred in 1906 in *People v. Jaffe*, where a defendant believed he was receiving stolen goods, when in fact, the goods had been returned to their rightful owner and thus had lost their character as stolen, a required legal element.<sup>123</sup> The New York Court of Appeals reversed the defendant’s conviction of attempt to receive stolen goods on the ground that the defendant could not complete the offense because the legal element of stolen goods was missing, and therefore he also could not be convicted of attempt to commit the crime. The *Jaffe* court reasoned, in language that is echoed by Justice Souter some 100 years later in *Williams*, that “[i]f all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended.”<sup>124</sup>

The relatively late development of the doctrine of attempt liability correlates to the development of the legal impossibility defense. The

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<sup>122</sup>DRESSLER, *supra* note 116, at 402. Providing a definition of “legal impossibility” is difficult because the courts have used the term to cover more than one type of attempts that are legally impossible to complete. Professor Dressler notes two categories that fall under the general term, “legal impossibility.” *Id.* at 400–01. The first is “pure” or true legal impossibility, which exists when what defendant is attempting to commit is not a crime. *Id.* Notwithstanding defendant’s subjective bad intentions, he is not guilty of any crime. Pure legal impossibility is a defense in all jurisdictions. *Id.* at 401.

<sup>123</sup>78 N.E. 169, 169–70 (N.Y. 1906).

<sup>124</sup>*Id.* at 170. California took an opposite approach to impossibility. In *People v. Rojas*, the California Supreme Court was presented with facts identical to *Jaffe* and upheld the defendant’s conviction of attempting to receive stolen property. 358 P.2d 921, 922 (Cal. 1961). Instead of focusing on what the defendant did or could not do, as the court in *Jaffe* did, the California Supreme Court in *Rojas* focused on what the defendant intended to accomplish. *Id.* at 924. The court rejected the defendant’s argument of impossibility holding that impossibility is not a defense where “the defendants had the specific intent to commit the substantive offense and that under the circumstances as the defendants reasonably saw them they did the acts necessary to consummate the substantive offense; but because of circumstances unknown to defendants, essential elements of the substantive crime were lacking.” *Id.* A California court recently reaffirmed *Rojas*’ viability in *People v. Reed*, 61 Cal. Rptr. 2d 658, 658–61 (Cal. Ct. App. 1996). There, the court upheld the defendant’s conviction of attempted molestation of a child under the age of fourteen years. *Id.* at 664. The defendant placed an ad in a paper and a sheriff’s detective responded. *Id.* at 659. The defendant argued that he could not be convicted because there was never a child under the age of fourteen and therefore it was improper to convict him of attempt where an element of the crime was missing. *Id.* at 660. The court rejected the defendant’s argument, holding, “Our courts have repeatedly ruled that persons who are charged with attempting to commit a crime cannot escape liability because the criminal act they attempted was not completed due to an impossibility which they did not foresee.” *Id.* at 661.

objectivist fear of punishment without overt evidence of intent to harm is the common factor between attempt rules in general and legal impossibility in particular.<sup>125</sup> Thus, an early commentator opined, in reasoning that echoed the *Jaffe* court, “[I]f none of the consequences which the defendant sought to achieve constitutes a crime, surely his unsuccessful efforts to achieve his object cannot constitute a criminal attempt.”<sup>126</sup>

Objectivists fear convictions based on suspect evidence, such as coerced confessions or uncorroborated testimony by informants.<sup>127</sup> Accordingly, these commentators support the legal impossibility doctrine that minimizes evidence of defendant’s intent, and looks instead at defendant’s actions. For example, one scholar explained that if a man has forcible intercourse with his wife believing it is her twin sister, he does not have the intent to commit rape because sex, even forcible, with one’s own wife could not at the time be rape.<sup>128</sup> Similarly, another commentator would acquit a defendant who, intending to kill a man, shoots at a tree stump instead, on the grounds that there is no objective, independent evidence of defendant’s intent that can be inferred from the innocuous act of shooting at a tree stump.<sup>129</sup> These rationales led to numerous examples of attempts barred by the legal impossibility defense.<sup>130</sup>

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<sup>125</sup> See, e.g., *State v. Taylor*, 133 S.W.2d 336, 340–41 (Mo. 1939); *State v. Guffey*, 262 S.W.2d 152, 156 (Mo. Ct. App. 1953); *People v. Teal*, 89 N.E. 1086, 1088 (N.Y. 1909); *Booth v. State*, 398 P.2d 863, 872 (Okla. Crim. App. 1964) (“[I]t is fundamental to our law that a man is not punished merely because he has a criminal mind. It must be shown that he has, with that criminal mind, done an act which is forbidden by the criminal law.”).

