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# THE CONTINUING SAGA OF INTERNET CENSORSHIP: THE CHILD ONLINE PROTECTION ACT

Martha McCarthy\*

*The values behind the First Amendment make the costs that accompany free expression worth bearing, but where children are concerned, the benefits are not as strong and the costs are greater.*<sup>1</sup>

Since 1996, Congress has enacted several measures designed to protect children from exposure to harmful materials over the Internet and to punish those who send such materials or allow children to access them. Legal conflicts over these laws have pitted First Amendment rights to express views and receive information against governmental obligations to ensure the well being of minors. The tension between these important interests has generated volatile legislative debates and numerous court cases, including several Supreme Court decisions.<sup>2</sup> This article explores the competing values at stake and various legislative and judicial efforts to balance them. Particular attention is given to the 2004 Supreme Court decision regarding the Child Online Protection Act<sup>3</sup> and to issues that remain unresolved since this ruling.

## I. FEDERAL LEGISLATION

Since the 1990s, Congress has exhibited concern about minors being exposed to harmful materials via the Internet, given the ease of communication through cyberspace. In 2000, there were approximately

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1. Kevin Saunders, *Do Children Have the Same First Amendment Rights as Adults? The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 Chi.-Kent L. Rev. 257, 270 (2004).

2. These controversies pit liberal and communitarian philosophies against each other. For a discussion of this topic, see Amitai Etzioni, *Do Children Have the Same First Amendment Rights as Adults?: Response*, 79 Chi.-Kent L. Rev. 299, 305-06 (2004).

3. *Ashcroft v. ACLU*, 124 S. Ct. 2783 (2004) [hereinafter *Ashcroft II*] (interpreting 47 U.S.C. § 231 (2004)).

600 million Internet users across more than 150 countries.<sup>4</sup> Indeed, Internet sites are doubling annually and include an estimated 100,000 pornographic sites; new strategies are regularly devised to redirect users from legitimate sites to pornographic ones and to make it difficult to exit once “kidnapped.”<sup>5</sup>

One commentator has observed four primary ways by which children view inappropriate materials on the Internet. First, “commercial actors” may send materials to children through cyberspace.<sup>6</sup> Second, “child predators either send visual materials or talk with children in ways considered harmful.”<sup>7</sup> Third, minors intentionally locate illicit sites.<sup>8</sup> And fourth, minors find such sites accidentally.<sup>9</sup> Congress has therefore attempted several times to curb the ease with which children come into contact with obscene material online.

### A. *Communications Decency Act*

The first law to generate a Supreme Court decision was the Communications Decency Act (CDA), enacted as part of the Telecommunications Act of 1996, which criminalized the knowing transmission of obscene or indecent messages or images through telecommunications to recipients under the age of eighteen.<sup>10</sup> The CDA was not confined to commercial speech or entities; instead it covered all postings on individual computers.<sup>11</sup> The law stipulated that community standards would be used to judge whether materials were indecent. It imposed criminal liability on creators as well as transmitters of such materials, so schools, libraries, and other institutions that allowed children electronic access to such harmful materials were subject to liability.<sup>12</sup>

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4. Susan Kosse, *Try, Try Again: Will Congress Ever Get It Right? A Summary of Internet Pornography Laws Protecting Children and Possible Solutions*, 38 U. Rich. L. Rev. 721, (2004).

5. See Rebecca L. Covell, *Problems with Government Regulation of the Internet: Adjusting the Court's Level of First Amendment Scrutiny*, 42 Ariz. L. Rev. 777, 777-78 (2000); Kelly Rodden, *The Children's Internet Protection Act in Public Schools: The Government Stepping on Parents' Toes?* 71 Fordham L. Rev. 2141, 2145 (2003).

6. Todd A. Nist, Student Author, *Finding the Right Approach: A Constitutional Alternative for Shielding Kids from Harmful Materials Online*, 65 Ohio St. L. J. 451, 485 (2004).

7. *Id.*

8. *Id.*

9. *Id.* at 486.

10. 47 U.S.C. § 223 (LEXIS 2004 & Supp. 1996) (In 2003 the act was amended; the former description of content that “depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs,” was changed to “is obscene or child pornography.”) *Id.* § 223(d)(1)(B).

11. *Id.* § 223(a).

12. *Id.*

In 1997, the Supreme Court struck down two CDA provisions as abridging the First Amendment.<sup>13</sup> The Court reasoned that the law's vague provisions pertaining to indecent transmissions and patently offensive displays chilled free speech and criminalized some legitimate speech for adults.<sup>14</sup> Applying a strict scrutiny standard, the Court further held that the measures were not narrowly tailored to serve a compelling governmental interest because less restrictive means to shield minors from access to inappropriate materials were available.<sup>15</sup> Given that the Court struck down these CDA provisions, Congress has enacted other measures to shield children from harmful Internet transmissions.

### *R. Children's Internet Protection Act*

In contrast to the CDA, the Children's Internet Protection Act (CIPA), signed into law in 2000, focuses on recipients rather than the senders of transmissions.<sup>16</sup> It requires public libraries and school districts receiving federal technology funds to enact Internet safety policies for minors that include the use of filtering measures to protect children from access to harmful images.<sup>17</sup> The law does not specify particular filters that must be used, and it stipulates that the filters can be turned off for adults to engage in research or other lawful activities.<sup>18</sup> Although the law specifies that local communities are to decide what materials are inappropriate for minors,<sup>19</sup> a few major software companies actually supply most filters nationally.<sup>20</sup>

Upholding CIPA in 2003, the Supreme Court in *United States v. American Library Association* recognized the latitude Congress has to attach reasonable conditions to the receipt of federal funds, as long as the conditions do not abridge constitutional rights.<sup>21</sup> This standard was met

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13. *Reno v. ACLU*, 521 U.S. 844 (1997).

