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Introduction to the 2007 BYU Law Review Symposium: Warning! Kids Online: Pornography, Free Speech, and Technology

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Introduction to the 2007 BYU Law Review
Symposium: *Warning! Kids Online: Pornography, Free
Speech, and Technology*

As we colonize the Virtual New World, society is faced with what may become indelible choices of values and directions. One critical decision facing our society is how we will balance the benefits that this new technological landscape provides with the potential harms that it can inflict on society. For example, we must decide the extent to which we will allow our children to learn about adult sexual roles online, while simultaneously deciding the extent to which we will allow the government to regulate a powerful tool for the free exchange of ideas and grass-roots democracy. Powerful rights and values are at stake and any solutions must carefully balance our identity as a society, the rights of parents and home owners, and the guarantees of the First Amendment—the freedom of speech, the right to be free from unwanted speech, and “the inherent dangers of undertaking to regulate any form of expression.”¹

Since 1995 Congress has passed a variety of measures aimed at reducing children’s exposure to age-inappropriate, sexually explicit material. All of these measures have been challenged, and in most cases struck down, because they failed to alight on the proper balance. Innovative new approaches that incorporate technology, Internet architecture, and law are needed.

The CP80 Foundation has recently proposed a new technological and legislative alternative for allowing individual homes and businesses to control the information accessible on the Internet from their private computers. In short, this new approach purports to give recipients of Internet service the ability to select an Internet access service—much like a television cable subscription—that permits access to the myriad wonders of the Internet, without inviting into homes and businesses the kind of lewd material that is regulated in the real world. This approach has the promised benefits of protecting families and businesses from unwanted exposure to harmful content, while allowing consenting adults to continue to

1. *Miller v. California*, 413 U.S. 15, 23 (1972).

access constitutionally-protected speech, including pornography.

This edition of the BYU Law Review contains articles introduced at the 2007 BYU Law Review Symposium, addressing the constitutional issues raised by this new method for protecting children from adult online content and other issues related to obscenity law and the Internet. This Introduction provides a brief overview of the articles and arguments advanced in this edition.

In *Zoning the Internet: A New Approach to Protecting Children Online*, Professor Cheryl Preston reviews Supreme Court precedent regarding children's access to Internet pornography, introduces the technological and administrative concept of managing Internet access by providing choices of content served on differentiated ports, and provides an in-depth analysis of the constitutionality of such an approach. She ultimately concludes that this method is the least intrusive solution to protecting children from material that is obscene for minors that also respects the demands of the First Amendment. In addition, in *Making Family-friendly Internet a Reality: The Internet Community Ports Act*, Professor Preston introduces, explains, and provides proposed statutory language—the Internet Community Ports Act (ICPA)—that would create a legal structure for implementing a channeling or zoning method for limiting exposure to unwanted Internet content.

In response, Professor Dawn Nunziato has contributed *Technology and Pornography*, which analyzes the constitutionality of ICPA statute in light of the constitutional scrutiny that courts have imposed upon the Child Online Protection Act (COPA) and other efforts to regulate minors' access to sexually-themed content. Professor Nunziato concludes that ICPA will ultimately be found unconstitutional because it requires content providers to screen out harmful material at its source, because it makes it difficult for adult end-users to undo the proposed filtering mechanism, and because user-based software filters are likely to be considered a less restrictive means when compared with the ICPA scheme.

Professor Arnold H. Loewy, in his essay, *Free Trade in Ideas Is (or Ought To Be) Absolute for Adults*, examines the costs of tolerating "bad speech" and argues that society should bear this cost. Professor Loewy also addresses obscenity regulation and asserts that the Supreme Court has created a philosophically flawed exception to its First Amendment jurisprudence. Finally, the essay addresses how obscenity intersects with the need to protect minors, ultimately

concluding that attempts to protect minors from sexual material must not be permitted to infringe upon adults' First Amendment rights.

Professor Patrick M. Garry makes the case for a new strict scrutiny model that takes account of modern media realities—especially the increasing number of mediums through which speech occurs. In *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model to Better Reflect the Realities of the Modern Media Age*, Professor Garry asserts that the Supreme Court's strict scrutiny approach evolved in a world where speech occurred only through one medium. Currently, speech is often transmitted through multiple mediums and a censorship in one medium is not tantamount to a censorship of the speech. Professor Garry argues that the Supreme Court should adopt an approach to content-based regulations of speech that focuses on balancing the burdens a regulation imposes on speech against the government interest that the regulation serves.

Regulating Internet Pornography Aimed at Children: A Comparative Constitutional Perspective on Passing the Camel Through the Needle's Eye takes a comparative law approach to limitations on pornography. Professor Mark S. Kende compares the United States Supreme Court's categorical approach to content-based regulations of speech with the more flexible approach of the South African Constitutional Court. Professor Kende advocates that the United States adopt the South African approach because it more effectively balances societal and individual interests and avoids unnecessarily broad rulings.

In *www.Sam's_Stationery_and_Luncheonette.com: Bringing Ginsberg v. New York into the Internet Age*, Professor Kevin W. Saunders compares the constitutional regulation of pornography discussed in *Ginsberg v. New York* with other Internet regulation efforts that have failed. Professor Saunders iterates factors that contributed to the statute's success in *Ginsberg* and examines potential approaches to constitutional Internet regulation in light of these factors.

Any proposal for enforcing decency law on the Internet would be incomplete without an analysis of how to categorize sexual speech and how obscenity standards, adopted almost three decades ago, apply in the Internet age. In *Obscenity and the World Wide Web*,

Professor John Fee argues that the *Miller v. California* contemporary community standards test is still valid in assessing the intersection of Internet technology and obscenity law. He responds to critics who claim that the Internet is inappropriate for the operation of this test.

In 1972, the Supreme Court commented on the difficulty, and judicial responsibility, of preserving the rights of free speech while limiting the harmful, valueless speech in our society. "This may not be an easy road, free from difficulty. But no amount of 'fatigue' should lead us to adopt a convenient 'institutional' rationale—an absolutist, 'anything goes' view of the First Amendment—because it will lighten our burdens."² The editors of the BYU Law Review hope that this edition will serve as another step toward enhancing the potential for interchange of ideas on the Internet, while preserving the rights of families to avoid exposure to harmful Internet content.

2. *Miller*, 413 U.S. at 29.