<sup>126</sup> *Sayre, supra* note 110, at 839.

<sup>127</sup> See generally Arnold N. Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665 (1969).

<sup>128</sup> See WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 554 (3d ed. 2000); see also Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 467 (1954) (“If a man mistaking a dummy in female dress for a woman, tries to ravish it he does not have the intent to commit rape since the ravishment of an inanimate object cannot be rape.”).

<sup>129</sup> Rollin M. Perkins, *Criminal Attempts and Related Problems*, 2 UCLA L. REV. 319, 332–33 (1955).

<sup>130</sup> See *supra* note 124. In discussions of legal impossibility, these cases are repeatedly cited as examples. See, e.g., *State v. Lopez*, 669 P.2d 1086, 1087 (N.M. 1983); *People v. Dlugash*, 363 N.E.2d 1155, 1160 (N.Y. 1977); DRESSLER, *supra* note 116, at 402; LAFAVE *supra* note 128, at 514–15; R.J. Spjut, *When is an Attempt to Commit an Impossible Crime a Criminal Act?*, 29 ARIZ. L. REV. 247, 247 (1987); Elizabeth Jean Watters, *State v. Collins: Is the Impossible Now Possible in Ohio?*, 51 OHIO ST. L.J. 307, 308 (1990); Deborah M. Weiss, Note, *Scope, Mistake, and Impossibility: The Philosophy of Language and Problems of Mens Rea*, 83 COLUM. L. REV. 1029, 1056 (1983).

Over time, many courts and scholars have criticized the doctrine of legal impossibility.<sup>131</sup> Most of the criticism is based on the slim semantic difference between factual and legal impossibility.<sup>132</sup> As aptly pointed out by Professor Dressler and others, “[b]y skillful characterizations, one can describe virtually any case of hybrid legal impossibility as an example of factual impossibility.”<sup>133</sup> For example, one could turn the pickpocket attempted larceny scenario into a case of legal impossibility if one asks whether it is a crime to pick an empty pocket. Since a larceny cannot be committed by picking an empty pocket, employing the rationale of the legal impossibility cases, one cannot attempt a larceny by picking the empty pocket. Similarly, we can turn the legal impossibility case into one of

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<sup>131</sup> See MODEL PENAL CODE § 5.01 cmt. at 307–17 (1985) (rejecting the defense, noting very little support for the defense can be found anywhere); Weigend, *supra* note 115, at 237–39; DRESSLER, *supra* note 116, at 403. See generally Kenneth W. Simons, *Criminal Law: Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447 (1990). Even New York rejected the *Jaffe* rule by statute. See N.Y. PENAL LAW § 110.10 (McKinney 2000); see also United States v. Farmer, 251 F.3d 510, 513 (5th Cir. 2001) (“[T]his circuit has properly eschewed the semantical thicket of the impossibility defense in criminal attempt cases . . . .”); United States v. Darnell, 545 F.2d 595, 598 (8th Cir. 1976) (refusing to address the impossibility issue, asserting that it “lurks in a semantic swamp”); People v. Rojas, 358 P.2d 921, 923–24 (Cal. 1961) (rejecting the defense, refusing to consider the distinction between factual and legal impossibility); State v. Moretti, 244 A.2d 499, 503 (N.J. 1968) (“[T]he defense of impossibility is so fraught with intricacies and artificial distinctions that the defense has little value as an analytical method for reaching substantial justice.”); Jerome B. Elkind, *Impossibility in Criminal Attempts: A Theorist’s Headache*, 54 VA. L. REV. 20, 33–36 (1968); John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1898 (1999) (noting hybrid legal impossibility’s implicit similarity to factual impossibility, pointing out that miscalculations involved in hybrid impossibility cases are “at heart, still factual”).

<sup>132</sup> Part of this problem stems from the lack of parallelism in the definition of factual and legal impossibility. For example, let us examine a common explanation of the two: “(1) Where the act if completed would not be criminal, a situation which is usually described as a ‘legal impossibility,’ and (2) where the basic or substantive crime is impossible of completion, simply because of some physical or factual condition unknown to the defendant, a situation which is usually described as a ‘factual impossibility.’” Booth v. State, 398 P.2d 863, 870 (Okla. Crim. App. 1964). The definitions are not parallel because the former concentrates on whether the conduct, had it been completed, would be a crime, while the latter concentrates on the reasons why the conduct was not completed. These definitions widely used by early courts are completely unworkable for situations of hybrid legal impossibility because they do not focus on the key component of attempt liability—the defendant’s intent. Rather the definitions look to whether the completed transaction objectively is a crime, and thus merely defines the “pure” legal impossibility category.

