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Mitchell P. Goldstein

ARTICLES

CONGRESS AND THE COURTS BATTLE OVER THE FIRST AMENDMENT: CAN THE LAW REALLY PROTECT CHILDREN FROM PORNOGRAPHY ON THE INTERNET?

MITCHELL P. GOLDSTEIN†

I. THE FIRST AMENDMENT, PORNOGRAPHY AND THE INTERNET

The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.[1] Recognizing that the free flow of ideas is essential to a free society, regardless of their popularity or society's agreement with them, the Continental Congress adopted the First Amendment to the Constitution, which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[2] The Supreme Court strengthened this right by extending the prohibition to the states through the Fourteenth Amendment.[3] While essential, this right is not absolute.[4]

† Mitchell Goldstein is the Director of the Virginia General Assembly's Joint Commission on Technology and Science (JCOTS). He received his J.D., *cum laude*, from the T.C. Williams School of Law at the University of Richmond in 1996 and his B.A. in International Relations and Economics, *cum laude*, from Boston University in 1993. Mr. Goldstein advises and counsels members of JCOTS, the House Committee on Science and Technology and other standing committees on science and technology issues for legislation and policy development. He is also a member of the National Conference of State Legislatures' Communications, Technology and Interstate Commerce Committee.

1. *Ashcroft v. ACLU*, 535 U.S. 564, 612 (2002).

2. U.S. Const. amend. I.

3. U.S. Const. amend. XIV. It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment. *Hague v. CIO*, 307 U.S. 496, 519 (1939) (citations omitted).

Congress has long tried to regulate what we see, hear and say. Regulations based on the time, place or manner of speech – content-neutral regulations – only need some rational basis to survive constitutional scrutiny under the First Amendment. Any regulation based on the content of expression, whether intended or not, is subject to strict scrutiny. The Court will permit the regulation of the content of speech only so long as the regulation is narrowly tailored to further a compelling government interest, and there is no less restrictive alternative. The state may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.[5] Only regulations based on content protected by the First Amendment must meet this standard.

Technological innovations have complicated the issue, but the Supreme Court traditionally has given wide discretion to regulate speech on new media (e.g., the telephone, radio, television and cable). These media had two things in common: scarcity and direct government involvement. Congress' discretion extended to each new medium until the Internet, where scarcity was no longer an issue and direct government regulation was never a factor.

The Internet provides convenient access to a highly diverse library of educational resources, enables collaborative study, and provides opportunities for remote dialog with subject-matter experts.[6] Individuals can obtain access to the Internet from many different sources: most colleges and universities provide access for their students and faculty, many corporations provide their employees with access through an office network, many communities and local libraries provide free access, and an increasing number of "cybercafes" provide access for a small hourly fee. In addition, several Internet service providers offer access either directly to the Internet or through their own proprietary networks. Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods, electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. The Internet offers

4. *See Schenck v. U.S.*, 249 U.S. 47, 52 (1919) (quoting Justice Oliver Wendell Holmes, Jr., who wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic").

5. *Carlin Commun., Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988).

6. *See ACLU v. Reno*, 929 F. Supp. 824, 830–45 (E.D. Pa. 1996) (providing more thorough descriptions of the Internet and the Web); *Reno v. ACLU*, 521 U.S. 844, 897 (1997); *Am. Lib. Assn. v. U.S.*, 201 F. Supp. 2d. 401, 416 (2002).

an unprecedented number of individuals an opportunity to speak and be heard around the world at low cost.

An estimated 445 to 533 million people use the Internet worldwide, and approximately 149 million of those are American (about fifty-four percent of the population).[7] According to a recent report, children and teenagers use computers and the Internet more than any other age group.[8] Ninety percent of children between the ages of five and seventeen (or forty-eight million) now use computers. Seventy-five percent of fourteen to seventeen year olds and sixty-five percent of ten to thirteen year olds use the Internet. Family households with children under the age of eighteen are more likely to access the Internet (sixty-two percent) than family households with no children (fifty-three percent), and non-family households (thirty-five percent). According to the U.S. Census, two-thirds of U.S. school-age children had home access to a personal computer in 2000.[9]

Not only does the Internet provide a window out to the world, but it also provides a window into the home. As the number of children on the Internet grows, so does the concern over their activities and those of others.[10] With more than 8.7 million distinct Web sites,[11] even a small fraction of them can be troublesome to a child, especially to a child learning how to maneuver around the Internet. The type of material most troublesome to parents and the government is sexually explicit material or more specifically adult-oriented material. This material, also known more generally as pornography, on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest-

7. *See* CyberAtlas, *Population Explosion!* <http://cyberatlas.internet.com/big_picture/geographics/article/0,1323,5911_151151,00.html> (accessed Nov. 6, 2002) (giving figures as of Mar. 2002).

8. *See* Natl. Telecomm. & Info. Administration, *A Nation Online: How Americans Are Expanding Their Use Of The Internet* <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf> (accessed Feb. 2002).

9. U.S. Census Bureau, *9-in-10 School-Age Children Have Computer Access; Internet Use Pervasive, Census Bureau Reports* ¶ 6 <www.census.gov/PressRelease/www/2001/cb01-147.html> (accessed Feb. 2002).

10. *See* USA Today, *Man Charged With Raping Teen He Met Online* <http://usatoday.com/life/cyber/tech/2002/06/20/netcrime.htm> (June 21, 2002) (stating a twenty four year-old man confessed to accidentally strangling a thirteen year-old girl he met in an Internet chat room while they were having sex and that a twenty seven year-old man was charged with raping a sixteen year-old girl he met on the Internet). These events over the last few years alone have proven that this concern is real and highly justified.

11. Online Computer Lib. Ctr., Inc., *Size & Growth* ¶ 1 <http://wcp.oclc.org/stats/size.html> (accessed Nov. 6, 2002) (stating that this figure represents an almost 350 percent growth rate since 1998-2002).

core."[12] Files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search.[13] Once this content is posted, it is available to everyone in every community.

According to a recent study, adult-oriented commercial sites account for approximately two and one-tenth percent of the World Wide Web.[14] The study also found that most of these sites do not employ age verification measures, about twenty-five percent employed practices like mouse trapping[15] that actively bar users from leaving the site, and less than

12. *ACLU*, 929 F. Supp. at 844 (finding eighty two). People disagree on what type of sexually explicit material is objectionable because it also includes material like exhibits of nudes (art) and safe sex instructions (health).

13. Deliberate searches use search engines, subscriptions to mailing lists, targeting a Web site known to contain porn, trading sexually explicit images or stories. Inadvertent searches use innocuous or ambiguous topics (e.g., beaver), poor search strategies (e.g., adult Web sites use meta tags containing common terms like Britney Spears), misspellings (e.g., surviver.com), expired innocuous domain names appropriated by adult entertainment industry, mistyping a Web address, improperly guessing a domain name, confusion between top level domains (.com, .org, .net, .edu - e.g., whitehouse.com is a porn site; whitehouse.gov is the White House), spam with ambiguous or misleading links and pop-up windows. *See e.g.* FTC, *Cyberscam Targeted by FTC* ¶ 3 <http://www.ftc.gov/opa/2001/10/cupcake.htm> (Oct. 1, 2001); FTC, *Statement of Timothy J. Muris, Chairman, FTC* <http://www.ftc.gov/os/2001/10/cupcakestate.htm> (Oct. 1, 2001) (describing a specific instance of mouse trapping). On October 1, 2001, the FTC announced that it had filed charges against a cyberscammer who used more than 5,500 Web addresses to divert surfers from their intended Internet destinations to one of his sites, and hold them captive while he pelted their screens with a barrage of ads. *Id.* at ¶ 1. He registered fifteen variations of the children's site www.cartoonnetwork.com and forty one variations of the name of teen pop star Britney Spears and misspelled and inverted Web addresses like cartoonjoe.com instead of joecartoon.com and annakurnikova.com. *Id.* at ¶ 3. Once diverted to his site, users would be bombarded with a rapid series of windows displaying ads for goods and services ranging from Internet gambling to pornography. *Id.* at ¶ 4. Anyone trying to leave his sites by using the back button or by trying to close the browser would see more windows open, a practice known as mouse trapping. *Id.* He also inserted a stealth page, which acted as a timer, automatically launching additional pages of advertisements. *Id.* at ¶ 5; *see also* Ben Edelman, *Domains Reregistered for Distribution of Unrelated Content: A Case Study of "Tina's Free Live Webcam"* <http://cyber.law.Harvard.edu/people/edelman/renewals/> (accessed June 17, 2002) (stating that over 4,500 domains pointed users to a Web cam porn site and many of these sites were expired domain names like savannah-bbb.org, ourchildstoys.com and others).

14. *See* Daniel Orr & Josephine Ferrigno-Stack, *Childproofing on the World Wide Web: A Survey of Adult Web servers*, 41 Jurimetrics J. 465 (2001).

15. Mouse trapping – providing consumer Internet traffic to another adult Web site in return for a small per-consumer fee. This practice causes a user to be automatically forwarded to another adult site whenever he tries to exit a referring site. Mouse trapping itself is not bad; the constant stream of exiting a site and being sent to another is the problem. Some sites also use page-jacking – making a copy of an innocuous page to attract a search engine and then automatically referring a user to sexually explicit material.

one percent publish privacy policies. About seventy-four percent of them were found to display adult content on the first page, which was accessible to everyone, sixty-six percent did not include a notice indicating the nature of the site, eleven percent had a notice and no content on the first page and only three percent required age verification, like a credit card, to proceed beyond the first page. Some operators employ other practices to lure people to their Web sites so that they can make money.[16]

Pornography and its proliferation on the Internet have received much attention in recent years. The line between pornographic and non-pornographic material is a difficult one to draw and more difficult to define in an objective manner. In fact, Justice Potter Stewart, acknowledging that he was trying to define what might be indefinable and that perhaps he could never succeed in intelligibly doing so, proclaimed that now famous phrase "I know it when I see it."[17] However, such a definition does not meet constitutional standards because it does not put people on notice as to what materials are covered by laws that regulate pornography.

"Pornography" is a generic term that includes both legal and illegal materials. Webster's Dictionary defines it as all sexually oriented material intended primarily to arouse the reader, viewer, or listener. Legal pornography includes serious works of art, literature, politics, science, mere nudity, medical works, and similar works.[18] Illegal pornography is still a matter of debate and depends upon the audience (e.g., adults or minors). Illegal pornography includes material that is obscene, obscene to minors or child pornography. In a landmark cases, the Supreme

16. *Youth, Pornography and the Internet,* (Dick Thornburgh & Herbert S. Lin eds., Prepublication Copy), available online at <http://bob.nap.edu/html/youth_internet/>. Profitable enterprises depend on drawing large volumes of traffic with the hope of converting some to paying customers. *Id.* at 3-2. Broad exposure is needed to attract potential customers; therefore, children can be "swept up" in the industry's reach for larger audiences of potentially paying customers. *Id.* To draw traffic, the industry operates on three basic models with homepages generally making no attempt to distinguish between adults and children. *Id.* at 3-3. Under the Cost per Million (CPM) model, the advertiser pays the Web site owner when the ad is displayed. *Id.* Under the Cost per Click (CPC) model, the advertiser pays for referrals sent from another Web site. *Id.* Finally, under the Cost per Acquisition (CPA) model – advertiser pays when it gains a new subscriber. *Id.* Web site owners that use this last model have an incentive to limit the number of children who see the site, because children can not become subscribers. *Id.* at 3-4. *See* Dan Ackman, *How Big is Porn?* <www.forbes.com.2001/05/25/0524porn.html> (May 25, 2001) (stating that the size of porn industry is uncertain). The adult online entertainment industry generates approximately $1 billion in revenues annually. *Id.* at ¶ 7. No one knows for sure and numbers vary from $150 million to $10 billion with little support for any specific figure. *Id.*; *Youth, Pornography and the Internet, supra,* at 3-1.

17. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

18. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 224 (1975); *Jenkins v. Georgia*, 418 U.S. 153, 165 (1974); *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 114 (1973).

Court held that materials that were obscene or child pornography or, with respect to minors, obscene to minors, are not protected by the First Amendment.

These decisions raise the question of what "pornographic" material is protected and what material is not. How far can Congress, or a state legislature, go in regulating this information and these ideas? To understand what is and is not protected, one must first understand the Supreme Court's troubled history in defining these materials and the scope of the First Amendment as it relates to them.

A. Obscenity is Illegal and Not Protected by the First Amendment

The Supreme Court first established a definition for obscenity in 1957 in *Roth v. United States*.[19] In that case, the Court upheld the federal obscenity statute, which makes punishable the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character."[20] The Court distinguished sex and obscenity stating, "obscene material is material which deals with sex in a manner appealing to prurient interest."[21] A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest (i.e., a shameful or morbid interest in nudity, sex, or excretion) and if it goes substantially beyond customary limits of candor in description or representation of such matters. The test for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[22]

Two years later, in *Smith v. California*,[23] the Court mandated a scienter (knowledge) requirement. In *Smith*, the proprietor of a bookstore was convicted for violating a municipal ordinance which made it unlawful for any person to have in his possession any obscene or indecent writing, (or) book . . . in any place of business where . . . books are sold or kept for sale.[24] The imposition of a jail sentence consisted solely of the possession, in the bookstore, "of a certain book found upon judicial investigation to be obscene."[25]

The Court held that strict liability in cases like this would tend seriously to have the effect of restricting the dissemination of books that are not obscene, by penalizing booksellers even though they had not the

19. *Roth v. U.S.*, 354 U.S. 476 (1957).
20. 18 U.S.C. § 1461 (2000).
21. *Roth*, 354 U.S. at 487.
22. *Id.* at 489.
23. *Smith v. California*, 361 U.S. 147, 172 (1959).
24. *Id.* at 148.
25. *Id.* at 149.

slightest notice of the character of the books they sold.[26] Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.[27] Imposing a strict liability statute such as this would create a chilling effect. It would tend to impose a severe limitation on the public's access to constitutionally protected matter.

The definition for community standards came five years later. In *Jacobellis v. Ohio*,[28] the Court reaffirmed the *Roth* test, but defined community standards as a national standard. The Court recognized that the *Roth* standard was not perfect, but reaffirmed it anyway because "any substitute would raise equally difficult problems."[29] The Court also questioned the interpretations of the contemporary community standards aspect of the *Roth* test that imply "a determination of the constitutional question of obscenity in each case by the standards of the particular local community from which the case arises." The Court held that this was an incorrect reading of *Roth*. The concept of "contemporary community standards" was first expressed by Judge Learned Hand in *United States v. Kennerley*.[30]

> It seems clear that . . . Judge Hand was referring not to state and local "communities," but rather to "the community" in the sense of "society at large; . . . the public, or people in general." Thus, he recognized that under his standard the concept of obscenity would have "a varying meaning from time to time" - not from county to county, or town to town. We do not see how any "local" definition of the "community" could properly be employed in delineating the area of expression that is protected by the Federal Constitution . . . [t]he Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines;" we see even less justification for allowing such limits to vary with town or county lines.[31]

The Court recognized the legitimate interest of states and localities in preventing the dissemination of material deemed harmful to children. However, that interest did not justify a total suppression of such material, the effect of which would be to "reduce the adult population . . . to reading only what is fit for children."[32] The Court likened that to "burn[ing] the house to roast the pig."[33]

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26. *Id.* at 152.
27. *Id.* at 153 (quoting *The King v. Ewart*, 25 N. Z. L. R. 709, 729 (C. A.)).
28. *Jacobellis*, 378 U.S. 184, 197 (1964).
29. *Id.* at 191.
30. *U.S. v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913).
31. *Jacobellis*, 378 U.S. at 193, 194-95.
32. *Id.* at 195.
33. *Id.*

The decision to define community standards as a national standard was not a unanimous one. Chief Justice Warren, with whom Justice Clark joined, believed that "when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards - not a national standard, as is sometimes argued." He went on to note that "there is no provable 'national standard,' and perhaps there should be none."[34]

In 1966, in *Memoirs v. Massachusetts*,[35] the Court modified the test of obscenity by adding a third requirement. In addition to the *Roth* test's requirements that the work, taken as a whole and applying contemporary community standards, must appeal to the prurient interest, it must also be utterly without redeeming social value.[36] According to the Court, *Roth* presumed that material that is obscene is utterly without redeeming social value.[37] However, this element never became widely accepted; in fact, only three justices of the majority even agreed on it.

The line of obscenity cases until this point provided little guidance to state and federal courts as to what must be proved for a work to be considered obscene and, therefore, not subject to First Amendment protection. The answer would come in 1973, in *Miller v. California*.[38] The Court built upon *Roth* and *Smith* while rejecting *Memoir's* "without redeeming social value" and *Jacobellis's* national standards interpretations.[39]

The Court believed that it would be unrealistic to require triers of fact to apply "some abstract formulation" to determine what contemporary community standards to apply. It further noted that historically this standard has been applied in criminal trials and it found no reason to change that standard in civil cases regarding obscenity. Furthermore, "to require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility."[40] The Court relied on *Roth* stating:

> The primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that . . . it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person - or indeed a totally insensitive one.[41]

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34. *Id.* at 199 (Warren, C.J. and Clark, J., dissenting).

35. 383 U.S. 413 (1966).

36. *Id.* at 418.

37. *Id.* at 419.

38. 413 U.S. 15 (1973).

39. *Id.* at 29.

40. *Id.* at 30.

41. *Id.* at 33 (quoting *Mishkin v. N.Y.*, 383 U.S. 502, 508-09 (1966)).

Applying contemporary community standards serves this protective purpose and is constitutionally adequate. In fact, "nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact."[42]

The *Miller* Court created a test for obscenity that added clarity to the state and federal courts that need to apply it. Under that test, material is obscene if: a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; b) the materials depict or describe, in a patently offensive way, sexual conduct specifically prohibited by applicable state law; and c) the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[43] While the first requirement will vary from community to community as intended, the last requirement will not. The Supreme Court tried to avoid developing a national test, believing that such a test would be unworkable.

