2002

Childproofing the Internet First Amendment Discussion Forum

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CHILDPROOFING THE INTERNET

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For many years, the United States Supreme Court has taken the view that the government may not "reduce the adult population . . . to reading only what is fit for children."[1] At the same time, however, the Supreme Court's approach to children and erotica has been janus-faced: even as it has proclaimed the freedom of adults to peruse indecent (but not obscene) materials, it also has abetted and encouraged government efforts to protect children from harms thought to be associated with pornography. Thus, the government may punish a convenience store owner for selling a non-obscene magazine to a minor, provided that the magazine is "obscene" as to minors.[2] Similarly, the Federal Communications Commission may severely restrict the broadcast of "indecent" materials over radio and television frequencies in order to protect children from exposure to age-inappropriate subject matter.[3] The constitutional right of privacy protects the right of an adult to possess even obscene materials in the home,[4] but this sphere of personal autonomy does not extend to child pornography.[5]

In case after case, the Justices have struggled to accomplish two similar, but distinct, goals related to child protection. First, the Supreme Court has endorsed the idea that adult erotica has a presumptively harmful effect on

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[1] Butler v. Michigan, 352 U.S. 380, 383 (1957).

[2] Ginsberg v. New York, 390 U.S. 629, 636-39 (1968) (upholding a New York law that prohibited the sale of erotica to minors age seventeen or younger and endorsing a modified definition of obscenity for use in determining the constitutionally permissible scope of such statutes).

[3] Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748-51 (1978) (upholding agency ban on use of indecent language during periods of the day when a significant child audience might exist).

[4] *See* Stanley v. Georgia, 394 U.S. 557, 565-66 (1969) (holding that the Constitution creates a right of privacy that encompasses possession and use of obscene materials in a person's home).

[5] *See* Osborne v. Ohio, 495 U.S. 103, 108-11 (1990) ("Given the importance of the state's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain.").

children and has allowed restrictions on access to such materials in order to protect children from exposure. Accordingly, the federal and state governments have a constitutionally legitimate interest in suppressing, at least as to minors, sexually explicit materials that adults may lawfully possess and peruse. The Supreme Court has held that this interest justifies prohibitions on the sale of indecent, but not obscene, materials to minors,[6] restrictions on the content of mass media broadcasts generally available over the airwaves,[7] encouraging cable system operators to censor materials on leased access cable channels,[8] and restrictions on ribald student speech in the public schools.[9]

Second, the Justices have shown a pronounced concern with the exploitation of children in the production of erotica for the adult audience (i.e., so-called "kiddie porn"). As a general proposition, the federal and state governments are free to criminalize the manufacture, sale, and possession of child pornography, without regard to its source or content.[10] The rationale for this rule reflects a common sense judgment that minors cannot give meaningful consent to participate in the production of such materials, that the production of such materials is inherently exploitative and harmful to the children in the materials, and that a market for such materials will undoubtedly ensure the continued production of child pornography to meet the market demand.[11]

In an ideal world, government would protect children from the harms associated with the production and distribution of pornography without seriously eroding the free speech rights of adults. Accordingly, the Supreme

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[6] *See Ginsberg*, 390 U.S. at 637-39.

[7] *See Pacifica Found.*, 438 U.S. at 748-51.

[8] *See* Denver Area Educ. Telecomm. Consortium v. Fed. Communications Comm'n, 518 U.S. 727, 737-53 (1996).

[9] *See* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683-85 (1986) ("Surely it is a highly appropriate function of public education to prohibit the use of vulgar and offensive terms in public discourse.").

[10] *See* New York v. Ferber, 458 U.S. 747, 756-64 (1982); *see also Osborne*, 495 U.S. at 108-11.

[11] *See Ferber*, 458 U.S. at 756-62; *see also Osborne*, 495 U.S. at 111 ("[A]s *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse" and "[s]econd, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."). *Cf.* Katherine Franke, *Constructing Heterosexuality: Putting Sex to Work*, 75 DENVER U. L. REV. 1139, 1143-53 (1998) (describing same-sex manhood rituals practiced by the Sambia people of Papua New Guinea and questioning whether, in cultural context, the practices are in fact sexualized, asking "[w]hy should we assume that the central meaning of Sambia initiation practices is sexual, that is, erotic?").