14. *Id.* at 845.

15. *Id.* at 846.

16. 47 U.S.C. § 254 (2004).

17. *Id.* § 254(h)(5)(B). CIPA applies to the E-rate Program, which provides discounts on telecommunications and Internet access for eligible schools and libraries, and to the Library Services and Technology Act that provides grants for eligible agencies to purchase computers or to pay for the direct costs associated with Internet access. See N. Y. St. Library, *Library Services and Technology Act (LSTA) Program*, <http://www.nysl.nysed.gov/libdev/lsta/lsta04/cipabkgd.htm> (accessed March 2, 2005) or N. Y. St. Library, *E-Rate (Universal Services for Telecommunications Discounts Program)*, <http://www.nysl.nysed.gov/libdev/univsvc/#program> (accessed March 2, 2005).

18. *Id.* § 254(h)(5)(D).

19. *Id.* § 254(f).

20. See John Berry, *The Disarray of Defeat: There Is a Small Victory for Free Access in Our CIPA Setback*, *Library J.* (Aug. 15, 2003), at 8; Kosse, *supra* n. 4, at 739; Martha McCarthy, *Internet Censorship: Values in Conflict*, 183 *Ed. Law Rep.* 299, 307 (2004).

21. *U.S. v. Am. Lib. Assn.*, 539 U.S. 194, 196 (2003).

since libraries could already adopt filters on their own without implicating the First Amendment. The Court rejected the contention that the filtering software prevents adult library patrons from gaining access to some constitutionally protected expression or abridges libraries' First Amendment rights, given that the filters can be disabled for adult patrons.<sup>22</sup>

Declining to apply heightened judicial scrutiny in reviewing the law, a majority of the justices concluded that since libraries can exclude pornography from print collections without being subjected to heightened scrutiny, they should similarly be able to block online pornography.<sup>23</sup> The Court emphasized that a public library is not creating a public forum when it acquires Internet terminals.<sup>24</sup> It is providing such Internet access to facilitate learning for research and recreational purposes and not to encourage free expression.<sup>25</sup> Although this decision applied specifically to the library portions of CIPA, one assumes that the rationale would be even stronger to uphold CIPA's provisions requiring schools to adopt such protections as a condition of receiving federal technology aid.<sup>26</sup>

### C. Child Online Protection Act

The Child Online Protection Act (COPA) has generated the most litigation, including the 2004 Supreme Court decision that will be addressed here in some detail. In enacting COPA in 1998, Congress attempted to resolve some of CDA's constitutional defects by making COPA narrower in scope. COPA prohibits content harmful to minors (under seventeen) from being distributed for commercial purposes through the Internet.<sup>27</sup> The commercial limitation is defined in the law as those individuals "engaged in the business of making such communications" in that the persons devote "time, attention, or labor to such activities" as part of their trade or business.<sup>28</sup> Thus, individuals placing materials on the web as a hobby would not be subject to COPA. An additional limitation is that COPA targets online communication that

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22. *Id.* at 208–09.

23. *Id.* at 207–08. Four justices, however, indicated that at least heightened scrutiny should have been used, and two of the four, Justices Souter and Ginsburg, argued for strict scrutiny analysis. *Id.* at 215 (Breyer, J., concurring); *id.* at 220 (Stevens, J., dissenting); *id.* at 231 (Souter, J., joined by Ginsburg, J., dissenting). For a discussion of these standards and a more detailed analysis of the *ALA* case, see McCarthy, *supra* n. 20, at 299.

24. *Am. Lib. Assn.*, 539 U.S. at 195.

25. *Id.*

26. See McCarthy, *supra* n. 20.

27. 47 U.S.C. § 231(a)(1)(d)(1) (2004).

28. *Id.* § 231(e)(2).

is publicly accessible over the Internet and does not target all methods of online communication, such as e-mail.<sup>29</sup> COPA imposes criminal and civil penalties on those who knowingly make available such materials in interstate or foreign commerce.<sup>30</sup> The law includes affirmative defenses for those who restrict access to prohibited materials by reasonable measures such as requiring use of a credit card or adult identification number or accepting a digital certificate that verifies age.<sup>31</sup>

The law defines materials harmful to minors as “any communication” (e.g. picture, image, recording, etc.) that “applying contemporary community standards . . . and with respect to minors is designed to appeal to . . . the prurient interest; depicts, in a manner patently offensive with respect to minors, . . . sexual acts or . . . contact . . . ; or taken as a whole lacks serious literary, artistic, political, or scientific value for minors.”<sup>32</sup> This standard is adapted from one applied by the Supreme Court in 1973 to determine whether materials are considered obscene and thus outside the protective arm of the First Amendment.<sup>33</sup>

## II. LITIGATION PERTAINING TO COPA

Litigation challenging the constitutionality of COPA was initiated in 1999.<sup>34</sup> The district court granted a preliminary injunction, reasoning that the law would place a burden on some protected expression.<sup>35</sup> The court did not find evidence that COPA’s criminal penalties for distributors of the targeted materials constituted the least restrictive means available to achieve the government’s goal of restricting minors’ access to harmful communication via the Internet.<sup>36</sup> On appeal, the

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29. The prohibited material must be placed on the World Wide Web “using hypertext transfer protocol or any successor protocol.” 47 U.S.C. § 231(c)(1).