Defendants may not raise as a defense the lack of knowledge that the material in question was obscene according to community standards under the *Miller* test.[44] This does not mean that lack of knowledge that the obscene material is present is not a defense,[45] but merely that lack of knowledge of the community standard by which it must be evaluated is not a defense.

With obscenity not protected by the First Amendment, Congress enacted the *Child Protection and Obscenity Act of 1988*,[46] making it a federal crime for any person engaged in the business of selling or transferring obscene matter to knowingly receive or possess, with the intent to distribute obscene matter that has been transported in interstate or foreign commerce.[47] The Act also made it a federal crime to sell or distribute obscene matter in interstate or foreign commerce.[48] Ten years later, in the *Protection of Children from Sexual Predators Act of 1998*,[49] Congress prohibited and set penalties for using the mail or any facility or means of interstate commerce to knowingly transfer obscene

42. 413 U.S. at 31-32.

43. *Id.* at 24.

44. *Pope v. Ill.*, 481 U.S. 497, 499 (1987).

45. *See Smith v. Cal.*, 361 U.S. 147 (1959).

46. *Anti Drug Abuse Act*, Pub. L. No. 100-690, Title VII, Subtitle N, Ch. 2, 102 Stat. 4181 (1988) (codified as 18 U.S.C. § 1465 (2000)).

47. The law requires that the material travel in interstate or foreign commerce, because the Commerce Clause of the U.S. Constitution (U.S. Const., art. I, § 8, cl. 3) confers upon Congress the power to "regulate commerce with foreign nations, and among the several states" but not intrastate commerce.

48. 18 U.S.C. § 1465.

49. Pub. L. No. 105-314, 112 Stat. 2978, Title IV (1998) (codified as 18 U.S.C. § 1470 (2000)).

matter to a minor known to be under the age of sixteen or attempting to do so.[50]

B. Materials That are Obscene to Minors, But Not to Adults, are Illegal and Not Protected by the First Amendment

The Supreme Court created a hybrid category of obscene materials in 1968 in *Ginsberg v. New York*.[51] In that case, the Court upheld the conviction of the operator of a stationery store and luncheonette for selling "girlie" magazines to a sixteen year-old boy in violation of New York's obscene-to-minors statute.[52] No one denied that the magazines were "harmful to minors," but they were not obscene for adults. This case raised the issue of the constitutionality of an obscenity statute that prohibits the sale to minors less than seventeen years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.

The Court had already acknowledged "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."[53] The Court also recognized that the parents' claim to authority in their own household to direct the rearing of their children is a basic part of the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[54]

While acknowledging that parents have the primary responsibility for their children's well-being, the Court stated that they are entitled to the support of laws designed to aid them in the discharge of that responsibility. One factor that led the Court to uphold the statute was that the prohibition against sales to minors did not "bar parents who so desire from purchasing the magazines for their children."[55]

Minors are entitled to a significant measure of First Amendment protection,[56] and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials

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50. *Id.*

51. 390 U.S. 629 (1968).

52. *Id.* at 629.

53. *Prince v. Mass.*, 321 U.S. 158, 170 (1944).

54. *Id.* at 166.

55. *Ginsberg*, 390 U.S. at 639.

56. *Erznoznik*, 422 U.S. at 212-13; *see Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *compare Rabeck v. N.Y.*, 391 U.S. 462, 462 (1968) (stating "[n]or is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children").

to them.[57] Speech that is neither obscene as to youths nor subject to some other legitimate proscription can not be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. Furthermore, states may not simply ban minors' exposure to a full category of speech, such as nudity, when only a subset of that category can plausibly be deemed "obscene" for them.[58]

C. Child Pornography is Illegal and Not Protected by the First Amendment

As a result of increased public attention on the problem of child pornography, Congress acted first, but built on the Court's precedent basing its first legislation on the *Miller* standard.[59] The *Protection of Children Against Sexual Exploitation Act of 1977*[60] prohibited the use of a minor in the production of obscene materials. In addition, it prohibited the transportation, importation, shipment, and receipt of child pornography for the purpose of sale or distribution by any interstate means. The law also provided for enhanced penalties of up to ten years and $10,000 for a first offense and up to fifteen years and $15,000 for subsequent offenses.

The Court removed the *Miller* test from the equation in 1982 in *New York v. Ferber*.[61] It held that child pornography is not protected by the First Amendment. In upholding the statute at issue, the Court reiterated a state's compelling interest in "safeguarding the physical and psychological well-being of a minor."[62] A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.[63]

The Court separated the test for child pornography from the obscenity standard enunciated in *Miller*, but they may be compared for the purpose of clarity. The *Miller* formulation was adjusted in the following respects: a trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.[64] The Court noted that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photo-

57. *Erznoznik*, 422 U.S. at 212-13 (citing *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Rabeck v. N.Y.*, 391 U.S. 462 (1968)).

58. *Erznoznik*, 422 U.S. at 212-14, n. 7.

59. *See Miller v. Cal.*, 413 U.S. 15 (1973).

60. Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as 18 U.S.C. §§ 2251-2253 (2000)).

61. 458 U.S. 747, 756 (1982).

62. *Id.* at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

63. *Prince*, 321 U.S. at 168.

64. *Ferber*, 458 U.S. at 764.

graphic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of knowledge on the part of the defendant.[65] The Court

> consider[ed] it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.[66]

Following the Supreme Court's decision in *Ferber*, Congress amended the law with the *Child Protection Act of 1984*.[67] The Act changed the meaning of "sexual conduct" to include certain non-obscene pictures of minors.[68] It made other significant changes, such as eliminating the requirement that the material be distributed for commercial purposes[69] and increasing the age of minors for purposes of the law from a person under age sixteen to one under age eighteen.[70] With these changes, the Act expanded the definition of "child pornography" and began targeting the growing non-commercial industry. In addition, the law clarified that purely textual pornography did not fall within the scope of the statute;[71] the language substituted "visual depiction" for "visual or print medium."[72] Also, fines increased ten-fold for a first-time offense to $100,000[73] and almost seventeen times for subsequent offenses to $200,000.[74] Fines for organizations that violate the law increased to

65. *Id.* at 764-65. This requirement is borrowed directly from obscenity law; *see Smith v. California*, 361 U.S. 147, 154-55 (1959) (establishing obscenity law scienter requirements); *see U.S. v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (holding that in order to convict a person for distributing or receiving child pornography, there must be proof that the accused knew minors were depicted); *see U.S. v. Reilly*, 2002 U.S. Dist. LEXIS 9865 (S.D.N.Y. May 31, 2002) (vacating defendant's guilty plea and holding that defendant did not fully understand the crime to which he pled because the court had not inquired whether defendant knew that the child pornography images on his computer were real or that the people depicted were actual minors).

66. *Ferber*, 458 U.S. at 762-63.

67. Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as 18 U.S.C. §§ 2251-2254, 2256, 2516 (2000)).

68. 18 U.S.C. § 2256(2).

69. Pub. L. No. 98-292 § 4(1).

70. *Id.* § 5(1).

71. *Id.* § 3(1).

72. *Id.*

73. *Id.* § 4(9).

74. *Id.* § 4(10).

$250,000.[75]

In 1986, Congress again amended the law by enacting the *Child Sexual Abuse and Pornography Act of 1986*[76] to ban the production and use of advertisements for child pornography[77] and included a provision for civil remedies of personal injuries suffered by a minor who is a victim.[78] In addition, the law clarified that "visual depiction" included undeveloped film and videotape.[79] It also raised the minimum sentences for repeat offenders from imprisonment of not less than two years to imprisonment of not less than five years.[80]

Further amending the law two years later, Congress enacted the *Child Protection and Obscenity Enforcement Act of 1988*[81] to make it unlawful to use a computer to transmit advertisements for or visual depictions of child pornography.[82] It also prohibited the buying, selling, or otherwise obtaining temporary custody or control of children for the purpose of producing or promoting child pornography.[83] In 1990, Congress amended this law with the *Child Protection Restoration and Penalties*

75. *Id.* § 4(11).

76. Pub. L. No. 99-628, 100 Stat. 3510 (1986) (codified as 18 U.S.C. §§ 2251, 2255-2256, 2421-2423 (2000)).

77. *Id.*

78. 18 U.S.C. § 2255(a).

79. *Id.* § 2256(5).

80. Pub. L. No. 99-628 § 5(b).

81. *Anti Drug Abuse Act*, Pub. L. No. 100-690 at tit. VII, Subtitle N, Ch. 1, 102 Stat. 4181 (1988) (codified as 18 U.S.C. §§ 2251-2256). The Act also imposed extensive record-keeping and disclosure requirements on producers and distributors of certain sexually explicit visual material. *Id.* Violation of the record-keeping or disclosure requirements of the Act and its regulations resulted in a presumption that every performer involved was a minor in a child pornography prosecution. *Id.* The reporting requirements were found unconstitutional because they were not narrowly tailored and "put as much, if not more, of a burden on reputable producers of adult images than on the child pornography industry." *Am. Lib. Assn. v. Thornburgh*, 713 F. Supp. 469, 479 (D.D.C. 1989). The court also found that the law's presumption that the performers were underage if the records were unavailable or incomplete violated due process. *Id.* at 480-81. Congress amended the Act to address concerns raised by the court. *Child Protection Restoration and Penalties Enhancement Act of 1990*, Pub. L. No. 101-647 (codified at 18 U.S.C. § 2257(d)-(e)). The government's appeal from the District Court's decision was dismissed in part as moot because of the changes. *See Am. Lib. Assn. v. Barr*, 956 F.2d 1178, 1186-87 (D.C. Cir. 1992). On remand, the changes were again challenged and found to be unconstitutional, *Am. Lib. Assn. v. Barr*, 794 F. Supp. 412, 417-20 (D.D.C. 1992), but the Court of Appeals reversed and determined that most of the provisions were constitutional. *Am. Lib. Assn. v. Reno*, 33 F.3d 78, 88-94 (D.C. Cir. 1994). The Court of Appeals did find that the requirement that records be kept indefinitely was unconstitutional and suggested a five-year limit. *Id.* at 91. The court also found that photo developers are not "producers" of sexually explicit material and therefore not subject to the record-keeping requirements. *Id.* at 93.

82. 18 U.S.C. § 2251(c).

83. *Id.* § 2251(b).

Enhancement Act[84] making it a federal crime to sell any visual depiction of child pornography, by any means, including computer.[85] The Act also made it a crime to possess three or more books, magazines, periodicals, films, videotapes or other matter that contain any visual depictions of child pornography.[86] Congress amended the statute again with the *Protection of Children from Sexual Predators Act of 1998*[87] to expand the definition of child pornography by providing for the prosecution of individuals for the production of child pornography if the visual depiction was produced with materials that have been mailed, shipped, or transported in interstate or foreign commerce, including by computer.[88] Congress also enacted zero tolerance for possession of child pornography by dispensing with the requirement that prosecutions be for possession of three or more matters containing child pornography.[89]

The Court agreed that even the mere possession of child pornography is illegal,[90] though not the mere possession of obscenity.[91] Unlike obscenity, the value of permitting child pornography is "exceedingly modest, if not de minimis."[92] Furthermore, the interests underlying possession of child pornography prohibitions (i.e. safeguarding the physical and psychological well-being of a minor) far outweigh the interests of possession of obscenity prohibitions (i.e. protecting the minds of viewers).[93] In fact, the legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child, and that judgment easily passes muster under the First Amendment.[94]

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84. *Crime Control Act*, Pub. L. No. 101-647, tit. III, 104 Stat. 4789 (1990) (codified as 18 U.S.C. § 2257).

85. 18 U.S.C. § 2252.

86. Pub. L. No. 101-647 § 323.

87. Pub. L. No. 105-314, tit. II, 112 Stat. 2978 (1998) (codified as 18 U.S.C. § 2252(A)).

88. Pub. L. No. 105-314 § 201(b).

89. 18 U.S.C. § 2252(c). Even though the law permits prosecution for even a single image of child pornography, Congress did include an affirmative defense if the person charged possessed less than three matters that contain such a visual depiction and take reasonable steps to destroy the visual depictions or reported the matter to law enforcement and give them access to the visual depictions.

90. *Osborne v. Ohio*, 495 U.S. 103 (1990). Even well-intended uses of images of child pornography are unprotected. *U.S v. Matthews*, 11 F. Supp. 2d. 656 (D. Md. 1998), *aff'd.*, 209 F.3d 338 (4th Cir. 2000) (upholding the prosecution of an NPR reporter who says he was researching a free-lance article on police tactics in pursuing child pornographers and was himself arrested for receiving child pornography).

91. *Stanley v. Ga.*, 394 U.S. 557 (1969).

92. *Ferber*, 458 U.S. at 762.

93. *Osborne*, 495 U.S. at 108.

94. *Ferber*, 458 U.S. at 758.

After the *Ferber* Court's decision, child pornography no longer required an inquiry into the social value of the visual depictions. The Court also indicated that a depiction of a nude minor, without more, does not constitute child pornography.[95] However, even non-nude visual depictions can qualify as child pornography because the federal child pornography statute[96] contains no nudity or discernibility requirement.[97] The definition and dividing lines are still unclear and depend on subjective viewpoints.

II. THE COURTS APPLY OBSCENITY LAW AND COMMUNITY STANDARDS TO THE INTERNET — *UNITED STATES v. THOMAS*

Computers and the Internet have made the problem even more complicated. Since the *Miller* Court developed the community standards requirement, the question became: "whose community standards should be applied" when the allegedly offensive materials are on the Internet? When obscene material is physically sent from one community to another, either community's standards could apply. However, when obscene material is sent through the Internet, it appears simultaneously everywhere and nowhere. While the obscene material remains on the operators' system, anyone can access it with little more than a computer and a modem.

The first obscenity case to apply the *Miller* standard to the Internet was *United States v. Thomas*,[98] a case in which bulletin board system ("BBS") operators were charged for violating obscenity laws based on the community standards of the place where the material was received, rather than where it originated. The Thomases were the system operators of an adults-only sexually oriented BBS in Milpitas, California called Amateur Action. Access to it was limited to members who were given a password after they paid a membership fee and submitted a signed application form that requested the applicant's age, address, and phone number. The Thomases would then call the number to verify the information.

95. *See id.* at 765 n.18 (quoting *Erznoznik*, 422 U.S. at 213, noting that "nudity, without more[,] is protected expression"); *Osborne*, 495 U.S. at 112 (stating "depictions of nudity, without more, constitute protected expression").

96. The federal child pornography statute can be found at 18 U.S.C. §§ 2251-2260 (2000).

97. *U.S. v. Knox*, 32 F.3d 733 (3rd Cir. 1994) (holding that videotapes that focus on the genitalia and pubic area of minor females constitute a "lascivious exhibition of the genitals or pubic area" under the federal child pornography laws even though these body parts are covered by clothing).

98. *U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 74 (1996).

People who called the BBS without a password could only view the introductory screens that contained brief, sexually explicit descriptions of graphic interchange format ("gif") files and adult videotapes that were offered for sale. Customers would order the tapes by sending Mr. Thomas an e-mail message, and he would typically deliver them through the United Parcel Service ("UPS").

A U.S. postal inspector received a complaint regarding the BBS from an individual residing in the Western District of Tennessee. Working closely with an assistant U.S. attorney in Memphis, he became a member of the Amateur Action BBS. He then downloaded sexually oriented images, ordered a videotape (which was delivered by UPS), and sent an unsolicited child pornography video to the Thomases. The Thomases were indicted on obscenity charges based on the downloads.[99]

Porn vendors in more liberal jurisdictions have been prosecuted if they have knowingly or intentionally distributed obscenity into conservative jurisdictions. This case calls into question the meaning of "community standards." After all, communities are no longer defined by geographic boundaries. The question still exists "should the community standards in Memphis, Tennessee apply to material on a computer in California?"

According to this case, the community standard becomes that of the most conservative jurisdiction with a phone line and a computer. This analysis runs contrary to the decision of the *Miller* court when it reversed a prior decision that created a national standard for obscenity law. The *Thomas* case was not the first time that the Court grappled with the question of whether community standards meant local or national community standards, and it will not be the last.

The Thomases tried to argue that the venue was improper.[100] However, to establish a § 1465 (Title 18) violation, the government need only prove that a defendant knowingly used a facility or means of interstate commerce for the purpose of distributing obscene materials.[101] Venue lies in any district in which the offense was committed.[102] There is no constitutional impediment to the government's power to prosecute por-

99. A Memphis jury convicted the Thomases for conspiracy to violate federal obscenity laws (18 U.S.C. § 371 (conspiracy) and 18 U.S.C. §§ 1462, 1465 (obscenity laws)); for knowingly using and causing to be used a facility and means of interstate commerce - a combined computer/telephone system - for the purpose of transporting obscene, computer-generated materials (the GIF files) in interstate commerce (18 U.S.C. §1465); and for shipping obscene videotapes via U.P.S. (18 U.S.C. § 1462). *Id.* at 705-06. The jury also convicted them of criminal forfeiture (18 U.S.C. § 1467); therefore, their computer system was to be forfeited to the United States.

100. *Thomas,* 74 F.3d at 709.

101. *Id.*

102. *Id.* (quoting *U.S. v. Bedlow*, 957 F.2d 1330, 1335 (6th Cir. 1992)).

nography dealers in any district into which the material is sent.[103] The statute established a continuing offense within the venue provisions of 18 U.S.C. § 3237(a) that occurs in every judicial district that the material touches. Venue for federal obscenity prosecutions lies in any district from, through, or into which the allegedly obscene material moves.[104] This may result in prosecutions of persons in a community to which they have sent materials that are obscene under that community's standards though the community from which it is sent would tolerate the same material. The Court left open the question of whether the Thomases could have been prosecuted in another, more conservative jurisdiction, if their communications had merely passed through a server in that jurisdiction.

