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Eric J. Segall

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At the end of its opinion in *Ashcroft v. ACLU*,[1] upholding a lower court's preliminary injunction against the enforcement of the Child Online Protection Act ("COPA"), the Court explained that its holding did not prevent Congress from "enacting any regulation of the Internet designed to protect minors from gaining access to harmful materials."[2] Perhaps the Court thought it necessary to send this unusual message because Congress, when enacting COPA, paid careful attention to a prior Supreme Court case,[3] which had invalidated a similar statute on the grounds that it violated the First Amendment.[4] In *Ashcroft*, the Court did not ignore Congress' efforts to comply with the Court's earlier opinion:

> In enacting COPA, Congress gave consideration to our earlier decisions on this subject, in particular the decision in [*Reno v. ACLU*]. For that reason, the Judiciary must proceed with caution and . . . with care before invalidating the Act. The imperative of according respect to Congress, however, does not permit us to depart from well-established First Amendment principles. Instead, we must hold the Government to its constitutional burden of proof.[5]

The thesis of this essay is that, contrary to the Court's statement that Congress could constitutionally enact a statute protecting minors from sexually explicit materials on the Internet, the government's "burden of proof" under the First Amendment will and should preclude any such effort. As a predictive matter, the Court that affirmed the injunction

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* Professor of Law, Georgia State College of Law. I would like to thank Russ Weaver for putting together this wonderful symposium, and the other participants who commented on an earlier draft of this essay.

1. 542 U.S. 656 (2004).
2. *Id.* at 672.
3. Reno v. ACLU, 521 U.S. 844 (1997).
4. *Id.* at 878.
5. *Ashcroft*, 542 U.S. at 660.

against COPA is unlikely to affirm a broader statute, and a narrower statute is difficult to imagine. As a normative matter, Congress should leave it up to parents, schools, and public libraries to police what children should and should not view on the Internet.

The first part of this essay summarizes Congress' efforts to protect children from harmful Internet speech and the Court's responses to those laws. The second half explains why Congress should halt any further efforts to regulate sexually explicit materials on the Internet.

I. Background

As the Internet expanded during the 1990's, Congress became concerned about the ability of children to access sexually explicit materials.[6] In response to this problem, Congress enacted the Communications Decency Act ("CDA"),[7] which made it a crime to knowingly transmit over the Internet to any person under eighteen any indecent or obscene materials or any material that depicted or described sexual or excretory activities or organs in terms patently offensive to local community standards.[8] The CDA allowed for two affirmative defenses for those who took "good faith, reasonable, effective, and appropriate actions" to restrict the covered communications to adults, and for those who restricted access to the covered materials by requiring proof of age such as credit cards or adult identification numbers.[9]

In a decision written by Justice Stevens, on behalf of the entire Court except Justices O'Connor and Rehnquist, the Court struck down the CDA saying that the statute was facially overbroad (it covered everything on the Web, including e-mail and chat rooms), that it was impermissibly vague because it failed to adequately define key definitional terms such as indecency, and that the affirmative defenses in the Act would be expensive and burdensome for many Internet users.[10] The *Reno* Court distinguished *Ginsberg v. New York,*[11] which upheld a state law prohibiting the sale of indecent (but not necessarily obscene) materials to minors, on the following four grounds: 1) the statute in *Ginsberg* did not "bar parents who so desire from purchasing the magazines for their children"; 2) the *Ginsberg* law only applied to commercial transactions; 3) the *Ginsberg* law defined the illegal

6. *See* Emily Vander Wilt, *Considering COPA: A Look at Congress's Second Attempt to Regulate Indecency on the Internet,* 11 VA. J. SOC. POL'Y & L. 373, 376 (2004).

7. 47 U.S.C. § 223(a) (2003).

8. Wilt, *supra* note 6, at 376.

9. *See Reno*, 521 U.S. at 860-61.

10. *See* Wilt, *supra* note 6, at 378.