30. 47 U.S.C. § 231. Among other things, COPA imposes a \$50,000 fine and six months in prison for knowing commercial posting of such content. There also have been legislative efforts to curtail the spread of child pornography via the Internet. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 (2000), that prohibited the distribution of virtual child pornography, finding no actual harm to children because no “real” children were used). See Kosse, *supra* n. 4, at 760–64.

31. 47 U.S.C. § 231(c)(1).

32. *Id.* § 231(c)(6).

33. See *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that the basic guidelines for trial courts to use in identifying unprotected obscene material are: “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value”).

34. See *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999).

35. *Id.* at 495.

36. *Id.* at 497.

Third Circuit held that the district court did not abuse its discretion in granting the preliminary injunction, recognizing that an injunction can be issued only after considering the following factors:

(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.<sup>37</sup>

But the Third Circuit used a different rationale to justify the injunction. The appeals court concluded that COPA's use of community standards made the law unconstitutionally overbroad in that distributors would have to gear messages to the most conservative community to satisfy this requirement.<sup>38</sup>

Reviewing the appeals court's ruling, the Supreme Court rendered its first COPA decision in 2002.<sup>39</sup> The Court concluded that COPA's use of community standards to identify harmful materials does not render the law unconstitutionally overbroad.<sup>40</sup> But the Court remanded the case for reconsideration of other grounds on which COPA could be found unconstitutional.<sup>41</sup>

Again enjoining the enforcement of COPA, the district court focused on the argument that there were less restrictive ways to achieve the government's goal—mainly using filtering devices—and that the government did not prove that these alternative methods were not effective. On remand, the Third Circuit once more affirmed the district court's injunction on the enforcement of COPA.<sup>42</sup> The appeals court used the strict scrutiny standard and concluded that the law likely violated the First Amendment on two grounds. First, the court held that COPA would probably not be considered narrowly tailored to serve a compelling government interest in that it is not the least restrictive means to prevent minors from using the Internet to gain access to harmful materials.<sup>43</sup> Second, the appeals court reasoned that COPA would likely be found overbroad because it places significant burdens on web publishers' dissemination of protected speech and on adults' access

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37. *ACLU v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000) (quoting *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999) (citing *ACLU v. Black Horse Pike Regl. Bd. of Educ.*, 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996))).

38. 217 F.3d at 166.

39. *Ashcroft v. ACLU*, 535 U.S. 564 (2002) [hereinafter *Ashcroft I*].

40. *Id.* at 585.

41. *Id.* at 602.

42. *ACLU v. Ashcroft*, 322 F.3d 240, 251–66 (3d Cir. 2003).

43. *Id.* at 251–66.

to such speech.<sup>44</sup> The government then again appealed the Third Circuit's decision to the Supreme Court.

### *A. Supreme Court Majority Opinion in Ashcroft II*

Addressing COPA a second time in *Ashcroft v. ACLU*, the Supreme Court in 2004 affirmed the Third Circuit's conclusion that the district court did not abuse its discretion by entering the preliminary injunction.<sup>45</sup> The Supreme Court reiterated that to grant such an injunction, the trial court must conclude that the plaintiffs are likely to prevail on the merits of their claim and held that the plaintiffs had satisfied this standard.<sup>46</sup> However, the Supreme Court's five-to-four decision was narrower than the Third Circuit's ruling. The majority focused on the likelihood that the statute burdens "some speech that is protected for adults."<sup>47</sup> The Court reasoned that it was important to let the injunction stand pending a full trial because of the potential harm in chilling protected speech that could result from prosecution of distributors of Internet materials under COPA.<sup>48</sup> The Court concluded that COPA likely violated the First Amendment because it imposes a content-based restriction, noting that "the Constitution demands that content-based restrictions on speech be presumed invalid."<sup>49</sup>

While continuing the injunction and suggesting that filters would be less restrictive of First Amendment freedoms than criminal sanctions to achieve the legitimate governmental objective of protecting children, the Court did not completely shut the door regarding the constitutionality of COPA. The majority held that a remand was appropriate for additional proceedings regarding the effectiveness and reliability of filtering software.<sup>50</sup> In remanding the case, the Court indicated that it would be possible, although not likely, for the government to meet its burden of showing that COPA is necessary for Congress to accomplish its goal of safeguarding children from harmful materials via the Internet.<sup>51</sup>

The key question on remand will be "whether the challenged regulation is the least restrictive means among available, effective alternatives."<sup>52</sup> The central alternative considered by the district court

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44. *Id.* at 266–71.

45. *Ashcroft II*, 124 S. Ct. at 2787.

46. *Id.* at 2791.

47. *Id.*

48. *Id.* at 2787.

49. *Id.* at 2788.

50. *Id.* at 2787.