Court consistently has rejected the notion that the government may regulate speech generically in order to protect the most vulnerable persons in the community.[12] But this commitment has not always carried the day. After all, *Federal Communications Commission v. Pacifica Foundation*, which found over-the-air radio and television broadcasts to be "uniquely pervasive" and "uniquely accessible to children,"[13] upheld content-based restrictions prohibiting "indecent" broadcasts, regardless of the literary, artistic, political, or scientific value of the material considered as a whole.[14] George Carlin's famous "seven dirty words" monologue skewers the federal government's efforts to excise certain words from the airwaves (and public discourse more generally),[15] but the Federal Communications Commission's indecency regulations remain on the books and the agency routinely enforces, or threatens enforcement of, these rules.[16]

The pattern that has emerged is one of a jurisprudence fundamentally in conflict with itself. On the one hand, government may not reduce adults to materials appropriate for children. On the other, however, it may enact regulations burdening the production and distribution of materials believed to be harmful to minors. Government cannot restrict the distribution of adult-content materials without, at the same time, impeding adult access in the process. This cause-effect relationship has given rise to a fundamental contradiction in the Supreme Court's efforts to address the problem of children and pornography.[17] Moreover, the advent of the Internet has made these issues

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[12] *See* Roth v. United States, 354 U.S. 476, 489 (1957) ("The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press."). *But cf.* Regina v. Hicklin, [1868] L.R. 3 Q.B. 360 (sustaining government regulation aimed at protecting most vulnerable elements of society from harm associated with pornography).

[13] 438 U.S. 726, 748-49(1978).

[14] *Id.* at 746-51.

[15] *See id.* at 751-55 (providing transcript of the monologue); *see also id.* at 777 (Brennan, J., dissenting) (noting the irony of the FCC's ban on Carlin's speech from radio broadcast).

[16] *See, e.g., In re* Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Report and Order, 8 FCC Rcd. 704 (1993); *see also* Clay Calvert & Robert D. Richards, *Free Speech and the Right to Offend: Old Wars, New Battles, Different Media*, 18 GA. ST. U. L. REV. 671, 697-703 (2002); Edyth Wise, *A Historical Perspective on the Protection of Children from Broadcast Indecency*, 3 VILL. SPORTS & ENT. L.J. 15 (1996).

[17] *See generally* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 925-37, 961-69 (2001) (arguing that "child pornography law has undergone a dramatic growth spurt, unchecked by critical analysis," noting that "many contemporary artworks have no protection under the First Amendment," and suggesting that "to understand the true costs of the decision

more pressing and their resolution in an intellectually persuasive fashion more difficult.

I. ADULT CONTENT ON THE INTERNET: *RENO V. ACLU* AND *ASHCROFT V. ACLU*

Limiting children's access to indecent materials on the Internet presents a very difficult problem. This is so because adults derive significant free speech benefits from an open, diverse marketplace of ideas and information on the Internet. Attempting to excise all age-inappropriate materials from the Internet would impose astonishingly high costs on adults seeking access to protected speech. At the same time, however, legislators at all levels of government have registered concern with the ability of minors to obtain access to age-inappropriate materials over the Internet. Moreover, the Supreme Court previously has held that legislation designed to limit the access of minors to erotic materials is constitutionally permissible.[18]

In the case of a bookstore or magazine rack, however, it is relatively easy for a shopkeeper to monitor precisely who is browsing or attempting to purchase the goods. Monitoring costs are really no higher than for other age-restricted goods, such as alcohol or cigarettes.

Monitoring costs on the Internet are quite another matter. On the Internet, no virtual shopkeeper exists to keep an eye on exactly who is looking at what. Internet service providers ("ISPs") probably represent the most logical virtual shopkeeper. These companies facilitate access to myriad websites on behalf of their subscribers and could, at least in theory, monitor (and even control) the sites and materials that their subscribers visit. Oddly enough, however, Congress has expressly exempted ISPs from liability for facilitating the transfer of age-inappropriate materials to minors.[19] Rather than force ISPs to assume

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not to exempt works of value, we must assess this stance in light of the evolving definition of 'child pornography' and the growing artistic interest in depicting children's bodies"); Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 234-44 (2001) (discussing judicial recognition of child pornography as a discrete class of speech and the expansion of the classification beyond materials that involve harm to real children and observing that "[t]here is a sense of boundlessness in child pornography law").