While the Thomases were convicted of violation of Memphis' community standards, this case is far from determinative of whose community standards apply to cases of obscenity on the Internet. In this case, the defendants had knowledge and control over the jurisdictions where materials were distributed for downloading and printing. They had in place methods to limit user access in jurisdictions where the risk of a finding of obscenity was greater than that of California. In addition, the Thomases sent obscene materials through the mail. Under the facts of this case, the Court of Appeals found no need to redefine "community" for use in obscenity prosecutions involving the Internet. The Supreme Court had no reason to hear this case because it had ample grounds to uphold the lower court's decision (e.g., the Thomases sent obscene material through the mail).

Community is defined as a social group of any size whose members reside in a specific locality, share government, and often have a common cultural and historical heritage.[105] It is also a social, religious, occupational, or other group sharing common characteristics or interests and perceived or perceiving itself as distinct in some respect from the larger society within which it exists.[106] The users of the Internet consider themselves distinct from the larger society and share many of the facets of a society that a geographic community shares. The Court has yet to alter its definition of community standards, but it is clear that this standard does not readily apply to the Internet. The question, however, still remains to be decided.

103. *Id.* (quoting *U.S. v. Bagnell*, 679 F.2d 826, 830 (11th Cir. 1982)).
104. 18 U.S.C. § 3237(b).
105. *Random House Unabridged Dictionary* 414 (2d ed. 1993).
106. *Id.*

III. CONGRESS EXPANDS PORNOGRAPHY LAW AS IT APPLIES TO THE INTERNET AND THE BATTLE BEGINS

Congress has been attempting to formulate a bright-line definition, albeit with little success, almost since that time. To further complicate matters, what is the legal effect of producing and distributing images that are completely computer-generated? What is the work "taken as a whole?"

A. THE *COMMUNICATIONS DECENCY ACT* BATTLE

1. *Congress Takes its First Shot*

On February 1, 1996, Congress passed the *Communications Decency Act of 1996* ("CDA").[107] Congress hoped "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material."[108] The Act regulates obscenity sent directly to children. It also imposes felony penalties[109] on anyone who:

> in interstate commerce or foreign communications by means of a telecommunications device knowingly makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with the intent to annoy, abuse, threaten, or harass another person.[110]

The law also imposes felony penalties on anyone who:

> in interstate commerce or foreign communications by means of a telecommunications device knowingly uses an interactive computer service to send to a specific person or persons under 18 years of age or uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.[111]

In either circumstance, if the person knowingly permits any telecommunications facility under his control to be used for any of the abovementioned activities with the intent that it be used for such activity, the

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107. *Telecomm. Act of 1996*, Pub. L. No. 104-104, tit. V, Subtitle A, 110 Stat. 133 (1996) (codified as amended at 18 U.S.C. § 1465, 47 U.S.C. §§ 223, 230).

108. 47 U.S.C. § 230(b)(4).

109. Penalties for violation of §§ 223(a) and 233(d) are a fine under Title 18, or imprisonment of not more than two years, or both. 47 U.S.C. §§ 223, 233.

110. *Id.* § 223(a)(1)(A).

111. *Id.* § 223(d).

person can also face felony penalties.[112]

The CDA provides various defenses for those who only provide access or facilitate connections and to employers for the actions of employees in certain circumstances. Two key affirmative defenses qualify the scope of the CDA. They provide a defense to whoever:

> (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication . . ., which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology or (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.[113]

Furthermore, the law provides[114] that "no provider or user of an interactive computer service[115] shall be treated as the publisher or speaker of any information provided by another information content provider."[116] It also provides that:

> no provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected;[117] or any action taken to enable or make available to information content providers or others the technical means to restrict access to said material.[118]

The impact of the CDA is greater than would appear by the statute, because it applies to any complaint instituted after its effective date, regardless of when the relevant conduct giving rise to the claims occurred.[119]

The CDA, like any law, had its critics. Senator Patrick Leahy advo-

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112. *Id.* §§ 223(a)((2) & (d)(2).

113. *Id.* § 223(e)(5).

114. *Id.* § 230(c)(1).

115. *Id.* § 230(e)(2). An interactive computer service is any information service, system, or access software provider that provides, enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions. *Id.*

116. *Id.* § 230(e)(3). An information content provider is any provider or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. *Id.*

117. *Id.* § 230(c)(2)(A).

118. *Id.* § 230(c)(2)(B).

119. *Id.* § 230(d)(3); *Cf Zeran v. Am. Online*, 129 F.3d 327 (4th Cir. 1997); *Doe v. Am. Online*, 718 So.2d 385 (Fla. App. 1998).

cated its repeal even before it went into effect.[120] In a statement before Congress, he stated that the legislation looks to the authority of the Federal Communications Commission ("FCC") to describe the precautions that can be taken to avoid criminal liability for posting indecent material.[121] It bans the rather vague terms "patently offensive" and "indecent" communications.

As a result of the law, America Online ("AOL") deleted the profile of a Vermont resident who communicated with fellow breast cancer survivors online.[122] According to AOL, she used the vulgar word "breast."[123] AOL later apologized and indicated it would permit the use of the word where appropriate (whatever that means).[124]

Senator Leahy was also concerned that advertisements that would be legal in print may be subject to liability under this new law.[125] This law was so broad that it could affect information about birth control, AIDS and even potty training. It would criminalize literary quotes from *Catcher in the Rye*, *Huckleberry Finn* and *Ulysses*. Senator Leahy also criticized the process, noting that the Senate passed these disputed provisions as an amendment on the floor with little or no debate, provisions that could dramatically change the Internet.

2. *The Court Fires Back: ACLU v. Reno*

The industry also voiced its concern. On the same day the bill was signed by President Clinton, twenty plaintiffs, including the American Civil Liberties Union ("ACLU"), filed suit against U.S. Attorney General Janet Reno and the Department of Justice seeking to enjoin the enforcement of the CDA on the ground that it violates the Constitution of the United States.[126] Specifically, the plaintiffs challenged §§ 223(a)(1) and

120. Senator Patrick Leahy, Statement, *Repealing the Communications Decency Act* ¶¶ 1-2 (Feb. 9, 1996) (available in 1996 WL 8783190). On Feb. 9, 1996, Senator Leahy introduced S. 1567 to repeal those provisions.

121. *Id.* at ¶ 19.

122. *Id.* at ¶ 20.

123. *Id.*

124. *Id.*

125. *Id.* at ¶ 23.

126. *ACLU*, 929 F. Supp. at 828. Also on the same day, another plaintiff, an editor, publisher and part-owner of an online newspaper, filed suit to enjoin enforcement of the law. *See Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996). The judge heard the case because the plaintiffs in *ACLU* based their challenges on the current state of technology, which changes rapidly. *Id.* at 922-23. The Judge ruled that the term indecent was not vague because it parallels language adopted by the FCC in the broadcast context and upheld in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Shea*, 930 F. Supp. At 948-49. In addition, the court held that use of the term community standards does not render the statute vague. *Id.* at 937. Like the *Reno* Court, the *Shea* Court held that, given the current state of technology, the affirmative defenses would be unavailable to most providers. *Id.* at 941-45. The

223(d).[127]

> One week later, a federal district court in Pennsylvania concluded that the term "indecent" was too vague to provide the basis for a criminal prosecution.[128] The judge enjoined enforcement of the provisions of the CDA regulating transmission of indecent materials.[129]

This word alone is the basis for a criminal felony prosecution.

A few weeks later, a group of twenty-seven plaintiffs also filed suit to enjoin the law.[130] The two cases were consolidated, and a three-judge panel convened pursuant to § 561 of the Act.[131] After an evidentiary hearing, that Court entered a preliminary injunction against enforcement of both of the challenged provisions. The district court found that "the statute sweeps more broadly than necessary and thereby chills the expression of adults" and that the terms "patently offensive" and "indecent" were inherently vague.[132] The court also found that the affirmative defenses "were not technologically or economically feasible for most providers."[133] It enjoined the government from enforcing § 223(a)(1)(B) insofar as it relates to "indecent" communications and all of § 223(d).

The government appealed and the Supreme Court, in *Reno v. ACLU*, affirmed the lower court's decision.[134] The Court noted that the New York statute at issue in *Ginsberg*[135] was narrower than the CDA in four aspects.[136] First, the statute did not bar parents from purchasing the material for their children; the CDA banned even parental consent or participation. Second, that statute only applied to commercial transactions, whereas the CDA contained no such limitation. Third, the New York statute was limited by the requirement that it be utterly without redeeming social importance for minors; the CDA failed to provide a definition for "indecent" and failed to limit the definition of "patently offensive" to materials that lack serious literary, artistic, political or scientific value. Fourth, the statute defined a minor as a person under the age of seventeen, whereas the CDA added an additional year.

The government relied on *FCC v. Pacifica*, a case in which the Court upheld a declaratory order of the FCC holding that the broadcast of a recording of a twelve-minute monologue entitled *Filthy Words* that had

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Court also granted an injunction, holding that the provisions were not salvageable without legislating from the bench. *Id.* at 950.

127. *Id.* at 827.
128. *Reno*, 521 U.S. at 861.
129. *Id.*
130. *Id.*
131. *Id.* at 862.
132. *Id.* at 854.
133. *Id.* at 856.
134. *Id.* at 862-64.
135. *See Ginsberg*, 390 U.S. at 629.
136. *Reno*, 521 U.S. at 865-66.

previously been delivered to a live audience could have been the subject of administrative sanctions.[137] However, the order upheld in *Pacifica* was issued by an agency for a medium that had been regulated for decades and targeted a specific broadcast that represented a dramatic departure from traditional programming. The CDA's prohibitions were not limited to particular times and were not dependent upon a regulatory agency, let alone one that was familiar with the medium. Unlike, the CDA, the FCC's order was not punitive and the court refused to decide whether the broadcast would justify criminal prosecution. Lastly, the FCC's order applied to a medium that had received "the most limited First Amendment protection" in large part because warnings could not adequately protect the listener from unexpected program content.[138]

The government also tried to rely on *Renton v. Playtime Theatres, Inc.*[139] However, the zoning ordinance upheld in *Renton* was aimed at the secondary effects of the conduct while the CDA was aimed at protecting children from the primary effects of indecent speech. The CDA's provisions were content-based blanket restrictions on speech, not restrictions based on time, place or manner of speech as they were in *Renton*. Content-based regulations on speech must meet the strict scrutiny test to be considered valid.

The Court was concerned that the terms "indecent" and "patently offensive" were not defined. The vagueness of this content-based regulation coupled with its increased deterrent as a criminal statute raised special First Amendment concerns because of its obvious chilling effect.[140] The CDA's vagueness undermined the likelihood that it had been carefully tailored to the congressional goal of protecting minors from potentially harmful materials. The Court acknowledged that the government has an interest in protecting children from potentially harmful materials.[141] However, the CDA was not narrowly tailored. There was "no textual support for the submission that material of scientific, educational, or other redeeming social value [would] necessarily fall outside the CDA's prohibitions."[142]

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137. *Pacifica*, 438 U.S. 726 (1978). The Commission had found that the repetitive use of certain words referring to excretory or sexual activities or organs in an afternoon broadcast when children are in the audience was patently offensive and concluded that the monologue was indecent as broadcast. *Id.* at 731.

138. *Reno*, 521 U.S. at 867.

139. *Id.* at 868; *see City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986) (stating that the ordinance kept adult movie theatres out of residential neighborhoods because of the secondary effects, such as crime and deteriorating property values).

140. *Id.* at 845.

141. *Id.* at 846.

142. *Id.* at 847.

The first part used the term "indecent" while the second used the term "patently offensive." Given the absence of a definition of either term, this difference in language would provoke uncertainty among speakers about how the two standards relate to each other and just what they mean.[143] The vagueness of the CDA raised First Amendment concerns because, as a content-based regulation of speech, it had a chilling effect on free speech. Also, the "severity of criminal sanctions might well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[144]

The CDA also ignored the second and third prongs of the *Miller* standard for obscenity: that the prohibited material be specifically defined by state law and that it lack societal value. Unlike the first requirement, which relies on community standards, these requirements do not vary by community because they are not judged by community standards. The community standards criterion as applied to the Internet creates a national standard, which the Court refused to create in *Miller* and refused to create in this case. Doing so would lead all speech to be judged by the most conservative community in the country, if not the world.

The Court also addressed the affirmative defenses stating that it would be prohibitively expensive for noncommercial and some commercial speakers who have Web sites to verify that their users are adults, especially given the size of the potential audience.[145] In addition, no effective way currently exists to determine the age of a user who is accessing material through e-mail, listservs, newsgroups or chat rooms. The defenses provided by the Act were not economically feasible for most noncommercial providers to adequately protect themselves from prosecution.

The age verification technologies available to control access on the Internet are credit cards, tagging, and placing content in blocked directories or registering content. In addition to being cost prohibitive for numerous content providers, using valid credit card numbers becomes less effective as credit cards, debit cards and pre-paid cards proliferate among minors. Tagging material to enable browsers to block it is only effective if the software exists and is in use that can recognize the tag. Finally, software is not widely available or used to block material is

143. *Id.* at 871. The government tried to argue that the terms should be defined with reference to what is patently offensive or indecent for minors. *Id.* However, the Conferees expressly rejected amendments that would have imposed such a "harmful to minors" standard. *See id.* at n. 37; S. Conf. Rep. No. 104-230, 189 (1996), 142 Cong. Rec. H1145, H1165-1166 (Feb. 1, 1996). The Conferees also rejected amendments that would have limited the prohibited materials to those lacking redeeming value. *See id.*; S. Conf. Rep. at 189, 142 Cong. Rec. H11465-1166 (Feb. 1, 1996).

144. *Reno,* 521 U.S. at 872.

145. *Id.* at 877.

listed in a blocked directory or is registered as harmful to minors. In addition, most of this technology is only effective for content on the World Wide Web. For it to be effective in any other forum (e.g., listservs), the technology must be available and in use on every server that the material passed through. In other words, for content providers to escape criminal liability, the technologies must be effective. For any of the technologies to be effective, content providers must rely on third parties whose actions are out of their control.

The government argued that the technology to avoid criminal liability by taking advantage of the affirmative defenses would be available in the near future. However, the Court must decide questions of law in the factual context of the world as we know it, mindful that restrictions on "First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury."[146] The government never advanced any evidence that these technologies actually preclude minors from accessing the material or from posing as adults. Furthermore, someone could easily enter a chatroom and claim to be a minor thereby preventing others from speaking and trading constitutionally protected material.

Finally, the Court refused to sever unconstitutional provisions from the CDA to save it. The statute that granted expedited review limited jurisdiction to facial challenges to the CDA.[147] In considering a facial challenge, the Court noted that it "may impose a limiting construction on a statute only if it is readily susceptible to such a construction."[148] The CDA did not lend itself to this possibility. To draw a line between speech covered by this statute and speech not covered by this statute "involve[d] a far more serious invasion of the legislative domain."[149] The Court refused to rewrite the law to conform to constitutional requirements.

In order to deny minors access to potentially harmful speech, the CDA effectively suppressed a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.[150] The breadth of the CDA's coverage was unprecedented. The undefined terms covered large amounts of nonpornographic material with serious educational or other value.[151] The Court noted that transmitting obscenity and child pornography is

146. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

147. 47 U.S.C. § 561.

148. *Reno*, 521 U.S. at 884 (quoting *Virginia v. Am. Bookseller's Assn., Inc.*, 484 U.S. 383, 397 (1988)); *see Erznoznik v. Jacksonville*, 422 U.S. 205, 216 (1975).

149. *Reno*, 521 U.S. at 884.

150. *Id.* at 874.

151. *Id.* at 877.

already illegal under federal law[152] and neither is protected by the First Amendment. Language that is indecent or offensive, but not obscene, is protected by the First Amendment.[153]

Under the CDA, a parent allowing her seventeen year old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term.[154] A parent who sent his seventeen year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material "indecent" or "patently offensive," if the college town's community thought otherwise.

The Court stressed throughout its opinion that the user must take affirmative steps to access information on the Internet. Almost all sexually explicit images are preceded by warnings as to the content. The District Court even stated that the "odds are slim that a user would come across a sexually explicit site by accident."[155] Therefore, restrictions concerning it will not be analyzed like other media, which are more restricted. In addition, the Internet is not a scarce, expressive commodity that requires regulation in the way that television or radio frequencies are. This decision officially gave full constitutional protection to the Internet, unlike any other medium.

The Court summed up its decision stating:

> In Sable . . . we remarked that the speech restriction at issue there amounted to 'burn[ing] down the house to roast the pig.' The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.[156]

Only the CDA's ban on the knowing transmission of obscene messages survived the Court's scrutiny because obscene speech enjoys no First Amendment protection.

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152. 18 U.S.C. §§ 1461-65, 2251.

153. *See Sable Commun. of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977). As the Court, in *Pacifica*, cautioned "the fact that society may find speech offensive is not a sufficient reason for suppressing it." 438 U.S. at 745.

154. 47 U.S.C. § 223(a)(2).

155. *Reno*, 521 U.S. at 869; *see* FTC, *Cyberscam Targeted by FTC, supra* n. 13. However, the accuracy of this statement is debatable. While researching a potential trademark for a client of my former firm, I entered an innocuous Web site address and was immediately transported to a site filled with pornography and "teasers." This information appeared on my computer by accident. While a warning preceded it, I had to scroll down to see the substance of the warning and ended up seeing more substance that I cared to see.

156. *Reno*, 521 U.S. at 882.