51. *Id.*

52. *Id.* at 2791.

was blocking and filtering software, and the Supreme Court majority noted that filters may be more effective than criminal penalties for several reasons. First, filters “impose selective restrictions on speech at the receiving end, not universal restrictions at the source.”<sup>53</sup> Second, adults may gain access to constitutionally protected speech that might be viewed as harmful to minors by turning off the filter on home computers or requesting that filters be turned off on library computers.<sup>54</sup> In addition, filters can be applied to e-mail as well as the World Wide Web,<sup>55</sup> whereas COPA’s sanctions do not extend overseas.<sup>56</sup> In essence, operators who would be threatened with criminal penalties in this country could simply move pornographic operations overseas and avoid criminal penalties under COPA. Also, the majority recognized that the technological landscape had substantially changed since the district court made its findings of fact five years earlier, so perhaps now filters are even less apt to overblock or underblock sites.<sup>57</sup> Finally, requiring the use of credit cards to access the material may not keep minors away as envisioned, because some minors have such cards.<sup>58</sup>

Moreover, the Court rejected the argument that Congress is not authorized to legislate filtering software, noting that “filters are part of the current regulatory status quo.”<sup>59</sup> It referred to the Supreme Court’s 2003 decision upholding the Children’s Internet Protection Act that conditions certain federal aid on public libraries and schools adopting filtering software.<sup>60</sup> The Court majority also recognized that Congress has the authority to enact laws that promote the use of filters by parents.<sup>61</sup>

The Court applied strict scrutiny in deciding that the injunction should remain in effect since this was a content-based speech restriction akin to one that the Court had invalidated in *United States v. Playboy Entertainment Group*.<sup>62</sup> In *Playboy Entertainment Group*, the adult entertainment company challenged part of the Telecommunications Act

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53. *Id.* at 2792.

54. *Id.*

55. *Id.* at 2793.

56. The Court also cited the *Report of the Commission on Child Online Protection to Congress* indicating that filters are more effective than age-verification requirements. Thus, the government’s own commission seems to refute the assertion that COPA is the least restrictive alternative. *Ashcroft II*, 124 S. Ct. at 2792-93.

57. *Id.* at 2787.

58. *Id.* at 2786.

59. *Id.* at 2793.

60. *See Am. Lib. Assn.*, 539 U.S. 194.

61. *Ashcroft II*, 124 S. Ct. at 2793.

62. 529 U.S. 803 (2000).

of 1996 (Section 505) that required cable companies to fully scramble sexually-oriented programming or limit their transmissions to between 10 p.m. and 6 a.m. when children would not likely be watching.<sup>63</sup> The “full scrambling” requirement was designed to address signal bleed (either audio or visual portions of the scrambled programs might be heard or seen).<sup>64</sup> The Court ruled that these requirements abridged the First Amendment because of the effective less restrictive alternative of households ordering signal blocking. Such targeted blocking allows the government to support parental authority without denying adult speakers and willing listeners their First Amendment Rights.<sup>65</sup> The *Ashcroft II* majority felt that the similar content-based aspect of COPA implicated the First Amendment and therefore merited strict scrutiny.

The Court in *Ashcroft II* was not persuaded that COPA’s application to only commercial communication reduced the law’s constitutional defects.<sup>66</sup> In addition, the majority recognized that the legal landscape had changed since the case was initiated because two other federal laws had been enacted in the interim, perhaps reducing the need for COPA. Congress passed a prohibition on adopting misleading Internet domain names to prevent web site owners from disguising pornographic sites.<sup>67</sup> Also, it enacted a law creating a second-level Internet domain, “kids.us,” which has content that is restricted to appropriate material for minors under age thirteen.<sup>68</sup> The justification for COPA’s criminal sanctions may not be as great as when the law was passed in 1998.

### B. *Ashcroft II* Concurring and Dissenting Opinions

Justice Stevens, joined by Justice Ginsberg, concurred with the Court majority that other methods, such as filtering software, would serve congressional interests in protecting minors from sexually explicit materials as well as or better than COPA’s content-based restraint on the dissemination of constitutionally protected speech.<sup>69</sup> He further argued that criminal sanctions were inappropriate because the line is not clear between offensive and protected communications, and he voiced uneasiness with using criminal regulation as “a substitute for, or a simple

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63. *Id.* at 806.

64. *Id.*

65. *Id.* at 807.

66. See *infra* n. 138 and accompanying text.

67. 18 U.S.C.A. § 2252B (West Supp. 2004).

68. Saunders, *supra* n. 1, at 258; see also *Dot Kids Implementation and Efficiency Act of 2002*, 47 U.S.C. § 941 (2004).

69. *Ashcroft II*, 124 S. Ct. at 2796 (Stevens, J., joined by Ginsburg, J., concurring).

backup to, adult oversight of children's viewing habits."<sup>70</sup>

However, Stevens strongly disagreed with the Court's conclusion that the contemporary community standards could be used to assess whether materials are harmful to minors.<sup>71</sup> He claimed that this would allow the least tolerant communities in America to determine what would be "a crime to post on the World Wide Web."<sup>72</sup>

