REGULATING *LOLICON*: TOWARD JAPANESE COMPLIANCE WITH ITS INTERNATIONAL LEGAL OBLIGATIONS TO BAN VIRTUAL CHILD PORNOGRAPHY

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I. INTRODUCTION

The sale of pornographic materials is widespread throughout Japan.[1] In virtually every convenience store, pornographic magazines and DVDs are sold alongside mainstream consumer products.[2] Although hardcore pornographic materials are often demarcated with signs reading "for adults only," additional explicit materials are available for any reader to grab and peruse.[3] Such materials include photographs of teenage pop sensations, also known as "junior idols," wearing bikinis or lingerie in highly suggestive poses, as well as comic book depictions of prepubescent boys and girls engaging in sexual and oftentimes violent acts.[4]

In June 2014, Japan finally fell in line with global norms by passing a statute that banned the possession of child pornography.[5] While this statute simply amended a 1999 law of the same name,[6] it attempted to close a loophole that criminalized the production and distribution of child pornography but permitted its simple possession.[7] In closing this loophole, the Diet, Japan's legislature, endeavored to curb Japan's growing presence as an international hub of child pornography.[8] The statute carries with it a notable exception, however: graphic materials such as *manga* (comic books) and *anime* (cartoons) are free to continue to display prepubescent children engaged in highly sexualized and violent activities.[9]

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[1] Sawa Omori, *Manga and anime: Japan still treating children as sexual objects*, AL JAZEERA (Aug. 11, 2014), http://www.aljazeera.com/indepth/opinion/2014/08/manga-anime-japan-still-treatin-201484145420634173.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Martin Fackler, *Japan Outlaws Possession of Child Pornography, but Comic Book Depictions Survive*, N.Y. TIMES, June 19, 2014, at A6.

[6] Jidō baishun, jidō ni kakaru kōi tō no shobatsu oyobi jidō no hogo no kansuru hōritsu [Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children], Law No. 52 of 1999, *translated in* JAPANESE LAW TRANSLATION [hereinafter *1999 Child Pornography Statute*], http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=-743&y=-316&co=01&ia=03&ky=pornography&page=2&id=100&lvm=01.

[7] Fackler, *supra* note 5, at A6.

[8] *Id.* (noting Japan's central government hopes "the new law would spur a broader change in social attitudes by sending a clear signal that it is no longer acceptable to objectify children"); *see also* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011, at 17 (stating Japan continues "to be an international hub for the production and trafficking of child pornography").

[9] Jidō baishun, jidō ni kakaru kōi tō no shobatsu oyobi jidō no hogo no kansuru hōritsu [Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children], Law No. 52 of 1999 (amended 2014) [hereinafter 2014 Amendment], http://www.moj.go.jp/keiji1/keiji11_00008.html. Unless otherwise noted, all translations

It is not uncommon to see such erotic themes in *manga*.[10] *Manga* is often characterized as synonymous with air, as it permeates every crevice of contemporary Japanese culture.[11] It can be purchased nearly everywhere: in bookstores, train stations, convenience stores, and even from vending machines.[12] Similarly, almost everyone in contemporary Japanese society reads *manga*.[13] It is not uncommon to see an elementary school student reading the same periodical as a thirty-year-old *salaryman* (サラリーマン, or office worker).[14]

The pervasiveness of *manga* as a mainstream medium and Japan's lenient attitude toward pornography[15] has led to the development of a *manga* subgenre known as *Lolicon*—a shortened form of *Lolita Complex*.[16] *Lolicon* works often include depictions of young girls, clad in school uniforms, engaged in sexual acts.[17] These images are purely imaginary, drawn by hand or computer, and do not involve actual or identifiable children performing physical acts; accordingly, commentators often refer to such works as "virtual child pornography."[18]

This Note addresses the need for Japan to further amend the 2014 Amendment so that it can fully conform to global norms against virtual child pornography. Part I provides background on *manga* as a mainstream art form in Japan, the development of the *Lolicon* subgenre, and Japan's most recent attempts to regulate the medium within contemporary Japanese society. Part II provides a legal framework for discussing the current status

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from Japanese were done by the author, with the gracious help of Daniel Bolwell and Marc McCrum.

[10] SHARON KINSELLA, ADULT MANGA: CULTURE AND POWER IN CONTEMPORARY JAPANESE SOCIETY 4 (2000).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] KINSELLA, *supra* note 10, at 3–4 (noting that "manga is primarily a medium . . . [that] carries an immense range of cultural material").

[15] *Id.* at 46 (stating "pornography has not been as strongly compartmentalized in post-war Japan as it has in post-war America or Britain").

[16] *Id.* at 122 (noting *Lolicon* "is widely used to refer to the theme of sexual obsession with young prepubescent girls which became particularly strong in Japanese culture during the 1980s and 1990s").

[17] *Id.* (noting young women in *Lolicon manga* are often infantilized, undressed and subordinate); *see also* JASON THOMPSON, MANGA: THE COMPLETE GUIDE 258 (2007) (noting *Lolicon anime* and *manga* depict "graphic sex . . . coupled with the big-eyed, vaguely infantile character designs common to children's *anime*" (emphasis added)).

[18] Mark J. McLelland, *The World of Yaoi: The Internet, Censorship and the Global "Boys' Love" Fandom*, 23 AUSTL. FEMINIST L.J. 61, 63 (2005) (categorizing virtual child pornography as "text and images that are purely imaginary and fictional").

of virtual child pornography in Japan; in so doing, Part II outlines the pertinent international treaties Japan has ratified relating to virtual child pornography and their internal applicability under Japanese constitutional law. Finally, Part III demonstrates how the 2014 Amendment falls short of complying with Japan's international obligations and offers recommendations for how Japan may proceed to fall in line with global norms: first, by following the legislative reform of countries such as Australia and Canada and adopting a clear ban on virtual child pornography; or second, in the absence of such legislative reform, utilizing current legal standards to encourage a ruling that such content is obscene.

II. REGULATING A MAINSTREAM MEDIA INDUSTRY: JAPAN AND SEXUALLY EXPLICIT "LOLITA COMPLEX" CARTOONS

In Japan, virtual child pornography is not isolated to the *manga* medium. Images of purely imaginary, juvenile characters engaging in graphic sexual acts can be found in a variety of forms, most notably *anime* movies and computer games. Nevertheless, *manga* provides a unique vehicle for the analysis of this controversial subject due to its status as a mainstream media industry, and its complex regulatory history in Japan. Accordingly, this section provides background on the development of Japanese law regarding virtual child pornography in Japanese comics. It begins with a brief history of *manga*, focusing in particular on the *Lolicon* subgenre as a means of illustrating the current debate in Japanese society surrounding the regulation of virtual child pornography. Next, it explicates the legislative restrictions Japan has placed upon the production, distribution, and possession of child pornography involving actual and identifiable children. Finally, it provides an account of the first instance of judicial regulation of *manga* in Japan in which the Supreme Court of Japan deemed a work of *Lolicon manga* obscene.

A. From Children's Literature to All-Ages Medium: A Brief History of Manga

1. Post-World War II Development of Forms

Manga (漫画, or まんが) is Japanese for "comics," and can be translated more literally as "whimsical sketches" or "lighthearted pictures."[19] The artist

[19] THOMPSON, *supra* note 17, at xiii.

Hokusai Katsushika, who lived from 1760 to 1849, is often credited with coining the term, which he used to refer to the doodles in his sketchbook.[20] Although the medium likely has its roots in the woodblock print (浮世絵 – *ukiyoe*) culture of the eighteenth and nineteenth centuries, the majority of styles and genres that compose the modern medium emerged only after the Second World War.[21]

Perhaps the most distinctive features of contemporary *manga* are its storytelling and character development.[22] This form, known as *story manga*, has its earliest roots in the 1950s, when artist Osamu Tezuka, who was influenced by American animation geared toward children, decompressed story lines, and thus revolutionized Japanese comics.[23] Tezuka developed a technique of novelizing;[24] that is, his books were characterized by self-contained stories, often hundreds of pages long, and designed for use in *kashibonya* (歌詞本屋)—professional book lenders, or "pay libraries"—which loaned these hardbound comic books for a small fee.[25] *Story manga* developed rapidly in the late 1950s and 1960s, with the *kashibonya* lending libraries soon displaced by relatively cheap serialized *manga* magazines that were far more commercial in nature.[26] The emergence of *manga* as a mass-cultural phenomenon in the post-World War II era is likely due to the inexpensive nature of comic book entertainment compared with other media.[27]

The 1960s saw the beginnings of the stylistic and thematic representations that have become commonplace in contemporary *manga*.[28] The commercialized nature of *manga* magazines allowed for an increasingly rapid rate of publication at monthly, and even biweekly intervals, while nonetheless filling hundreds of pages with new stories.[29] This influx of content began to tackle markedly adult-oriented themes, at times even becoming linked to political radicalism and countercultural

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[20] ROBIN E. BRENNER, UNDERSTANDING MANGA AND ANIME 3 (2007).
[21] KINSELLA, *supra* note 10, at 19–20.
[22] FREDERICK L. SCHODT, DREAMLAND JAPANS: WRITINGS ON MODERN MANGA 25 (2011).
[23] KINSELLA, *supra* note 10, at 4; SCHODT, *supra* note 22, at 25.
[24] SCHODT, *supra* note 22, at 25.
[25] THOMPSON, *supra* note 17, at xiii.
[26] KINSELLA, *supra* note 10, at 30.
[27] THOMPSON, *supra* note 17, at xiii; KINSELLA, *supra* note 10, at 30. *See also* SCHODT, *supra* note 22, at 23 ("Where a typical 32-page U.S. comic book (with many ads) cost[s] over $2, a 400-page manga magazine rarely cost[s] more than $3–4.").
[28] BRENNER, *supra* note 20, at 8.
[29] *Id.*

experimentation.[30] Thus, while the majority of *manga* remained geared toward children and adolescents, a significant portion of the market began shedding the traditional child-oriented themes and styles that Tezuka and others had pioneered.[31] In contrast with the Disney-inspired themes of the past, these new anthologies frequently incorporated violence, sex, and crime into their stories.[32]

By the late 1970s and early 1980s, *manga* had expanded and developed into a countrywide phenomenon that continues to this day.[33] Virtually every aspect of Japanese society is depicted in the art form,[34] and in terms of volume, it is estimated to account for up to forty percent of the entire publishing market.[35] Characters from all walks of life stroll among *manga*'s pages—not only those who clearly denote fantasy, but also those who champion the ordinary.[36] *Manga* characters tend to embody aspects of caricature, drawn with exaggerated facial expressions and conveying hyperbolized emotions.[37] "It is possible," wrote University of Manchester lecturer on Japanese visual culture Sharon Kinsella in 2000, "that highly expressive and emotionally readable manga characters have held a particular attraction in a contemporary environment which has encouraged high levels of self-discipline and a relatively controlled mode of physical and facial expression."[38] The colossal quantity and variety of *manga* thus provides valuable insight into both Japanese society and culture.[39]

2. The Shōjo Ideal and The Rise of Lolicon: Sexually Explicit Depictions of Apparent Children

The use of sexually explicit depictions of non-identifiable childlike characters in *manga* is tied to the development of the *shōjo* (少女, or young girl) as a dominant theme in Japanese consumer culture.[40] By the 1970s,

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[30] KINSELLA, *supra* note 10, at 4, 32.