11. 390 U.S. 629 (1968).

materials as those "utterly without redeeming social importance for minors"; and 4) the *Ginsberg* law applied to any person under seventeen whereas the CDA applied to everyone under eighteen.[12]

The Court also distinguished *FCC v. Pacifica Foundation*,[13] which upheld a FCC sanction against the transmission over the radio of George Carlin's "Filthy Words" monologue during a time when children were likely to be listening.[14] The Court in *Reno* stated that there were several differences between the agency action in *Pacifica* and the CDA. The order in *Pacifica* only limited the timing of the prohibition; it did not impose criminal sanctions, and it involved radio broadcasts that because of wavelength scarcity had traditionally been given limited First Amendment protection.[15]

After the Court struck down the CDA on grounds of vagueness and overbreadth, Congress went back to work and tried to fix the statute to address the Court's concerns. It passed COPA, which prohibits the transmission for "commercial purposes" of World Wide Web content that is "harmful to minors."[16] COPA defines "minors" as anyone seventeen or under.[17] The law also provides for affirmative defenses if the person who transmits illegal materials to minors has restricted access to those materials by requiring use of a digital certificate of age, credit card or debit account, or by any other reasonable measures.[18]

In passing COPA, Congress paid careful attention to the Court's decision in *Reno*. First, the law only applies to Internet materials distributed for commercial purposes,[19] addressing the *Reno* Court's concern that the affirmative defenses in the CDA[20] would have been expensive for non-commercial web users.[21] Second, COPA only applies to the World Wide Web[22] whereas the CDA applied to the entire Internet, including e-mails and chat rooms.[23] This narrowing of the statute's reach made COPA less broad and also made the affirmative defenses more technologically possible.[24] Third, COPA only applies to people seventeen and under,[25] which responds to the *Reno* Court's concern[26] that

12. *Reno*, 521 U.S. at 865-66.
13. 438 U.S. 726 (1978).
14. *Id.* at 742-51.
15. *See* Wilt, *supra* note 6, at 378.
16. 47 U.S.C. § 231(a)(1) (1998).
17. § 231(e)(7).
18. § 231(c)(1).
19. § 231(a)(1).
20. *See* § 233(e).
21. *See* Wilt, *supra* note 6, at 379-80.
22. 47 U.S.C. § 231(a)(1).
23. Wilt, *supra* note 6, at 379.
24. *Id.*
25. § 231(e)(7).

the CDA applied to people only one year away from becoming an adult.[27] Finally, Congress defined indecency with more precision in COPA than it had in the CDA by employing the *Miller* test[28] as applied to minors.[29] There is no doubt that Congress made a good faith effort to comply with the Court's decision in *Reno* when it passed the narrower statute.[30]

Immediately after COPA became law, it was challenged by a group of plaintiffs including Internet providers and the ACLU.[31] The complicated and tortured history of that litigation is summarized in the *Ashcroft* decision, and there is no reason to recount it in detail here.[32] Eventually, the Supreme Court affirmed the lower court's injunction.[33] The Court held that plaintiffs demonstrated a reasonable probability that they would prevail on the merits because filtering software would be a less restrictive alternative to the sanctions in the statute, and therefore the law was not narrowly tailored to further a compelling governmental interest.[34] Putting the burden of proof on the government to demonstrate that filtering software would be less effective than COPA's restrictions, the Court concluded that:

> Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter. . . . Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.[35]

Although the Court upheld the lower court's preliminary injunction of COPA, it did remand the case in order to allow the government to present evidence that filtering software would not be a less restrictive alternative to COPA's sanctions.[36] As of this writing, the lower court's

26. *Reno*, 521 U.S. at 844, 865-66.
27. *See* Wilt, *supra* note 6, at 380.
28. Miller v. California, 413 U.S. 15, 24 (1973).
29. Wilt, *supra* note 6, at 399.
30. *See* Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).
31. *Id.* at 663.
32. *See id.* at 663-64.
33. *Id.* at 673.
34. *Id.* at 666.
35. *Id.* at 667.
36. *Id.* at 671.

injunction is still in effect.

II. Indecency, The Internet and Minors

Congress' desire that children be shielded from sexually explicit Internet materials is understandable. Society undoubtedly has an interest in how young people, especially teenagers, act sexually, and their decisions may be influenced by what they view on the Internet. The Court has repeatedly held that the state has a compelling interest in keeping minors away from sexually explicit images. This essay will assume for sake of argument that such materials may cause harm to children.

The problems with congressional regulation of these materials, however, are numerous. Broadly speaking, there are two major obstacles to such legislation. First, it is virtually impossible to design a scheme of regulation of sexually explicit but non-obscene Internet materials that will not impinge on the First Amendment rights of adults. Second, it will be extremely difficult to design such a scheme, and implement it constitutionally, without depriving children of information that is important and protected by the First Amendment. As a predictive matter, it is unlikely that Congress can draft a statute that a majority of the Court will find consistent with the First Amendment. As a normative matter, any such statute would do more harm than good. This essay will discuss those two points separately.