[18] *See* Ginsberg v. New York, 390 U.S. 629, 636-39 (1968); Butler v. Michigan, 352 U.S. 380, 383-84 (1957).

[19] *See* 47 U.S.C. §§ 230(c), 231(b) (2001); *see also* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 868-72 (2000) (describing the broad exemption from liability for Internet content Congress extended to ISPs, and arguing that "[b]oth the title of the Act and its legislative history suggest that Congress meant to establish a

the role of a virtual shopkeeper or face civil and criminal liabilities for failing to do so, Congress has elected to reward ISPs making no efforts (or half-hearted efforts) at protecting children.

This encourages ISPs to leave the Internet a free-for-all, but intellectually it is the equivalent of excusing a shopkeeper for leaving a rack of *Playboy* and *Penthouse* magazines unguarded and unwatched outside his store. If Congress were really concerned about children's access to age-inappropriate materials over the Web, its members would pay less attention to America Online's lobbyists and devote greater legislative effort to making ISPs assist in protecting children who use the Internet. As things stand now, if an ISP does not monitor content, it is excused from all liability for the content it facilitates (just like a telephone company has no liability for facilitating a threatening telephone call or a call used to plan a robbery). An ISP may monitor content, but it faces no legal consequences if its efforts fall short. Just as New York could impose a higher burden on a business selling adult-themed magazines, Congress could (and perhaps should) demand more of companies like AOL/Time Warner.[20]

All that said, keeping children from accessing age-inappropriate materials over the Internet represents an almost impossible task, with or without the active assistance of the ISPs.[21] The Internet exacerbates tremendously the problem of protecting children from age-inappropriate content by lowering to almost zero the transaction costs associated with obtaining hard core erotica. With a few swift keystrokes, an enterprising twelve year old can obtain pictures that would make *Playboy* or *Penthouse* look prudish. Thus, the Internet fundamentally differs from a bookstore or a public library: a store clerk or librarian can easily check a patron's identification prior to providing adult materials, thereby denying minors access to age-inappropriate materials; by way of contrast, the ability to install filtering devices that reliably limit access by children—but not adults—to particular websites simply does not exist.[22] If

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policy that ISPs would not be subject to liability as 'publishers' of content posted by third parties just because they exercise a limited degree of editorial control over content.").

[20] *See* John F. McGuire, Note, *When Speech Is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 770-71 (1999) (describing the German "Information and Communication Services Law," a statute that imposes criminal liability on ISPs for failing to police proscribed content that is accessible over the Internet to persons resident in Germany).

[21] *See generally* Melanie Hersh, Note, *Is COPPA a Cop Out?: The Child Online Privacy Protection Act as Proof That Parents, Not Government, Should Be Protecting Children's Interests on the Internet*, 28 FORDHAM URB. L.J. 1831 (2001).

[22] *See generally* Jack M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1141-53 (1996) (discussing the role and function of

erotic materials are available on the Web, there will always be some risk that children will gain access to them. As things stand, then, government has essentially two choices: ban content on the Internet or run a substantial risk that children will gain access to age-inappropriate materials.

Enter Congress. Concerned with the ubiquity of porn on the Internet, Congress has attempted legislatively to restrict children's access to adult materials. The Communications Decency Act of 1996[23] required content providers to determine affirmatively the age of a person seeking access to a website featuring "patently offensive" content[24] and also prohibited knowingly sending an "indecent" message to a minor.[25] The statute permitted affirmative defenses based on the use of an age verification protocol (such as requiring an adult verification account number or a credit card as a precondition to access) or the use of "good faith, reasonable, effective, and appropriate actions."[26]

In *Reno* v. *ACLU*,[27] the Supreme Court struck down as overbroad material provisions on the Communications Decency Act, including the definition of proscribed material,[28] the ban on transmissions of indecent messages to minors,[29] and the requirement of affirmative age verification efforts (at least as applied to non-commercial websites).[30] Although the decision invalidated key provisions of the CDA, *Reno* plainly left open the possibility that more narrowly tailored restrictions might withstand constitutional scrutiny.[31]

The *Reno* decision effectively broke with *Pacifica*'s reasoning by disallowing government regulations that protect children from age-inappropriate content, notwithstanding the increasingly pervasive nature of the Internet and its websites.[32] This may or may not be a good thing, but either way

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filtering devices for accessing and limiting access to information and arguing that "[i]f filters cannot be made relatively costless for parents to use, they will be ineffective in practice even if available in theory").