<sup>133</sup> DRESSLER, *supra* note 116, at 403.

factual impossibility simply by asking whether the crime of receipt of stolen good would have been committed had the facts been as defendant intended.<sup>134</sup>

In the early 1960s, the drafters of the Model Penal Code took the position that the distinction between factual and legal impossibility should be abolished for a number of reasons. First, the legal impossibility doctrine focuses unnaturally on what actually transpired rather than what defendant believed, leading to strained reasoning at odds with conventional understanding of terms such as intent and purpose. Second, the Model Penal Code drafters opined that the proper approach to criminality should focus on the dangerousness of the actor as manifested by his intent, rather than his actions. Thus, the Model Penal Code recommended a rejection of an objectivist approach in favor of a subjectivist viewpoint.<sup>135</sup>

Some scholars disagree with the Model Penal Code approach. Professor George Fletcher criticizes the subjectivist approach as turning the inquiry on criminality inside out. He states that principles of legality demand that “it is not the internal question of intent that should first concern us, but the external issue whether the actor’s conduct objectively constitutes ‘an attempt’ to commit a recognized offense.”<sup>136</sup> To answer this question, he suggests a “rational motivation” test: how would the actor behave if he knew he was mistaken about particular facts?<sup>137</sup> By focusing on the way in which the actor’s mistaken beliefs influence his decision to act, Professor Fletcher argues we can decide what is an attempt. He uses *Jaffe* to illustrate his test: If the defendant was told the cloth was not stolen, he still would have wanted and therefore we cannot say he was attempting to receive stolen goods.<sup>138</sup>

Professor Fletcher acknowledges, however, that his test may not work where a person has “idiosyncratic motives.”<sup>139</sup> He gives the example of a person who engages in sexual intercourse with a girl he mistakenly believes is under the age of consent. Professor Fletcher states that while in the normal case, a person would be just as happy that the girl was of legal age, it is possible a person’s motivation is to have sex with a minor. He

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<sup>134</sup> See generally Simons, *supra* note 131, at 472–73.

<sup>135</sup> MODEL PENAL CODE § 5.01 cmt. at 307–17 (1985).

<sup>136</sup> FLETCHER, *supra* note 112, at 181.

<sup>137</sup> *Id.* at 160–66.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 164.

acknowledges this scenario is a problem with the rational motivation test that “admittedly does not lend itself to a compelling solution” to identifying which attempts are impossible.<sup>140</sup>

Most jurisdictions, in keeping with the Model Penal Code recommendation, abolished the distinction between factual and legal impossibility, either by statute or case law.<sup>141</sup> While a few jurisdictions still required objective proof of criminality,<sup>142</sup> by the end of the 1990s the courts rarely heard impossibility cases.<sup>143</sup> It appeared the defense was relegated to consideration of Lady Eldon’s lace by first-year law school students as an

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<sup>140</sup> *Id.*

<sup>141</sup> ARK. CODE ANN. § 5-3-202(b)(2) (1987); COLO. REV. STAT. § 18-2-101(15) (2002); GA. CODE ANN. § 16-4-4 (2002); 720 ILL. COMP. STAT. 5/8-4(b) (2002); IND. CODE § 35-41-5-1(b) (2002); KAN. STAT. ANN. § 21-3301 (2001); LA. REV. STAT. ANN. § 14:27(A) (2002); MINN. STAT. § 609.17 (LEXIS through March 2008 Regular Session); N.Y. PENAL LAW § 110.10 (Consol. 2002); OHIO REV. CODE ANN. § 2923.02(B) (LexisNexis 2002); OR. REV. STAT. § 161.425 (2001); 18 PA. CONS. STAT. ANN. § 901(b) (West 2002); UTAH CODE ANN. § 76-4-101(3)(b) (2002); WASH. REV. CODE § 9A.28.020 (2002); *see United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1978); *United States v. Darnell*, 545 F.2d 595, 597 (8th Cir. 1976); *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976) (rejecting the defendant’s defense of impossibility and refusing to distinguish between factual and legal impossibility); *United States v. Duran*, 884 F. Supp. 577, 580 n.5 (D.D.C. 1995), *aff’d*, 96 F.3d 1495 (D.C. Cir. 1996); *State v. Carner*, 541 P.2d 947, 948–49 (Ariz. Ct. App. 1975); *State v. Curtiss*, 65 P.3d 207, 210 (Idaho Ct. App. 2002) (rejecting defendant’s defense of impossibility and holding the attempt statute, IDAHO CODE ANN. § 18-306, eliminates the defense); *Van Bell v. State*, 775 P.2d 1273, 1274 (Nev. 1989) (declining to distinguish between factual and legal impossibility and focusing on the specific intent of the offense); *State v. Smith*, 621 A.2d 493, 501–05 (N.J. Super. Ct. App. Div. 1993) (rejecting the impossibility defense and holding that the legislature showed a strong intent to reject the defense of impossibility in the omission of the reasonable person standard in the applicable subsection of the attempt statute); *State v. Hageman*, 296 S.E.2d 433, 441 (N.C. 1982) (rejecting the impossibility defense and holding that neither “legal [n]or factual impossibility should be used as a shield . . .”); *State v. Ferreira*, 463 A.2d 129, 132 (R.I. 1983) (rejecting the defendant’s legal impossibility defense and holding that “any type of impossibility argument, legal or factual, is not a defense to a criminal attempt charge”); *State v. Curtis*, 603 A.2d 356, 358–59 (Vt. 1991) (rejecting the defendants impossibility defense while noting that the majority of jurisdictions have followed the modern trend of rejecting such a defense).