B. THE *CHILD ONLINE PROTECTION ACT* BATTLE

1. *Congress Regroups and Fires Again*

Congress did not give up on its attempt to "protect" children from pornography. One and a half years after the Supreme Court struck down provisions of the *Communications Decency Act*, Congress enacted the *Child Online Protection Act* ("COPA").[157]

Unlike the CDA, COPA applied only to material on the World Wide Web, limited the prohibition to communications made for commercial purposes and restricted only material that is harmful to minors. Adapting the *Miller* standard to minors, Congress required material that is harmful to minors to be defined in terms of contemporary community standards, patently offensive with respect to minors and "taken as a whole, lack[ing] serious literary, artistic, political, or scientific value for minors."[158]

COPA retained the idea of affirmative defenses established in the CDA. These defenses applied if "in good faith, the defendant ha[d] restricted access by minors to material that is harmful to minors."[159] Internet service providers were specifically excluded.[160]

Like the CDA, violations of COPA could involve prison. Under COPA:

> Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.[161]

Intentional violations lead to a fine of not more than $50,000 for each violation in addition to the previous penalties.[162] Civil penalties consisting of fines of not more than $50,000 also applied to violations of this Act.[163]

2. *The Court Returns Fire: ACLU v. Reno II (a.k.a. Ashcroft v. ACLU)*

The government tried to remedy the problems with the CDA when it enacted COPA on October 21, 1998. Like the CDA, COPA also posed

157. 47 U.S.C. § 231 (2000). COPA was signed into law on Oct. 21, 1998 as Title XIV of the *Transportation Appropriations Bill* for FY99. Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as amended at 47 U.S.C. § 231).

158. 47 U.S.C. § 231(a)(6).

159. *Id.* § 231(c).

160. *Id.* § 231(b).

161. *Id.* § 231(a)(1).

162. *Id.* § 231(a)(2).

163. *Id.* § 231(a)(3).

problems for the courts.[164] It was supposed to go into effect on November 29, 1998, but, on October 22, 1998, Web site operators and content providers filed a lawsuit challenging its constitutionality in *ACLU v. Reno II*.[165]

The same district court that enjoined the government from enforcing the CDA also preliminarily enjoined the government from enforcing COPA, concluding that the statute was unlikely to survive strict scrutiny. The Court of Appeals for the Third Circuit affirmed the decision that the statute was overbroad but based its rationale on the use of contemporary community standards and ignored the issues raised in the lower court.[166] In an eight-to-one decision, the Supreme Court vacated and remanded the decision, holding that COPA's use of community standards to identify material that is harmful to minors is not fatal.[167]

The questions left over from the *Thomas* case regarding which community standards apply to communications on the Internet and where violators of constitutional laws can be prosecuted became issues again in this case. Not only did the Court muddle the answer to the first question, but also it never really addressed the second. Five justices, writing through Justice Thomas decided that relying on local community standards, even with the variations that could result, by itself would not render the statute unconstitutionally overbroad for purposes of the First Amendment.[168] They asserted that using the *Miller* standard for defining obscenity and applying it to minors helps COPA avoid the fate of the CDA.

However, they did not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague, or whether the district court correctly concluded that the statute likely will not survive strict scrutiny. The Court

164. COPA also posed a problem for the Department of Justice. In a letter from L. Anthony Sutin, Acting Asst. Atty. Gen. to Rep. Thomas Bliley dated October 5, 1998, Mr. Sutin explained that creating a criminal statute would divert resources from current prosecutions and investigations, would not address material available from overseas Web sites and would likely be challenged on constitutional grounds. He also cautioned Congress to at least wait until the Commission established by COPA (Pub. L. No. 105-277 § 1405) had completed its study.

165. *ACLU*, 31 F. Supp. 2d 473 (E.D. Pa. 1999).

166. *ACLU*, 217 F.3d 162 (3rd Cir. 2000).

167. *Ashcroft*, 535 U.S. at 585. The Court's rationale was rather muddled and fractured. Justice Thomas wrote the majority opinion in which Chief Justice Rehnquist and Justice Scalia joined. Justices O'Connor and Breyer joined parts of the opinion, but each wrote their own concurring opinions. Justice Kennedy wrote a concurring opinion in which Justices Souter and Ginsburg joined. Only Justice Stevens dissented.

168. *Id.* at 579. The others were Chief Justice Rehnquist and Justices Scalia, O'Connor and Breyer.

believed that it would be prudent to allow the court of appeals to address these matters first. However, it did maintain the injunction.

In a concurring opinion, Justice O'Connor noted that the respondents failed to demonstrate that the variation between local communities caused the statute to be overbroad, but she also pointed out that using local community standards might cause problems for regulating obscenity on the Internet when applied in future cases.[169] Furthermore, while agreeing that using local community standards does not by itself render the statute unconstitutional, she emphasized the constitutionality and desirability of adopting a national standard.

Justice Breyer, in another concurring opinion, argued that COPA was meant to adopt a national standard. He referred to the legislative history, which stated that the standard is "an adult standard, rather than a geographic standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors."[170] He reasoned that to read the statute as adopting the community standards of every locality in the United States would provide the most puritanical of communities with a heckler's Internet veto affecting the rest of the Nation.[171] He conceded, however, that variations reflecting application of the same national standard by different local juries do not violate the First Amendment.[172]

In the portion of the opinion joined only by Chief Justice Rehnquist and Justice Scalia, Justice Thomas addressed the question of whether community standards on the Internet referred to the community standards of a specific geographic area or those of the adult community as a whole, without regard to geography. They found it sufficient to note that community standards need not be defined by reference to a precise area.[173] Justice Thomas went on to argue that COPA's challengers failed to point out even a single exhibit in the record as to which coverage under COPA would depend upon which community in the country evaluated the material.[174] He concluded that holding COPA unconstitutional because of its use of community standards would likely render unconstitutional federal obscenity statutes as applied to the Web.[175] This result, he reasoned would be contrary to the Court's decision in *Reno* in which it held that the application of the CDA to obscene speech was constitutional, because obscenity is not protected by the First Amendment. He further argued "if a publisher wishes for its materials to be judged only

169. *Id.* at 587.
170. H.R. Rpt. 105-775, at 28 (1998).
171. *Ashcroft*, 535 U.S. at 590.
172. *Id.* at 591.
173. *Id.* at 573; *see Jenkins*, 418 U.S. at 157.
174. *Ashcroft*, 535 U.S. at 584.
175. *Id.*

by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release into those communities."[176]

In an opinion concurring only in the judgment, Justice Kennedy, joined by Justices Souter and Ginsburg, declared that the majority opinion missed the true issue. The question should have been to what do the community standards refer. "Whether the national variation in community standards produces overbreadth requiring invalidation of COPA, . . . depends on the breadth of COPA's coverage and on what community standards are being invoked."[177] The court of appeals did not consider these questions, which are inextricably entwined with the grounds that it did address. For example, Justice Kennedy posed the questions: how does one judge the work "as a whole" on the Internet; and is the work a single image on a Web page, a whole Web page, an entire Web site, or an interlocking set of Web sites?[178]

He agreed with the majority concluding that using community standards can not, by itself, invalidate "COPA without careful examination of the speech and the speakers within the ambit of the Act."[179] He disagreed with the assumption that to avoid liability in other jurisdictions, a speaker could always use a different medium.[180] Justice Thomas countered this assertion with the requirement that COPA only requires that material deemed harmful to minors be placed behind adult identification screens.[181] However, this assertion runs counter to the *Reno* decision in which the Court held that such an action would not be economically feasible for many commercial and most noncommercial speakers. In essence, this requirement, when applied, may result in foreclosing this medium for many speakers.

Justice Kennedy also took issue with Justice Breyer's reliance on one statement in a House Report to determine that applying a national standard was a uniform view within Congress.[182] The statement reflected the view of a majority of one House committee, but there is no reason to believe that it reflects the view of a majority of the House of Representatives, let alone the uniform view within Congress. He dis-

176. *Id.* at 583.

177. *Id.* at 592.

178. *Id.* at 593.

179. *Id.*

180. *Id.* at 596 (quoting *City of Ladue v. Villeo*, 512 U.S. 43, 55 (1994), Justice Kennedy referred to prior decisions that "have voiced particular concern with laws that foreclose an entire medium of expression . . . the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech").

181. *Id.* at 573.

182. *Id.* at 596.

missed the need to determine whether "community standards" refers to a local or national standard, because "the actual standard applied is bound to vary by community," and that variation "constitutes a particular burden on Internet speech."[183] Whether that burden renders COPA substantially overbroad depends upon what speech COPA regulates and what community standards it invokes. What does judged as whole mean? What is the proper venue? The Act's prohibition includes an interstate element[184] and any offense involving interstate commerce may be inquired of and prosecuted in any district from, through, or into which such commerce moves.[185]

Nothing in the plain text of COPA limits its applicability to commercial pornographers or to pornography for sale. It seems to apply to any pornography so long as the speaker merely hopes to profit as an indirect result. COPA can conceivably apply to communications that include, but are not necessarily wholly comprised of, material that is harmful to minors. Blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators.

Only Justice Stevens dissented, arguing that application of a community standards test to the World Wide Web renders COPA facially overbroad.[186] The majority's rationale denies some parts of the country access to material that it considers acceptable, because others might consider it to be offensive according their community standards. Given the undisputed fact that a provider who posts material on the Internet can not prevent it from entering any geographic community, . . . a law that criminalizes a particular communication in just a handful of destinations effectively prohibits transmission of that message to all of the 176.5 million Americans that have access to the Internet.[187] He posed the question as whether the statute restricts a substantial amount of protected speech relative to its legitimate sweep by virtue of the fact that it uses community standards[188] and answered it in the affirmative. For precedent, he cited the most recent case with very similar circumstances, *ACLU v. Reno*, a case whose majority opinion he authored.

183. *Id.* at 597.

184. 47 U.S.C. § 231(a)(1).

185. 18 U.S.C. § 3237(a). However, Justice Kennedy points out that "the Court has had no occasion to consider whether venue would be proper in 'every hamlet into which [obscene mailings] may wander', for the petitioners in *Hamling* did not challenge the statute as overbroad on its face." *Hamling v. U.S.*, 418 U.S 87, 144 (1974). He leaves open the possibility for a challenge to the application of this provision to the Internet.

186. *Ashcroft*, 535 U.S. at 611.

187. *Id.* at 606.

188. *Id.*

Not only did Justice Stevens affirm the decision of the Court of Appeals, but Justices Kennedy, Souter and Ginsburg also leaned toward affirming the Court of Appeals decision stating, "the Court of Appeals was correct to focus on the national variation in community standards, which can constitute a burden on Internet communication; and its ultimate conclusion may prove correct."[189] In addition, given the Court's ruling in *Reno*, a more complete analysis by the Court of Appeals should sway Justice Breyer who sided with the majority against COPA's predecessor, the CDA.[190]

After this decision, a number of questions still remain. The Court has developed no real consensus as to the definition of "obscene for minors," especially on the Internet. The main area of disagreement is the definition of community standards. COPA applies only to commercial sites on the World Wide Web that are located in the United States and ignores the numerous other sources of obscenity. Increased prosecutions may add deterrence, but there is a lack of them now and, therefore, a lack of direction.

C. THE *CHILD PORNOGRAPHY PREVENTION ACT* BATTLE

1. *Congress Attacks on a Different Front and Amends the Child Pornography Laws*

In addition to trying to adapt the obscenity laws to the Internet, Congress also tried to expand the child pornography laws. Technological advances have made it possible to create visual depictions that appear to be minors engaged in sexually explicit conduct, which are virtually indistinguishable from actual photographs of real children engaged in identical conduct. Real pictures would be a violation of the federal child pornography laws, which prohibit the sexual exploitation of children for the purpose of producing any visual depiction of a minor. Computer-generated photographs that are either an alteration of a photograph in which real children were used or a photograph in which no real children were used pose a problem, because prosecutors must prove that a real child was used in the creation of the photograph. This problem "threatens the Federal Government's ability to protect children from sexual

189. *ACLU*, 521 U.S. at 844. Justices Kennedy, Souter and Ginsburg joined in the majority opinion, authored by Justice Stevens, which struck down provisions of the CDA.

190. Justice O'Connor, in a concurring opinion that Chief Justice Rehnquist joined, decided that the indecency provision, § 223(a)(1)(B), and the specific person provision, § 223(d)(1)(A) were not unconstitutional on their face. In her view, the universe of speech constitutionally protected as to minors but banned by the CDA was a very small one. *Id.* at 896. According to her, the appellees presented no evidence to refute this view and without real and substantial overbreadth, they did not carry their burden. Given this view and that expressed in *Ashcroft v. ACLU*, it is unlikely that Justice O'Connor and the Chief Justice will overturn COPA.

exploitation."[191]

The *Child Pornography Prevention Act of 1996* ("CPPA")[192] tried to expand the definition of child pornography to include not only visual depictions that involve the use of real minors engaging in sexually explicit conduct,[193] but also visual depictions that "appear to be" or "convey the impression" of real minors engaged in sexual conduct (so-called "virtual child pornography").[194] It also classifies as child pornography images that have been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct (also known as morphing).[195] The CPPA defines an identifiable minor as a person who either was a minor at the time the image was created, adapted or modified; whose image as a minor was so used; or who is recognizable as an actual person.[196] The Act does not require proof that an actual minor was used or of the identity of that minor.[197]

Like the CDA and COPA, the CPPA is a criminal statute.[198] Any person who knowingly sends or receives child pornography, or any material containing child pornography, using interstate or foreign commerce, or knowingly reproduces such material faces fines, imprisonment up to fifteen years, or both. For second and subsequent offenses, the penalty increases to not less than five no more than thirty years. Any person who possesses three or more images of child pornography faces fines, imprisonment up to five years, or both. The penalty increases to not less than two years nor more than ten years for second and subsequent offenses.

The Act also provides an affirmative defense. If the material was produced using an actual person who was an adult at the time the material was produced and the material was not advertised, promoted, described or distributed in such a manner as to "convey the impression" that it is or contains "a visual depiction of a minor engaging in sexually explicit conduct."[199]

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191. H.R. Rpt. 104-545 (1996).

192. Pub. L. No. 104-208, § 121, 110 Stat. 3009-25 (1996) (codified as amended at 18 U.S.C. §§ 2251, 2252, 2252A, 2256). CPPA was signed into law on Sept. 30, 1996 as part of the Dept. of Defense Appropriations Act for FY97.

193. 18 U.S.C. § 2256(8)(a).

194. *Id.* § 2256(8)(b),(d).

195. *Id.* § 2256(8)(c).

196. *Id.* § 2256(9)(A).

197. *Id.* § 2256(9)(B).

198. *Id.* § 2252A(a) & (b).

199. *Id.* § 2252A(c).

2. *After Confusion Among the Circuit Courts, the Supreme Court Snatches Victory Away*

In the years since the enactment of the CPPA, the courts have disagreed about its constitutionality. Four Circuits (the First, Fourth, Fifth and Eleventh) upheld the law while only one (the Ninth) found it unconstitutional.[200] The courts that upheld the law centered their decisions around the harmful effects of the child pornography industry. They found that the government had a compelling interest in preventing harm to actual children and that the statute was sufficiently narrowly tailored to promote this interest. These courts concluded that the government's interest was no less compelling where the images are virtually indistinguishable from those in which an actual child is used and abused during the production process. The Fifth Circuit went on to note "the statute does not criminalize an intolerable range of constitutionally protected conduct . . . in relation to the statute's plainly legitimate sweep."[201] To reach this conclusion, the court interpreted the "appears to be" language of the statute "to target only those images that are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children."[202] A district court also upheld the law on similar grounds.[203]

Only the Ninth Circuit, in a two-to-one decision, found the law unconstitutional as a content-based restriction on protected speech that does not further any compelling governmental interest because the prohibited images do not include real children. With this split in the circuits, and the Ninth Circuit's refusal to grant a rehearing, the Supreme Court agreed to hear the government's appeal.[204] The Court upheld the Ninth Circuit's decision striking down parts of the CPPA.[205] Only the provisions that did not require the use of real children, the so-called virtual child pornography provisions found in sections 2256(8)(B) and (D), were challenged.

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200. *U.S. v. Fox*, 248 F.3d 394, 397 (5th Cir. 2001); *U.S. v. Mento*, 231 F.3d 912, 915 (4th Cir. 2000); *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999); *U.S. v. Acheson*, 195 F.3d 645, 649 (11th Cir. 1999); *U.S. v. Hilton*, 167 F.3d 61, 65 (1st Cir). In *Mento*, the Fourth Circuit had no need to rule on the constitutionality of the law, because the defendant did not contest that he knowingly possessed some images of actual minors. *Mento*, 231 F.3d at 915.

201. *Fox*, 248 F.3d at 406.

202. *Id.* at 401.

203. *See U.S. v. Pearl*, 89 F. Supp. 2d 1237 (D. Utah 2000).

204. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

205. Justice Kennedy authored the majority opinion, in which Justices Stevens, Souter, Ginsburg and Breyer joined. Justice Thomas concurred in the judgment, but not the rationale. Justice O'Connor concurred in part regarding § 2256(8)(D) and dissented in part regarding § 2256(8)(B). Only Chief Justice Rehnquist and Justice Scalia dissented in the entirety.

The Court first evaluated the CPPA under the precedent established by *Miller* and *Ferber*. Noting that other statutes already criminalize obscene material and that the statute did not conform to the *Miller* test, the Court decided that it was not directed at speech that is obscene. Furthermore, because the statute prohibits images that do not depict actual children, it goes beyond *Ferber* and can not be considered as a child pornography statute. Sexual expression that is indecent but not obscene is protected by the First Amendment and requires strict scrutiny.[206]

The Court again recognized Congress' compelling interest in protecting children from abuse. However, responding to the government's argument that the CPPA only prohibits images that are virtually indistinguishable from child pornography using real children, the Court reiterated its position in *Ferber* where it upheld a prohibition on the distribution and sale of child pornography, as well as its production. The Court reasoned, "these acts were intrinsically related to the sexual abuse of children" by "creating a permanent record of the abuse" and supporting "an economic motive for its production."[207] Subsequent decisions that strengthened this prohibition focused on the victim of the crime, not the actions themselves.[208] The CPPA, however, prohibits speech that records no crime and creates no victims.