[23] 110 Stat. 133 (codified at 47 U.S.C. § 223 (2001)).

[24] 47 U.S.C. § 223(d)(1) (2001).

[25] *Id.* at § 223(a)(1)(B).

[26] *Id.* at § 223(e)(5)(A).

[27] 521 U.S. 844 (2001).

[28] *See id.* at 874-78.

[29] *See id.* at 882-83.

[30] *See* 47 U.S.C. § 223.

[31] *See Reno*, 521 U.S. at 874, 877-79.

[32] *See id.* at 866-67, 869-70. Significantly, the majority failed to offer a persuasive explanation for its decision not to extend *Pacifica Foundation* to the Internet. Justice Stevens, the author of both *Pacifica Foundation* and *Reno*, made a weak effort to distinguish *Pacifica Foundation*. He argued that the Federal Communication Commission's ban was limited to specific times (presently covering 18 of 24 hours a day, running from 6:00 AM to 12:00 AM).

the Supreme Court's efforts to balance adult access with reasonable child protection measures will face continuing difficulties. In the end, maintaining relatively open adult access to adult-themed materials over the Web while effectively limiting children's access are fundamentally incompatible policy objectives — advancing one goal inevitably comes at the price of impeding the achievement of the other. *Reno* resolved these issues in favor of adult access, but did not purport to set the final balance.

The Child Online Protection Act ("COPA")[33] represented Congress's follow up effort to the Communications Decency Act. COPA applies to a much more limited number of websites. The websites must be "commercial" in nature; the sender must "knowingly" make available the age-inappropriate materials to a minor; and COPA incorporates the *Miller* standard for obscenity, modified by the *Ginsberg* "as to minors" addendum.[34] Adopting age verification requirements for access to a website featuring adult content, such as an adult check service or a credit card requirement, will satisfy COPA's

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See Reno, 521 U.S. at 866-67. An eighteen hour ban, covering the times when most viewers and listeners access radio and television services, effectively chills such speech. Because of the advertiser-funded nature of free, over-the-air radio and television, a ban on indecent materials when significant audiences exist is effectively a ban on such materials altogether. Without the prospect of significant advertising revenues—which require mass audiences, or at least the potential for mass audiences—station programmers will not be willing to pay much for a given program. Accordingly, program producers will be unwilling to produce high quality indecent programming, at least for broadcast on free, over-the-air radio and television. *See* Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2109-15 (1997) (discussing the advertiser-driven economics of commercial television broadcasting and the persistent need of commercial broadcasters to generate mass audiences on a regular basis in order to remain profitable). Justice Stevens noted that *Pacifica Foundation* involved only administrative sanctions, rather than criminal sanctions. He must not have known that indecency fines, or "forfeitures," in FCC-speak, have run into the *millions* of dollars. A multi-million dollar fine represents a deterrent of equal force to a criminal sanction. His final rationale involved the limited application of free speech principles to broadcasters. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). This is true, but hardly provides a persuasive rationale for invalidating the provisions of the Communications Decency Act at issue in *Reno*. Bookstores historically have enjoyed full First Amendment protection, but have nevertheless been required to refrain from selling indecent books to minors. The question is not whether the government can ban the distribution of indecency over the Internet—the CDA did not purport to do this—but rather whether the government could prohibit the transmission of indecent materials to children.

[33] 47 U.S.C. § 231. This statute prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce, or by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." *Id.* at § 231(a)(1).

[34] Ginsberg v. New York, 390 U.S. 629, 636-39 (1968).

requirements.[35] In tandem, these limitations substantially restrict the censorial effect of COPA.