<sup>142</sup> See *Oviedo*, 525 F.2d at 885. In *Oviedo*, the court held that the evidence was insufficient to establish that a defendant who sold cocaine, a lawful substance, to an undercover officer intended to sell him heroin. Defendant’s conviction for attempted sale of heroin was thus reversed. The Fifth Circuit approach is also followed by the Ninth and Eleventh Circuits. *United States v. Everett*, 692 F.2d 596, 600 (9th Cir. 1982); *United States v. Innella*, 690 F.2d 834, 835 (11th Cir. 1982).

<sup>143</sup> See generally John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1 (2002).

exercise in mental gymnastics.<sup>144</sup> This lull ended with the Internet sting cases.

#### D. The Internet Cases

Internet sting operations to catch would-be child molesters and those who traffic in child pornography have generated an impressive number of arrests and convictions.<sup>145</sup> They also have led to a revival of the impossibility defense. More and more defendants claimed it was legally impossible for them to be charged with attempting a crime against a minor when they were communicating with an adult who was posing as a minor.<sup>146</sup> Thus, jurisdictions once again had to grapple with the defense.

Many courts used the Internet cases to specifically reject the distinction between factual and legal impossibility.<sup>147</sup> A prime example is *People v. Thousand*, decided by the Supreme Court of Michigan.<sup>148</sup> The defendant, a twenty-three-year-old male entered a chat room and began a series of conversations with “Bekka,” who described herself as a fourteen-year old female.<sup>149</sup> During the conversations, which occurred over a week,

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<sup>144</sup> See SANFORD H. KADISH, ET AL., CRIMINAL LAW AND ITS PROCESSES (8th ed. 2007). The hypothetical is discussed in many criminal law casebooks and law review articles. See, e.g., JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 785 (3rd ed. 1999); Weigend, *supra* note 115, at 231, 237; Enker, *supra* note 127, at 667.

<sup>145</sup> JANIS WOLAK ET AL., ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 10 (NCMEC 2006), available at <http://www.unh.edu/ccrc/pdf/CV138.pdf>.

<sup>146</sup> See, e.g., Hatch v. Superior Court, 94 Cal. Rptr. 2d 453, 465 (Cal. Ct. App. 2000); People v. Reed, 61 Cal. Rptr. 2d 658, 660 (Cal. Ct. App. 1996); Hudson v. State, 745 So.2d 997, 999 (Fla. Dist. Ct. App. 1999); Laughner v. State, 769 N.E.2d 1147, 1152 (Ind. Ct. App. 2002); State v. Jones, 21 P.3d 569, 571 (Kan. 2001); People v. Meyers, 649 N.W.2d 123, 126 (Mich. Ct. App. 2002); Bloom v. Commonwealth, 542 S.E. 2d 18, 21 (Va. Ct. App. 2001); State v. Robins, 646 N.W.2d 287, 291 (Wis. 2002); State v. Koenck, 626 N.W.2d 359, 365 (Wis. Ct. App. 2001); see also State v. Carlisle, 8 P.3d 391, 395 (Ariz. Ct. App. 2000); Van Bell v. State, 775 P.2d 1273, 1275 (Nev. 1989) (non-Internet undercover operation involving promise of a fictitious child); cf. *Laughner*, 769 N.E.2d at 1152 (attempted solicitation).

<sup>147</sup> See, e.g., United States v. Gagliardi, 506 F.3d 140, 146–47 (2d Cir. 2007); United States v. Helder, 452 F.3d 751, 756 (8th Cir. 2006); United States v. Sims, 428 F.3d 945, 960–61 (10th Cir. 2005); United States v. Meek, 366 F.3d 705, 717–20 (9th Cir. 2004); United States v. Root, 296 F.3d 1222, 1227, 1229 (11th Cir. 2002); United States v. Farner, 251 F.3d 510, 512–13 (5th Cir. 2001); United States v. Hamrick, 43 F.3d 877, 885 (4th Cir. 1995). Accord *Laughner*, 769 N.E.2d at 1154–55.