Justice Breyer, joined by Chief Justice Rehnquist and Justice O'Connor, dissented in *Ashcroft II*, arguing that COPA is constitutional because it is narrowly drawn to further a compelling interest and is the least restrictive means available to further that interest.<sup>73</sup> In short, Breyer contended that COPA satisfies the strict scrutiny standard.<sup>74</sup> He concluded that the only significant difference between COPA's definition of obscene images and the definition of unprotected, obscene material for adults that was articulated in *Miller v. California* consists of the addition of the phrase "with respect to minors."<sup>75</sup> He claimed that "material that appeals to the 'prurient interests' of some . . . adolescents" surely would "appeal to the 'prurient interests' of some . . . adults as well" and would not be protected under *Miller*.<sup>76</sup> Thus, he found nothing in COPA that broadens prohibitions beyond what is already considered unprotected obscene material.<sup>77</sup> In fact, Breyer asserted that by restricting COPA's limitation of penalties to commercial pornography the statute's application is further confined, which reduces the First Amendment infringement.<sup>78</sup> He conceded that the identification requirements for adults have some costs and may deter potential users from viewing certain materials for fear of embarrassment.<sup>79</sup> Still, he noted that this does not differ from the use of filters, required by CIPA, which adults must ask to be disabled.<sup>80</sup>

Justice Breyer also contended that available filtering software simply does not solve the problem of protecting children from inappropriate materials because it lets some harmful material through, and it costs money that not all families can afford.<sup>81</sup> He additionally observed that

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70. *Id.* at 2797.

71. *Id.* at 2796. *See supra* n. 34 and accompanying text.

72. *Id.*

73. *Id.* at 2797 (Breyer, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

74. *Id.* at 2797-98.

75. *Id.* at 2798-99.

76. *Id.* at 2799.

77. *Id.* at 2800.

78. *Id.* at 2799-2800.

79. *Id.* at 2801.

80. *Id.*

81. *Id.* at 2802.

children are not always under parental supervision, and filters depend on parents' willingness to enforce use of the software.<sup>82</sup> Furthermore, Breyer noted that filters overblock some useful and protected materials.<sup>83</sup>

Justice Scalia agreed with Justice Breyer's conclusion that COPA is constitutional, but he wrote separately to argue that COPA should not be subjected to strict judicial scrutiny.<sup>84</sup> He contended that the commercial pornography covered by COPA enjoys less constitutional protection and, therefore, does not raise a First Amendment concern.<sup>85</sup> With the Supreme Court justices thus divided on the issue, the future of Internet censorship seems uncertain.

### III. UNRESOLVED ISSUES

The U.S. Constitution was not drafted with children in mind, so the application of constitutional provisions to children has always been troublesome. Protecting freedom of expression often collides with safeguarding children's welfare, and the guiding principles to resolve this conflict are not always clear. Legislation designed to restrict access to the Internet focuses on children primarily as consumers of expression rather than as creators and distributors.<sup>86</sup> Often polar positions are offered as to whether children should be treated like adult citizens in terms of access to Internet sites or whether adults should be treated similarly to children in that materials deemed harmful to minors should be restricted for everyone. These positions raise sensitive questions, pitting important values against each other. When materials are restricted for children, is the spillover that burdens adult access to lawful materials too heavy a First Amendment price to pay to protect children? Or is a slight restriction on adult access worth the gain in protecting children from

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82. *Id.*

83. *Id.* at 2802-03.

84. *Id.* at 2797 (Scalia, J., dissenting).

85. *Id.* at 2797.

86. A parallel body of law is emerging where students themselves are the ones placing materials on the World Wide Web, and sometimes these strands of litigation overlap. In general, before students can be disciplined by school personnel for Internet postings, courts have required evidence that students' personal web sites or other transmissions created at home are libelous, cause a school disruption, or in other ways interfere with the management of the school. See *e.g.*, *Buessink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (granting a preliminary injunction against suspending a student for posting a homepage that criticized the school); *Killion v. Franklin Regl. Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) (finding that a student's suspension for publishing a list with some derogatory statements about the school athletic director violated the First Amendment because the expression did not create a substantial disruption); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wa. 2000) (overturning the suspension of a student for creating and posting mock "obituaries," since the website did not actually threaten anyone).

access to harmful pornography and graphic violence? Strong, even compelling, arguments can be mounted on both sides.

The American Civil Liberties Union tends to argue that any restrictions on access to Internet materials, which might chill expression among adults, should be struck down under the First Amendment.<sup>87</sup> Advocates of this position contend that protected expression does not change depending on the recipient of the material.<sup>88</sup> They claim that restricting access to protect children has too substantial an impact on adults' protected expression.<sup>89</sup>

In contrast, those supporting government restrictions that make it difficult for *anyone* to have access to materials considered pornographic or otherwise harmful for minors contend that the protection of children trumps the First Amendment rights of adults to send and receive information.<sup>90</sup> Some conservative citizen groups claim that protecting the community from harmful influences is more important than Free Speech concerns, because obscene and other detrimental materials corrupt our society.<sup>91</sup>

Possibly, there is a middle ground between these opposite assertions. A more moderate position is that the tension between the two core values of encouraging free expression and protecting children can be resolved by balancing the interests rather than by having one trump or negate the other.<sup>92</sup> This stance acknowledges that children can suffer harm from Internet transmissions, while at the same time it recognizes the importance of adults' free expression rights.<sup>93</sup> But determining how these interests should be balanced is a monumental task.

### A. Voluntary Censorship

Some who feel that the balance should be struck in favor of the free exchange of ideas contend that government intervention is *not* needed to protect children because it should be assumed that adults will voluntarily protect minors from exposure to pornographic, excessively violent, or other detrimental materials.<sup>94</sup> They argue that parents should ensure

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87. Br. of Appellees, *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), [http://www.epic.org/free\\_speech/CDA/lawsuit/sup\\_ct\\_brief.html](http://www.epic.org/free_speech/CDA/lawsuit/sup_ct_brief.html) (accessed March 2, 2005).