Although serious questions remain regarding the constitutionality of this statute, in *Ashcroft* v. *ACLU*,[36] a splintered court rejected a facial challenge to COPA based on the statute's reliance on local community standards,[37] rather than a single national standard, to define "material harmful to minors."[38] Significantly, *Ashcroft* does not address the ultimate question of whether COPA is constitutional. The Justices spoke only to the narrow question of whether Congress deployed a constitutionally acceptable definition of proscribable information.[39] No opinion garnered a strong majority on this precise point,[40] and the *Reno* holding suggests that if COPA's ultimate effect is to reduce significantly the universe of material available to adults over the Internet, COPA would be unconstitutionally overbroad, just like the CDA before it.[41] Of course, even if the Supreme Court ultimately sustains COPA, the statute's blanket exemption for non-commercial websites (as *Reno* effectively mandates) ensures that the problem of child access will continue.

Good arguments exist for preferring adult access to child protection in the context of the Internet. At least arguably, it is far easier for parents to install blocking software and net monitoring software than it is for adults to find materials through sources other than the Internet. If one lives in rural West Virginia, access to the photographs of Robert Maplethorpe or the writings of the Marquis de Sade might be, at best, rather limited in the absence of the

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[35] *See* 47 U.S.C. § 231(a).

[36] 122 S. Ct. 1700 (2002).

[37] *See* 47 U.S.C. § 231(e)(6).

[38] *Ashcroft*, 122 S. Ct. 1712-13.

[39] The precise question before the Supreme Court involved the use of local "community standards" rather than a single national standard for evaluating the prurience and patent offensiveness of materials that a minor views on the Web. *See Ashcroft*, 122 S. Ct. at 1712-13 ("The scope of our decision today is quite limited. We hold only that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.").

[40] *See id.* at 1714-15 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 1715-16 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 1717, 1719-20, 1722 (Kennedy, J., concurring).

[41] *See id.* at 1713 ("We do not express any views on whether COPA suffers from substantial overbreadth for other reasons. . . . [w]hile respondents urge us to resolve these questions at this time, prudence dictates allowing the Court of Appeals to first examine these difficult issues."); *see also id.* at 1722 (Kennedy, J., concurring) ("There may be grave doubt that COPA is consistent with the First Amendment; but we should not make that determination with so many questions unanswered.").

Internet. The Internet makes such materials available with the stroke of a few keys. In this way, the Internet radically expands the universe of information and has an intrinsically democratizing function.[42] Rich or poor, urban or rural, all citizens now enjoy roughly the same access to the marketplace of ideas.[43]

At the same time, highly qualified efforts at limiting children's access to adult websites—like COPA—are unlikely to be effective. Even if government requires the use of a driver's license or credit card as a pass key to websites featuring adult content (as COPA presently requires for commercial websites featuring adult content), a sufficiently enterprising naughty child would not be precluded from obtaining access (particularly if the verification simply required entry of data online). At the same time, any system of in-person checks would be wholly implausible in cyberspace. People share content over the Internet without regard to real space or geography. It is very unlikely that a particular content provider will have a real world local presence in Lexington, Virginia, or Moss Point, Mississippi. Moreover, websites that do not generate fees would not be able to absorb the cost of maintaining a comprehensive system of in-person age verification.

Favoring the protection of children over preserving access to unrestricted content would effectively destroy this aspect of the Internet.[44] Materials that would be available in the absence of effective age verification schemes will not be available if such schemes are enacted and enforced against all websites (whether commercial or non-commercial in character). Such schemes also would undoubtedly increase the cost of accessing information even as they decrease the universe of available content (as non-commercial websites shut down rather than comply with the age verification requirements or face liability for failing to block access by minors). Perhaps the transaction costs could be reduced if the government itself undertook the age verification process, but even this solution might prove unpalatable to the operators of non-commercial

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[42] *See* Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1781-84 (1995); Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE L.J. 1805, 1833-43 (1995).

[43] *See* Lidsky, *supra* note 19, at 892-902 (discussing benefits of instant information on the Internet to the process of democratic deliberation and noting that "[s]cholars have touted the Internet as the living embodiment of the 'marketplace of ideas' metaphor that lies at the heart of the First Amendment" and that "[f]rom a First Amendment scholar's perspective, the fascination of the Internet lies in its potential for realizing the concept of public discourse at the heart of the Supreme Court's First Amendment jurisprudence").