[31] SCHODT, *supra* note 22, at 22 (noting the pre-war, child-oriented manga that developed at the turn of the century and incorporated sequential panels with word balloons arranged on the page, was heavily influenced by American newspaper comic strips).

[32] BRENNER, *supra* note 20, at 7–8.

[33] KINSELLA, *supra* note 10, at 4, 32.

[34] *Id.* at 4–5.

[35] BRENNER, *supra* note 20, at 13.

[36] SCHODT, *supra* note 22, at 26–28.

[37] KINSELLA, *supra* note 10, at 7.

[38] *Id.*

[39] *Id*.

[40] Patrick W. Galbraith, *Lolicon: The Reality of 'Virtual Child Pornography' in Japan*, 12 IMAGE & NARRATIVE 83, 86 (2011).

Japan had weathered the post-World War II storm of military, economic, and social turmoil; consumerism was rapidly on the rise.[41] Tokyo had become a major market on the world stage, and an unprecedented amount of capital was invested in advertising, packaging, design, and image production.[42] The amorphous concept of the idealized young girl, or *shōjo*, began to dominate this media-heavy environment.[43] Products of all forms began to display ambiguously aged girls who were fixated on newly offered goods and services in an effort to excite the consumer.[44] The *shōjo* quickly became a fictional ideal, embodying cuteness and personifying purity within romantic love.[45] As time progressed, these attributes of cuteness, purity, and romance were attached to images of females at increasingly younger ages.[46] Eventually, this led to a particularly strong cultural obsession with young prepubescent girls in the 1980s and 1990s.[47]

The *Lolicon* subgenre of *manga* emerged from this cultural obsession with the *shōjo* ideal.[48] *Lolicon* is short for *Lolita Complex*,[49] itself a reference to Vladimir Nabokov's novel about a middle-aged literature professor's sexual obsession with his twelve-year-old stepdaughter, Lolita.[50] The term is better associated with Russell Trainer's alleged psychological evaluation of "man-child sexual relationships," *The Lolita Complex*, entitled

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[41] *Id.* at 86.

[42] *Id.* (discussing Shun'ya Yoshimi, *Posuto sengo shakai* [Post-Postwar Society] 56 (2009)).

[43] The literal translation of *shōjo* is "little girl" (少 or *shō* meaning little, and 女 or *jo* meaning girl). This term is commonly used in Japanese to identify a particular child or group of children, and is frequently used in reference to adolescents and even young women. In contrast, *shōjo* may also be used to describe an overarching concept, i.e. an idealized notion of the quintessential "young girl," embodying attributes of particular significance to post-World War II contemporary consumer-driven Japanese culture. For the purposes of this Note, the latter notion is meant when the term is used. For further discussion of the term, see generally ANNE ALLISON, PERMITTED AND PROHIBITED DESIRES: MOTHERS, COMICS, AND CENSORSHIP IN JAPAN (1996).

[44] John Whittier Treat, *Yoshimoto Banana Writes Home: Shojo Culture and the Nostalgic Subject*, 19 J. JAPANESE STUD. 353, 361 (1993) ("Magazines, radio, above all television: in whatever direction one turns, the barely (and thus ambiguously) pubescent woman is there both to promote products and purchase them, to excite the consumer and herself be thrilled by the flurry of goods and services that circulate like toys around her.").

[45] Galbraith, *supra* note 40, at 87.

[46] *Id.*

[47] KINSELLA, *supra* note 10, at 122.

[48] *Id.* at 122–24 (arguing that *Lolicon* reflects an infantilized female object of desire prevalent throughout contemporary Japanese society).

[49] *Id.* at 4, 32.

[50] *Id.* at 122.

Lolicon in its 1969 Japanese translation.[51] That same year, photo collections of nude images of *shōjo* girls began to appear for sale in bookstores and other major media outlets in Japan.[52] Erotic images are not segregated in contemporary Japanese society to the same extent as they are in the West; rather, such images often appear in popular media in addition to productions specifically created as pornography.[53] Similarly, *manga* has not shied away from tackling highly sexualized and oftentimes violent themes.[54] It should come as no surprise then, that in such a relaxed environment the prepubescent and highly fictionalized *shōjo* emerged in *manga* dominated by highly sexualized situations.[55]

The first *Lolicon* works were intended to be parodies of any supposed connection between cartoonish characters and eroticism.[56] Although these works featured cute Tezuka-inspired childlike characters having sex, they differed from pornographic *manga* that were drawn in a more realistic style; thus, such works were meant to be humorous, and only a minority found such works to be erotic in nature.[57] By the 1980s, this dynamic had changed.[58] A large fan-base developed that found *Lolicon* works to be erotically appealing, which resulted in an outpouring of professional and amateur comics in support of the new pornographic genre.[59] This new market grew large enough to support a variety of niches and specialty magazines.[60] Today, *Lolicon* is something of a blanket term used to refer to any *manga* that concentrates on this theme of sexual obsession with the *shōjo* ideal.[61] These *manga* commonly feature infantilized and undressed young female characters in subordinate positions.[62] Indeed, as found in the 2013 U.S. Department of State country report on Japan, it is not uncommon for such *manga* to depict scenes of violent sexual abuse and rape.[63]

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[51] Galbraith, *supra* note 40, at 94.
[52] *Id.*
[53] KINSELLA, *supra* note 10, at 46.
[54] *Id.* at 4, 32.
[55] *Id.* at 122.
[56] Galbraith, *supra* note 40, at 95.
[57] *Id.*
[58] *Id.* at 97.
[59] *Id.*
[60] *Id.*
[61] KINSELLA, *supra* note 10, at 122; Galbraith, *supra* note 40, at 94.
[62] KINSELLA, *supra* note 10, at 122; Galbraith, *supra* note 40, at 95.
[63] U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013, JAPAN, at 9 [hereinafter JAPAN 2013 HUMAN RIGHTS REPORT].

3. The Miyazaki Incident Spurs Domestic Debate over Regulation

In analyzing the current state of Japanese law regarding the regulation of child pornography, it is important to note past efforts in contemporary Japanese society to respond to problems perceived as stemming from *Lolicon*. In the late 1980s and early 1990s, anxiety over media saturation of sexualized images of *shōjo* led to a moral panic in Japanese society.[64] To be precise, a backlash of anti-manga activism was carried out by a combination of local citizens' organizations, parent-teacher associations, local government and police, and national quasi-governmental agencies.[65] This moral backlash has also been dubbed the *otaku* panic (オタクパニック), since it was by and large directed at the most hardcore of manga and anime fans: *otaku*.[66]

Just as the rise of *Lolicon* was closely tied to the concept of the *shōjo*, the anti-manga backlash of the early 1990s is closely associated with rise of the *otaku* generation.[67] *Otaku* is literally translated as a formalized expression of "you," which became closely associated with hardcore manga fans due to the stiff, pretentious, and often socially awkward manner in which they addressed one another.[68] Today, the term is roughly equivalent to the English term "nerd," and no longer necessarily carries the same negative connotation it had in the late 1980s.[69] Like the American stereotypical nerd, *otaku* are at best viewed as "sheltered, middle-class boys who were being groomed to pass tests and get good grades" in preparation to become productive members of the then booming Japanese economy.[70] The classic *otaku* is often viewed in negative terms as well: he is seen as having "poor social skills and hygiene [and] has obsessive collecting tendencies."[71] What is more, he is a hardcore devotee of fantasy, science fiction, *manga*, and *anime*.[72] While *otaku* are known to enjoy a diverse array of *manga* subgenres, in the late 1980s and early 1990s they were closely associated with, and perhaps assumed to have, a love of pornography.[73] As such, the

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[64] Galbraith, *supra* note 40, at 103.
[65] KINSELLA, *supra* note 10, at 135–37.
[66] *Id.* at 136; Galbraith, *supra* note 40, at 104.
[67] SCHODT, *supra* note 22, at 43–45.
[68] THOMPSON, *supra* note 17, at 258.
[69] KINSELLA, *supra* note 10, at 128–30.
[70] THOMPSON, *supra* note 17, at 258.
[71] *Id.*
[72] *Id.*
[73] *Id.*

term *otaku* became almost synonymous with *Lolicon*, with an obsession with sexualized *shōjo* images, and with seeking refuge in a fantasy world.[74]

This cultural backdrop set the scene for an episode that rocked Japanese society in the 1980s. At the center was Tsutomo Miyazaki, a disturbed twenty-seven-year-old man who kidnapped, molested, and killed four preschool age girls in 1988 and 1989.[75] Miyazaki delivered the remains of one of his victims to her family using the pseudonym "Yūko Imada"—reportedly the name of a favorite *manga* character.[76] After Miyazaki was arrested, convicted, and imprisoned, camera crews and reporters found an immense collection of *manga* and *anime* in his apartment.[77] The collection amounted to almost 6,000 videos, many of which were *Lolicon*,[78] as well as soft pornographic *manga*, and a collection of academic analyses of contemporary youth and girls' culture.[79]

The somber cultural debate that followed Miyazaki's arrest evolved into a nationwide panic about *manga* subculture, and *Lolicon manga* in particular.[80] Miyazaki's status as an *otaku* played a crucial role, given that the media portrayed his alienation and lack of substantial relationships as the ultimate causes of his anti-social behavior.[81] Specifically, the media emphasized Miyazaki's development into an *otaku*; then posited his apparent need to immerse himself in a fantasy world created by *manga* as the result of poor parenting coupled with the death of his grandfather, the only person with whom he enjoyed a real human connection.[82]

The outpour of reports surrounding the incident also helped to establish a notion within the public mind that all *otaku* were doomed to follow in Miyazaki's footsteps; and as a result, that action must be taken.[83] As *manga* historian Frederick L. Schodt has noted, following Miyazaki's arrest, several organizations formed in an attempt to "banish harmful *manga*."[84] A movement made up of "housewives, PTAs, Japan's new feminist groups and politicians" successfully urged prefectural legislatures throughout Japan to

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[74] SCHODT, *supra* note 22, at 45–47; Galbraith, *supra* note 40, at 96.
[75] SCHODT, *supra* note 22, at 45.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] KINSELLA, *supra* note 10, at 126–27.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] SCHODT, *supra* note 22, at 46.
[84] Galbraith, *supra* note 40, at 104 (quoting SCHODT, *supra* note 22).

