1-1-2006

# Protecting Children From the Dark Side of the Internet

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# COMMENTARY

## PROTECTING CHILDREN FROM THE DARK SIDE OF THE INTERNET*

by
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Allowing children to be exposed to pornography or other harmful materials on the Internet is patently unacceptable. So why are children still exposed to a very real threat of viewing these materials on the Internet a full decade after Congress began its efforts to protect children from this danger? Although it is clear that children need to be protected from harmful materials on the Internet, Congress' attempts to address this problem have raised difficult legal and practical questions. For instance, how can Congress make the Internet safe for children without censoring some constitutionally protected speech and thereby opening a dangerous door to further government censorship of free speech on the Internet? Even if the constitutional problems could be resolved, won't U.S. legislation on this issue still fail to achieve its objectives because of the Internet's international scope? Is legislation necessary to address these problems or can technology alone provide an effective solution?

Congress and the federal courts have been struggling with these questions for over a decade now, beginning with the 1996 Communications Decency Act (CDA),[1] caught in the conundrum of the necessity to protect both children and free speech. To examine the ongoing judicial-legislative dialogue over these issues, this article provides: 1) a brief review of free speech law in the U.S.; 2) summaries of relevant U.S. legislation and corresponding litigation on Internet speech including: a) the Communications Decency Act (CDA) and the U.S. Supreme Court's response in *Reno v. ACLU;* b) the Child Pornography Prevention Act (CPPA) and *Ashcroft v. Free Speech Coalition;* c) the Children's Internet Protection Act (CIPA) and *United States v. American Library Association;* and d) the Child Online Protection Act (COPA) and *Ashcroft v. ACLU*; and 3) an analysis of the issues raised by this legislation and litigation.

### 1) A BRIEF REVIEW OF FREE SPEECH LAW IN THE U.S.

The U.S. Constitution's First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of

* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 212 Ed.Law Rep. [553] (Nov. 2, 2006).

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1. 47 U.S.C. § 223(a)-(h) (1996).

the people peaceably to assemble, and to petition the Government for a redress of grievances."[2] Although the First Amendment was ratified in 1791, most of the U.S. Supreme Court's decisions concerning free speech were decided after World War I,[3] with the most significant cases occurring after 1960.[4] First Amendment jurisprudence continues to evolve,[5] but some central themes have emerged. The Court has long recognized the importance of free political and religious speech to the democratic marketplace of ideas,[6] and the Court has required great governmental deference concerning citizens' exercise of free speech on political and religious issues.[7] Within an evolving hierarchy of First Amendment protection the Court generally prohibits content-based censorship, with political speech and religious speech receiving the greatest protections, commercial speech receiving less rigorous protection, and obscenity[8] falling outside of the scope of constitutional protection.[9]

2. U.S. CONST. amend. 1.

3. *See Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). *See also* Paul L. Murphy, *Gitlow v. New York*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 339, 339 (Kermit L. Hall ed., 1992) ("The landmark *Gitlow* case marks the beginning of the 'incorporation' of the First Amendment as a limitation on the states. This process, which continued selectively over the next fifty years, resulted in major changes in the modern law of civil liberties, affording citizens a federal remedy if the states deprived them of their fundamental rights").

4. Bill F. Chamberlin, *Speech and the Press*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 808, 808 (Kermit L. Hall ed., 1992).

5. *See Denver Area Educ. Telecom. Consortium v. F.C.C.*, 518 U.S. 727, 740, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) ("The history of this Court's First Amendment jurisprudence ... is one of continual development").

6. *See Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

7. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (desecration of the U.S. flag is protected speech); *Tinker v. Des Moines*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (protecting rights of students to protest government actions); *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (establishing a higher standard of proof for public figure plaintiffs in libel cases). Recent cases have also recognized significant free speech rights on religious issues. *See Rosenberger v. University of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 [101 Ed.Law Rep. [552]] (1995) (recognizing free speech rights of a religious organization); *Capitol Square Rev. Bd. v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (holding that display of a cross was protected religious speech); *Lamb's Chapel v. Center Moriches*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 [83 Ed.Law Rep. [30]] (1993) (recognizing free speech rights of a religious organization).