[44] *Cf.* Butler v. Michigan, 352 U.S. 380, 383 (1957) ("Surely, this is to burn the house to roast the pig.").

websites. In fact, mandatory government registration schemes would themselves implicate important First Amendment values and might not survive constitutional scrutiny.[45]

In sum, childproofing the Internet in a fashion that does not "reduce the adult population . . . to reading only what is fit for children" currently represents an impossible task.[46] Either the Internet remains essentially free, with the concomitant risk of some children accessing age-inappropriate materials, or the Internet can be child proofed through aggressive government regulations that protect children but, in the process, deprive adults of important information. For the time being, *Reno* settles this question in favor of adult access, even at the price of potential harm to children. Whether the Supreme Court will continue to set the balance in this fashion remains to be seen, but *Ashcroft* does not send an unequivocal message that the Supreme Court will accept a radically altered balance of these interests in order to afford children a greater measure of protection.

II. PROTECTING CHILDREN FROM SEXUAL EXPLOITATION: *FREE SPEECH COALITION V. ASHCROFT*

The second theme in the Supreme Court's jurisprudence addressing children and free speech involves materials that feature children as objects of sexual desire or expression. Beginning with *New York* v. *Ferber*,[47] the Supreme Court has declined to give erotica featuring real children *any* First Amendment protection. The Court's reasons are both simple and compelling:

> 1) The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance;

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[45] Giving the government a list of all persons who visit your Web site is unlikely to be popular either with persons who create and maintain websites or those who visit them. In the context of forced disclosure of campaign contributions, the Supreme Court has held that mandatory disclosure requirements cannot be applied where the effect would invite social retaliation against contributors. *See* Buckley v. Valeo, 424 U.S. 1, 64-74 (1976); *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-98 (1982); NAACP v. Alabama, 357 U.S. 449, 460-63 (1957). At least arguably, a government-sponsored age verification program would require mandatory disclosure of a sort that cases like *Buckley*, *Brown*, and *NAACP* disallow.

[46] *Butler*, 352 U.S. at 383.

[47] 458 U.S. 747 (1982).

> 2) [T]he distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled;
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> 3) The advertising and sale of child pornography provide an economic motive for and are thus an integral part of the production of such materials;
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> 4) The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis; and
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> 5) Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.[48]

A reasonable person cannot really argue with these five propositions. A problem, however, inheres in their application.

If courts interpret the category of child pornography broadly, a great deal of art and literature becomes potentially proscribable as "kiddie porn."[49] Donatello's bronze statue of King David flagrantly sexualizes the body of an adolescent boy. Nabokov's *Lolita* presents an equivocal view about the moral status of a sexual relationship between an adult man and a teenage girl. William Shakespeare's *Romeo and Juliet* involves an illicit love affair between two teenagers well below the age of 18.[50] The *Ferber* holding potentially criminalizes any live representation of these works involving the use of minors. Moreover, the *Ferber* market rationale would conceivably sweep up erotic materials that generate a demand for works that feature live children, even if the particular materials at issue do not themselves use real children in their production.

Reading *Ferber* broadly, Congress enacted the Child Pornography Prevention Act ("CPPA"), legislation that criminalized not only the distribution of materials featuring live children, but also any materials that appeared to

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[48] *Id.* at 757, 759, 761-63.

[49] *See* Adler, *Inverting the First Amendment*, *supra* note 17, at 928-35, 937-54, 961-69; Adler, *The Perverse Law*, *supra* note 17, at 234-44.

[50] Shakespeare identifies Juliet as a youth of around thirteen years of age. *See* WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years.").

feature live children, whether created through computer generation or the use of youthful looking adults.[51] If any market for child pornography has bad tendencies,[52] then the use of real children in the production of a particular picture, movie, or book should not really matter; harm will eventually come to real children because pedophiles will not be satisfied with "virtual" or faux child pornography.

Ashcroft v. *Free Speech Coalition,*[53] presented a First Amendment challenge to the CPPA and therefore required the Supreme Court to delimit the precise scope of the *Ferber* holding. The majority, led by Justice Kennedy, concluded that Congress could not proscribe materials whose production does not directly harm children. Thus, the CPPA failed constitutional review because it banned otherwise protected speech. The *Ferber* rule categorically excluding child pornography from any First Amendment protection simply has no application when the materials at issue do not feature actual children.[54]

Three Justices, led by Justice O'Connor, dissented in part, relying on a broader reading of *Ferber* to sustain the government's ban on virtual child pornography.[55] If any market for child pornography leads to the sexual exploitation of children, Congress could reasonably conclude that the entire market should be closed.[56] Materials featuring virtual child pornography might not directly cause harm to children in their production, but the secondary effects

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[51] *See* Child Pornography Prevention Act, 18 U.S.C. §§ 2252, 2256(8) (2000).