88. *Id.*

89. *Id.*

90. See *Ashcroft II*, 124 S. Ct. at 2798-99 (Breyer, J., dissenting).

91. See Amitai Etzioni, *Do Children Have the Same First Amendment Rights as Adults?: On Protecting Children From Speech*, 79 Chi.-Kent L. Rev. 3 (2004).

92. *Id.* at 4.

93. *Id.*

94. See Separate Statement of Commissioner Gloria Tristani, Federal Communications Commission, *Commission Finds Industry Video Programming Rating System Acceptable: Adopts*

that their children will not have access to such harmful content by taking full advantage of the availability of V-chips<sup>95</sup> and filters to block these materials, and of labeling and rating systems for music, television programs, and movies.<sup>96</sup> Movies have been rated since the 1960s, but ratings of television programs are more recent. The Telecommunications Act of 1996 specified guidelines for rating television programs and established requirements that new television monitors meeting certain size specifications must include V-chip technology.<sup>97</sup> The law gave the television industry a year to enact a voluntary ratings system, which it did. After some revisions, the *TV Parental Guidelines* were accepted by the Federal Communications Commission in 1998.<sup>98</sup> Strides have been made in providing voluntary options to censor various telecommunications transmissions, even though additional attention to publicizing these strategies is needed to ensure public awareness.

Much of the attention directed to alternatives to criminal sanctions for harmful Internet transmissions has focused on the use of software filters that can be installed in a host server and used with a network of computers or can be installed on individual computers (as required for public libraries and schools to receive federal technology funds under CIPA). The software is designed to block sites that have been identified as containing the categories of material to be restricted—in this instance, material that is harmful to minors. Even if filters are considered the least restrictive means to protect children, problems will persist. The criteria used by software companies in deciding which sites to block often are not transparent, so their congruence with legal standards is difficult to ascertain.<sup>99</sup> Overblocking as well as underblocking are still concerns, and questions remain about the ability of filters to block pornographic

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*Technical Requirements to Enable Blocking of Video Programming (the "V-Chip")*, FCC News (March 12, 1998), [http://ftp.fcc.gov/Bureaus/Cable/News\\_Releases/1998/nrcb8003.html](http://ftp.fcc.gov/Bureaus/Cable/News_Releases/1998/nrcb8003.html) (accessed March 19, 2005);

Saunders, *supra* n. 1, at 273, 276.

95. A V-chip is a feature designed to enable viewers to block the display of all programs with specified ratings.

96. *See generally*, Committee to Study Tools and Strategies for Protecting Kids from Pornography, National Research Council, *Youth, Pornography, and the Internet* (Dick Thornburgh & Herbert Lin eds., Nat'l Academies 2002), [http://www.nap.edu/html/youth\\_internet/](http://www.nap.edu/html/youth_internet/) (accessed March 2, 2005).

97. 47 U.S.C. § 303(x) (2004); *see also* 47 U.S.C. § 330 (2004).

98. *See* Separate Statement of Commissioner Gloria Tristani, *supra* n. 94. However, the ACLU was not satisfied with the ratings system, contending that these "voluntary" measures were actually governmentally coerced.

99. *See* Paul Smith, *Free-Speech Groups to Filtering Companies: Come Clean*, 1 SCHOOL NEWS (Aug. 2003), at 8.

pictures that are not accompanied by text.<sup>100</sup> Some new software is designed to monitor the content being retrieved rather than to block particular sites, which helps with the overblocking and underblocking concerns.<sup>101</sup> As noted previously, ideally each community would devise criteria for restricting particular sites or content, but in reality software developers are usually making these important decisions.<sup>102</sup>

Some commentators have suggested that the problem with minors' access to harmful materials in cyberspace could be addressed by Internet zoning. Todd Nist has proposed that children can be protected by creating a separate x-rated Internet domain (e.g. .xxx) that could be accessed only with software purchased with verification of age.<sup>103</sup> This approach places the burden on those attempting to gain access to the x-rated zone rather than on the developers or distributors of the materials.<sup>104</sup> Using this strategy, specific material would not be removed; instead, certain content would be placed in "a secluded location, off in the back, where children cannot go."<sup>105</sup> However, given that minors might get the necessary software from relatives or others, verifying that only individuals of a certain age have access is not as easy as checking minors' age before serving them liquor in a restaurant.<sup>106</sup>

Rather than zoning the Internet itself, Amitai Etzioni has suggested that a solution might be to have separate computers for children and adults.<sup>107</sup> He has noted that there is some precedent in that libraries often have separate children's sections and video rental stores have X-rated sections.<sup>108</sup> But this strategy would not address access to harmful materials on home computers, where voluntary censorship by adults would still be required.<sup>109</sup>

### *B. Treating Children and Adults Differently*

Even those asserting that parents should monitor their children's

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100. See Saunders, *supra* n. 1, at 259.

101. See *supra*, n. 96.

102. See Kosse, *supra* n. 4, at 739. Where schools are required to adopt filters as a condition of receiving federal technology aid and they delegate blocking decisions to software companies, questions arise regarding whether schools are delegating their legal authority to determine the school curriculum to software companies in violation of state constitutional provisions. See McCarthy, *supra* n. 20, at 307-09.