Congress found that the images the CPPA prohibits are used by pedophiles to stimulate or whet their sexual appetites or to seduce children to sexual abuse and exploitation.[209] Nevertheless, the Court found "the harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[210] The prospect of crime does not justify laws suppressing protected speech.[211] Further complicating the government's position, the Court reiterated its position in *Ferber* when it recognized that using young-looking adults or virtual people could provide an alternative to using real children if it were necessary for literary or artistic value.[212] The CPPA would foreclose even this possibility, in essence banning protected speech as a means to ban unprotected speech.

The Court found it easier to find the "coveys the impression" provision unconstitutional. This provision only looks to the packaging of the material, not the material itself. Material that is prohibited under this provision is prohibited in the hands of all who receive it, regardless of

206. *Sable Commun. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

207. *Ashcroft*, 535 U.S. at 249; *see Ferber*, 458 U.S. at 759-60.

208. *See e.g. Osborne v. Ohio*, 495 U.S. 103 (1990).

209. 18 U.S.C. § 2251 (2000) (citing Congressional Findings, notes (3), (4) & (8)).

210. *Ashcroft*, 535 U.S. at 250.

211. *See Kingsley Intl Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959).

212. *Ferber*, 458 U.S. at 762-63.

who actually marketed, sold or described it. With no support for this provision in the legislative findings and a potential that someone could be punished for possessing a sexually explicit film containing no youthful actors that was accidentally placed in a box suggesting a prohibited film, the Court found this provision substantially overbroad and in violation of the First Amendment.

As the Court stated before, the First Amendment requires actual harm, not hypothetical harm. As examples of actual harm, the Court cited two movies that the terms of the CPPA prohibit: *Traffic*, which was nominated for a best picture Oscar, and *American Beauty*, which won the 1999 best picture Oscar. *Traffic* portrays a sixteen year-old girl who becomes addicted to drugs and ends up in a filthy room trading sex for drugs. In *American Beauty*, a teenage girl engages in sexual relations with her teenage boyfriend and her teenage friend succumbs to her father's sexual advances. In another scene, one character sees what appears to be his teenage son performing oral sex on the girl's father. "If these films . . . contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value."[213] This result, the Court warned, is inconsistent with the First Amendment rule requiring that the work be judged as a whole. One scene, even if it is obscene judged by itself, does not make an entire work obscene.[214]

Agreeing with the majority in judgment, but not in rationale, Justice Thomas wrote a concurring opinion. He believes that the government's strongest argument is that "persons who possess and disseminate pornographic images of real children may escape conviction by claiming that the images are computer-generated, thereby raising a reasonable doubt as to their guilt."[215] However, the government never pointed to any case in which this has happened. He did not want to foreclose the government from enacting this type of legislation if it contained an appropriate affirmative defense or some other narrowly drawn restriction. He concludes, contrary to the majority view, that "if technological advances thwart prosecution of 'unlawful speech,' the Government may well have a compelling interest in barring or otherwise regulating some narrow category of 'lawful speech' in order to enforce effectively laws against pornography made through the abuse of real children."[216]

Like the majority, Justice O'Connor would strike down the COPA's ban on material that "conveys the impression" that it contains actual

213. *Ashcroft*, 535 U.S. at 248.

214. *Id.*; *see Kois v. Wis.*, 408 U.S. 229, 231 (1972).

215. *Ashcroft*, 535 U.S. at 259.

216. *Id.*

child pornography. Unlike the majority, she would have upheld the statute's ban on pornographic depictions that "appear to be" of minors so long as it is not applied to youthful-adult pornography. She agrees with Justice Thomas that the government's concern is reasonable, but she sides with the government arguing that the Court's precedent "do[es] not require Congress to wait for harm to occur before it can legislate against it."[217] To limit the unnecessarily adverse impact of the CPPA, Justice O'Connor would limit the application of "appears to be . . . of" to those materials that are "virtually indistinguishable from" child pornography that uses actual children. Unlike, Justice Thomas, Justice O'Connor places the burden on the respondents to provide examples of materials that are "wholly computer-generated and contain images that 'appear to be . . . of minors' engaging in indecent conduct, but that have serious value or do not facilitate child abuse."[218]

Chief Justice Rehnquist, with whom Justice Scalia joined in part,[219] went one step further and argued that the entire statute should be upheld. He limited the interpretation of the "conveys the impression" provision to prohibit "only the knowing possession of materials actually containing visual depictions of real minors engaged in sexually explicit conduct, or computer generated images virtually indistinguishable from real minors engaged in sexually explicit conduct."[220] In essence, he argued that the statute could be limited to cover no more material than what was already unprotected by the First Amendment. However, if the statute were limited to only that material which was already unprotected by the First Amendment, then what would be the urgent need for this statute?

In addition, he disagreed with Justice O'Connor's limitations on the "appears to be" provision. The Chief Justice argued that the provision "reaches only the sort of 'hard core' of child pornography that [the Court] found without protection in *Ferber*."[221] He noted that with this limitation, the CPPA would ban visual depictions of youthful looking adult actors engaged in actual sexual activity, not mere suggestions. To counter the majority's argument that the CPPA would chill protected speech like the films *Traffic* and *American Beauty*, the Chief Justice argued that if the CPPA covered these films, they would not have been made the way they were. The CPPA was in full force and effect since 1996, years before they were created.

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217. *Id.* at 264 (O'Connor, J., concurring) (quoting *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 212 (1997)).

218. *Id.* at 265-66.

219. The Chief Justice relied, in part, on legislative history for his conclusions. Justice Scalia did not join in this part of the dissent.

220. *Id.* at 273.

221. *Id.* at 269.

The dissent, however, ignored a key limitation of the *Ferber* Court's decision: that it applied to protect actual minors. Banning virtual child pornography has no direct effect on actual minors. To the contrary, the ability to create materials using virtual people or youthful-looking adults would lead to a reduction in real child pornography. Who would risk the penalties associated with using real minors when legal alternatives are available? Even though the Court struck down the CPPA, the government can still prosecute cases in which these images are involved as obscenity under the *Miller* test, applying community standards and other First Amendment protections.

3. *Congress Attempts a Response*

Congress made a number of attempts to respond to the Court's concerns regarding the CPPA.[222] However, these bills preserve the prohibition on virtual child pornography and the affirmative defense that transfers the burden to the defendant to prove that he did not break the law. The Supreme Court held that pornography that does not involve an actual child is just pornography and, if it is not obscene, it is protected by the First Amendment. Like the CPPA, these bills would not only criminalize speech that is not obscene, but also speech that has redeeming literary, artistic, political or other social value. Congress raised the same arguments in support of these new bills that the Court rejected in *Free Speech Coalition*.[223]

In an apparent attempt to avoid constitutional issues, one representative even attempted to amend the constitution to declare that neither the U.S. Constitution nor any State constitution shall be construed to protect child pornography, whether actual or virtual.

D. THE *CHILDREN'S INTERNET PROTECTION ACT* BATTLE: A NEW WEAPON, A NEW BATTLE: CONGRESS USES THE SPENDING CLAUSE

1. *The Weapon — The Spending Clause*

The Constitution empowers Congress to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[224] The power of Congress to authorize expenditure of public moneys for public purposes is

222. *The Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act*, S. 151, 108th Cong. § 3 (2003) (sponsored by Sen. Hatch (R-Utah), the author of the CPPA, and co-sponsored by Sen. Leahy (D-Vt.)); *The Child Obscenity and Pornography Prevention Act*, H.R. 1161, 108th Cong. (2003) (sponsored by Representative Lamar Smith). Last year, the House passed a similar version of H.R. 1161 with the President's support.

223. H.R. Rpt. 107-526, at § 2 (2002).

224. U.S. Const. art. I, § 8, cl. 1.

not limited by the direct grants of legislative power found in the Constitution,[225] nor is it absolute. The seminal case outlining constraints on Congress' spending clause power is *South Dakota v. Dole*,[226] a case in which the Supreme Court held that a statute that reduced federal highway funding to states with a minimum drinking age below twenty-one did not violate Congress' spending power.

Dole enumerated four restrictions on Congress' spending power. First, the exercise of spending power must be in pursuit of the general welfare.[227] Second, if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation.[228] Third, the conditions might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.[229] Finally, other constitutional provisions may provide an independent bar to the conditional grant of federal funds.[230] Only this last limitation was in dispute. The Court explained this last limitation not as a prohibition on Congress doing indirectly what it can not do directly, but as a caution that Congress can not "induce the States to engage in activities that would themselves be unconstitutional."[231] Furthermore, the financial inducement may be so coercive that congressional pressure becomes congressional compulsion.[232]

2. *The Attack — The Children's Internet Protection Act*

After trying to regulate pornography on the Internet directly and losing the battles in the federal courts, Congress took a different approach and tried to regulate it indirectly. By enacting the *Children's Internet Protection Act* ("CIPA"),[233] Congress used its spending power as an

225. *U.S. v. Butler*, 297 U.S. 1, 66 (1936).

226. *S.D. v. Dole*, 483 U.S. 203 (1987).

227. U.S. Const. art. I, § 8, cl. 1; *see Dole*, 483 U.S. at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) and *Butler*, 297 U.S. at 65).

228. *Dole*, 483 U.S. at 207 (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).

229. *Id.* (citing *Mass. v. U.S.*, 435 U.S. 444, 461 (1978)).

230. *Id.* (citing *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269-70 (1985)); *Buckley v. Valeo*, 424 U.S. 1, 91 (1976); *King v. Smith*, 392 U.S. 309, 333, n. 34 (1968).

231. *Dole*, 483 U.S. at 210.

232. *Id.* (citing *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)) (stating that the financial inducement amounted to less than five percent of the state's highway grants and, according to the Court, did not amount to coercion in this case).

233. CIPA was signed into law on Dec. 21, 2000 as Title XVII of the *Dept. of Labor, Health and Human Servs., and Educ. Appropriations Act for FY01* (Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000)) (codified as amended at 20 U.S.C. §§ 6801 et seq., 9134(b), 47 U.S.C. § 254(h)). The provisions that amended the *Elementary and Secondary Educ. Act* (ESEA) were re-adopted by Congress when the ESEA was reauthorized as Subpart 4 of

incentive for public schools and libraries to comply with its wishes. To achieve Congress' objective, CIPA placed further conditions on the receipt of funds that help schools and libraries provide Internet access, among other things.

Those schools or libraries that have computers with Internet access and receive universal service funds[234] must certify to the FCC that they have in place and are enforcing a policy of Internet safety that includes using filters and other blocking measures on any of its computers with Internet access that protects against access to visual depictions that are obscene or child pornography or, with respect to minors, harmful to minors.[235] Schools also must include in their policy monitoring the online activities of minors. An authorized person may disable the blocking measure, during use by an adult only, for bona fide research or other lawful purposes.[236] The restrictions apply to all computers, as CIPA makes no distinction between computers used only by staff and those accessible to the public.[237]

Any school or library that is unable or fails to certify compliance with the requirements would be ineligible for services at discount rates or funding in lieu of services until it certifies its compliance. CIPA also empowered the respective regulators[238] to compel compliance or enter into compliance agreements in these circumstances. Only if a school or library knowingly failed to comply with its certification, would it be required to reimburse any funds and discounts that it received for the period covered by the certification.

The requirements for those schools and libraries that have computers with Internet access and do not receive universal service discounts were similar, but not identical. They were ineligible for funds to purchase computers used to access the Internet or to pay for Internet access[239] unless the school or library complied with certain require-

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Part D of Title II of the ESEA Reauthorization Bill, popularly known as the *No Child Left Behind Act of 2001* (Pub. L. No. 107-110, 115 Stat. 1686 (2001)).

234. The universal service support mechanism, known as e-rate, is provided for under the *Commun. Act of 1934*, as amended by the *Fed. Telecomm. Act of 1996*, 47 U.S.C. § 254 (h)(1)(B) (2000).

235. CIPA defines obscene and child pornography by incorporating 18 U.S.C. §§ 1460, 2256. Harmful to minors is defined by adapting the *Miller* standard like the Congress did in COPA. Minors, like under COPA, are individuals under seventeen.

236. These terms are problematic because Congress never define "bona fide research" or "other lawful matters," and these terms hold the key to disabling the filters.

237. *See In re Federal-State Joint Board on Universal Service: Children's Internet Protection Act*, CC Docket No. 96-45, Report and Order, FCC 01-120, ¶ 30 (Apr. 5, 2001).

238. The respective regulators are the Secretary of Education for schools and the Director of the Institute of Museum and Library Services for libraries.

239. Congress provided for these funds in the *Elementary and Secondary Educ. Act of 1965* (20 U.S.C. § 6801 et seq.) and the *Museum and Lib. Servs. Act* (20 U.S.C. § 9134(b)).

ments. They had to certify that they had in place the same Internet safety policy. However, CIPA did not require schools in this category to monitor the online activities of minors. Furthermore, the disabling provision, which applied to both schools and libraries, was not limited to use by adults. They faced the same penalties for noncompliance, except the recovery of funds was expressly prohibited.[240]

3. *The First Court Ruling on Filters Handicaps Congress Before It Even Attacks: Mainstream Loudoun*

The first case to address the applicability of the First Amendment to public libraries' filtering Internet access was *Mainstream Loudoun v. Board of Trustees*.[241] Precipitating the case was the Library Board's ("Board") adoption of a Policy on Sexual Harassment ("Policy") on October 20, 1997, which required filtering software to be installed on all library computers to block material that is child pornography or obscene (so-called hard core pornography) or harmful to minors (so-called soft core pornography).[242] Patrons challenged this policy claiming that it imposed an unconstitutional restriction on their right to access protected speech on the Internet.

According to the Court, the central question was whether a public library may, without violating the First Amendment, enforce content-based restrictions on access to Internet speech.[243] For precedent, the Court looked to *Board of Education v. Pico,* in which the Supreme Court reviewed the decision of a local board of education to remove certain books from a high school library based on the board's belief that the books were anti-American, anti-Christian, anti-Semitic, and just plain filthy.[244] A five-member majority[245] of the Court balanced the "special

240. Pub. L. No. 106-554, §§ 3601(a)(4)(B), 1712(a)(5)(B).

241. 24 F. Supp. 2d 552 (E.D. Va. 1998). The judge initially ruled on the Board of Trustee's motions to dismiss and motion for summary judgment. 2 F. Supp. 2d. 783 (E.D. Va. 1998) After dismissing the individual defendants and denying the remaining motions, she ordered the Board to respond to the complaint and then issued her final ruling. 24 F. Supp. 2d 552.

242. Tech L.J., *Internet Sexual Harassment Policy of Loudoun County Lib.* <http://techlawjournal.com/courts/loudoun/71020pol.htm> (Oct. 10, 1997). The policy also required that Internet computers be place in close proximity, and in full view, of library staff. Penalties for violation of this policy included being asked to leave the library. Parents were required to personally appear and show proof of identity before filling out a form granting their children access to the Internet and they had to personally present it to the library staff. However, these provisions were not challenged. In addition, the Policy included a severability clause. *Id.*

243. *Mainstream Loudoun*, 2 F. Supp. 2d at 792.

244. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

245. Though the Court had no real majority in *Pico*, five members did agree on this point. Four members formed the plurality opinion with one concurring. The plurality, writing through Justice Brennan, focused on the right to receive information, while Justice

role of the school's library as a locus for free and independent inquiry" with the public high school's "crucial inculcative role in the preparation of individuals for participation as citizens" and held that "the school board members could not remove books simply because they dislike the ideas contained in them."[246]

In interpreting *Pico*, this Court concluded that it "st[ood] for the proposition that the First Amendment applies to, and limits, the discretion of a public library to place content-based restrictions on access to constitutionally protected materials within its collection."[247] However, the amount of discretion available was still in controversy.[248] The amount of discretion that the *Pico* Court accorded to school libraries was tied to the public school's role as educator, a factor that was not present in this case. In fact, none of the factors that justified giving high school libraries broad discretion to remove materials was present in this case. In this case, the patrons were adults, whose rights to speak and receive speech are entitled to full First Amendment protection. Unlike school libraries, public libraries are "places of freewheeling and independent inquiry."[249] Finding that Internet publications do not take up space or require physical maintenance and that restricting access to a particular Internet publication requires the expenditure of resources, the Court ruled that considerations based on resource-related issues such as cost or physical resources could not justify a public library's decision to restrict access to Internet materials. Having chosen to provide access, the Library Board may not thereafter selectively restrict certain categories of Internet speech because it disfavors their content.[250]

The Board unsuccessfully argued that its policy should be evaluated under a lesser First Amendment standard because the libraries were non-public forums and the policy was a restriction on time, place or manner.[251] In determining that the public libraries constituted limited public forums, the Court focused on the government's intent to create a

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Blackmun in his concurrence focused on the school board's discrimination against disfavored ideas. *See Mainstream Loudoun*, 2 F. Supp. 2d. at 792-93.

246. *Id.* (quoting *Pico*, 457 U.S. at 872).

247. *Id.* at 794.

248. Even a majority of the *Pico* Court could not agree on the amount of discretion available to school libraries. *Id.; see* Pico, 457 U.S. at 853.

249. *Mainstream Loudoun*, 2 F. Supp. 2d. at 795.

250. The Court relied, in part, on *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1943) in which the Supreme Court held unconstitutional a federal statute that directed the Postmaster General not to deliver a publication deemed communist propaganda without written request from the recipient, stating that the United States may give up the post office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues. *Id.* at 305 (quoting *Milwaukee Sec. Dem. Pab. Co.v. Burieson*, 255 U.S. 407, 437 (1921)).

251. *See Playtime*, 475 U.S. 41.

public forum, the extent of the use of the libraries granted to the people of the county, and the nature of the forum being compatible with the expressive activity at issue.[252] As a limited public forum, the Board must "permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum."[253] Dispensing with the second argument, the Court stated, "the Fourth Circuit [Court of Appeals] has recently observed that content-neutrality is a prerequisite to the constitutionality of time, place and manner restrictions on expressive conduct on public grounds."[254]

The Policy failed strict scrutiny analysis. While the interests were compelling, the Policy was not necessary to further those interests, nor was it narrowly tailored to achieve those interests. The Board was required to demonstrate that, "in the absence of the Policy, a sexually hostile environment might exist and/or there would be a problem with individuals accessing child pornography or obscenity or minors accessing materials that are illegal as to them."[255] The Board was required to demonstrate real harm, not hypothetical, and that the Policy would alleviate the harm "in a direct and material way."[256] For the first interest, the Board could not point to a single incident in which a library employee or patron complained that material being accessed on the Internet was harassing or created a hostile environment.[257] For the second interest, the Board pointed to one incident in another Virginia jurisdiction in which the library offered unfiltered Internet access and adequately corrected the problem with privacy screens.