[52] *See* Dennis v. United States, 341 U.S. 494, 509-11 (1951) (noting that the clear and present danger test "cannot mean that before the government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited" and endorsing a gloss or clear and present danger test that discounts the probability of harm actually occurring when the gravity of the potential harm is particularly great).

[53] 122 S. Ct. 1389 (2002).

[54] *See id.* at 1402 (noting that "[i]n contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production" and suggesting that social harm associated with virtual-child pornography, unlike child pornography featuring real children "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts").

[55] *See id.* at 1407-11 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor argued that the prohibition on the use of youthful-appearing adults was overbroad, but would have sustained the ban against the creation of virtual child pornography. *See id.* at 1410 ("Although in my view the CPPA's ban on youthful-adult pornography appears to violate the First Amendment, the ban on virtual-child pornography does not.").

[56] *See id.* at 1408-09 (noting that "the Government has a compelling interest in protecting our Nation's children" and finding interest present in context of realistic virtual-child pornography because "[s]uch images whet the appetites of child molesters . . . who may use the images to seduce young children").

associated with a market for such materials could present a serious risk of indirectly producing such harm. The existence of virtual child pornography would also seriously complicate the government's ability to prosecute child pornography cases, as defendants invariably would claim that the materials at issue featured "virtual" rather than real children.[57]

One should keep in mind, of course, that the materials protected in *Free Speech Coalition* are still subject to obscenity analysis under *Miller* v. *California*.[58] That is to say, if the materials, viewed as whole, lack serious literary, artistic, political, or scientific value, appeal to the prurient interest, and describe or depict sex or excretory functions in a patently offensive way, the government may prohibit them and punish their manufacture, sale, and distribution. One should not, therefore, read *Free Speech Coalition* as a generic greenlight to the production and sale of virtual or faux child pornography. Rather, the decision forces the federal and state governments to prosecute cases involving such materials under the somewhat less forgiving standards of *Miller* (rather than *Ferber*).

In my own view, the Supreme Court rightly decided *Free Speech Coalition*. The contrary view would sweep up a great deal of serious art and literature.[59] If the Free Speech Clause protects art and literature, this result cannot be correct,60 especially when *Ferber*'s central rationale—avoiding direct harm to children in the production of erotica—is utterly absent. Moreover, *Miller* ensures that materials lacking any serious nexus with important free speech values will remain subject to plenary government regulation.

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[57] *See id.* at 1409 (noting possibility that "defendants indicted for the production, distribution, or possession of actual-child pornography may evade liability by claiming that the images attributed to them are in fact computer-generated" and concluding that "given the rapid pace of advances in computer-graphics technology, the Government's concern is reasonable").

[58] 413 U.S. 15, 24 (1973).

[59] *See Ashcroft*, 122 S. Ct. at 1400-01 (noting that "teenage sexual activity and the sexual abuse of children . . . have inspired countless literary works," that "[c]ontemporary movies pursue similar themes," and concluding that "[w]hether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions . . . . [t]his is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene").

[60] *See* Alexander Meiklejohn, *The First Amendment Is Absolute*, 1961 SUP. CT. REV. 245, 256-57. *Cf.* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that only political speech should be within the protection of the Free Speech Clause).

Although *Free Speech Coalition* generated a great deal of publicity, the decision does not really engage the most difficult issues regarding child pornography and the Internet. For the reasons noted in the previous section, it is very easy to disseminate child pornography over the Internet and not particularly easy to detect. Federal and state law enforcement agencies work to discover and punish the distribution of such materials, but this is a losing battle. Virtually anyone with an ISP subscription and a scanner can transmit child pornography over the Internet.