<sup>148</sup> 631 N.W.2d 694, 699 (Mich. 2001).

<sup>149</sup> *Id.* at 696.

defendant engaged “Bekka” in a series of sexually explicit conversations and sent her a photograph of male genitalia over the Internet.<sup>150</sup> The evidence demonstrated that the defendant believed “Bekka” was fourteen-years-old.<sup>151</sup> After the defendant and “Bekka” made arrangements to meet, the defendant was arrested and charged with, among other offenses, attempted distribution of obscene material to a minor. In fact, “Bekka” was an adult undercover detective. Following his arrest, the defendant moved to quash the information on the grounds that the evidence was legally insufficient because of the absence of a child victim.

The trial court and court of appeals agreed, ruling that it was legally impossible to attempt the crimes with which defendant was charged.<sup>152</sup> Relying heavily on a subtle distinction between factual and legal impossibility,<sup>153</sup> the court of appeals reasoned it was legally impossible for the defendant to attempt to disseminate obscene materials to a minor, where the recipient of the materials was in fact an adult. The crux of the court’s analysis was that the defendant’s mistake went to the legal status of a material element of the offense—a “minor.” Since it is not a crime to send the material to an adult, it was impossible to commit the crime. Accordingly, it was also impossible to attempt to commit the crime because dissemination to an adult could never be a crime.

The Supreme Court of Michigan reversed.<sup>154</sup> Rather than engage in the same hair-splitting analysis undertaken by the court of appeals on whether the case was one of factual or legal impossibility, the court ruled that neither is a defense in Michigan.<sup>155</sup> The court noted that nothing in Michigan common law recognizes legal impossibility as a defense.<sup>156</sup> Furthermore, the court examined the language and legislative history of the Michigan attempt statute and found no indication of legislative intent to create such a defense.<sup>157</sup>

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<sup>150</sup>Id.

<sup>151</sup>Id.

<sup>152</sup>People v. Thousand, 614 N.W.2d 674, 678 (Mich. Ct. App. 2000), *rev’d*, 631 N.W.2d 694 (Mich. 2001).

<sup>153</sup>See *supra* text accompanying notes 121–24.

<sup>154</sup>People, 614 N.W.2d at 705.

<sup>155</sup>Id. at 701.

<sup>156</sup>Id.

<sup>157</sup>Id. at 702.

Although most appellate courts have ruled that defendants in Internet sting cases are not shielded by a legal impossibility defense, those caught in sting operations continue to raise the defense.<sup>158</sup> They are encouraged by some courts that have continued to hold that attempt liability in Internet sting cases is legally impossible.<sup>159</sup> For example, in 2007 the New Jersey Supreme Court applied an impossibility theory in holding that a person could not be charged with attempted sexual assault of a minor when the alleged victim was an undercover officer.<sup>160</sup> The Court found the defendant “did not complete the criminal act, nor under the circumstances, could he have done so.”<sup>161</sup> Similarly, the highest court in Maryland reversed a conviction of a person who tried to arrange to have sex with a person he believed to be a minor when he was actually communicating over the Internet with an adult undercover agent.<sup>162</sup> The ruling prompted the Maryland legislature to enact a sexual solicitation statute that prohibited soliciting a minor “or a law enforcement officer posing as a minor.”<sup>163</sup>

### 1. Impossibility According To Williams

The *Williams* majority relied explicitly on the doctrine of factual impossibility to support its ruling that attempts to engage in illegal activity fall outside of First Amendment protection. As discussed in Part II above, the majority treated would-be child pornographers no differently than drug dealers or spies who are mistaken about their goods. Attempt liability

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<sup>158</sup> See, e.g., United States v. Gagliardi, 506 F.3d 140, 144–45 (2d Cir. 2007); United States v. Yakooob, No. 07-20084, 2008 U.S. Dist. LEXIS 562, at \*3 (E.D. Mich. Jan. 4, 2008); United States v. Doyle, No. 06-CR-224, 2007 U.S. Dist. LEXIS 11429, at \*19 (E.D. Wis. Feb. 16, 2007); United States v. Kaye, No. 1:06CR205, 2006 U.S. Dist. LEXIS 54281, at \*2 (E.D. Va. Aug. 4, 2006); Johnson v. State, 159 P.3d 1096, 1098–99 (Nev. 2007).