The Policy was not narrowly tailored to achieve the Board's interests, because less restrictive means were available and the Policy was overinclusive. The Board presented no evidence that it tested any of the less restrictive means available.[258] The court found the Policy overinclu-

252. *Mainstream Loudoun,* 24 F. Supp. 2d at 563.

253. *Id.* (quoting *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1262 (3d Cir. 1992)).

254. *Id.* at 564 (citing *U.S. v. Johnson*, 159 F.3d 892 (4th Cir. 1998)).

255. *Id.* at 565. The court did not indicate whether it would have upheld the Policy if the library could have demonstrated that a sexually hostile environment would exist without the Policy. In 2001, the Equal Opportunity Employment Commission determined that the unrestricted Internet access policy of the Minneapolis Public Library could create a sexually hostile work environment. *See Smith v. Minneapolis Pub. Lib.*, Charge Number 265A00651 (May 23, 2001).

256. *Mainstream Loudoun,* 24 F. Supp. 2d at 565 (quoting *Turner Broad. v. FCC*, 512 U.S. 622, 664 (1994)).

257. *Id.*

258. "Less restrictive means" includes designing an acceptable use policy, requiring patrons to sign forms agreeing to comply with the policy, installing privacy screens, recessing the monitors, using filters that can be turned off for adult use, changing the location of Internet terminals, educating patrons on Internet use, directing patrons to preferred websites, placing time limits on use, using a tap on the shoulder to stop violations, and enforc-

sive because, on its face, it limited the access of its patrons, adult and juvenile, to material deemed fit for juveniles.[259]

The court also found the Policy unconstitutional under the doctrine of prior restraint because it provided neither adequate procedural safeguards[260] nor sufficient standards to limit the discretion of the decision maker.[261] The Policy had no provision for prior judicial determinations before material was censored. Furthermore, the Policy not only lacked standards limiting the decision maker's discretion, but it also entrusted the decision to a private, non-local corporation based on secret criteria not disclosed to anyone, even the Board, criteria that might or might not bear any relation to legal definitions of obscenity, child pornography or harmful to juveniles or to the parameters of the Policy.[262]

Contrary to the Board's argument that the unblocking procedure saved the Policy because it ensured that patrons could view constitutionally protected material, it too lacked procedural safeguards and standards limiting the discretion of the decision maker.[263] To get a site unblocked, a patron was required to submit a written request and include his name, telephone number, and a detailed explanation of why he desired access to the blocked site.[264] Then, the library staff decided whether the request should be granted or denied.[265] The Policy provided no time limit for a request to be handled or a procedure for notifying the patron of the outcome of a request.[266] The Supreme Court ruled unconstitutional a similar statute that required patrons of the U.S. Post Office to send in a card requesting that communist propaganda be sent to them before the Postmaster could deliver it.[267] That statute required postal employees to grant such requests for access automatically. This policy does not even provide that much. Finally, forcing citizens to publicly petition the Government for access to disfavored speech has a severe chil-

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ing criminal laws and Internet use policies when violations occur. The court did not address the constitutionality of these methods because that question was not before them.

259. *Mainstream Loudoun,* 24 F. Supp. 2d at 567.

260. The procedural safeguards required by the Supreme Court are that any restraint prior to judicial review can be imposed only for a brief period during which the status quo must be maintained, expeditious judicial review of that decision must be available, and the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Id.* at 568 (quoting *Freedman v. Maryland,* 380 U.S. 51, 58-60 (1965); *11126 Baltimore Boulevard, Inc. v. Prince George's County,* 58 F.3d 988, 994 (4th Cir. 1995)).

261. *Mainstream Loudoun,* 24 F. Supp. 2d at 568.

262. *Id.* at 569.

263. *Id.* at 570.

264. *Id.* at 557.

265. *Id.*

266. *Id.*

267. *Lamont,* 381 U.S. at 303-04.

ling effect.[268]

The Board did not appeal the decision. Instead, it replaced the old policy with an "Internet Use Policy."[269] The new policy states the limits of, guidelines for and conditions governing Internet access and provides for both filtered and unfiltered access.[270] More importantly, it recognizes adults' rights to decide what information they and their minor children will receive by enabling them to decide whether access will be filtered or unfiltered. The new policy also incorporates some of the less restrictive methods of furthering its interest, such as privacy screens, educating patrons on Internet use and placing time limits on Internet use.

4. *The First Court Responds to CIPA and Defeats Congress . . . Again*

Congress thought that by using the Spending Clause, it could circumvent the problems that it had with its previous attempts to regulate pornography on the Internet. They must have forgotten the Supreme Court's caution that Congress can not use this power to persuade the states to do something unconstitutional. One federal court had already ruled that mandating the use of filters was unconstitutional. Because no one appealed that decision, the Supreme Court had no opportunity to rule. Now, through another challenge to another statute, a federal court has given them that opportunity.

Before CIPA was scheduled to go into effect, a group of libraries, library patrons and Web site publishers filed suit against the United States seeking to enjoin the enforcement of CIPA on the ground that it violated the Constitution of the United States.[271] Specifically, the plaintiffs argued that CIPA was based on the last limitation to the Congress' use of the Spending Clause as described in *Dole*, an independent constitutional bar.[272] Following § 1741 of the Act, a three-judge panel was convened to hear the case.

It is well settled that the government need not permit all forms of

268. *Mainstream Loudoun*, 24 F. Supp. 2d at 570, n. 22 (citing *Lamont*, 381 U.S. at 307).

269. Loudoun County, *Internet Policy* <http://www.loudoun.gov/lcpl/docs/lcplpolicies_/internetusepoli.doc> (accessed Sept. 6, 2002).

270. Tech L.J., *supra* n. 242.

271. *Am. Lib. Assn.*, 201 F. Supp. 2d. at 407.

272. No one ever raised the argument that the money does not come from Congress. Every telecommunications provider is required to collect a universal service fee. The money is paid to a corporation chartered by Congress to specifically administer the universal service program. The universal service fee can not be used for any other purpose and it never passes through Congress's hands. Until someone raises this issue, we will never know if it makes a difference. I will not discuss it either because its impact is beyond the scope of this paper.

speech on property that it owns and controls.[273] The First Amendment does not guarantee access to property simply because it is owned or controlled by the government.[274] The extent to which the First Amendment permits the government to restrict speech on its own property depends on the character of the forum that the government has created.[275] The Supreme Court has identified three types of forums to determine the level of First Amendment scrutiny applicable to content-based restricts on speech on government property – traditional public forums, designated public forums, and nonpublic forums.

Traditional public forums include streets and parks, which have immemorially been held in trust for the use of the public and have been used for purposes of assembly, communicating thoughts and discussing public questions.[276] For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[277] The state may also enforce regulations of the time, place and manner of expression that are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[278] Examples of traditional forums are sidewalks, public squares, public parks and streets.

The second type, limited public forums, consists of public property that the State has opened for use by the public as a place for expressive activity.[279] The state is generally permitted to limit this type of forum to certain speakers or the discussion of certain subjects, as long as it does not discriminate on the basis of viewpoint.[280] Once it has defined the limits of a designated public forum, regulation is subject to the same limitations as those governing a traditional public forum.[281] Examples of this type of forum include university meeting facilities, school board

273. *Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981) (referring to mailboxes); *Greer v. Spock*, 424 U.S. 828 (1976) (referring to military bases); *Adderley v. Florida*, 385 U.S. 39 (1966); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (referring to jails and prisons); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (referring to advertising space made available in city rapid transit cars).

274. *Perry Educ. Assn. v. Perry Local Educators' Assn*, 460 U.S. 37, 46 (1983) (quoting *Postal Serv.*, 453 U.S. at 129).

275. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 826 (1985).

276. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

277. *Perry Educ. Assn.*, 460 U.S. at 45 (quoting *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

278. *Id.* (quoting *Postal Serv.*, 453 U.S. at 132).

279. *Id.*

280. *Id.*

281. *Intl. Socy. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

meetings, and municipal theaters.[282]

Limitations on expressive activity conducted on any other government-owned property (so-called nonpublic forums) need only be reasonable to survive, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.[283] The restriction "need only be reasonable; it need not be the most reasonable or the only reasonable limitation."[284] An example of a nonpublic forum is an airport terminal operated by a public authority.[285]

The purpose of a public library in general, and the provision of Internet access within a public library in particular, is for use by the public for expressive activity, namely, the dissemination and receipt by the public of a wide range of information. The Court defined the right at issue as the specific right of library patrons to access information on the Internet, and the specific right of Web publishers to provide library patrons with information via the Internet.[286] Consequently, the Court decided that the relevant forum was "the specific forum created when the library provides it patrons with Internet access."[287]

Because the government opened the library for "virtually unrestricted use by the general public for speech on a virtually unrestricted range of topics," the Court adopted *Mainstream Loudoun*'s holding that the public library is a limited public forum.[288] In rejecting the government's argument that the library's discretion in acquiring Internet materials should be treated the same as print materials, the Court observed that while library books are reviewed before purchase, Internet content is reviewed by no one. Instead, the public defines the content that public libraries make available to their patrons through the Internet, simply by adding information to the Web. Therefore, the government's decision to selectively exclude certain speech on the basis of its

282. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981); *Madison Sch. Dist. v. Wisconsin Empl. Rel. Commn*, 429 U.S. 167 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

283. *Perry Educ. Assn.*, 460 U.S. at 46.

284. *Krishna*, 505 U.S. at 683 (quoting *U.S. v. Kokinda*, 497 U.S. 720, 730 (1990)).

285. *Id.*

286. *Am. Lib. Assn.*, 201 F. Supp. 2d. at 456.

287. *Id.*

288. *Id.* at 460-61. This court relied on *Mainstream Loudoun* only in declaring libraries limited public forums, but did not agree with that court's rationale in distinguishing restrictions on public libraries' print collections from restrictions on the provision of Internet access. Whereas, the *Mainstream Loudoun* court reasoned that unlike the money and shelf space consumed by the library's provision of print materials, no appreciable expenditure of library time or resources is required to make a particular Internet publication available once the library has acquired Internet access, this court noted that just as the scarcity of a library's budget and shelf space constrains a library's ability to provide its patrons with unrestricted access to print materials, the scarcity of time at Internet terminals constrains the libraries' ability to provide patrons with unrestricted Internet access. *Id.* at 465, n. 25.

content must survive strict scrutiny like a restriction in a traditional public forum.

The Court attempted to identify the compelling government interest that the use of filtering software promotes, analyze whether the use of filtering software is narrowly tailored to further those interests, and determine whether less restrictive alternatives exist that would promote the government interest. The state has a well-recognized interest in preventing the dissemination of obscenity and child pornography, and in preventing minors from being exposed to material harmful to their well-being. However, public libraries do not have a compelling interest in protecting patrons from accidentally or unwittingly viewing sexually explicit images or other unwanted Web pages or in keeping them from intentionally accessing material that the libraries deem inappropriate.[289] Nor do public libraries have a compelling interest in attempting to control patrons' inappropriate or illegal behavior. In fact, the court rejected the public library's interest in preventing unlawful or otherwise inappropriate patron conduct as a basis for restricting patrons' access to speech on the Internet.[290]

To analyze whether the use of filtering software is narrowly tailored to further the government's compelling interests, it is first necessary to elaborate on how software filters work and their limitations. Software filtering companies gather sites by searching for keywords in commercial search engines and Web directories and using a number of other techniques (mine user logs, use spiders, etc.). Filtering companies then divide the sites that they will block into multiple categories, each with its own unique definitions. Customers can then choose which categories to block.

No category definition is identical to CIPA's definitions of obscene, child pornography or harmful to minors. Also, category definitions and categorization are made without reference to community standards, a necessary element in defining whether material is obscene or obscene to minors. The judicial system is not even involved in creating category definitions or categorizing Web sites at any stage in the process. Furthermore, no one but the filtering companies has access to the complete list of URLs (Uniform Resource Locator or Web address) in any category,

289. Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities simply by averting our eyes. *Id.* at 472 (quoting *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000)).

290. *Id.* at 475. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech. *Id.* (quoting *Kingsley Intl. Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 689 (1959)); *see Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

because companies consider it proprietary.[291] Lists are unavailable for review by customers and the general public; not even the Web site owners and operators that are blocked know.

Filtering companies do periodically update their category lists, but they do not generally re-review the contents of a page or site unless requested to do so. Through this process they may catch some new Web sites that are added but not those that change their content or URL. In addition, given the immense size of the Internet and the rate of growth, it is impossible to review every Web site and every document on that site manually or automatically. Furthermore, not everything is searchable on the Internet and search engines generally can not search and filter images as mandated by CIPA, which applies only to visual depictions. As a result of these limitations, filters will incorrectly fail to block a substantial amount of speech (underblocking) and incorrectly block a substantial amount of speech (overblocking).[292]

Given the substantial amount of constitutionally protected speech blocked by software filters, the court concluded, "that use of such filters is not narrowly tailored with respect to the government's interest in preventing the dissemination of obscenity, child pornography, and material harmful to minors."[293] Therefore, the government could not meet its burden of demonstrating the existence of a filtering technology that "both blocks enough speech to qualify as a technology protection measure, for purposes of CIPA, and avoids overblocking a substantial amount of constitutionally protected speech."[294] Consequently, public li-

291. The court granted leave for N2H2's counsel to intervene to object to testimony that would potentially reveal N2H2's trade secrets. In another case, Microsystems Software and its corporate parent, Mattel, Inc. sued two foreign programmers and their Internet service providers for posting an original program to their home pages that allowed the program's users to decrypt and read the list of blocked Web sites for CyberPatrol, an Internet filtering program. *Microsystems Software, Inc. v. Scandinavia Online AB*, Civil No. 00-10488-EFH (D. Mass. filed March 15, 2000). The parties eventually settled and the court entered a permanent injunction. *Id.* The Copyright Office issued an exemption to the *Digital Millennium Copyright Act* that allows users of filtering software to decrypt lists of banned or blocked Web sites used by the filtering software. The exemption does not allow the user to publish such a list. Lib. Of Cong, *Rulemaking* <http://www.loc.gov/copyright/1201/anticirc.html> (accessed Nov. 18, 2002).

292. Dozens of e-mail messages telling Harvard University applicants whether they had been admitted never arrived in December 2001 after America Online interpreted the messages as junk e-mail. USA Today, *E-Mail Glitch Blocks Harvard Acceptance E-Mails* <http://www.usatoday.com/life/cyber/tech/2002/01/02/harvard-spam.htm> (Jan. 2, 2002). Software filters blocked Beaver College's (PA) website and online biographies of the COPA Commissioners who graduated magna cum laude. *Youth, Pornography and the Internet* 12-6 (Dick Thornburgh & Herbert S. Lin eds., Prepublication Copy).

293. *Am. Lib. Assn.*, 201 F. Supp. 2d. at 476. Adding more support to this conclusion, software filters would also have to block anonymity and translation Web sites; otherwise, they would be easy to circumvent.

294. *Id.* at 477.

braries will be unable to comply with CIPA without also blocking significant amounts of constitutionally protected speech.

Lastly, there are a number of less restrictive alternatives that could serve the government's interests.[295] For minors, the library could require that they use filtered access unless their parent consents to unfiltered use. The court noted that even with filters, given their "inevitable underblocking," a library would still have to resort to a "tap-on-the-shoulder method of enforcement."[296] Like the *Mainstream Loudoun* court, this court did not address the constitutionality of any of these alternative methods.[297] The Court could not even determine whether filters and any of the alternatives were comparable because the government offered no evidence to show that the less restrictive alternatives were ineffective at furthering the government's compelling interests or that they were less cost-effective than filters.[298]

Like the policy at issue in *Mainstream Loudoun*, CIPA also can not be saved by the unblocking procedure. The court held that "requir[ing] that library patrons ask a state actor's permission to access disfavored content violates the First Amendment."[299] Such a requirement would have a chilling effect by deterring patrons from requesting that a library disable the filters to allow a patron to view constitutionally protected, but sensitive information.[300] A patron also may be hesitant to make a request to view sensitive information, like medical information or information on sexual identity, if they would be embarrassed, desire to protect their privacy or wish to remain anonymous.[301] In addition, like the *Mainstream Loudoun* policy, unblocking is not instantaneous and CIPA provides no time limit in which a request must be handled or procedure for notifying the patron of the outcome of a request. Furthermore, un-

295. *See supra* n. 258.

296. *Am. Lib. Assn.*, 201 F. Supp. 2d at 482.

297. Regardless of whether these methods are constitutional, CIPA prohibits using some of them. CIPA §§ 1712 and 1721(b) (codified at 47 U.S.C. § 254(h)(6)(C) & 20 U.S.C. § 9134(f)(1)(A), respectively) prohibit offering unfiltered access on even a single terminal because filters are required on every terminal with Internet access, regardless of the computer's purpose. CIPA does not even contain an exception for parental consent. CIPA makes no distinction between computers used only by staff and those accessible to the public. *In re Federal-State Joint Board on Universal Serv.: Children's Internet Protection Act*, 15 FCC Rcd. 8182, ¶ 30 (Apr. 5, 2001).

298. *Am. Lib. Assn.*, 201 F. Supp. 2d at 484.

299. *Id.*; *see Lamont*, 381 U.S. 301 (1965) (holding that a federal statute requiring the Postmaster General to halt delivery of communist propaganda unless the addressee affirmatively requested the material violates the First Amendment); *Denver Area Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (holding unconstitutional a federal law requiring cable operators to allow access to patently offensive, sexually explicit programming only to those subscribers who request access in advance and in writing).