Even when law enforcement authorities are able to identify the sources of child pornography, their ability to do much about its distribution may be limited if the server featuring the materials is physically located outside the United States. A website with a server located in Thailand or France is effectively beyond the immediate reach of United States law enforcement authorities. Moreover, with the ease of producing child pornography in some foreign nations and the ease of distribution provided by the Internet, a domestic market for child pornography is an ugly side effect of the information superhighway.[61]

Resolving the problem takes us back to the structural difficulties associated with protecting children from age-inappropriate content. It is possible for a government to block access to websites and limit the universe of materials available on the Web. China engages in such efforts with a relatively high measure of success.[62] It is therefore likely that the government could require domestic ISPs to block access to websites featuring illegal child pornography.[63]

This represents only a partial solution, however, because offshore sites featuring child pornography can escape the block by simply opening another, as-yet-unblocked, website. More draconian measures, such as blocking access to all sites in a given country, would be grossly overbroad and prevent access to materials that are constitutionally protected. So long as the Internet remains both free and global in scope, it will be practically impossible to prevent its use

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[61] The problem of illegal Internet transactions is hardly limited to child pornography, of course—online gambling services, with offshore net servers, are also effectively beyond domestic law enforcement's powers.

[62] *See* Shamoil Shipchandler, Note, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 447-48, 453-58 (2000); *see also* Richard Cullen & Pinky D. Choy, *The Internet in China*, 13 COLUM. J. ASIAN L. 99 (1999); Steven M. Hanley, *Comment, International Internet Regulation: A Multinational Approach*, 16 J. MARSHALL J. COMPUTER & INFO. L. 997, 1005-06 (1998).

[63] *See, e.g.*, McGuire, *supra* note 20, at 768-70 (describing CompuServe's decision to shut down chat rooms world-wide in order to avoid criminal prosecution in Germany for distributing pornography and extremist political propaganda over its chat rooms).

to disseminate child pornography without also blocking vast amounts of content having nothing to do with kiddie porn. Simply put, it is much easier to monitor the wares in an adult bookstore in Manhattan than it is to monitor the Web. Thus, control devices that are effective in the context of a real world store with a physical location within a domestic jurisdiction are, at best, ill-suited to the Web.

Notwithstanding the furor over *Free Speech Coalition*, the case really does not meaningfully address the most problematic aspects of attempting to excise child pornography from the community. The case only establishes the definition of child pornography, limiting it to materials featuring real children. The fact is that a great deal of material coming within the *Free Speech Coalition* majority's definition of proscribable child pornography circulates freely on the Internet, with law enforcement forced to play an unwinnable game of hide-and-seek with the purveyors of this sludge. Absent some sort of technological breakthrough that facilitates much more nuanced blocking than presently exists—and blocking that is somehow pro-active in nature to avoid the expedient of simply relocating the content to another website—one of the social costs of the Internet will be the enhanced availability of child pornography.

CONCLUSION

Childproofing the Internet simply is not possible, unless the Supreme Court is prepared to severely restrict the content available to adults in order to protect children. *Reno* v. *ACLU* suggests that, at least for the moment, a majority of the Justices are disinclined to take this step. Accordingly, children probably will be able to access age-inappropriate materials on the Web. The primary responsibility for protecting children from such materials will rest with parents and caregivers, rather than the government. Safeguarding the First Amendment rights of adults will mean that the age of innocence may be even further reduced over time in our culture.

Turning to government efforts to eradicate child pornography, the Internet has made law enforcement's work a great deal more difficult. Moreover, unlike the question of preserving adult access to materials not appropriate for children, there is simply no corresponding free speech benefit in encouraging and facilitating a market in child pornography. But the same conditions that make it very difficult to protect children from inappropriate content also work to frustrate efforts to suppress child pornography.

To be sure, there are ways of eradicating child pornography from the Internet — government control over websites and government blocking of unlicensed websites would effectively end the Internet trade in kiddie porn.[64] But, an effective solution to the problem would impose tremendous costs on free speech on the Web. It is doubtful that the present Supreme Court would sustain such regulations, even if Congress were to enact them (which also seems unlikely). Consequently, the evil of child pornography will be a social cost imposed on our society in exchange for the wonders of instant information from virtually any location in the country with a telephone.

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[64] *Cf.* Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (suggesting that any requirement that works as form of press licensure, including differential forms of taxation, would violate the Free Press Clause of the First Amendment).