A. What Will Happen Next?

The Court's affirmance of the lower court's injunction of COPA was somewhat surprising in light of the narrow class of materials that COPA prohibits. The statute only reaches material that is obscene as to minors, which, as Justice Breyer argued in dissent, would cover "little more" than legally obscene materials which receive no First Amendment protection.[37] It is hard to imagine materials that would be legally obscene to minors but not to adults because any such materials would have to lack any "serious literary, artistic, political, or scientific value" for minors and would have to appeal to their "prurient interests."[38] As Justice Breyer concluded, "one cannot easily imagine material that has serious literary, artistic, political, or scientific value for a significant group of adults, but lacks such value for any significant group of

37. *See* Ashcroft v. ACLU, 542 U.S. 656, 678 (2004) (Breyer J., dissenting). *See also* Robert Corn-Revere, *Ashcroft v. ACLU II: The Beat Goes On*, 2004 CATO SUP. CT. REV. 299, 319.

38. *See* 47 U.S.C § 231(e)(6) (2003).

minors."[39]

Despite the narrowness of COPA, the entire *Ashcroft* Court (except Justice Scalia) applied strict scrutiny to the statute and required the government to satisfy the compelling interest test. The holding that the government could not satisfy this test was somewhat surprising as the Court had previously ruled that the government could apply a different obscenity standard to minors than adults,[40] and all COPA did was add the word "minor" to the *Miller* test.[41] It is hard to imagine a statute affecting less non-obscene speech than COPA, so unless Congress simply prohibits all legally obscene speech on the Internet, any effort to draw a line between protected speech for adults and protected speech for minors on the Internet is unlikely to succeed.

The Court's decision in *Ashcroft* that the plaintiffs had shown a reasonable probability of succeeding on the merits because filters would be a less restrictive alternative to the criminal sanctions in COPA was also somewhat surprising. First of all, filters are a voluntary option. It is unlikely that Congress could constitutionally require filters, or devise a set of incentives that would entice most parents to use them.[42] Moreover, filtering software is notoriously unreliable.[43] Most filters screen out information that would not be deemed obscene for minors, and allow in images that probably are. A recent study by the Kaiser Foundation found, among other weaknesses, that seven filters set at intermediate levels blocked 27% of health sites related to "condoms."[44] This is a high price to pay for the limited utility of such filters. Moreover, it is likely that companies distributing sexually explicit materials may devise ways to evade such software. If filtering software, with all of these problems, is a constitutionally required alternative to congressional prohibition of sexually explicit Internet materials, it is difficult to imagine a regulatory scheme that would pass constitutional muster. As one commentator has suggested, "a holding that blocking and filtering software is a less restrictive means [leaves] Congress utterly impotent to deal with [indecency on the Internet]."[45]

Not only is it unlikely that Congress could devise a constitutional

39. *Ashcroft*, 542 U.S. at 679 (Breyer, J., dissenting), *quoted in* Corn-Revere, *supra* note 37, at 320.

40. *See* Ginzberg v. United States, 383 U.S. 463 (1966).

41. § 231(e)(6).

42. *Cf.* United States v. American Library Association, 539 U.S. 194 (2003) (upholding federal law requiring public libraries to use filters to obtain federal funding).

43. *See* Kate Reder, *Ashcroft v. ACLU: Should Congress Try, Try, and Try Again, or Does the International Problem of Regulating Internet Pornography Require an International Solution?*, 6 N.C. J. L. & TECH. 139, 147-48 (2004).

44. *Id.* at 148.

45. Wilt, *supra* note 6, at 423.

scheme regulating sexually explicit Internet materials, it should not do so. The Internet provides an unprecedented opportunity for individuals without great capital to participate in the growth of culture, politics, and commerce.[46] Moreover, for the first time, people all over the globe can communicate with and influence other people inside their own homes. Of course, this tool of mass communication creates dangers, especially to children.[47] To the extent this potential harm arises inside the home, however, there are significant privacy issues that should deter Congress from attempting to coercively determine what can and cannot be posted on the Web.