pass strong local ordinances aimed at regulating obscene *manga* material.[85] This movement was eventually met with resistance, however, leading to the somewhat normalized state of *Lolicon* within Japan today.[86]

The national debate surrounding *otaku* and Miyazaki became so prevalent in mainstream media outlets that it created a backlash of its own.[87] Commentators began to complain that the media's derogatory use of *otaku* was discriminatory, and therefore was a form of "*otaku*-bashing."[88] In turn, *manga* artists became determined to resist any legislation aimed at regulating the publishing industry.[89] In 1992, this countermovement took its first steps in combatting such regulation through the organization of the Society to Protect the Freedom of Expression in Manga (Society).[90] Led by Shinoda Hironori, a publisher and chief contributor of *Tsukuru*, a leading periodical devoted to the critical analysis of the media and communications industries, *manga* artists recruited notable lawyers, artists, and public officials to defend their work in the national press.[91] The Society aimed to earn *manga* artists the same status already enjoyed by independent practitioners of the fine arts or craftsmen; that is, the status of independent creators in control of the content of their own works.[92]

The Society's first campaign was designed to appeal to members of Japanese society that more closely identified as politically conservative by framing the debate in terms of individual responsibility.[93] Notable artist Machiko Satonaka published an article in the widely circulated newspaper, *Asahi Shimbun*, which argued that institutional censorship of *manga* was equivalent to institutional censorship of literature and therefore at odds with notions of personal autonomy.[94] Accordingly, Satonaka concluded that *manga* artists, like authors, should be held individually responsible for the self-censorship of the content in their own work.[95] This innovative concept—opposition to institutional censorship combined with a simultaneous claim that artists should retain the power to censor their own

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[85] *Id.*
[86] SCHODT, *supra* note 22, at 46.
[87] *Id.*
[88] *Id.*
[89] KINSELLA, *supra* note 10, at 157.
[90] *Id.* (*Manga Hyōgen wo Jinyu ni Mamoru Kai*).
[91] *Id.* at 157–58.
[92] *Id.* at 159–60.
[93] *Id.* at 158–59.
[94] *Id.*
[95] *Id.*

creations—took root in contemporary society.[96] *Manga* artists began to be perceived as serious and respectable individuals constituting a societal group that possessed the right to pursue their interests beyond the arbitrary control of the government.[97]

The debate between persons who wish to regulate what may be perceived as obscene *manga* content and *manga* artists' desire for freedom from institutional control continues to this day.[98] The back and forth between these two groups has led to a somewhat normalized view of *Lolicon*'s status within contemporary Japanese society.[99]

B. Legislative Restrictions on Child Pornography

Although critics of *Lolicon* and similar media viewed as virtual child pornography have succeeded in passing regulations at the local level, such success has not been enjoyed in further attempts to pass national legislative restrictions. This is demonstrated through the two major pieces of national legislation regarding child pornography explicated below. This section first discusses the 1999 Child Pornography Statute, which criminalized the production and distribution of child pornography. Next, the 2014 Amendment is discussed, which criminalizes the possession of child pornography, but allows the possession of virtual child pornography media such as *Lolicon*.

1. 1999 Child Prostitution and Pornography Statute

On May 26, 1999, the Diet passed the first piece of national legislation prohibiting the commercial sexual exploitation of children aimed at "protect[ing] the rights of children by punishing activities relat[ed] to child prostitution and child pornography."[100] Under Article 2, the statute defines "child" as a person less than eighteen years of age,[101] and in paragraph 3 defines child pornography:

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[96] *Id.*
[97] *Id.*
[98] Agnes Chan, *Jidō Poruno Konzetsu wo Mezashite* [Aiming Toward the End of Child Pornography], ASAHI DIGITAL (May 3, 2010), http://www.asahi.com/english/weekly/0715/02.html.
[99] Fackler, *supra* note 5, at A6.
[100] *1999 Child Pornography Statute*, *supra* note 6, art. 1.
[101] *Id.* art. 2(1).

> The term "child pornography" as used in this Act shall mean photographs, recording media containing electromagnetic records . . . or any other medium which depicts the pose of a child, which falls under any of the following items, in a visible way:
>
> i. Any pose of a child engaged in sexual intercourse or any conduct similar to sexual intercourse;
> ii. Any pose of a child having his or her genital organs touched by another person or of a child touching another person's genital organs, which arouses or stimulates the viewer's sexual desire;
> iii. Any pose of a child wholly or partially naked, which arouses or stimulates the viewer's sexual desire.[102]

Under this definition, the statute only applies to visual depictions of the "pose of a child" (*jidō no shitai*). Therefore, since "child" under the statute only refers to actual or identifiable persons under the age of eighteen, the law does not criminalize virtual child pornography such as *Lolicon*.[103] This interpretation is reaffirmed in Article 7, which outlines the relevant penalties pertaining to activities relating to child pornography:

> Any person who provides child pornography shall be sentenced to imprisonment with work for not more than three years or a fine of not more than three million yen. The same shall apply to a person who provides electromagnetic records or any other record which depicts the pose of a child, which falls under any of the items of paragraph 3 of Article 2, in a visible way through electric telecommunication lines. . .
>
> . . . .
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> (3) In addition to the preceding paragraph, any person who produces child pornography by having a child pose in any way which falls under any of the items of paragraph 3 of Article 2, depicting such pose in photographs, recording media containing electromagnetic records or any other medium shall be

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[102] *Id.* art. 2(3).

[103] ECPAT INT'L, GLOBAL MONITORING STATUS OF ACTION AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: JAPAN 26–27 (Veyoma Hevamange et al. eds., 2d ed. 2011), *available at* http://www.ecpat.net/sites/default/files/a4a_v2_eap_japan.pdf.

> punished by the same penalty prescribed in paragraph 1 of this article.[104]

The statute further provides that offering or displaying child pornography for the public is punishable by up to five years imprisonment, a fine of up to five million yen, or both.[105] Additionally, this same sentence applies to any person producing, possessing, transporting, importing or exporting from Japan, child pornography, or a Japanese national importing or exporting child pornography to or from a foreign country for the same purpose.[106] Consequently, by referring to the production of child pornography as "having a child pose" in any manner prohibited under Article 2, the statute clearly denotes that it applies only to "real" or actual children.[107]

Notably, the statute not only is limited to visual depictions of actual or identifiable children, but also only criminalizes possession of child pornography if the offender has the intention to offer or distribute the materials.[108] Therefore, the 1999 Statute did not punish the simple possession of child pornography, and further failed to criminalize acts related to developing technologies such as knowingly accessing or viewing child pornography on the internet.[109]

2. 2014 Amendment to the 1999 Child Pornography Statute

In June 2014, the Diet amended the 1999 Statute due to increased domestic and international pressure to close the loophole that allowed for the simple possession of child pornography.[110] Specifically, the 2014 Amendment expands the definition of child pornography in the statute under Article 2, paragraph 3.3:

> Any pose of a child wholly or partially naked, especially a child's sexual parts (defined as sex organs or their neighboring areas, the posterior, and the chest) that are exposed or

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104 *1999 Child Pornography Statute*, *supra* note 6, art. 7(1), (3).
105 *Id.* art. 7(4).
106 *Id.* art. 7(5)–(6).
107 ECPAT INT'L, *supra* note 103, at 27.
108 *Id.* at 27.
109 *Id.*
110 Fackler, *supra* note 5, at A6.

> emphasized, which arouse and stimulate the viewer's sexual desire.[111]

Further, the amendment revises the language of Article 7 to clearly denote that simple possession of child pornography is prohibited and subject to criminal penalty:

> A person in possession of child pornography (limited to a person who possesses child pornography based on their own volition, and said person is undoubtedly recognized as being in possession of child pornography) for the purpose of fulfilling one's sexual curiosity shall be sentenced to imprisonment with work for no more than one year or a fine of no more than one million yen.[112]

Although the 2014 Amendment clearly criminalizes the simple possession of child pornography, it retains the original language of the 1999 Statute referring to actual or identifiable children. Thus, the amendment does not apply to media that depicts sexually explicit scenes involving imaginary and non-identifiable childlike characters such as *Lolicon*.

Virtual child pornography is not explicitly exempted from regulation under the 2014 Amendment; however, the significant expansion of Article 3 unambiguously demonstrates that the amended statute is not intended to apply to such media. Article 3 provides for the manner in which the statute is to be implemented:

> In the application of this Act, care shall be taken not to infringe upon the rights and freedoms of citizens involved in academic research, cultural and artistic activities, and news reporting. This Act shall not be abused for other purposes and deviate from its intrinsic aim of advocating rights for children and protecting them from sexual exploitation as well as sexual abuse.[113]

The amended statute's reference to "cultural and artistic activities" (*bunka geijutsu katsudō*) appears to be a reference to the Basic Act for the

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[111] *2014 Amendment*, *supra* note 9, art. 2, para. 3.3.
[112] *Id.* art. 7.
[113] *Id.* art. 3.

Promotion of Culture and the Arts,[114] which provides for the promotion of *manga* and *anime* as forms of important Japanese cultural media.[115] Thus, the 2014 Amendment protects all forms of *manga*, including *Lolicon*, from criminalization.

C. Judicial Intervention: Supreme Court Rules an Adult Manga Publication Obscene

A common theme among critics of the regulation of virtual child pornography is the tension between such regulation and the Japanese Constitution's guarantee of the right to freedom of expression.[116] Indeed, freedom of expression has been cited as the underlying reason that national legislation regulating virtual child pornography has not succeeded in passing through the Diet.[117] Freedom of expression, however, is not an unlimited right in Japan. Accordingly, this section explores the tension between the right to freedom of expression and its limiting principle: the public welfare doctrine. Next follows an explication of the first instance in which a *manga* work was judicially regulated under the public welfare doctrine.

1. Dueling Doctrines: Freedom of Expression and the Public Welfare

Derived from a *laissez-faire* conception of civil liberty,[118] freedom of expression is considered a fundamental personal right of liberty[119] primarily established by Article 21 of the Japanese Constitution:

> Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.[120]

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[114] Bunka geijutsu shinkō kihon-hō [Basic Act for the Promotion of Culture and the Arts], Law No. 148 of 2001 (Japan).

[115] *Id*. art. 9.

[116] *See* KINSELLA, *supra* note 10, at 157 (noting the Society's opposition to regulation and censorship largely centered around substantive rights-based themes such as the freedom of expression).

[117] Galbraith, *supra* note 40, at 109.

[118] HIROYUKI HATA & GO NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 24 (1997).

[119] *Id.* at 128–29.

[120] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 21, paras. 1, 2 (Japan).