<sup>159</sup> See, e.g., State v. Taylor, 810 A.2d 964, 970 (Md. 2002) (ruling that trial court’s dismissal of attempt charges on grounds of legal impossibility barred re-indictment as violative of double jeopardy principles); *People*, 614 N.W.2d at 676.

<sup>160</sup> State v. Condon, 919 A.2d 178, 183 (N.J. Super. Ct. App. Div. 2007); see also United States v. Helder, No. 05-00125-01-CR-W-DW, 2005 U.S. Dist. LEXIS 38874, at \*7 (W.D. Mo. Aug. 5, 2005), *rev’d*, 452 F.3d 751 (8th Cir. 2006); United States v. Hicks, No. 05-00042-01-CR-W-DW, 2005 U.S. Dist. LEXIS 36625, at \*1–2 (W.D. Mo. Aug. 29, 2005), *rev’d*, 457 F.3d 838 (8th Cir. 2006); *Taylor*, 810 A.2d at 985.

<sup>161</sup> *Condon*, 919 A.2d at 183.

<sup>162</sup> *Moore v. State*, 882 A.2d 256, 270 (Md. 2005).

<sup>163</sup> MD. CODE ANN., CRIM. LAW § 3-324 (West 2005).

applies to all three because the factual impossibility of completing the crimes is not a defense.<sup>164</sup>

In contrast, the *Williams* dissent relied heavily, albeit implicitly, on the legal impossibility defense. For example, Justice Souter rejected a blanket rule that proposals to commit crimes are not protected speech because it “rests on the assumption that the proposal is actually to commit a crime, not to do an act that may turn out to be no crime at all.”<sup>165</sup> This reasoning is almost identical to that used in the classic stolen goods case where the *Jaffe* court stated, “If all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended.”<sup>166</sup>

In the same vein, an early commentator supported the legal impossibility defense by noting “if none of the consequences which the defendant sought to achieve constitutes a crime, surely his unsuccessful efforts to achieve his object cannot constitute a criminal attempt.”<sup>167</sup> This reasoning matches Justice Souter’s analysis that “no matter what the parties believe, and no matter how exactly a defendant’s actions conform to his intended course of conduct in completing the transaction he has in mind . . . if [no actual child was used], there could be, respectively, no conviction and no crime.”<sup>168</sup>

Other legal impossibility cases contain strikingly similar language to that of Justice Souter. For example, one court found no liability for attempted subornation of perjury where the false testimony solicited was immaterial and therefore not perjurious, stating that “[a]n unsuccessful attempt to do that which is not a crime when effectuated cannot be held to be an attempt to commit the crime specified.”<sup>169</sup> Another court found a defendant not guilty of an attempt to hunt out of season when he shot at a decoy because, “[i]t is no offense to attempt to do that which is not illegal . . . Neither is it a crime to attempt to do that which is legally impossible to do.”<sup>170</sup>

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<sup>164</sup> See *supra* text accompanying notes 84–86.

<sup>165</sup> *United States v. Williams*, 128 S. Ct. 1830, 1851 (2008) (Souter, J., dissenting).

<sup>166</sup> *People v. Jaffe*, 78 N.E. 169, 170 (N.Y. 1906); *accord State v. Taylor*, 133 S.W.2d 336, 341–42 (Mo. 1939) (“If all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended.”).

<sup>167</sup> *Sayre*, *supra* note 110, at 854–55.

<sup>168</sup> *Williams*, 128 S. Ct. at 1852 (Souter, J., dissenting).

<sup>169</sup> *People v. Teal*, 89 N.E. 1086, 1088 (N.Y. 1909).

<sup>170</sup> *State v. Guffey*, 262 S.W.2d 152, 156 (Mo. Ct. App. 1953).

Echoing these impossibility cases, Justice Souter stated, “[w]e should hold that transaction in what turns out to be fake pornography is better understood, not as an incomplete attempt to commit a crime, but as a complete series of intended acts that simply do not add up to a crime, owing to the privileged character of the material the parties were in fact about to deal in.”<sup>171</sup> Likewise, the Eleventh Circuit noted somewhat metaphysically that “when the non-existence of illegality is a function not of the non-existence of an illegal product but rather the non-illegality of an existing product, the First Amendment returns to the picture.”<sup>172</sup>

Justice Souter urged there “ought to be no absolute rule on the relationship between attempt liability and a frustrating mistake.”<sup>173</sup> Instead, Justice Souter stated that a defendant’s mistaken belief that he is dealing in real child pornography is irrelevant. In other words, look only at the objective act, the image itself, not what the defendant intended to obtain or provide. Because the PROTECT Act’s pandering section does not hew to this objectivist view and instead grounds culpability on a person’s beliefs about the images he is offering or soliciting, Justice Souter found it unconstitutional. The next section explains the danger in this reasoning.