In *Stanley v. Georgia*,[48] the Supreme Court held that a person could not be prosecuted for merely possessing obscenity inside his house.[49] The Court summarized the defendant's argument as follows: "He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library."[50] The Court agreed with the defendant:

> [If] the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[51]

Although the Court has never held that there is a concomitant right to bring obscene materials inside the home, the advent of the Internet should lead to the expansion of the Stanley protections.[52] Any regulation of Internet material will leave its greatest mark on what people choose to view inside their own homes.[53] Although radio and television regulation

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46. *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 5 (2004).

47. *See* Sarah B. Evans, *Hear No Evil, Speak No Evil, See No Evil: Protecting the Nation's Children From Sexually Explicit Material on the Internet*, 13 TEMP. POL. & CIV. RTS. L. REV. 253, 253-256 (2003).

48. 394 U.S. 557 (1969).

49. *Id.* at 568.

50. *Id.* at 565.

51. *Id.* The idea that the government should not place itself between citizens and what they do in the privacy of their own homes was recently reaffirmed when the Court invalidated Texas' law prohibiting same-sex sodomy. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

52. See Deborah Milham, *The Constitutional Issues Presented by the Communications Decency Act's Application to HIV/AIDS Information on the Internet*, 8 ALB. L.J. SCI. & TECH. 195, 197 (1997).

53. To the extent Congress is concerned about public places such as libraries and schools, where the right to privacy is greatly diminished, Congress has ample means short of criminal penalties and outright censorship to achieve its goals. *See, e.g.*, United

also affects the First Amendment rights of people at home, the ubiquitous nature of the Internet and its potential to provide much-needed information in virtually every area of social, economic and political life make the stakes of overbroad regulation much higher than for traditional media sources. A teenager seeking information about AIDS or birth control should be able to do so without government censorship. Although the potential for that teenager to access sexually explicit materials is serious, in the long run, the responsibility for solving that problem must rest with parents and not government overseers. As the Court discussed in *Ashcroft*, Congress and parents working together to voluntarily prevent children from accessing harmful Internet materials is a solution more consistent with First Amendment values than a system of coercive sanctioning of protected speech.[54]

Another problem with congressional regulation of sexually explicit materials on the Internet is that, even though the Court has upheld the "community standards" part of COPA against a facial challenge,[55] this part of the Miller test as applied creates insurmountable problems. As Professor Cenite has argued persuasively:

> Regulating online obscenity by geographically determined local community standards imposes high burdens on content providers serving wide audiences to know multiple, vague local standards. In addition, because controlling geographic distribution of explicit content online is not practical, standards of the least tolerant community would likely prevail, limiting content available nationally. A national standard, though preferable to multiple local standards, raises definitional and constitutional questions; if it is a national average standard, it would restrict material acceptable in communities with above average tolerance, resulting in some overbreadth. Alternatively, a minimal national standard would eliminate overbreadth by embracing only what would be considered obscene throughout the nation.[56]

It is one thing to require distributors of sexually explicit movies, books, and magazines to conform to the standards of the communities in which they inject their wares. But both local and national regulation of the Internet on the basis of moral disapproval carries tremendous costs. Most of First Amendment doctrine involves the balancing of free speech interests with legitimate, sometimes compelling, governmental interests.

States v. Am. Library Ass'n, 539 U.S. 194 (2003) (upholding Congress' use of the spending power to require filters in public libraries).

54. *See* Ashcroft v. ACLU, 542 U.S. 656, 670 (2004).

55. *See* Ashcroft v. ACLU, 535 U.S. 564 (2002).

56. Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 25 (2004).

In the case of the Internet, the most communicative device ever invented, the risks of both local parochial judgments and overreaching national legislation make the costs of governmental regulation too high. If young children and teenagers are accessing inappropriate Internet materials, the better answer lies with parents, schools, and libraries, not governmental censorship and coercion.

III. Conclusion

New technologies bring new challenges. Sometimes advances are incremental and sometimes they are revolutionary. The Internet has dramatically changed the way people communicate with each other, conduct commerce, and even participate in politics. It has also altered the landscape for the viewing and purchasing of sexually explicit materials and provided information about sex that is important and valuable. Distinguishing the former from the latter should not be the job of government bureaucrats, judges, or juries. The near universal availability of the Internet, as well as its prominent place in the home, makes both state and national regulation troubling as a matter of policy and difficult as a constitutional matter. The freedom of speech is too important, and the Internet too vast and useful, for the government to dictate policy.

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