Of particular relevance to virtual child pornography is Article 21's extension of protection to "other forms of expression" as well as to speech and the press. Such other forms of expression have been recognized to include painting, sculpture, music, movies, plays, and symbolic forms of speech, such as picketing and demonstrations.[121] Undoubtedly, the medium of *manga* squarely falls within this category. The second paragraph of the article also is of particular importance. It professes to guarantee the freedom to express one's views in words, print, or other means without interference from the government in that it expressly prohibits governmental authorities from censoring such content before it is published.[122]

Although freedom of expression is a substantial right guaranteed by the constitution, it is not without limitation.[123] Counterbalancing the enumerated individual civil liberties is the notion that such rights are subject to restriction for the "public welfare" (*kōkyō no fukushi*).[124] This limiting principle is espoused in two constitutional provisions. Article 12 states:

> The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.[125]

Similarly, Article 13 provides:

> All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.[126]

Courts have invoked the public welfare doctrine infrequently,[127] and its use to restrict intellectual rights such as freedom of expression has been the

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[121] HATA & NAKAGAWA, *supra* note 118, at 128.
[122] *Id.* at 128–29.
[123] *Id.* at 128.
[124] Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, *in* JAPANESE CONSTITUTIONAL LAW 221, 223 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).
[125] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 12 (Japan).
[126] *Id.* art. 13.
[127] HIROSHI ITOH & LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS 1961–70, at 175 (1978).

subject of considerable debate between lawyers, academics, and government officials.[128] This debate is likely due to a lack of a precise definition for the phrase, which ranges in meaning from abstract references to public order and state policy, to specific criteria relating to particularized fact patterns and court cases.[129] In a 1993 essay, Lawrence Beer, a scholar of Japanese constitutional law, pointed to a statement made by the Supreme Court of Japan in its 1950 decision in *Japan v. Sugino* as a reflection of the doctrine: "[T]he maintenance of order and respect for the fundamental human rights — it is precisely these things which constitute the content of the public welfare."[130] Thus, in Japan, constitutionally protected rights are not viewed as emanating from natural laws fundamentally grounded in the individual.[131] Rather, individual rights are respected insofar as such rights do not infringe upon maintenance of social order; that is, the public welfare of Japanese society in general.[132]

2. Japanese Obscenity Law and The Misshitsu Trial

A comprehensive analysis of Japanese obscenity law is beyond the scope of this Note. However, a selective discussion of the law is required before discussing the first judicial decision regulating *manga*, and the implications this decision may have on the regulation of works of *manga* that may be deemed virtual child pornography, such as *Lolicon*.

The sale and distribution of obscene materials are restricted under Article 175 of Japan's revised 1907 Criminal Code as follows:

> A person who distributes or sells an obscene writing, picture, or other object or who publicly displays the same, shall be punished with imprisonment . . . or a minor fine. The same

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[128] Beer, *supra* note 124, at 224.

[129] *Id.*

[130] *Id.* (quoting *Japan v Sugino*, Saikō Saibansho [Sup. Ct.] 1950, 4 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 2012 (Japan)).

[131] CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 52 (2d ed. 2008) (noting that constitutional rights and prohibitions in Japan are better understood as hortatory prescriptions rather than strict rules; that is, directives of national policy that are not entirely binding upon legislative or executive action).

[132] *Id*.

> applies to a person who possesses the same for the purpose of sale.[133]

The plain text criminalizes the sale of any material deemed obscene,[134] and prohibits its display from any member of the public, whether alone or in a group.[135] Noticeably absent from the law, however, is a specific definition of obscenity.[136] Nevertheless, a doctrine of obscenity has developed through a series of judicial decisions.[137]

In its 1957 decision in *Koyama v. Japan*, the Supreme Court of Japan upheld a three-part conditional test for establishing obscenity under Article 175.[138] Under this test, a work is deemed obscene if it: first, wantonly arouses and stimulates sexual desire; second, offends a common sense of modesty or shame; and third, violates proper concepts of sexual morality. [139] Through this ruling, notes political scientist James R. Alexander, the court not only "assumed final responsibility for articulating and protecting the appropriate standard of social morality," but also firmly established the policy that censorship of obscene materials is not a violation of freedom of expression due to social stability concerns stemming from the public welfare doctrine.[140]

Of particular relevance, this policy can be seen in the Supreme Court of Japan's 2007 decision in the *Shōbunkan* Trial[141]—commonly referred to as

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[133] *See* ITOH & BEER, *supra* note 127, at 183 (citing to Ministry of Justice, Japan, CRIMINAL STATUTES, n.d., I:39). For an English translation accompanied by the Japanese text endorsed by the Japanese Government, see JAPANESE LAW TRANSLATION, Law No. 45 of 1907, *as amended in* Act No. 54 of 2007, *available at* http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=-793&y=-316&co=01&ia=03&ky=article+175&page=11.

[134] *See* James R. Alexander, *Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's 'In the Realm of the Senses*,*'* 4 ASIAN-PAC. L. & POL'Y J. 148, 154 & n.23 (2003) (noting "other objects" considered obscene often consist of visual depictions including cartoons and drawings).

[135] *Id.* at 154.

[136] Alexander, *supra* note 134, at 154 (citing Kawashima Takeyoshi, *The Status of the Individual in the Notion of Law, Right, and Social Order in Japan*, *in* THE JAPANESE MIND: ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE 263 (Charles A. Moore ed., 1967)).

[137] *Id.*

[138] Saikō Saibansho [Sup. Ct.] Mar. 13, 1957, 11 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 997 (Japan).

[139] Koyama v. Japan [Sup. Ct.] Mar. 13, 1957, 11 KOYAMA 997 (Japan), *translated in* COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS 1948–60, at 7 (John M. Maki ed., 1964). *See also* Alexander, *supra* note 134, at 155 n.26; ITOH & BEER, *supra* note 127, at 183.

[140] Alexander, *supra* note 134, at 155.

[141] Kishi Motonori v. Japan, Tōkyō Saibansho [Tōkyō High Ct.] June 16, 2005, no. 458 (Japan).

the *Misshitsu* Trial[142]—Japan's first obscenity case involving *manga*.[143] It began in August 2002, when a father sent an angry letter to his representative in the Diet after finding an erotic *manga* anthology published by *Shobunkan*, a midsized publisher that specializes exclusively in erotic *manga*, in his teenage son's room.[144] The father singled out a story entitled "Mutual Love,"[145] created by *manga* artist Yuji Suwa under the pen name "Beauty Hair" as the most offensive.[146] The Diet member forwarded the letter to the police who subsequently identified *Misshitsu*, an adult *manga* published by *Shōbunkan* exclusively featuring the work of Beauty Hair, as the comic in question.[147] *Misshitsu* (密室) is conventionally translated as "locked" or "hidden" room. However, the title was translated into English on the cover of the work as "Honey Room," a pun meant to convey sexual overtones by evoking images of dripping honey. This is achieved by replacing the homophonous character for "hidden" (密, or *mitsu*) with "honey" (蜜, also pronounced *mitsu*).[148]

Police reports found the depictions of "genitalia and scenes of sexual intercourse" within the *manga* to have been "drawn in detail and realistically," and that the self-censorship markings meant to obscure genitalia and sexual penetration were "less conservative" than usual.[149] The police arrested Beauty Hair, editor-in-chief Kōichi Takada, and *Shōbunkan* president Motonori Kishi on charges of obscenity. [150] In 2004, the three defendants were found guilty of producing and distributing obscene material; however, Kishi challenged the decision as a violation of the freedom of

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[142] *Misshitsu* is the name of the *manga* anthology eventually deemed obscene. *See* KIRSTEN CATHER, WEATHERHEAD EAST ASIAN INSTITUTE, THE ART OF CENSORSHIP IN POSTWAR JAPAN 224 (2012); Patrick W. Galbraith, *The Misshitsu Trial: Thinking Obscenity with Japanese Comics*, 16 INT'L J. COMIC ART 125, 126 (2014).

[143] Galbraith, *supra* note 142, at 126.

[144] *Id.* at 130.

[145] "Mutual Love" (相思相愛 or *sōshi sōai*) tells the story of a prostitute who seemingly suffers through the sadistic sexual desires of a client that include repeated whippings of her face and body with a belt, and several instances of vaginal stomping. However, despite what seems like extreme physical abuse, on the final page of the story she confesses her pleasure in such acts.

[146] CATHER, *supra* note 142, at 224 (also noting the pen name Beauty Hair (ビュウチ・ヘアor Byūtī Hea) plays on the romanized word for pubic hair in Japanese).

[147] Galbraith, *supra* note 143, at 130.

[148] See CATHER, *supra* note 142, at 224, n.6, for further discussion.

[149] *Id.* at 232 (quoting Nagaoka Yoshiyuki, '*Waisetsu Komikku' Saiban—Shobunkan Jiken no Zenbou* [The Obscene Comic Trial—The Whole Picture of the Shobunkan Incident], 247, 252–53 (Tokyo: Michi Shuppan 2004).

[150] *Id.*

expression.[151] He argued that *Misshitsu* was more analogous to traditional Japanese art known as *shunga*—erotic drawings common in Japan in the Edo Period (1603–1867)—and therefore was not subject to restriction under Article 175.[152] The case was retried, and after another guilty verdict was returned, Kishi appealed the case to the Supreme Court of Japan.[153]

In its 2007 opinion, the court concluded that *Misshitsu* was in fact obscene, and therefore upheld both guilty verdicts.[154] The court deemed the *manga* obscene due to its potentially harmful effects: first, the court implied that even if the manga was clearly designated as restricted to adults, it could still easily circulate among susceptible youths; and second, the court explicitly stated that the graphic images of torture and rape of young women found in *Misshitsu* could potentially transform young readers of the *manga* into sex criminals.[155] The court further outlined a strategy for limiting the prevalence of *manga* such as *Lolicon* by specifically referring to international norms aimed at limiting potential harms caused by virtual child pornography, and characterizing *manga* as a medium uniquely prone to obscenity.[156]

By directly citing the Council of Europe's Convention on Cybercrime,[157] signed by Japan in 2001, the court justified its finding of obscenity by referring to international norms that seek to prevent both actual and potential

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[151] Galbraith, *supra* note 143, at 130. *See also Court Targets Obscene Comics*, JAPAN TIMES, Jan. 14, 2004, http://www.japantmes.co.jp/news/2004/01/14/national/court-targest-obscene-comics/#.VrfHAVgrLDc (noting that Kishi's lawyers "insisted that Article 175 violates Article 21 of the [Japanese] Constitution, which guarantees the freedom of expression).

[152] *Id.* at 130, 134.

[153] *Id.* at 130.

[154] *Id.*

[155] CATHER, *supra* note 142, at 262.

[156] *Id.* at 270–72.