#### IV. PROTECTING CHILDREN AFTER WILLIAMS

Despite Congress’ best efforts, the market for child pornography has grown immensely as technology has allowed easy creation and transmission of pornographic images. The global market has significantly diminished law enforcement’s ability to catch pornographers, and it is becoming more and more apparent that the free versus banned speech line needs redrawing. Previous cases ruled that harm to actual children is the linchpin in assessing the constitutionality of legislative bans on speech. Direct harm is evident when an actual child is depicted in an image, but would-be pornographers also endanger children. Those who seek to find or offer to provide child pornography are no different than any other person who attempts to commit a crime. The impossibility of the task should not matter.

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<sup>171</sup> *Williams*, 128 S. Ct. at 1854 (Souter, J., dissenting).

<sup>172</sup> United States v. Williams, 444 F.3d 1286, 1304 (11th Cir. 2006), *rev’d*, 128 S. Ct. 1830 (2008) (quoting *Stopping Child Pornography: Protecting our Children and the Constitution: Hearing on S. 2530 Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Frederick Schauer, Professor, Harvard School of Law)).

<sup>173</sup> *Williams*, 128 S. Ct. at 1854 (Souter, J., dissenting).

Justice Souter's analysis (and that of the Eleventh Circuit) fits squarely within the legal impossibility doctrine. The question is why hearken back to it? The early supporters of the doctrine feared punishment without adequate proof of intent. Actions taken by seemingly respectable individuals could be misconstrued by aggressive prosecutors. The merchant who receives goods he believes are stolen, the hunter who shoots at a deer off-season but hits a decoy, and the man who has intercourse with a person he believes is not his wife could all be at risk.<sup>174</sup> According to the proponents of the legal impossibility defense, we cannot be sure the merchant was intending to receive stolen property, the hunter wanted a live deer, or the man wanted to have extramarital sex. Unless the harm is manifest, *i.e.*, apparent to an objective viewer, the actor could be punished merely for bad thoughts, or punished on proof of harm that prosecutors obtain through coerced confessions or other improper evidentiary tactics.<sup>175</sup>

These concerns appear to be at the root of the *Williams* dissent and the Eleventh Circuit ruling. The Eleventh Circuit feared that a person could be prosecuted based on the "wholly subjective determination" by law enforcement personnel who misconstrue innocent communication as pandering or soliciting of child pornography.<sup>176</sup> For example, it cites an email that states "Little Janie in the bath—hubba, hubba!" as grounds for a pandering prosecution, even if the pictures themselves are completely innocent. In other words, if the picture turns out to be wholly innocent, it should shield the defendant regardless of his desire to trade in child pornography. Just like the merchant, hunter, or husband discussed above, according to Justice Souter and the Eleventh Circuit, one who trades in photographs should not be prosecuted based merely on his intent to engage in child pornography when his outward conduct appears to be legal.

To best protect children we need to dispel any lingering doubts about the dangers pedophiles pose to children in cyberspace. Skeptics may suggest that the chatter over the Internet is just that—a verbalizing of bad thoughts. The statistics may show otherwise. For example, a 2005 study of child pornography possessors conducted by the National Center for Missing and Exploited Children, found more than eighty percent of arrested child

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<sup>174</sup> See *supra* text accompanying notes 125–29.

<sup>175</sup> See *supra* text accompanying note 127–28.

<sup>176</sup> *Williams*, 444 F.3d at 1306. The Court gave the hypothetical as part of its vagueness analysis, but its analysis is relevant to the fear of overzealous prosecutions raised by proponents of the legal impossibility doctrine.

pornography possessors had images of prepubescent children, and eighty percent had images of children being sexually penetrated.<sup>177</sup> Twenty percent of the defendants had images of children enduring sadistic sex and bondage<sup>178</sup> and thirty-nine percent had videos of children being abused.<sup>179</sup> Thus, the vast majority of possessors of child pornography are viewing hard-core child pornography.

The Center estimates one in seven children receives a sexual solicitation over the Internet.<sup>180</sup> In addition, an alarming link may exist between possession of child pornography and sexual molestation. A recent study by psychologists at the Federal Bureau of Prisons found that eighty-five percent of individuals charged with possessing child pornography admitted that they also sexually abused children.<sup>181</sup> The study's results were so shocking the prison bureau ordered the paper containing the results of the survey be withdrawn from publication pending further investigation. Earlier, more conservative estimates still placed the percentage of child pornography possessors who had also molested or attempted to molest children at fifty-five percent.<sup>182</sup>

The refusal to acknowledge the full extent of the very real danger by bad actors has led to the revival of the legal impossibility defense. Yet, the Internet cases provide a fundamental reason for eliminating the defense. The very nature of the Internet cases obviates concerns about improper punishment or prosecution tactics.<sup>183</sup> The evidence trail is produced by the

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<sup>177</sup> JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY vii (NCMEC 2005), available at [http://www.missingkids.com/en\\_US/publications/NC144.pdf](http://www.missingkids.com/en_US/publications/NC144.pdf).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> WOLAK, *supra* note 145, at vii.