8. Defining what constitutes obscenity has been problematic. In *Reno v. ACLU*, 521 U.S. 844, 872, 117 S.Ct. 2327, 138 L.Ed.2d 874 (1997), the Court noted that: "Having struggled for some time to establish a definition of obscenity, we set forth in [*Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)] the test for obscenity that controls to this day: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) 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." However, problems with the *Miller* test persist, including that what has "serious literary, artistic, political, or scientific value" is often in the eye of the beholder, and that the *Miller* test allows local community standards to define federal rights of free speech. Consequently, U.S. citizens' privileges of free speech are subject to varied local community standards and receive less protection

The Court recognizes freedom of speech as a fundamental right under the U.S. Constitution.[10] Government officials may only limit fundamental rights, including constitutionally protected speech, by establishing that limitations are necessary to a compelling interest and narrowly tailored to achieving that interest.[11] But the Court has also recognized that government officials may apply reasonable time, place, and manner regulations to speech where these regulations are content-neutral and leave open adequate alternative routes of communication.[12] The Court has recognized the necessity of different standards for different mediums of communication.[13] For example, the Court has allowed greater restrictions on general broadcast communications than on print media.[14] The Court has also recognized different protections in different contexts, vigorously protecting speech in traditional public forums such as public streets and parks, and allowing greater restrictions in more limited forums.[15]

Disputes over free speech have frequently involved public educational institutions, with the Court addressing the proper balance between individuals' constitutional rights of free speech and legitimate institutional needs. In the context of a dispute over the rights of students to express their opposition to government activities while in public schools, the Court stated: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[16] The Court in *Tinker v. Des Moines Independent School District* recognized that: "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[17]

Although recognizing a constitutional right to dissent by students, the Court has also emphasized the importance of teaching children tolerance and civility. The Court stated in *Bethel School District v. Fraser* that public schools "must inculcate the habits and manners of civility" and that this must

in some communities and states. *But see* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.61(h) (4th ed. 1991) (discussing national and local standards of obscenity).

9. Bill F. Chamberlin, *Speech and the Press*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 808, 809 (Kermit L. Hall ed., 1992).

10. *San Antonio v. Rodriguez*, 411 U.S. 1, 33, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (fundamental rights are those that are "explicitly or implicitly guaranteed by the Constitution").

11. *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220 (1886).

12. Donald A. Downs, *Time, Place, and Manner Rule*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 874, 874 (Kermit L. Hall ed., 1992).

13. *F.C.C. v. Pacifica*, 438 U.S. 726, 748, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("We have long recognized that each medium of expression presents special First Amendment problems").

14. *Red Lion v. F.C.C.*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). *See also* Bill F. Chamberlin, *Speech and the Press*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 808, 809 (Kermit L. Hall ed., 1992).

15. Donald A. Downs, *Public Forum Doctrine*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 692, 692–693 (Kermit L. Hall ed., 1992).

16. *Tinker v. Des Moines*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

17. *Id.* at 511, 89 S.Ct. 733.

"include tolerance of divergent political and religious views, even when the views expressed may be unpopular."[18] In conjunction with rights to freedom of speech, the Court has emphasized the responsibility of teaching civility in communications. The Court noted that: "Indeed the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others ... The inculcation of these values is truly the 'work of the schools.' "[19] Courts have recognized that divergent views are tolerated in a democratic society, and that civil discourse is the appropriate way to express individual views and opposition to even those views that evoke anger. As one federal judge has stated:

> I am firmly convinced that a course designed to teach students that a free and democratic society is superior to those in which freedoms are sharply curtailed will fail entirely if it fails to teach one important lesson: that the power of the state is never so great that it can silence a man or woman simply because there are those who disagree. Perhaps that carries with it a second lesson: that those who enjoy the blessings of a free society must occasionally bear the burden of listening to others with whom they disagree, even to the point of outrage.[20]