[157] Convention on Cybercrime, Nov. 23, 2001, C.E.T.S. 185, *available at* https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001609000016 [hereinafter Cybercrime Convention]. This treaty, which entered into force on July 1, 2004 after meeting the condition that five members of the Council of Europe (COE) ratified the instrument, has forty-four parties, including three nonmembers of the COE, Australia, the United States, and Japan. *See* COUNCIL OF EUROPE, CHART OF SIGNATURES AND RATIFICATIONS OF TREATY 185, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures. In Japan, this Cybercrime Convention entered into force on November 1, 2012. *Id.* Additionally, on July 3, 2012, Japan attached reservations with its instrument of acceptance to not apply Article 9 (offenses related to child pornography), paragraph 1.d and e (producing child pornography through a computer system), and paragraph 2.b and c (pornographic material depicting minors engaged in sexually explicit conduct) except as related to Article 7 of the *1999 Child Pornography Statute*, *supra* note 6. *See* COUNCIL OF EUROPE, RESERVATIONS AND DECLARATIONS FOR TREATY NO. 185 – CONVENTION ON CYBERCRIME, http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/185/declarations.

harm to children from sexual predators incited by child pornography.[158] According to the court, Japan's then status as a signatory to the Cybercrime Convention represented the consensus of legal scholars' efforts to expand the provisions of Article 175 in order to prosecute obscenity in contemporary Japan.[159] Moreover, since the treaty makes specific reference to virtual child pornography and its potential abuse by sexual predators,[160] the court concluded international standards clearly aim toward limiting the access to such potentially harmful images, real or simulated.[161] As such, the court justified an expansion of the definition of obscene materials to include works potentially harmful to contemporary Japanese society, in an effort to conform to current international trends in this arena.[162]

The court then found *Misshitsu* to fall within the potentially harmful category; interestingly, precisely because of how *manga* functions as a medium.[163] In an extended discussion of the medium itself, the court found *manga*'s use of sequential images and purposefully punctual text commandeers its viewer's imagination, causing the reader to engage as a participant within the depicted scene.[164] These unique characteristics operate to heighten stimulation, and engage the reader's imagination in a manner that differs from traditional art or still photography.[165] Thus, in the case of erotic *manga*, the very form of the medium operates to heighten sexual stimulation, and makes it more prone to being considered obscene.[166]

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[158] CATHER, *supra* note 142, at 268 (citing Kishi Motonori v. Japan, Tōkyō Kōtō Saibansho [Tōkyō High Ct.] June 16, 2005, no. 458 (Japan)).

[159] *Id.*

[160] Cybercrime Convention, *supra* note 157, art. 9 para. 2(c).

[161] CATHER, *supra* note 142, at 270 ("[T]he aims of the treaty were not only to prevent *real* harm to *real* children . . . but also to prevent *potential* harm done to *real* children by readers and viewers who consume sexualized images, whether based on real or simulated children.").

[162] *Id.*; Galbraith, *supra* note 143, at 135. Prior to the decision, obscenity in Japan was not conventionally viewed as including materials that may potentially induce future bad acts, but rather focused solely on those works that satisfied the three-part *Koyama* definition in and of themselves. *See* Alexander, *supra* note 134, at 155, n.26 (discussing the conventional Japanese standard for obscenity as "inducing a disregard for morality" and "sense of shame" within the individual).

[163] CATHER, *supra* note 142, at 254, 261–62; Galbraith, *supra* note 143, at 136–39.

[164] CATHER, *supra* note 142, at 254, 261–62; Galbraith, *supra* note 143, at 136–39.

[165] CATHER, *supra* note 142, at 254, 261–62; Galbraith, *supra* note 143, at 136–39.

[166] CATHER, *supra* note 142, at 254, 261–62; Galbraith, *supra* note 143, at 136–39.

III. JAPAN'S INTERNATIONAL LAW OBLIGATIONS RELATING TO VIRTUAL CHILD PORNOGRAPHY

Having provided background on *manga* and Japan's checkered attempts to regulate the medium, the following section provides a legal framework for the analysis of the 2014 Amendment within the context of Japan's international obligations. The section begins by outlining the pertinent treaties Japan has ratified that relate to the regulation of virtual child pornography and their internal applicability in Japan under domestic law. Next, this section explicates key provisions within each treaty, and statements by relevant policymakers regarding their applicability to virtual child pornography content.

A. Ratification of Pertinent International Treaties

1. Pertinent Treaties Ratified

In November 1989, the General Assembly of the United Nations adopted the U.N. Convention on the Rights of the Child (Children's Convention);[167] the most influential international instrument relating to children's rights and protection.[168] The Children's Convention establishes a baseline international standard governing social, civil, and political rights of the child,[169] and is the most widely accepted international human rights agreement.[170] In April 1994, Japan ratified the Children's Convention and committed to take measures to harmonize its national laws and policy with the provisions of the treaty.[171]

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[167] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter *Children's Convention*], *available at* http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf. This treaty, which entered into force on September 2, 1990, has 194 parties, including two nonmembers of the United Nations, the Holy See and the State of Palestine. *See* U.N. Treaty Collection, *Convention on the Rights of the Child*, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv=11&chapter=4&lang=en. The only nonparty states are the United States and Somalia, both of which have signed the treaty but have not deposited instruments of ratification, along with the United Nations' newest member state, South Sudan. *Id.* Japan ratified the Children's Convention on Apr. 22, 1994, without attaching any reservations or declarations relevant to the question under review. *Id.*

[168] IAN O'DONNELL & CLAIRE MILNER, CHILD PORNOGRAPHY: CRIME, COMPUTERS, AND SOCIETY 22 (2007); TREVOR BUCK ET AL., INTERNATIONAL CHILD LAW 269 (2d ed. 2011).

[169] BUCK ET AL., *supra* note 168, at 269.

[170] O'DONNELL & MILNER, *supra* note 168, at 22.

[171] MINISTRY OF FOREIGN AFFAIRS JAPAN, GENERAL MEASURES FOR IMPLEMENTING PROVISION OF THE CONVENTION ON THE RIGHTS OF THE CHILD, http://www.mofa.go.jp/policy/human/child/report2/general.html.

Shortly after drafting the Children's Convention, the need for a more definitive statement regarding the protection of children from sexual exploitation became of great concern.[172] This led the U.N. Commission on Human Rights to appoint the first Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography.[173] As part of his or her mandate, the Special Rapporteur is expected to "investigate the exploitation of children around the world and to submit reports to the General Assembly and the Commission on Human Rights, making recommendations for the protection of the rights of the children concerned."[174] Vitit Muntarbhorn, the first Special Rapporteur, concerned with whether the Children's Convention sufficiently covered all forms of sexual exploitation, encouraged the wording of the treaty to be developed.[175]

Rather than redraft the Convention, the Special Rapporteur's concerns were used as evidence for the need of a new instrument.[176] As a result, in May 2000, the U.N. General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (Child Pornography Protocol).[177] The Child Pornography Protocol has not garnered the same near-universal support as the Children's Convention; however, 158 countries have ratified

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[172] BUCK ET AL., *supra* note 168, at 272; ALISDAIR A. GILLESPIE, CHILD PORNOGRAPHY: LAW AND POLICY 290 (2011).

[173] BUCK ET AL., *supra* note 168, at 272.

[174] U.N. Comm. on Hum. Rts., *Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Background to the Mandate*, http://www.ohchr.org/EN/Issues/Children/Pages/Children Index.aspx. See U.N. Comm. on Human Rights, Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, U.N. Doc. E/CN34/RES/1990/68 (Mar. 7, 1990), for the text of the resolution that first established the office of the Special Rapporteur. *See also* GILLESPIE, *supra* note 172, at 290; BUCK ET AL., *supra* note 168, at 272.

[175] BUCK ET AL., *supra* note 168, at 272; GILLESPIE, *supra* note 172, at 290.

[176] BUCK ET AL., *supra* note 168, at 272; GILLESPIE, *supra* note 172, at 290.

[177] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, 2171 U.N.T.S. 247 [hereinafter *Child Pornography Protocol*], *available at* http://www.ohchr.org/Documents/ProfessionalInterest/crc-sale.pdf. This treaty, which entered into force on Jan. 18, 2002, has 171 parties, among them the United States, a nonparty to the *Children's Convention*, *supra* note 167, as well as one nonmember of the United Nations, the Holy See. *See* U.N. Treaty Collection, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/iv-11-c.en.pdf. Japan ratified this 2000 Child Pornography Protocol on Jan. 24, 2005, without attaching any reservations to the instrument of ratification. *Id.*

it.[178] Japan ratified the Child Pornography Protocol in January 2005, and committed to take measures to implement its provisions.[179]

2. Internal Applicability of Treaties Japan Has Ratified

As a general rule, Japan considers treaties approved by the Diet as having the same force and effect as domestic law.[180] Additionally, Japanese law requires such treaties to be interpreted as superior to inconsistent domestic law;[181] that is, they rank above the statutes enacted by the Diet and may be considered among the supreme laws of the nation.[182] Therefore, assuming the Children's Convention, the Child Pornography Protocol, and the Cybercrime Convention require states parties to regulate virtual child pornography, the 2014 Amendment—allowing for the possession of graphic materials such as *Lolicon*—would be inconsistent with Japan's obligations as a state party to each of these agreements. In other words, assuming these treaties require the regulation of virtual child pornography, Japanese courts would be required to overrule the 2014 Amendment as inconsistent with superior domestic law.[183]

Unfortunately, in practice, Japanese law is not so straightforward. Japanese courts have created various exceptions to this default rule.[184] These exceptions allow courts to distinguish any inconsistencies between Japanese domestic law from the international obligations established in treaties of which Japan is a state party. First, Japanese courts often distinguish treaties that require their terms to take immediate effect, also known as self-executing treaties, from those that may be classified as "merely directional"—that is, from treaties that allow for their provisions to take effect over time.[185] This exception is often thought of as an "escape valve," allowing Japanese courts to avoid construing the terms of a treaty as taking domestic effect while simultaneously paying lip service to the general rule.[186]

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[178] BUCK ET AL., *supra* note 168, at 273.
[179] MINISTRY OF FOREIGN AFFAIRS JAPAN, WORLD CONGRESS AGAINST SEXUAL EXPLOITATION OF CHILDREN AND ADOLESCENTS, *available at* http://www.mofa.go.jp/policy/human/child/congress0811-t.pdf.
[180] GOODMAN, *supra* note 131, at 246 (citing YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS AND JAPANESE LAW 28 (1998)).
[181] *Id.* at 248.
[182] HATA & NAKAGAWA, *supra* note 118, at 31.
[183] GOODMAN, *supra* note 131, at 248.
[184] *Id.* at 246–51.
[185] *Id.* at 248.
[186] *Id.*

Second, Japanese courts may construe domestic statutes as overriding the provisions of a treaty if the government asserts that the treaty is "progressive" in character.[187] This "progressive" exception bears resemblance to U.S. doctrines of administrative deference: the issue of whether a treaty takes precedence over domestic law never comes to fruition due to the government's interpretation of the text.[188]

Finally, Japanese courts often reserve the right to disregard provisions of a treaty if they deem the challenged domestic law or statute "reasonable."[189] This exception is most often applied within the constitutional context. In such instances, the court disregards the treaty and considers matters of relief purely in terms of constitutional law or legislative discretion.[190]

B. Convention on the Rights of the Child and Relevant Optional Protocol

The Children's Convention is a comprehensive human rights treaty; that is, its provisions establish international standards that not only cover child pornography, but also children's rights in the social, political, economic, health, and cultural arenas as well.[191] Similarly, the Optional Protocol establishes international law standards for child prostitution and child trafficking in addition to standards regulating child pornography.[192] This section outlines the key provisions in both the Children's Convention and Optional Protocol that relate to the subject of virtual child pornography. Additionally, this section provides key statements by pertinent personnel regarding the interpretation of the relevant provisions of each agreement.