<sup>181</sup> Julian Sher & Benedict Carey, *Debate on Child Pornography's Link to Molesting*, N.Y. TIMES, July 19, 2007, available at, [http://www.nytimes.com/2007/07/19/us/19sex.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/07/19/us/19sex.html?_r=1&oref=slogin). The study was conducted at the Federal Correctional Institution in Butner, N.C. of 155 male inmates serving sentences for possession or distribution of child pornography.

<sup>182</sup> See WOLAK, *supra* note 177, at 16. It is not clear whether it is the images that incite the prurient interest in children, or whether the interest leads to the collecting of child pornography. Regardless, the danger to children is significant.

<sup>183</sup> Challenges to Internet sting operations on the basis of entrapment have largely failed as law enforcement officials are well-trained in setting up proper stings. See Rogers, *supra* note 110, at 502 n.97.

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defendant in his Internet searches and a record of his intent is contained in the Internet communications.<sup>184</sup>

While seeking pictures of children could be objectively innocent conduct, the nature of the Internet communications, and the images traded make clear the intent behind the actor's conduct.<sup>185</sup> If the actor wants virtual child pornography, or images of child-like adults, he can make that clear by the areas he visits in cyberspace and in the Internet communications he makes. In contrast, a person who trolls the Internet looking for child pornography should be held to his word. Even the Eleventh Circuit acknowledged that "posting in a known child pornography chat room would clearly spotlight the true child abuser."<sup>186</sup>

Professor Fletcher, who generally supports a legal impossibility defense, acknowledges the conduct of those with "idiosyncratic motives" may amount to a punishable attempt.<sup>187</sup> Another scholar who otherwise supports the legal impossibility defense notes that punishing "unusual criminals" who verbalize their criminal intent while performing otherwise innocent-appearing acts is proper because it does not increase the risk of enforcement error or abuse.<sup>188</sup> The cyber-space panderer fits squarely within these examples and should not escape punishment.

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<sup>184</sup> See Rogers, *supra* note 110, at 512–13; see also, Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 540 (2008).

<sup>185</sup> The Internet communications fit remarkably well with Professor Weigend's proposal that impossibility cases be judged by statements an actor makes which accompany his actions. If they arouse alarm or apprehension to the average observer, attempt liability is appropriate. See Weigend, *supra* note 115, at 266–70. He uses the rather infamous example of a man who shoots at a tree stump believing it to be his enemy and is cleared of attempted murder on the grounds of legal impossibility. *Id.* at 267–78. If there was no evidence other than the act of shooting, no apprehension would occur and therefore no attempt liability. If, however, there was evidence that the shooter stated to his companion before shooting that he was out to get his enemy, the act of shooting would cause alarm and the actor should be found guilty of attempted murder. Using this alarm test in the context of attempted offenses against a minor, Internet communications taking place before the actor sets out to meet his victim, make clear that he intends to meet a minor.

<sup>186</sup> United States v. Williams, 444 F.3d 1286, 1307 (11th Cir. 2006), *rev'd*, 128 S. Ct. 1830 (2008).

<sup>187</sup> See *supra* text accompanying notes 136–40.

<sup>188</sup> Hasnas, *supra* note 143, at 68 n.186.

### CONCLUSION

The struggles Congress and the courts have had finding a balance between protected speech and illegal conduct is exemplified in the *Williams* opinion. The majority upheld Congress' latest effort to protect children by punishing those who seek to obtain or provide child pornography, yet the dissent remained concerned that this tactic improperly suppresses protected speech. Both sides turned to competing aspects of the impossibility defense for support, and the two views on impossibility are reflective of the struggle to measure criminal culpability. Should we consider defendant's beliefs as subjectivists would, or should we look solely at his acts as objectivists demand? The former would find that defendant's mistake of fact as to the nature of pornographic images is not a defense, whereas the latter would find that if the images turn out to be legal because they do not involve minors, culpability is legally impossible.

The answer lies in the nature of the problem. The Internet has vastly increased the child pornography market. Yet, it has also allowed us to peek into the mind of the predator, and we should take him at his word. If he seeks to provide or obtain child pornography and acts accordingly, he should not be shielded by the impossibility of reaching his goal.