300. *Am. Lib. Assn.*, 201 F. Supp. 2d at 486.

301. *Id.*

blocking decisions are based on suitability for minors regardless of the patron.

These content-based burdens on access to speech "are no less offensive to the First Amendment than laws imposing content-based prohibitions on speech."[302] The distinction is but a matter of degree.[303]

The content-based burden that the library's use of software filters places on patrons' access to speech suffers from the same constitutional deficiencies as a complete ban on patrons' access to speech that was erroneously blocked by filters, since patrons will often be deterred from asking the library to unblock a site and patron requests can not be immediately reviewed.[304]

"[G]iven the crudeness of filtering technology, any technology protection measure mandated by CIPA will necessarily block access to a substantial amount of speech whose suppression serves no legitimate government interest," in violation of the First Amendment.[305] Because it will induce public libraries, as state actors, to violate the First Amendment, the court found CIPA facially invalid in its entirety.[306] As the Court explained, "where the government draws content-based restrictions on speech in order to advance a compelling government interest, the First Amendment demands the precision of a scalpel, not a sledgehammer."[307] Finally, without any argument that Congress intended to discontinue funding under either program without CIPA's requirements, the Court enjoined the government from enforcing §§ 1712(a)(2) (codified at 20 U.S.C. § 9134(f)), and 1721(b) (codified at 47 U.S.C. § 254(h)(6)), and restored these provisions to their pre-CIPA requirements.[308]

Even under the government's standard that CIPA is facially invalid only if it is impossible for a single (i.e. any) public library to comply with CIPA's conditions without violating the First Amendment, the Court held CIPA facially invalid. The overbreadth doctrine creates a limited exception by permitting facial invalidation of a statute that burdens a

302. *Id.*

303. *See generally Playboy,* 529 U.S. 803.

304. *Am. Lib. Assn.*, 201 F. Supp. 2d at 489.

305. *Id.*

306. *Id.* at 490.

307. *Id.* at 479.

308. It is important to note that not only can libraries not be required to filter Internet access to everyone, but at least one court has ruled that they can not be sued for not offering filtered access at all. *Kathleen R. v. City of Livermore,* 87 Cal. App. 4th 684 (2001) (holding that the immunity provision of the *Communications Decency Act* [47 U.S.C. § 230] shields a public library's unrestricted Internet access policy from a state law tort suit alleging that the library's policy creates a public nuisance and a danger to minors). The court noted that the library's policy did not compel minors to view pornography, nor did it even encourage it. The library warned parents of the dangers; there was no constitutional duty of the library to do more.

substantial amount of protected speech, even if the statute may be constitutionally applied in particular circumstances.[309] Unlike the CDA and COPA, CIPA contains no criminal penalties. However, "even minor punishments can chill protected speech,"[310] and absent the ability to challenge CIPA on its face, public libraries that depend on federal funds may decide to comply with CIPA's terms, thereby denying patrons access to substantial amounts of constitutionally protected speech, rather than refusing to comply with CIPA's terms and consequently losing the benefits of federal funds.

Knowing that this case would be appealed to the Supreme Court and to avoid having the case returned because it failed to settle all of the issues raised before it,[311] the court addressed the argument that CIPA is invalid because it requires public libraries, as a condition of receiving federal funds, to relinquish their own First Amendment rights to provide the public with unfiltered Internet access, an unconstitutional condition. The doctrine of unconstitutional conditions holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit.[312] The government countered that government entities, like municipalities and public libraries, have no First Amendment protection. However, believing that the identity of the speaker has no bearing on the decision and relying on *First Nat'l Bank of Boston v. Bellotti*[313] and the text of the First Amendment, the court determined that the focus must be on whether the government is abridging expression that the First Amendment was meant to protect rather than on the identity of the speaker.[314] Furthermore, regardless of whether public libraries can assert the First Amendment,[315] they can assert the rights of their patrons,

309. *Free Speech Coalition*, 535 U.S. at 244; *see Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

310. *Free Speech Coalition*, 535 U.S. at 244 .

311. *Am. Lib. Assn.*, 201 F. Supp. 2d at 490; *see Ashcroft*, 535 U.S. at 564 (remanding the case to review the legal and factual bases on which the District Court granted plaintiff's motion for a preliminary injunction after vacating the Court of Appeals opinion that relied on different grounds from the ones used by the District Court).

312. *Am. Lib. Assn.*, 201 F. Supp. 2d at 490, n. 36 (quoting *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972))).

313. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (holding that the First Amendment protects a class of speech rather than a class of speakers).

314. *Am. Lib. Assn.*, 201 F. Supp. 2d at 490, n. 36; *Bellotti*, 435 U.S. at 776.

315. Whether a municipality, or any arm of the government, has First Amendment rights that it can exercise is an open question. While the court cites to cases where the issue was answered in the negative, these cases rely on a concurrence by Justice Stewart in which he opined that the First Amendment affords protection *from* the government and not *for* the government. *See Columbia Broadcasting v. Democratic Comm.*, 412 U.S. 94 (1973) (stating "[t]he First Amendment protects the press from governmental interference; it con-

even though they are the ones receiving the money subject to restrictions.[316]

Mindful of the public libraries' traditional role in maintaining First Amendment values and of the constitutional limitations of software filters, the Court noted that "the plaintiffs have a good argument that CIPA's requirement that public libraries use filtering software distorts the usual functioning of public libraries in such a way that it constitutes an unconstitutional condition on the receipt of funds."[317] However, it relied on its analysis of the "functioning of public libraries, their use of the Internet, and the technological limitations of Internet filtering software" as support for a finding that CIPA is an unconstitutional condition if the Supreme Court finds it necessary to decide this issue.[318]

5. *The Government's Appeal Should also Fail*

Section 1741(b) of CIPA provides for an automatic appeal of right direct to the Supreme Court. On June 20, 2002, the government exercised that right.[319] In its appeal, the government basically argued that public libraries should not have been evaluated under the public forum doctrine, that strict scrutiny should not apply and that the use of software filters is constitutionally permissible.[320] Furthermore, the government argued again that the provisions that enable librarians to unblock material or disable the filters under certain circumstances eliminate the overblocking and make CIPA constitutional.[321] The district court already addressed these issues and the government's arguments did not counter its findings or conclusion. In addition, the government misunderstood and misapplied forum analysis and confused decisions regarding acquiring information with decisions regarding removing information. The government also ignored the court's reliance on the "state of the technology" and its current constitutional limitations. The government even ignored the court's reliance on the lack of review of the decision of the filtering companies as what they filter, the libraries'

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fers no analogous protection on the Government"). According to this court, these cases provide no discussion or analysis and the support for the opposite is just as persuasive. *Am. Lib. Assn.*, 201 F. Supp. 2d at 490, n. 36.

316. *See Legal Servs Corp. v. Velazquez*, 531 U.S. 533 (2001); *Rust v. Sullivan*, 500 U.S. 173 (1991); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984).

317. *Am. Lib. Assn.*, 201 F. Supp. 2d at 490, n. 36.

318. *Id.*

319. *Am. Lib. Assn., Inc. v. U.S.* (Notice of Appeal), No. 01-CV-1303 (U.S. Sup. Ct., 2002).

320. *Am. Lib. Assn., Inc. v. U.S.* (Jurisdictional Statement), No. 02-361, 14 (U.S. Sup. Ct. 2002) <http://www.usdoj.gov/osg/briefs/2002/3mer/2mer/2002-0361.mer.aa.pdf> [hereinafter *J.S. App*].

321. *Id.* at 11.

lack of knowledge of what these companies filter and the lack of reliance on any legal definitions when determining what to filter.

The government's arguments do not contradict the lower court's analysis. In some cases, the government's arguments actually support the court's decision. First, the government argued that the decisions by a public library should not be subject to forum analysis.[322] However, the Supreme Court has already determined that regulations of speech on government property are determined by the type of forum created.[323] The only question is what type of forum the government created in the public library.

The government agrees that in applying the forum analysis, a public library could only be a non-public forum or a limited public forum,[324] but then incorrectly argues that strict scrutiny would not apply. In distinguishing between a limited public forum and a non-public forum, the Court pinpointed the government's intention as the key.[325] Clearly, the government intended to open up the public library for public discourse, albeit with some limitations. Therefore, as the lower court decided, a public library must be a limited public forum. In a limited public forum, the government argues that it may limit the forum to certain purposes, and then impose limitations that are "reasonable in light of the purpose served by the forum."[326] However, the limitations that the government can impose are based on the purposes of the use and not the content of the speech.[327]

In this case, the government admitted that CIPA is a content-based

322. *Id.* at 14. A public library's exercise of judgment in selecting the material it will make available to its patrons is not subject to forum analysis. *Id.*

323. *See Perry Educ. Assn. v. Perry Local Educators' Assn*, 460 U.S. 37 (1983); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985).

324. *J.S. App., supra* n. 320, at 21.

325. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." *Cornelius*, 473 U.S. at 802. Justice Blackmun criticized "the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers." *Id.* at 813-14.

326. *J.S. App., supra* n. 320, at 21 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (quoting *Cornelius*, 473 U.S. at 806)).

327. *See e.g. Widmar v. Vincent*, 454 U.S. 263 (1981) (referring to a college rule permitting access to university meeting facilities to all student organizations except religious groups); *Heffron v. ISKCON*, 452 U.S. 640 (1981) (referring to state fair grounds); *Carey v. Brown*, 447 U.S. 455 (1980); *Police Department v. Mosley*, 408 U.S. 92 (1972) (holding an ordinance void which barred all picketing around school building except labor picketing); *Madison Sch. Dist. v. WERC*, 429 U.S. 167 (1976) (referring to a school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (referring to a municipal theater); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (referring to permission to use parks for some groups but not for others). These limitations also apply when government opens non-traditional forums for expressive activities.

statute,[328] and content-based statutes must survive strict scrutiny. The government tried to draw a distinction between decisions based on content and those based on viewpoint, saying that content-based decisions should receive a different standard of review than decisions based on viewpoint. However, there has never been a Supreme Court case that draws such a distinction.[329]

In addition to trying to draw a distinction where none existed, the government failed to realize one where it did. The government argued that in Congress' judgment, connecting a library computer to the Internet is no more than a technological extension of the book stack.[330] Even in the book stack, the government's decision to remove a book is subject to strict scrutiny.[331] The government also argued that the district court acknowledged that generally the First Amendment subjects libraries' content-based decisions about which print materials to acquire for their collections to only rational basis review, but did not apply the same analysis to libraries' content-based decisions regarding material they acquire from the Internet.[332]

While a public library may exercise content-based judgments in deciding what information to make available to its patrons without violating the First Amendment, those judgments will be evaluated on the basis of strict scrutiny. Judgments about which items to remove receive the same level of scrutiny. Furthermore, a library's refusal to make available to its patrons pornographic magazines or XXX videos is not the same as its removal of those materials from the shelf or disabling access to those materials through its computers. If a library can not exercise these restrictions, neither can a party to which it delegates this function.[333]

The court never said, as the government claims that the Internet must be an all-or-nothing proposition,[334] only that decisions to remove access to certain information must survive strict scrutiny. The government then argues that a public library's traditional exercise of discretion to determine what materials to collect would be particularly threatened by application of strict scrutiny to collection decisions, which would require a library to establish that a challenged decision furthers a compel-

328. *Id.* (stating "[c]ongress noted that CIPA involves filtering material based on its sexually explicit content, not based on its viewpoint").

329. In fact, I can find no case in any federal court that draws such a distinction.

330. *J.S. App., supra* n. 320, at 6.

331. *See generally, Pico*, 457 U.S. 853 (1982).

332. *J.S. App., supra* n. 320, at 7.

333. This argument does not matter anyway because in the case of software filters, as both the *ALA* and *Mainstream Loudoun* courts pointed out, neither the library nor the software filtering company knows what is being filtered. No one makes editorial decisions based on the value or the content of the Web sites.

334. *J.S. App., supra* n. 320, at 17.

ling interest and that plausible less restrictive alternatives would not be effective.[335] While this is true, the library can make content-neutral decisions on criteria such as the quality of the writing, their position on best-seller lists, the presence or absence of other materials in the collection related to certain subjects, and the like. The library can also decide to not allow patrons to use its computers to send and receive e-mail messages, to participate in chat rooms, or to access sites that include games, personals or dating services for content-neutral reasons. Contrary to the government's argument, this decision will not render unconstitutional a library's decision to provide links on the first screen a patron views on the library's computer to those sites that it has deemed to be of particular value.

The government argues that the percentage of material erroneously blocked is low and that the information can be found on another Web site or on the library's bookshelves.[336] The point, however, is that a substan-

335. *Id.* at 16; *Playboy*, 529 U.S. at 813-16.

336. *J.S. App.*, *supra* n. 320, at 23. The government also supported its argument stating that because instances of overblocking are rare and the information can be found elsewhere, a patron will rarely need to obtain access to a site that has been blocked in order to obtain the information he or she seeks at the library. *Id.* However, the government provides no support for this statement and all evidence presented in both this case and in *Mainstream Loudoun* proves the opposite. In fact, according to a 1997 study conducted by the Electronic Privacy Information Center, some software indiscriminately blocks access to ninety percent of the relevant information available on the Internet regardless of content. EPIC, *Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet* <http://www.epic.org/Reports /filter_report.html> (Dec. 1997). Included in the blocked content were elementary and high school home pages, as well as searches on terms such as "American Red Cross," "Smithsonian Institution," "Christianity," "eating disorders," and "Bill of Rights." *Id.* In many cases, the tested search service, which was described as "family-friendly," denied access to ninety-nine percent of material that would otherwise be available without the filters. *Id.* In a 2000 Peacefire survey, selected filtering programs had an average error rate (computed as: (number of non-pornographic sites blocked)/(total number of sites blocked)) of between twenty percent and eighty-two percent. Bennett Haselton, *Study of Average Error Rates for Censorware Programs* <http://peacefire.org/error-rates/> (accessed Oct. 23, 2000). By contrast, a list of blocked sites that was composed by human reviewers would have a much lower error rate—in that situation, less than one percent of the blocked sites should be mistakes (due to, for example, a clerical error). *Id.* The study concluded that any one of the given products blocked large amounts of innocuous material—and that most of the sites blocked by these products had not been reviewed by staff to ensure that the sites met the company's criteria. *Id.* The actual average error rate could much larger because, in the case of AOL Parental Controls, the numbers produced by the experiment were so small (five blocked sites and one site blocked in error) that, according to Peacefire, the "20 percent" figure could not be taken as accurate without using a larger sample. *Id.* A 2001 Kaiser Family Foundation study found that nearly half (forty-six percent) of teenagers seeking online health information were blocked from sites that they believed were not pornographic. Kaiser Family Found., *Generation Rx.com: How Young People Use the Internet for Health Information* 3 <http://www.kff.org/content/2001/20011211a/GenerationRx.pdf> (Dec. 2002). Even a student using a school li-

tial amount of constitutionally protected material is blocked; the actual percentage is irrelevant. In addition, if the software filters block the information on some Web sites, but not on others, this proves that they are incapable of achieving the goals as stated by Congress. The government argues again that the unblocking procedures and ability to disable the filters under certain circumstances also protects CIPA from a constitutional challenge.[337] The court already addressed and dismissed this argument.

The government attacked the decision based on how it frustrates Congress' effort to ensure that special federal assistance is used for educational purposes and does not facilitate access to enormous amounts of illegal and harmful pornography on the Internet;[338] deprives public libraries of the ability to make their own independent judgments concerning how to avoid becoming a conduit for illegal and harmful material;[339] and its comparison to other methods of preventing patrons from accessing materials that are not protected by the First Amendment.[340] When the government argues that material wrongfully blocked is available elsewhere on the Internet, it admits that software filters do not achieve Congress' goals either. They do not even stop access to illegal material because of the inherent problem of underblocking. Furthermore, Congress can not prevent access to all material that it or the library deems pornographic, because some pornography is protected by the First Amendment.

The government also misstates the court's decision. The court ruled that neither the Congress nor the libraries can mandate the use of a constitutionally prohibited method for everyone that wishes to use a library.[341] Furthermore, the intrusiveness or constitutionality of the

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brary had to choose a new senior project because a site for Red Hat, Inc., a company he was going to profile, was blocked. Anick Jesdanun, *Schools Install Internet Filters Despite Flaws* <http://www.nandotimes.com/technology/story/536983p-4248011c.html> (Sept. 15, 2002). Libraries are not immune either. One public library had to change its name because a filtering program that it installed blocked the library's Web site. The Flesh Public Library (formerly www.fleshpublic.lib.oh.us) is located in Piqua, Ohio and was named for donor Leo Flesh. Kelly Isaacs Baker, *Piqua's Library Has To Flesh Out Its Own Web Site* <http://www.activedayton.com/ddn/local/daily/1122flesh.html> (Nov. 22, 2002).

337. *J.S. App.*, *supra* n. 320, at 23.

338. *Id.* at 11-13.

339. *Id.*

340. *Id.* at 25 (stating "[a] system under which librarians closely monitor everyone using computers to make sure that they are not viewing material covered by CIPA would be far more intrusive than using filtering software").

341. Neither is there any support for the government's contention that the district court's analysis would extend to any other resource to which a library makes a connection (e.g., cable TV or telephone service) or to Internet access provided at city hall or a public hospital. *See J.S. App.*, *supra* n. 320, at 20. The other resources (telephone, radio and television) are subject to a different analysis than the Internet. *See Reno v. ACLU*, 521

other methods was not at issue, because the court only ruled that they were less restrictive, not that they would be constitutional.