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[187] *Id.* at 249. An example of the progressive interpretation exception in action is in the context of Japan's Equal Employment & Opportunity Law adopted to conform to Japan's obligations under the Convention on the Elimination of Discrimination Against Women. The Japanese government affirmatively characterized the treaty as progressive and subsequently enacted legislation that merely called for employers to "endeavor" to create equal employment rather than punishing employers for violating the Act. As such, Japanese courts did not find the treaty directly applicable to domestic law. *See* YOSHIE KOBAYASHI, A PATH TOWARD GENDER EQUALITY: STATE FEMINISM IN JAPAN 100–16 (Edward Beauchamp ed., 2004); M. Diana Helweg, *Japan's Equal Employment Opportunity Act: A Five-Year Look at Its Effectiveness*, 9 B.U. INT'L L.J. 293 (1991); *but see* JENNIFER CHAN-TIBERGHIEN, GENDER AND HUMAN RIGHTS POLITICS IN JAPAN: GLOBAL NORMS AND DOMESTIC NETWORKS 99–103 (2004) (noting domestic courts have ruled Japan bound by obligations stemming from international treaties against discrimination).

[188] GOODMAN, *supra* note 131, at 249.

[189] *Id.*

[190] *Id.* at 249–51.

[191] BUCK ET AL., *supra* note 168, at 273.

[192] *Id.* at 272.

1. Key Provisions

a. 1989 Convention on the Rights of the Child

States parties to the Children's Convention are bound to its provisions under international law. Under Article 1, the treaty defines a child as "every human being below the age of eighteen years," unless the age of majority is attained earlier under a state's domestic laws.[193] Article 34 of the Children's Convention specifically relates to the subject of child pornography, providing:

> States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent: . . .
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> . . . .
>
> (c) The exploitative use of children in pornographic performances and materials.[194]

At first glance, the text of the article appears rather straightforward: it clearly obligates countries to take comprehensive measures against the sexual abuse and sexual exploitation of children.[195] The terms "sexual abuse" and "sexual exploitation," however, are not defined in the text of the Convention. Nevertheless, the prevailing view is that although sexual exploitation can involve abuse, exploitation is distinguishable because it conveys a commercial connotation.[196]

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[193] *Children's Convention*, *supra* note 167, art. 1.

[194] *Id.* art. 34.

[195] BUCK ET AL., *supra* note 168, at 273.

[196] GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 275 (1998). This view is confirmed by the legislative history of Article 34, in which the delegations to Japan and the United States clarified and differentiated the meaning of the terms "sexual abuse" and "sexual exploitation." *See* UN Comm. on Hum. Rts., 2 *Legislative History of the Convention on the Rights of the Child* 720 (2007), *available at* http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf. This definition was subsequently endorsed in 1996 at the First World Congress against Commercial Sexual Exploitation of Children held in Stockholm, which produced the Stockholm Declaration and Agenda for Action against Commercial Sexual Exploitation of Children. *See* VITIT MUNTARBHORN, ARTICLE 34: SEXUAL EXPLOITATION AND SEXUAL ABUSE OF CHILDREN 1 (2007). The Stockholm Declaration has been ratified by over 120 countries, including Japan, and defines "commercial sexual exploitation of children" as comprising of "sexual abuse by the adult and remuneration in cash or in kind to the child or a third person." *Id.* at 1–2.

Further, the article does not provide a precise definition of child pornography, and therefore complicates any effort to establish its applicability to virtual child pornography. Article 34(c) refers to the exploitative use "of children" in pornographic performances and materials.[197] By phrasing the definition in terms "of children," the article may be interpreted to require the presence of an identifiable child,[198] however comments made by the Special Rapporteur contradict this view.[199]

Despite its vague wording, Article 34 may be interpreted to apply to virtual child pornography. The article obligates states parties to protect children from "all forms" of sexual exploitation.[200] Sexual exploitation is not limited to the exploitative use of children in pornographic performances and materials, but is also interlinked to other practices associated with the medium.[201] Thus, the harmful effects of child pornography extend not only to children abused in its production, but also to child pornography's use as a tool of seduction and blackmail—a tool that may effectuate physical abuse of actual, identifiable children.[202] This process, known as "grooming," entails exposing a potential victim to images of children engaged in sexual acts in an effort to normalize sexual imagery, desensitize the victim, and lower his or her inhibitions.[203] The wide availability of *Lolicon*[204] enhances its potential for abuse in grooming processes.[205] Viewed through this prism, Article 34 may be applied to the use of virtual pornographic images, such as *Lolicon*, as a form of sexual exploitation used in the grooming process.[206]

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[197] *Children's Convention*, *supra* note 167, art. 34(c).

[198] GILLESPIE, *supra* note 172, at 100–02 (writing that the existence of an identifiable child may place material outside the scope of virtual child pornography and instead in the realm of traditional child pornography).

[199] *See* Key Statements by U.N. Committee on the Rights of the Child, *infra* Part III.*B*.*2*.

[200] *Children's Convention*, *supra* note 167, art. 34.

[201] VAN BUEREN, *supra* note 196, at 275.

[202] O'DONNELL & MILNER, *supra* note 168, at 69, 74.

[203] *Id.* at 73–74. For a comprehensive definition of "grooming," and its legal dimensions see GILLESPIE, *supra* note 172, at 108.

[204] Fackler, *supra* note 5, at A6.

[205] GILLESPIE, *supra* note 172, at 100–03, 286–87.

[206] *Id.* at 290 (writing that an optimistic approach to the article has allowed for Article 34(c) to be used as a platform upon which developments on tackling sexual exploitation has been built).

b. 2000 Child Pornography Protocol

In contrast with the Children's Convention,[207] the Child Pornography Protocol "clearly defines child pornography."[208] To be precise, under Article 2(c), child pornography means "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes."[209] That the definition is intended to encompass virtual child pornography is evident in its references to "any representation, by whatever means," to "simulated explicit sexual activities," and to "any representation of the sexual parts of the child."[210]

Furthermore, the Child Pornography Protocol may be differentiated from the broad structure of the Children's Convention in that it mandates states parties to ensure that at minimum, certain acts and activities are fully covered under domestic criminal or penal law.[211] Moreover, the protocol requires the criminalization of "[p]roducing, distributing, disseminating, importing, exporting, offering, selling or possessing . . . child pornography as defined in article 2."[212] As such, if virtual child pornography is found to fall within the definition of child pornography as outlined in Article 2, Japan, as a state party to the agreement, is obligated to ensure measures are taken to regulate such content.

2. Key Statements by U.N. Committee on the Rights of the Child

The U.N. Committee on the Rights of the Child (Committee), a body of eighteen independent experts in the field of human rights, monitors compliance and implementation of the Children's Convention and the Child Pornography Protocol by states parties.[213] Under Article 44 of the Children's Convention, states parties are required to report to the Committee periodically to provide information regarding the implementation of the treaties and progress made with respect to child rights in their country.[214]

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[207] *See Children's Convention*, *supra* note 167, art. 34(c).
[208] BUCK ET AL., *supra* note 168, at 273.
[209] *Child Pornography Protocol*, *supra* note 177, art. 2.
[210] BUCK ET AL., *supra* note 168, at 276 (arguing the protocol's definition of child pornography is considerably wide, and "would include all forms of representation, including text, drawings and photographs").
[211] *Id.* at 274.
[212] *Child Pornography Protocol*, *supra* note 177, art. 3(1)(c).
[213] BUCK ET AL., *supra* note 168, at 92–93.
[214] *Children's Convention*, *supra* note 167, art. 44.

Additionally, the Special Rapporteur makes recommendations to the Committee regarding the protection of children's rights under both international instruments.[215] As policy-level initiatives of the U.N., statements made by the Committee and the Special Rapporteur are persuasive authority for determining the scope of both the 1989 Children's Convention and the 2000 Child Pornography Protocol.

For example, in response to a potential gap within the wording of Article 3(c) of the Child Pornography Protocol—which suggests possession of child pornography with the intention of disseminating the images is criminalized, but simple possession is not—Juan Miguel Petit, the third Special Rapporteur who served in the position from 2001 until 2008, recommended that simple possession be criminalized so as to tackle the "participant chain" in the production and dissemination of child pornography.[216] Najat M'jid Maalla, the Special Rapporteur from 2008 to 2014, has subsequently reinforced this recommendation and has further argued that criminal liability should also be extended to those who knowingly access such material online.[217] Moreover, the Committee has attempted to cement this view by stating in national reports that the Child Pornography Protocol applies not only to the commercial exploitation of children, but to the simple possession of such images as well.[218]

Additionally, in a 2004 report to the U.N. Commission on Human Rights focusing on child pornography and the internet, then Special Rapporteur Petit argued child pornography "includes not only the use of real children but also artificially created imagery."[219] Petit acknowledged that although virtual child pornography does not involve the direct abuse of a child, "its power to 'normalize' images of sexual abuse and incite sexual exploitation of

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[215] BUCK ET AL., *supra* note 168, at 273.

[216] Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Rights of the Child*, U.N. Comm. on Hum. Rts., U.N. Doc. E/CN.4/2005/78 (Dec. 23, 2004) (by Juan Miguel Petit), *available at* http://www.refworld.org/docid/42d66e480.html.

[217] Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights*, U.N. Comm. on Hum. Rhts., U.N. Doc. A/HRC/12/23 (July 13, 2009) (by Najat M'jid Maalla), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.23.pdf.

[218] Ugo Cedrangolo, *The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the jurisprudence of the Committee on the Rights of the Child* 9-10 (UNICEF Innocenti Research Centre, Working Paper No. 2009-003, 2009), *available at* http://www.unicef-irc.org/publications/pdf/iwp_2009_03.pdf.

[219] Petit, *supra* note 216, at 8.

children" must be addressed.[220] Maalla subsequently endorsed this view, arguing for the criminalization of virtual child pornography in a 2009 report to the U.N. Human Rights Council.[221]

IV. IMPROVING JAPANESE COMPLIANCE WITH ITS INTERNATIONAL LEGAL OBLIGATIONS

A. Japan's Legislative Framework Falls Short of Complying with its International Obligations

Japan's status as a state party to the pertinent international agreements obligates it to outlaw the possession of virtual child pornography such as *Lolicon*. Accordingly, this section first argues the 2014 Amendment permitting the possession of virtual child pornography violates the legal obligations Japan assumed by ratifying the pertinent treaties. Next, a recommendation for correcting Japan's legislative framework is provided that suggests adopting a clear ban on virtual child pornography by following model legislation from Canada and Australia.