103. Nist, *supra* n. 6, at 481-85.

104. See *id.* at 481.

105. *Id.* at 490.

106. *Id.* at 482.

107. Etzioni, *supra* n. 91, at 28-29.

108. *Id.* at 29.

109. See *id.*

access to harmful materials concede that some parents are not aware of the filters and related technology available to them and that other parents are simply not inclined to censor their children's Internet access.<sup>110</sup> The question remains: should the government treat children differently in terms of legislative protections because they comprise a vulnerable group?

Champions of governmental intervention note the historical evidence supporting the differential treatment of children and adults for First Amendment purposes. For example, in *Prince v. Massachusetts* the Supreme Court found that the government's interests in protecting children overrode parents' interests in having their children engage in selling religious materials and preaching on public roads.<sup>111</sup> Subsequently, in *Ginsberg v. New York*, the Supreme Court recognized the governmental responsibility to protect children when it upheld a New York law prohibiting the sale of materials deemed to be pornographic to minors under age seventeen.<sup>112</sup> In this case, the Court recognized the legislative authority to assist parents in ensuring the welfare of children, noting that "the concept of obscenity . . . may vary according to the group to whom the questionable material is directed."<sup>113</sup>

Similarly, the Court has upheld the Federal Communications Commission ruling that disallows the broadcast of indecent speech when children are likely to be listening or watching unsupervised.<sup>114</sup> Also, to settle ongoing litigation, major tobacco companies agreed to terms of a settlement that included restrictions on advertisements that appeal to children, such as the use of cartoon characters or sponsoring events or team sports that have a substantial youth audience.<sup>115</sup> Of course, such advertising is commercial speech, which is entitled to less First Amendment protection than other forms of expression.<sup>116</sup>

There is a fairly large body of law documenting that children in schools are treated differently from adults in applying constitutional protections. In the landmark case recognizing that students have expression rights in public schools, *Tinker v. Des Moines*, the Supreme

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110. See *id.* at 31-33.

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

112. *Ginsberg v. New York*, 390 U.S. 629 (1968).

113. *Id.* at 636 (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966)). More recently, the Fourth Circuit upheld state prohibitions on the display of sexually explicit materials to juveniles under eighteen. *Amer. Booksellers Assn. v. Va.*, 882 F.2d 125 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990).

114. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

115. National Association of Attorneys General, *Tobacco Settlement Agreement at a Glance*, <http://www.naag.org/issues/tobacco/msa> (Nov. 6, 1998) (accessed January 15, 2005).

116. See e.g. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-75 (1983).

Court nonetheless acknowledged that the school is a special environment in terms of First Amendment rights.<sup>117</sup> In subsequent cases the Court has recognized that students' expression rights in public schools are not coextensive with those of adults in other settings.<sup>118</sup> For example, the Court held in 1986 that lewd and vulgar student expression is not protected, even though adults might enjoy First Amendment protection for such expression.<sup>119</sup> The Court further held that it is appropriate for school personnel to determine what expression is lewd and vulgar and thus subject to censorship.<sup>120</sup>

Assuming for the moment that some government intervention is needed to protect children and that free expression rights apply differently to children and adults,<sup>121</sup> who should decide what is harmful for minors, how should this determination be made, and how differently should children be treated from adults? If community standards are used to determine what materials are harmful, then the category of prohibited materials may vary greatly across communities and states.<sup>122</sup> Some have argued that using community standards is unworkable, particularly involving the Internet, because of the global reach of the transmissions to very diverse communities and countries.<sup>123</sup>

However, Justice O'Connor has countered these assertions by noting that a national standard *is* being promoted in terms of values, and this standard has been articulated and can be legislated.<sup>124</sup> Justice Breyer similarly has argued that "community" refers to the nation's adult community taken as a whole rather than to geographic areas.<sup>125</sup> Agreeing, Etzioni has further observed that

the very Constitution and its First Amendment that liberals rise to defend reflect national values that some communities may well not endorse if left to their own devices, but we hardly exempt those communities from abiding by it. Of course, Congress is an institution authorized to speak for nationwide preferences and values. So is the

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117. 393 U.S. 503, 506-07 (1969).

118. See generally *Hazelwood Sch. District.*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

119. *Bethel*, 478 U.S. at 682-83.

120. See *id.* at 685.

121. See Etzioni, *supra* n. 91, at 42.

122. See *id.* at 50-52.

123. See e.g. Kelly M. Doherty, Student Author, *An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 Akron L. Rev. 259 (1999); Philip E. Lewis, Student Author, *A Brief Comment on the Application of the "Contemporary Community Standard" to the Internet*, 22 Campbell L. Rev. 143 (1999).

124. *Ashcroft I*, 535 U.S. at 587-89 (O'Connor, J., concurring).

125. *Id.* at 589-91 (Breyer, J., concurring).