Not only do the government's arguments fail with respect to CIPA's application to public libraries, but it also fails with respect to its application to public school libraries. In *Pico*, a school board had attempted to remove controversial titles such as *Slaughterhouse Five* and *Soul on Ice* from a school library.[342] The school board's action did not restrict minors' own expression but the Supreme Court rejected the action because the board was restricting what minors could read. The Court stated, "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom,"[343] and made clear that "students too are beneficiaries of this principle."[344]

IV. CONGRESSIONAL COMMISSIONS

In addition to a number of laws that have been successfully challenged in the courts, Congress also commissioned at least three studies to study various facets of pornography, children and the Internet. None of the studies supported Congress' actions. All of them realized that software filters were inherently flawed and were not the silver bullet that Congress and others expected them to be.

A. THE COPA COMMISSION

Congress created the *Commission on Online Protection* ("COPA Commission") to study "methods to help reduce access by minors to material that is harmful to minors on the Internet."[345] A key task for the Commission was discovering the most effective means of addressing the public's interest in protecting children online that have the least potential adverse impacts on protected adult speech. The COPA Commission tried to address the issue understanding that material that is harmful to minors can originate anywhere in the world and arrive via not only the World Wide Web, but also e-mail, chat rooms, instant message, newsgroups and numerous other methods developed through the Internet's

U.S. 844 (1997). As the courts have ruled, the evaluation of limitations on Internet access are based on the forum and limitations in such non-public forums as the private offices in city hall and public hospitals are subject to rational basis. Also, governments acting as employers have more discretion. *See Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001) (holding that the regulation of state employees' access to sexually explicit material, in their capacity as employees, on computers owned or leased by the state is consistent with the First Amendment).

342. *Pico*, 457 U.S. at 856.

343. *Id.* at 867.

344. *Id.* at 868.

345. Pub. L. No. 105-277, § 1405.

convergence with other media, such as interactive television. It also recognized that differences in language, culture, the level of resources, and the level of familiarity with the Internet pose challenges to families' ability to protect their children online. Add to this challenge the various places that a child can access the Internet, many without direct supervision and the task before parents and the Commission becomes so daunting that it is almost impossible.

The COPA Commission, acting under significant time restraints and with limited resources, delivered its report to Congress on October 20, 2000.[346] It considered numerous protective technologies and methods, including filtering and blocking services; labeling and rating systems; age verification efforts; the possibility of a new top-level domain for harmful to minors material; "green" spaces containing only child-appropriate materials; Internet monitoring and time-limiting technologies; acceptable use policies and family contracts; online resources providing access to protective technologies and methods; and options for increased prosecution against illegal online material. The COPA Commission concluded:

> No single technology or method will effectively protect children from harmful materials online. Rather, . . . a combination of public education, consumer empowerment technologies and methods, increased enforcement of existing laws, and industry action are needed to address this concern.[347]

Among its recommendations are cooperation among the public and private sector to protect minors from material that is harmful to them.[348] The COPA Commission recommended that the private sector support an independent, non-governmental testing facility to test and evaluate child-protection technologies and provide consumers with "objective, well-researched information on the features, effectives, prices, search criteria, transparency, flexibility, and ease of use of various technologies."[349] Government should encourage the use of technology and fund its development; investigate, prosecute and report violations of state and federal obscenity laws; and address international enforcement concerns. The private sector should provide for independent evaluation of technologies; take steps to improve child protection mechanisms and make them accessible online; develop systems for labeling, rating and

346. COPA Commn., *Report to Congress* <http://www.copacommission.org/report/ COPA report.pdf> (Oct. 20, 2000). The Commission was supposed to deliver the report by Oct. 20, 1999 as required by the statute, but it requested and was granted a one-year extension because of delays in appointing members. *Id.*

347. *Id.* at 9.

348. In total, the Commission made twelve recommendations. *Id.* at 39-46.

349. *Id.* at 41.

identifying content regardless of the medium; and develop and adhere to best practices to protect minors.

The COPA Commission had much more work left when it tendered its report to Congress. Due to time constraints, the COPA Commission could not address whether any technology currently exists that may meet the requirements for use as affirmative defenses. The COPA Commission's report, while providing some value to the debate, provided little support for COPA itself or for filtering as a solution to the issue. Not that its support mattered because the law never took effect.

B. The National Academies Report

In the *Protection of Children from Sexual Predators Act of 1998*,[350] Congress ordered the Attorney General to request the National Academy of Sciences, acting through the National Research Council, to "conduct a study of computer-based technologies and other approaches to the problem of availability of pornographic material to children on the Internet." The study had to address: a) the capabilities of present-day computer-based control technologies for controlling electronic transmission of pornographic images; b) research needed to develop computer-based control technologies to the point of practical utility for controlling the electronic transmission of pornographic images; c) any inherent limitations of computer-based control technologies for controlling electronic transmission of pornographic images; and d) operational policies or management techniques needed to ensure the effectiveness of these control technologies for controlling electronic transmission of pornographic images.[351] According to the National Academy of Sciences, Congress sought "to frame the problem in an appropriate social, legal, educational, technological, and ethical context."

The study was conducted by a commission, which was chaired by former Attorney General Richard Thornburg ("Thornburg Commission"). The Thornburg Commission evaluated a number of different ways to protect children from inappropriate material on the Internet including, restricting a minor to appropriate material, blocking inappropriate material, warning a minor of impending exposure to inappropriate material or suggesting appropriate material, deterring minors' access to inappropriate material, educating a minor about how to access appropriate material, reducing the accessibility of inappropriate material, reducing the appeal of deliberate contact with inappropriate material and helping minors cope with the exposure to inappropriate material. The report outlined three major approaches to the problem: public policy, social and educational strategies and technology-based tools.

350. Pub. L. No. 105-314, tit. IX, § 901.

351. *Id.* at § 901(b)(1-4).

Like the COPA Commission, the Thornburg Commission concluded that neither technology nor public policy alone could provide a complete solution. Public policy can be effective on commercial sources because they must draw attention to themselves to make money. It can also be used to educate Internet users or encourage providers to self regulate. Social and educational strategies can be used to teach children responsible behavior and coping skills for how to deal with inappropriate material and experiences on the Internet and elsewhere. Children can be taught how to critically evaluate all types of media messages, conduct effective Internet searches for information and navigate with confidence, and make ethical and responsible choices about Internet and non-Internet behavior. Technology-based tools include filters, monitoring, age verification technologies and the creation of new top-level domains such as .xxx or .kids. Each of these strategies has its issues.[352]

The Thornburg Commission found that developing in children and youth an ethic of responsible choice and skills for appropriate behavior is foundational for all efforts to protect them from many dangers on the Internet and in the physical world. Parents also have to learn more about the Internet and how their children use it, share in their experiences, set rules for use and set good examples for responsible Internet use. In addition, the Thornburg Commission recommended a legal tool to prevent minors from viewing inappropriate materials. It suggested the possibility of granting Web sites a statutory "safe harbor" immunity from prosecution under obscenity laws if the provider places the Web site behind a "plain brown wrapper" with an appropriate warning indicating that going any further constitutes certification that the user is older than eighteen. To prevent the problem of exposure to obscene teasers, this recommendation would require adding a protocol that stops search engines from reaching beyond the front page and this "wrapper." The Thornburg Commission cautioned that officials must balance concerns about exposure to harmful things against the benefits gained from exposure to positive things.

To illustrate how the three strategies work to yield a reasoned approach to protection in cyberspace, the Thornburg Commission drew an analogy to a physical world solution to a similar problem.

> Communities have dealt with the issue of preventing minors from reading and viewing adult-oriented magazines available at a newsstand through a number of steps. Children are taught by parents not to seek out such magazines, and parents refrain from leaving such magazines lying around the house (social and educational measures). In the stores, adult magazines are placed on the highest shelves, so that they are harder for shorter people to reach (a social measure). They are

352. For a complete analysis of each strategy, *see Youth, Pornography and the Internet*, *supra* n. 16.

> sealed in plastic, so that browsing them in the store is more difficult (a technology measure). An opaque "belly band" obscures the picture on the front (another technology measure). The picture itself, while sexually suggestive, does not depict either overt sexual activity or the genitalia of the models (a public policy measure). A purchaser of such magazines must usually make the transaction face-to-face with the operator of the newsstand, who can generally distinguish between a 12-year-old boy and an adult and whose very presence helps to deter some minors from even seeking to make such a purchase (another social measure). The operator of the newsstand may be subject to prosecution if he knowingly sells an adult magazine to a minor under state and local laws that prohibit such sales to minors (another public policy measure).[353]

While this analogy is imperfect, it shows that society has reached a consensus on a particular issue and combined a number of approaches to solve it for its community.[354]

The report noted a number of issues that hamper a one-size-fits-all solution. The two leading issues are definitions for inappropriate material, which vary by culture and uncertain jurisdiction, which hinders enforcement and prosecution. Add to those issues that children have access to various types of content in numerous venues with varying amounts of protection and that noncommercial sources have varying levels of motivation, excluding financial gain,[355] and a single solution becomes even more difficult to realize.

The report concluded that children should be taught how to act responsibly on the Internet. Because software filters and other technology measures are unable to block all inappropriate material, a child who knows what to do about inappropriate materials and experiences is much safer than a child whose parents and school teachers rely primarily on technology and laws to solve the problem for them.

Because trade-offs exist with any given solution, the Thornburg Commission agreed with the COPA Commission that a mix of methods would be more effective than exclusive or primary reliance on any one method. Technology can help to create a child-rearing environment that parents can moderate and shape according to their values and the maturity of their children. Technology can help to keep parents and other responsible adults informed about what their children are doing online. Technology offers many desirable benefits: speed, scalability, standardization, and reduced cost. Public policy can help to influence the adult

353. *Id.* at 8-12.

354. *Id.* at 8-13.

355. For example, individuals not motivated by financial reward include, friends sharing pictures online, people seeking to harass, people engaging in "cybersex" individuals with personal Web pages or profiles, exhibitionists, and moderators and users of newsgroups, chat rooms, and instant messages.

online industry to take actions that better deny children's access to their material and/or influence others in the private sector to support self-regulatory or self-help measures. Furthermore, through prosecution of violators of existing laws that prohibit the transmission of obscene material, public policy can help to some extent to reduce the number of providers of such materials.

C. The National Telecommunications and Information Administration Report

In § 1703 of CIPA, Congress ordered the National Telecommunications and Information Administration ("NTIA") to study technology protection measures. This study must focus on evaluating the ability of current technology protection measures to address the needs of educational institutions; making recommendations on how to foster the development of measures that meet such needs; and evaluating the development and effectiveness of local Internet safety policies that are currently being used.[356] NTIA issued a Federal Register Notice on May 22, 2002 to initiate a notice and comment period as required by CIPA.[357]

D. Report Conclusions

Interestingly, the charges to all three commissions focused on the technology. Neither charge included a review of the nature of the harmful material, the prevalence of the material or ease of accessibility. However, the two commissions that completed their work found the need to not only address these issues, but also the First Amendment and other constitutional implications of any solution. Congress never even waited for any of the reports before it enacted the failed legislation.

V. CONCLUSIONS

Much of the debate about pornography on the Internet focuses on the advantages and disadvantages of technical and public policy solutions. Technical solutions seem to offer quick and inexpensive fixes that allow responsible adults (e.g., parents, school officials, librarians) to believe that the problem has been addressed, and it is tempting to believe that the use of technology can drastically reduce or even eliminate the need for human supervision. Public policy approaches promise to eliminate the sources of the problem.

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356. Pub. L. No. 106-554, § 1703(a).

357. Natl. Telecomm. & Info. Administration, *Request for Comment on the Effectiveness of Internet Protection Measures and Safety Policies* <http://www.ntia.doc.gov/ntiahome/frnotices/2002 /cipa_52202.htm> (accessed Feb. 3, 2002).

Congress has tried using public policy four times to protect children from both the direct and indirect harmful effects of the same speech that the Supreme Court held unprotected by the First Amendment. No one has ever questioned that the government has a compelling interest in protecting children from obscene material and abuse.[358] What they have questioned is the priority of that interest over the parents' rights to raise their children as they see fit[359] and the free speech rights of society. The government's interest is secondary to parents' interests and it lessens as minors age.

To achieve these interests, Congress attempted to extend regulations regarding the three categories of speech identified by the Supreme Court as beyond the protection of the First Amendment: materials that are obscene, materials that are obscene to minors and child pornography. Obscene materials must satisfy the test established in *Miller v. California*; materials that are obscene to minors can not be restricted from adults; and child pornography does not need to satisfy any test, but, according to the Court, it must involve real children.

When the Supreme Court first defined obscenity in *Miller*, it refused to establish a national standard and instead relied on community standards. Because the Internet has no geographic limitations and any material posted is available to communities across the globe, the Court must decide as it rules on the constitutionality of COPA in *Ashcroft v. ACLU* how "community standards" apply to the Internet and how to determine which community's standards apply. After all, the United States alone has fifty states and numerous other jurisdictions, each with its own laws and standards, making the task of defining which community standards to apply to a given situation complex. Multiply that by more than 200 countries, protectorates and territories around the world, each with different cultures and laws, and the question of what is obscene and, more specifically, obscene for minors becomes even more complex. To complicate matters further, many more cultures, jurisdictions and communities exist within each jurisdiction. These thousands, perhaps millions of communities and cultures have vastly different community standards and ages at which children are considered adults.

358. *See Miller*, 413 U.S. at 18-19 (stating that "[t]he States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles"); *Stanley*, 394 U.S. at 567; *Ginsberg*, 390 U.S. at 637-643; *Interstate Circuit, Inc.*, 390 U.S. at 690; *Redrup*, 386 U.S. at 769; *Jacobellis*, 378 U.S. at 195 (all ruling similar to *Miller*).

359. *Ginsberg*, 390 U.S. at 639 (stating "[t]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"). *Prince*, 321 U.S. at 166 (stating "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

Though the Court declared child pornography beyond the protection of the First Amendment without regard to community standards or to its value, it has warned that pornography not involving real children must be determined to be obscene under *Miller* before it can be regulated. Even this has been difficult to regulate, because people do not even agree on what child pornography is.[360] Arguing that prosecutors have trouble proving whether a real child was used, Congress tried to declare more material to be child pornography. The Supreme Court put a stop to that approach.

Finally, Congress tried to do indirectly what it could not do directly. Here again, at least one court relying on the state of the technology held that even this approach would not succeed. Reliance on software filters is not only unconstitutional, but it also provides a false sense of security. Those who really want to access inappropriate material will do so, and it is available from many sources. The only way to truly stop access to this material is to ban all speech and the First Amendment clearly prohibits that approach. The Supreme Court must now stop this approach as well and end the war. Congress must accept this defeat and use its vast resources elsewhere to help parents solve the problem.

The federal government has focused successfully on preventing criminal activities connected to material that is inappropriate for children and material that abuses children;[361] the Supreme Court has fo-

360. *See e.g. Kate Coscarelli & Jeffery C. Mays, Photos of Undressed Kids Get Grandmother Arrested*, Newark Star-Ledger 1 (Feb. 5, 2000). A sixty five year-old New Jersey grandmother and respected photographer was arrested for taking nude photographs of her two four to six year-old granddaughters. *Id.* The photos were not sexual or provocative in nature. *Id.* The *Child Modeling Exploitation Prevention Act of 2002*, H.R. 4667, introduced by Rep. Foley (R-FL) on May 7, 2002, attempted to raise the issue of whether some "child modeling" Web sites, like the ones that feature photographs of prepubescent girls wearing bikinis and other attire, which are available on a pay-per-view basis, are child exploitation that is or should be child pornography. Exploitive child modeling is defined as the display of a minor (through any medium) without a direct or indirect purpose of marketing a product or service other than the minor.

361. *See e.g.* FBI, *Innocent Images Natl. Initiative* <http://www.fbi.gov/hq/cid/cac/innocent.htm> (Mar. 2002). The FBI has started a multi-agency investigative initiative to combat child pornography through the Internet. *Id.* In 1998, the Department of Justice reported that it had obtained 207 convictions since 1995 as a result of this online undercover operation. Letter from L. Anthony Sutin, Acting Asst. Atty. Gen., to Rep. Thomas Bliley (Oct. 5, 1998). Throughout the FBI, online child pornography and child sex exploitation cases increased 1,280% from 113 in 1996 to 1,559 in 2001. *Id.* It is considered the most significant crime problem confronting the FBI that involves crimes against children. *Id.* In Operation Avalanche in September 1999, after shutting down a child pornography Web site and indicting its operators, federal prosecutors used the list of individual subscribers, which led to 144 searches in thirty-seven states and yielded 100 arrests. ABCNews.com, *An Avalanche of Porn* <http://abcnews.go.com/sections/business/TechTV/TechTV_Avalanche_Porn_011114.html> (accessed June 21, 2002). This was only the beginning. According to U.S. Customs Service officials, twenty people in the United States

cused on preserving the *Miller* test. Now it is time for both of them to focus on education. Congress can not continue to rely on the problems that prosecutors have in enforcing the laws as a reason to expand them;[362] the Court can not continue to rely on a test that is based on geographic jurisdictions.

The challenge for Congress, and society as a whole is to help parents instill in their children the guidance needed to deal with this material and give them the tools to succeed, not to increase the amount that falls under this category. The challenge for the Court is to put an end to some of the litigation by clearly defining how *Miller* works in a world that is no longer divided by space and time. Once and for all, it must decide whether it wants to establish a national or local test for community standards and provide the guidance needed to determine how the people determine "the work as a whole" on the Internet.

This cycle of legislation, litigation and court action has provided little in the way of providing solutions to anyone dealing with inappropriate content on the Internet. The events of the last several years have shown that Congress can not use the law alone to solve the complications caused by technology. It takes a concerted effort by every community to decide for itself what is obscene and what to do about it.

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and Europe were arrested in a global child molestation ring, accused of posting pornographic images of minors – many of them their own children – on the Internet. WSACP, *20 Charged in Porn Ring After Minors Seen on Web* <http://www. wsacp.org/news/news24. htm> (Aug. 19, 2002).

362. *See e.g. Stanley*, 394 U.S. at 567-68:

> [F]inally, we are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.

Id.; Free Speech Coalition, 535 U.S. 234; *Smith*, 361 U.S. 147.