1. The 2014 Amendment Permits Virtual Child Pornography, Thereby Violating International Legal Obligations Japan Assumed by Ratifying Pertinent Treaties

a. Treaties Ban Virtual Child Pornography

Although neither the Children's Convention nor the Child Pornography Protocol explicitly outlaw virtual child pornography, the text of both agreements establishes their applicability to the fictionalized graphic images that typify the *Lolicon* subgenre. First, Article 34(c) of the Children's Convention obligates states parties to take all appropriate measures to protect children from all forms of sexual exploitation and sexual abuse.[222] The potential use of virtual child pornography as an integral component of grooming processes clearly establishes its role as a form of sexual exploitation. The comments of the first Special Rapporteur, Vitit Muntarbhorn, that the thrust of Article 34 is that the provision should apply to both traditional and modern forms of child pornography, further confirms

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[220] *Id.*
[221] Maalla, *supra* note 217, at 23.
[222] *Children's Convention*, *supra* note 167, art. 34(c).

this interpretation.[223] As a result, Japan, as a state party to the Convention, is obligated under international law to regulate *Lolicon*.

Similarly, the text of Article 2(c) of the Child Pornography Protocol clearly denotes that *Lolicon* falls within its definition of child pornography. *Lolicon manga* convey images that not only "simulate[ ] explicit sexual activities," but also display "representation[s] of the sexual parts of [the] child."[224] Najat M'jid Maalla, the previous Special Rapporteur, has not only endorsed this interpretation, but also called for the criminalization of virtual child pornography under Article 3 of the agreement.[225] Thus, Japan, as a state party to the Child Pornography Protocol is obligated to criminalize the production, dissemination, and possession of works such as *Lolicon.*

Japanese law considers treaties approved by the Diet as having the force and effect of domestic law, and further requires the terms of approved treaties to be interpreted as superior to inconsistent domestic law.[226] Since the Diet has approved the ratification of both the Children's Convention and the Child Pornography Protocol, this would require the terms of both treaties to be treated as superior to any inconsistent law to the contrary. The 2014 Amendment to the 1999 Child Pornography Statute falls within this category; that is, its terms are clearly inconsistent with Japan's international obligation to ban virtual child pornography. Although virtual child pornography is not explicitly exempted under the terms of the amendment, Article 3 unambiguously demonstrates the statute does not apply to *manga* such as *Lolicon*. In particular, by providing that "cultural and artistic activities" are not subject to criminalization under the law, the 2014 Amendment conflicts with Japan's international obligations to ban "any representation, by whatever means," content that simulates the sexual explicit activities of a child.[227] As such, Japanese domestic law requires the 2014 Amendment to be either repealed or construed as void.

Furthermore, the exceptions to the default rule, which allow for Japanese courts to avoid striking down domestic statutes on the basis of international obligations, are defeated by the specificity of the Child Pornography Protocol. The "escape valve" exception allows a Japanese court to pay lip service to the general rule while simultaneously construing the terms of the treaty as directional; that is, not obligating their immediate effect upon the

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223 MUNTARBHORN, *supra* note 196, at 4.
224 *Child Pornography Protocol*, *supra* note 177, art. 2(c).
225 Maalla, *supra* note 217, at 23.
226 GOODMAN, *supra* note 131, at 248.
227 2014 Amendment, *supra* note 9, art. 3.

domestic laws of the ratifying state party.[228] The provisions of the protocol, however, do not call for its requirements to take effect over time. Rather, Article 14 specifically states that the instrument enters into force exactly "one month after the date of the deposit of [the State's] own instrument of ratification."[229] Although the protocol does allow for a one-month grace period, its provisions indicate that its requirements and obligations are to take immediate effect after the agreement has come into force. Since the provisions of the agreement cannot be construed as "merely directional," this exception would seem to be inapplicable.

Similarly, any attempt to interpret the protocol as "progressive" and therefore lacking immediate domestic effect would fall wide of the mark. For this second exception to apply, the Japanese government must characterize its position regarding the Child Pornography Protocol as "progressive."[230] The Japanese government has taken no such steps regarding the agreement. To the contrary, representatives of the Ministry of Foreign Affairs repeatedly have indicated the Japanese government's desire to conform to the obligations set forth in both the Children's Convention and the Child Pornography Protocol through the enactment of legislation aimed at the elimination of child pornography.[231] Such efforts cannot be characterized as "progressive," and therefore render the "progressive" exception inapplicable.

Finally, the "reasonable" exception—by which the court finds the inconsistent domestic law "reasonable" despite the provisions of the approved treaty—is similarly inapplicable. Several arguments may be advanced in support of this view: first, under Article 1 of Japan's 1999 Child Pornography Statute, the aim of the law is "to protect the rights of children by punishing activities relating to child prostitution and child pornography . . . and tak[e] into account international trends in the rights of children."[232] Considering that the emerging international trend regarding virtual child pornography is that such content falls within the definition of child pornography and therefore must be criminalized, the exception for

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228 GOODMAN, *supra* note 131, at 248.

229 *Child Pornography Protocol*, *supra* note 177, art. 14.

230 GOODMAN, *supra* note 131, at 249.

231 *See, e.g.*, *Statement by Dr. Atsuko Heshiki Alternate Representative of Japan on Item 65: Promotion and protection of the rights of children*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/announce/speech/un2011/un_1013.html; *Statement of Ms. Yaeko Sumi Alternate Representative of Japan on Item 65(a), (b) Protection and Promotion of the Rights of Children*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, http://www.mofa.go.jp/announce/speech/un2012/un_121018_en.html.

232 *1999 Child Pornography Statute*, *supra* note 6, art. 1.

graphic materials found in the 2014 Amendment appears to frustrate the stated purpose of the act itself. Second, insofar as the 2014 Amendment may be viewed as tolerant of a culture that accepts child sexual abuse, it cannot be deemed reasonable. Finally, given that sexual predators may groom victims by use of content such as *Lolicon*, it is manifestly more reasonable to criminalize the possession and distribution of such materials.

b. Free-Expression Guarantees Do Not Mandate Tolerance of This Extremely Harmful Medium

Virtual child pornography such as *Lolicon* stems primarily from a person's imagination; it consists solely of visual representations, the production of which does not involve harm to an identifiable child. *Manga* advocates thus frame any legislative action aimed at regulating or banning *Lolicon* as an infringement on the right to freedom of expression as protected by Article 21 of the Japanese Constitution.[233] Justifying the possession of virtual child pornography on the basis that it is a protected intellectual right of the Japanese Constitution, however, is subject to scrutiny under the public welfare doctrine in Articles 12 and 13 of the Japanese Constitution.[234] Thus, any analysis of the 2014 Amendment's protection for "cultural and artistic activities," such as *manga*,[235] must weigh the statute's effect on the greater societal good.[236] Since this protection effectively exempts harmful *manga* works from regulation, the 2014 Amendment cannot reasonably be said to have a positive net effect on Japanese society; and thus, must be subject to limitation under the public welfare doctrine.

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[233] *See* KINSELLA, *supra* note 10, at 154 (noting the Society's opposition to regulation and censorship centered around substantive rights-based themes such as freedom of expression).

[234] ITOH & BEER, *supra* note 127, at 175.

[235] 2014 Amendment, *supra* note 9, art. 3.

[236] Admittedly, construing a domestic law that is seemingly inconsistent with an international treaty as subject to the public welfare doctrine seems to turn the analysis on its face. That is, even when treaties are deemed superior to domestic law, it is usually the terms of the treaty that are subject to the public welfare limitation. *See, e.g.*, Kayano v. Hokkaido Expropriation Committee, 38 I.L.M. 394 (1997) (concluding the Hokkaido Expropriation Committee failed to properly take account of rights granted by the International Covenant on Civil and Political Rights while simultaneously finding the rights and obligations of the treaty to be subject to the public welfare). Nevertheless, it is reasonable to conclude that a domestic statute, such as the 2014 Amendment, would be subject to the public welfare doctrine; given that group-oriented social values and behavior patterns inform Japanese law, and since Japanese courts have previously subjected cases involving civil liberties to such a standard. *See* Beer, *supra* note 124, at 224–30.

The emerging international trend regarding virtual child pornography is that such harmful content is not only subject to regulation under the pertinent international conventions, but also that it engenders a culture accepting of the sexual exploitation of children.[237] It is unimaginable that a Japanese court would find the fostering of such a culture not subject to the limitations of the public welfare doctrine; and yet, the 2014 Amendment's protection for *Lolicon* is almost certainly to be viewed as a continuation of domestic policy that has earned Japan the dubious honor of being labeled as an international hub of child pornography.[238]

In 2012, the Japanese National Police Agency reported a record-high of 1,597 child pornography investigations, involving 1,264 child victims—an increase of 9.7% in cases and 98% in victims as compared with 2011.[239] Although there is no firmly established link between virtual child pornography and child victimization, experts have suggested that children are harmed by a culture that appears to accept child sexual abuse.[240] The degree to which this culture exists within contemporary Japan has been subject to considerable debate. However, the presence of this debate, and the force with which opponents of *Lolicon* decry its degradation on the public welfare, ought to limit the degree to which a court may find the allowance of the possession of such materials reasonable.

Similarly, sustaining the 2014 Amendment's exception for virtual child pornography is likely to greatly expand production of *manga* within this particular market. Until the 2014 Amendment, rather than facing the risk of potential criminal liability, many took advantage of the loophole the 1999 Statute created that allowed for the simple possession of child pornography, and effectively turned Japan into an international hub and safe-haven for the possession of such materials.[241] There is no reason to think the exception for virtual child pornography will operate in another manner. Moreover, this effect—of increasing the proliferation of virtual child pornography—would frustrate the stated aims of the statute. Under Article 1 of the 1999 Statute, the aim of the legislation is "to protect the rights of children by punishing

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[237] *See, e.g.*, Petit, *supra* note 216, at 9 (noting certain types virtual child pornography may be used to encourage the formation of a "subculture favouring child abuse"); O'DONNELL & MILNER, *supra* note 168, at 74 (noting "regular consumption of child pornography numbs an individual to the harm caused to a child and encourages a view of children as legitimate sexual objects"); GILLESPIE, *supra* note 172, at 287 (outlining the global policy initiatives that single child pornography out as an "issue that require[s] special treatment").

[238] JAPAN 2013 HUMAN RIGHTS REPORT, *supra* note 63, at 19–20.