Supreme Court.<sup>126</sup>

While some assume that the use of community standards might result in applying restrictive norms of the most conservative geographic community to the nation as a whole, the counterargument is that a virtual national standard would likely adopt the perspective of the most liberal communities. Nist argues that the intent of a national standard is not to force one group's values on everyone else; it is to protect expression. Thus, "a national standard stops the government from restraining expression that the more liberal communities deem to be okay; it stops the government from restraining unpopular expression."<sup>127</sup>

Even if consensus is reached regarding which community standards are applied, determining the contours of expression that are harmful to children remains extremely problematic. Using a modified *Miller*<sup>128</sup> standard to identify obscene materials does not address how depictions of violence would be screened. Indeed, there is more evidence of the harmful effects on children of violence than of pornographic materials. A group of major professional associations addressing concerns of youth documented more than 1,000 studies pointing to a causal relationship between media violence and children's aggression.<sup>129</sup> Some research has shown a greater impact of the violence in video games than of television violence, because of the active and interactive nature of the games.<sup>130</sup> Yet, most of the efforts to block Internet transmissions accessible to minors have focused on obscenity rather than violence.<sup>131</sup>

Another area of uncertainty pertains to the status of hate speech and harassing expression, which can be quite harmful to children. Legislative efforts to restrict minors' access to the Internet have not usually addressed such expression unless combined with obscenity.<sup>132</sup> Resistance Records and other groups are currently promoting hate speech and music to young people via the Internet,<sup>133</sup> and whether such

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126. Etzioni, *supra* n. 91, at 52.

127. Nist, *supra* n. 6, at 472-73.

128. *Miller*, 413 U.S. 15. See *supra* nn. 32-33 and accompanying text.

129. Am. Acad. of Pediatrics et al., *Joint Statement of the Impact of Entertainment Violence on Children* (July 26, 2000), <http://www.aap.org/advocacy/releases/jstmtvcv.htm> (accessed March 2, 2005); but see Marjorie Heins, *On Protecting Children - From Censorship: A Reply to Amitai Etzioni*, 79 Chi.-Kent L. Rev. 229 (2004) (providing a contrary position on the impact of media violence).

130. See Craig Anderson and Karen Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 Personality & Soc. Psychol. 772, 788 (2000).

131. See Saunders, *supra* n. 1, at 262.

132. See generally 47 U.S.C. § 231; 47 U.S.C. § 223.

133. Anti-Defamation League, *Deafening Hate: The Revival of Resistance Records*, <http://www.adl.org/resistancerecords/summary.asp> (2000) (accessed March 2, 2004).

sites would be blocked with current filters is ambiguous.

If agreed that children deserve special governmental protection, questions still remain regarding whether all minors should be treated in the same manner. The term “minor” as used by Congress in COPA refers “in a literal sense to an infant, a five-year old, or a person just shy of age seventeen.”<sup>134</sup> But the government in defending COPA has argued that “minors” are older adolescents who may be capable of possessing a prurient interest.<sup>135</sup> The key consideration is whether there should be categories of minors, with greater protections for younger children. Very young children can easily surf the Internet and inadvertently be exposed to harmful materials with a few wrong clicks. Some advocate an age-differentiated approach with children twelve and under receiving greater protection than teenagers between ages thirteen and seventeen.<sup>136</sup> An age and content-based system would shield younger children from certain materials and would protect older minors (teenagers) from access to other types of Internet speech.<sup>137</sup>

Questions also remain regarding how differently to treat commercial expression. Traditionally, commercial expression has enjoyed some constitutional protection, but not the same level as afforded speech intended to convey a particular point of view.<sup>138</sup> The drafters of COPA attempted to address the CDA’s defects by restricting COPA sanctions to commercial purposes, but this restriction did not satisfy the courts that COPA should pass constitutional scrutiny.<sup>139</sup> In fact, the Third Circuit concluded that this limitation did not narrow the reach of COPA sufficiently because the law’s provisions went beyond commercial pornographers to any communication for commercial purposes even if distributors do not make a profit from such material.<sup>140</sup> Whether commercial restrictions could be drafted to satisfy the First Amendment is still not clear.

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134. *ACLU*, 322 F.3d at 256.

135. *Id.* at 253.

136. See Etzioni, *supra* n. 91, at 42–47.

137. See *id.* at 43–47; see also Dawn Nunziato, *Do Children Have the Same First Amendment Rights As Adults?: Toward a Constitutional Regulation of Minors’ Access to Harmful internet Speech*, 79 Chi.-Kent L. Rev. 121, 121–22 (2004).

138. See e.g. *Bd. of Trustees v. Fox*, 492 U.S. 469 (1989) (finding that government restrictions on commercial speech do not have to be the least restrictive means to achieve the desired government goal; there simply needs to be a reasonable fit between the restrictions and the goal); *Bolger*, 463 U.S. at 64–75 (holding that commercial speech in terms of unsolicited mailings is afforded less constitutional protection than other forms of expression).

139. See generally *Ashcroft II*, 124 S. Ct. 2783 (2004).

140. *ACLU*, 322 F.3d at 256.

## IV. CONCLUSION

The Supreme Court in *Ashcroft v. ACLU* dealt another blow to congressional efforts to shield minors from exposure to harmful materials over the Internet.<sup>141</sup> But the issues left unresolved are not going away, given the mind-boggling growth of cyberspace, which shows no signs of dissipating. Increased education is crucial to alert parents and others about dangers on the Internet and to encourage all involved to be mindful of Internet safety. Also, governmental efforts to regulate the Internet, especially access by children, seem destined to continue generating legal controversies and moral dilemmas. Some governmental protection of children in cyberspace seems necessary, but how much protection is allowed by the First Amendment remains elusive.

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141. See generally *Ashcroft II*, 124 S. Ct. 2783 (2004).