[239] *Id.*

[240] *Id.*

[241] *Id.*

activities relating to child prostitution and child pornography . . . and tak[e] into account international trends in the rights of children."[242] Since sustaining the exception would contradict global norms by further incentivizing the production of virtual child pornography, it would be unreasonable for a Japanese court to deem the 2014 Amendment's protection for *Lolicon* and related materials as beneficial to the greater societal good.

Finally, since virtual child pornography may be used by sexual predators to "groom" their victims, it would be of net benefit to the public welfare to criminalize the possession and distribution of such materials. Even assuming the claim that *Lolicon* and related virtual child pornography do not engender a culture accepting of child sexual abuse, the use of virtual child pornography in grooming processes is an unfortunate and stark reality.[243] Since such behavior is undeniably at odds with the public welfare, it would seem to be far more reasonable to limit expression in this area and ban the possession of virtual child pornography such as *Lolicon.*

2. Japan's Diet Should Consider Adopting a Clear Ban on Virtual Child Pornography

Freedom of expression is a fundamental component of any democratic society, and any law seeking to limit its reach should not be taken lightly. It is possible that a Japanese court, in light of the protections guaranteed under Article 21, would find the 2014 Amendment's protection for graphic materials sufficiently reasonable to avoid the countermands of the pertinent international agreements to which Japan is a party. Nevertheless, it is equally plausible to conclude that the majority of individuals would find the images depicted in *Lolicon* appalling. Moreover, such a reaction cannot be simply brushed aside under the rather predictable criticism that Eastern art forms should not be subjected to Western notions of morality. To the contrary, the prevalence of sexual and violent themes in *manga* has been the subject of debate in Japan for many years.[244] Thus, the question remains as to how persons in favor of limiting the reach of virtual child pornography are to proceed.

The most straightforward approach would be for the Diet to overturn the 2014 Amendment's exception for such harmful content, and adopt a clear ban on virtual child pornography. Such legislative action would doubtless be difficult to achieve. The publishing and entertainment industries possess

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[242] *1999 Child Pornography Statute*, *supra* note 6, art. 1.
[243] *See* GILLESPIE, *supra* note 172, at 108.
[244] *See* Chan, *supra* note 98.

powerful lobbies in Japan; indeed, it was they who pressed legislators to grant the protection for *manga* in the first place.[245] Nevertheless, because legislation is often regarded as superior to unilateral judicial action due to it being a more reliable expression of political will, it must be addressed as a potential avenue forward for limiting the breadth of *Lolicon.* Accordingly, this section recommends two examples of model legislation that outlaw the possession of virtual child pornography: Australia and Canada. Both countries not only prohibit the possession of virtual child pornography, but also have addressed the possession of *manga* in relation to such laws.

a. Australian Model Legislation

Australian legislation relating to child pornography is informed by a zero-tolerance policy that makes no concession to the right to freedom of speech or the right to privacy; and includes works displaying purely fictional children as well as those including the presence of an identifiable child.[246] Broadly speaking,[247] in the Australian system, the national government is limited in its ability to enact criminal laws, and therefore primary responsibility for criminal law is given to the states and territories.[248] Nevertheless, the Criminal Code defines child pornography as follows:

> [M]aterial that depicts or describes a person (or representation of a person) who is under 18 years old (or who appears to be under 18), either engaged in (or appearing to be engaged in) a sexual pose or sexual activity or in the presence of a person who is engaged in (or appears to be engaged in) a sexual pose or sexual activity.[249]

Additionally, all Australian states and territories have enacted laws prohibiting the creation, possession, and distribution of child pornography.[250] Although most jurisdictions have adopted the national definition, some

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[245] Fackler, *supra* note 5, at A6.
[246] McLelland, *supra* note 18, at 8.
[247] As a comprehensive analysis of Australian law is beyond the scope of this Note, Australian law will be addressed in a more general fashion. For further discussion of Australian law as it relates to child pornography, see generally Thomas Crofts & Murray Lee, *'Sexting', Children and Child Pornography*, 35 SYDNEY L. REV. 85 (2013).
[248] Crofts & Lee, *supra* note 247, at 87 n.9 (noting the Australian Constitution does not specifically enumerate this legislative power).
[249] *Id.* at 89 (citing *Criminal Code Act* 1995 (Cth) sch 1 s 473.1 (Austl.)).
[250] *Id.* at 90.

jurisdictions use definitions with various differences.[251] However, all jurisdictions include in their definitions of child pornography language that allows for the inclusion of fictionalized representations of children.[252]

By including representations of children within the definition of child pornography, Australia has outlawed the possession of works that only include fictionalized characters, such as *Lolicon*. This standpoint was confirmed in 2008, when the New South Wales Supreme Court upheld the conviction of a defendant who had been in possession of a pornographic cartoon that depicted characters modeled after members of the television animated series *The Simpsons*.[253] The fictional characters involved, Bart and Lisa, are widely known to be of elementary school age, and were displayed as engaging in sexual acts.[254] The court reasoned that because "a fictional cartoon character, even one which departs from recognizable human forms in some significant respects, may nevertheless be [a] depiction of a person," possession of the cartoon may "fuel demand for material that does involve the abuse of children."[255] Since the New South Wales definition of child pornography essentially adopts the terminology and definitions of the National Criminal Code,[256] the 2008 decision demonstrates the breadth and scope of the law.

b. Canadian Model Legislation

Unlike Australia, the Canadian government operates under a parliamentary system similar to the United Kingdom. As such, child pornography is defined under a national criminal code that applies with equal force throughout the country. The definition for child pornography is set out in section 163.1(1) of the national criminal code as follows:

In this section, "child pornography" means

> (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
>
> (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or

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[251] *Id.*
[252] McLelland, *supra* note 18, at 64 n.30.
[253] *McEwen v Simmons* [2008] NSWSCR 1292 (Austl.).
[254] *Id.*
[255] *Id.* ¶¶ 26, 40.
[256] Crofts & Lee, *supra* note 247, at 90.

> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or
>
> (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.[257]

The definition's breadth allows its application to visual representations of both identifiable and fictional children. Any doubt as to its application to fictionalized versions of persons was eliminated by a 2001 decision of the Supreme Court of Canada.[258] In *Sharpe*, Canadian customs officials detained the defendant after he attempted to bring into the country a collection of stories and photographs that depicted nude teenage boys engaged in sexual acts with one another.[259] The defendant was subsequently arrested, charged, and convicted of violating section 163.1 of the Criminal Code.[260] The defendant appealed, and argued that the law violated freedom of expression. The court rejected the defendant's argument, and held that a "person" under the law included "both actual and imaginary human beings."[261]

Of additional relevance is a 2005 decision in which the Alberta Provincial Court found a defendant guilty of importing erotic Japanese *manga* into the country.[262] The provincial court, in the first known application of the law in relation to *manga*, rejected the defendant's assertion that he was ignorant of the law and sentenced him to a twelve-month term of imprisonment followed by an eighteen-month probation term where he was barred from using the internet.[263]

Critics of the Australian and Canadian definitions of child pornography argue that the negative effect of such legislation is that it potentially criminalizes adolescent sexual experimentation.[264] Nonetheless, both countries not only utilize a definition of child pornography that is sufficiently

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[257] Bruce Ryder, *The Harms of Child Pornography Law*, 36 U.B.C. L. REV. 101, 104 (2003) (citing Criminal Code, R.S.C. 1985, c. C-46, s. 163.1 (Can.)).

[258] *R. v. Sharpe*, [2001] 1 S.C.R. 45 (Can.).

[259] *Id.* para. 3.

[260] *Id.*

[261] *Id.* para. 38.

[262] *R. v. Chin*, [2005] CarswellAlta 2692 (Can.).

[263] *Id.* paras. 21, 27.

[264] *See generally* Ryder, *supra* note 257 (arguing that despite achieving its laudable goal of preventing child sexual abuse, the breadth of Canadian child pornography legislation ultimately harms society by suppressing harmless thought and expression); McLelland, *supra* note 18 (arguing the overinclusive nature of Australia's child pornography legislation harms the very people it was meant to protect).

broad to include fictionalized virtual representations of children, but have also crafted such legislation to clearly convey to their respective courts the legislature's desire to criminalize such content as well. Thus, should the Diet choose to repeal the law as it currently stands, both jurisdictions provide a model for the Diet to follow. Furthermore, both jurisdictions provide solid evidence of the current international trend in this arena.

B. Even Absent Legislative Reform, Jurisprudence Points to a Ruling Banning Lolicon *As Obscene*

The considerable power of the publishing lobby in Japan will inevitably complicate any attempt to legislatively reform the 2014 Amendment's protection of virtual child pornography in *manga*. Furthermore, *Lolicon*'s normalized status in contemporary Japanese society, coupled with the fact that child sexual exploitation is a particularly delicate topic to investigate, likely renders the issue of virtual child pornography far from the top of the Diet's current agenda. Thus, the most practical approach to limiting the proliferation of virtual child pornography is to prosecute such material as obscene.

The *Misshitsu* Trial provides an excellent example of the practicality of this approach. First, in its 2007 opinion, the Supreme Court of Japan not only made note of the current international norms with respect to virtual child pornography, but also made use of those norms as evidence of its need to regulate such content in the modern age. Subsequent declarations of Japan's international legal obligations by the court would only serve to further draw the attention of the public—and thus, the attention of the Diet—to the problems associated with this harmful medium.

Second, the specificity of the court's holding is instructive for any future attempt to deem *Lolicon* obscene. The court interpreted the provisions of Article 175 of Japan's revised criminal code to encompass claims of obscenity against specific *Lolicon* comics, by singling out the particular comic at issue as a work that was uniquely prone to being considered obscene due to its "high level of reality and verisimilitude to other *manga*."[265] Thus, discretion must be exercised in specifically choosing those *manga* within the subgenre that warrant prosecution. In the wake of the court's 2008 decision, many retail bookstores voluntarily chose to drop certain *Lolicon* comics due to the controversy surrounding these *manga*. If proper prosecutorial discretion were exercised in the future, the practical

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[265] CATHER, *supra* note 142, at 257.

effect of an additional ruling would result in rendering the 2014 Amendment's protection for *Lolicon* practically obsolete.

V. CONCLUSION

Undoubtedly, the 2014 Amendment's protection for the possession and distribution of *Lolicon* is at odds with Japan's international obligations. The pertinent treaties in this arena obligate state parties to regulate the possession and distribution of virtual child pornography, and Japan's status as a party to these treaties establishes an obligation to overrule the 2014 Amendment as inconsistent with its international obligations. However, concerns over infringing upon the constitutional right to freedom of expression make judicially overturning the Amendment a difficult task. Moreover, the *manga* publishing industry's lobbying efforts similarly render the possibility of legislatively overturning the 2014 Amendment slim. In light of these realities, limiting the reach of virtual child pornography is best achieved through the successful prosecution of undeniably objectionable *Lolicon* comics as obscene. The judiciary has previously explored this avenue in the context of *manga*, and its successful application may result in rendering the law practically obsolete.