Freedom of speech is protected not only for the benefit of individuals, but also to assure the free flow of information that leads to the political, intellectual, and cultural advancement of the community.[21] Innovative and productive ideas flourish in a free environment where the only controls these ideas are subjected to are the tests of public debate and the reason of an educated and free people.[22] Similarly, ideas that are potentially dangerous to the community are also best refuted in open debate. Open public debate and the reasoning power of an educated and free people are the best protections against threats to democracy.[23] As Thomas Jefferson declared after prevailing in one of the nation's most bitter political battles "if there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."[24]

18. 478 U.S. 675, 680–681, 106 S.Ct. 3159, 92 L.Ed.2d 549 [32 Ed.Law Rep. [1243]] (1986). *See also United States v. Schwimmer*, 279 U.S. 644, 655, 49 S.Ct. 448, 73 L.Ed. 889 (1928) (Holmes, J., dissenting) (the Constitution embodies "the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate").

19. *Bethel v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 [32 Ed.Law Rep. [1243]] (1986).

20. *Wilson v. Chancellor*, 418 F.Supp. 1358, 1368 (D. Or. 1976).

21. *See* Bill F. Chamberlin, *Speech and the Press*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 808, 808 (Kermit L. Hall ed., 1992). *See also* John Dayton & Carl Glickman, *American Constitutional Democracy*, 69 PEABODY J. EDUC. 62, 73 (1994).

22. *See* Thomas Jefferson, *A Bill for Establishing Religious Freedom in Virginia*, *in* THE AMERICAN READER 24 (Diane Ravitch ed., 1990) ("the truth is great and will prevail if left to herself").

23. John Adams, *Liberty and Knowledge*, in THE AMERICAN READER 12 (Diane Ravitch ed., 1990) ("Wherever a general knowledge and sensibility have prevailed among the people, arbitrary government and every kind of oppression have lessened and disappeared in proportion").

24. THOMAS JEFFERSON, CRUSADE AGAINST IGNORANCE 28 (Gordon C. Lee ed., 1961).

## 2) FEDERAL LEGISLATION AND LITIGATION ON INTERNET SPEECH

Our nation's founders recognized that freedom of speech is the essential means of protecting all other freedoms, and that unpopular speech is the "canary in the coal mine."[25] When the speech we hate can no longer be spoken without the fear of punishment by governmental authorities, the freedoms of all citizens are in peril. It is against this notable history of long standing recognition of the necessity to rigorously protect freedom of speech that Congress first attempted to deal with the difficult task of protecting children from exposure to inappropriate materials on the Internet, passing the Communications Decency Act (CDA), and prompting a constitutional challenge by the American Civil Liberties Union and other plaintiffs.

### a) The CDA and *Reno v. ACLU*

In the most sweeping changes to U.S. telecommunications laws in over 60 years, on February 8, 1996 the Telecommunications Act of 1996 was signed into law.[26] The most controversial part of the Telecommunications Act was the Communications Decency Act (CDA).[27] The CDA provided criminal penalties for certain types of electronic communications, and was the subject of intense criticism by civil libertarians and many Internet users.[28] Shortly after its enactment the constitutionality of the CDA was challenged by the American Civil Liberties Union in *ACLU v. Reno*,[29] and by an editor of an Internet newspaper in *Shea v. Reno*.[30] The CDA included unusual procedural provisions authorizing the appointment of a special three-judge panel for

25. *See* Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263, 266 (2000), noting the three traditional justifications for expansive freedom of speech in a democracy: "First, open discussion creates a 'marketplace of ideas,' in which ideas compete in the public sphere until truth emerges. Second, 'intelligent self-government' requires free speech because citizens need to understand and debate matters of public concern. Third, people can only experience true autonomy and self-fulfillment if they are allowed to express themselves, thus free expressions represents an end in itself. Freedom of speech can also be considered a fundamental right, which in turn helps protect other rights. If people can speak freely, they can assert their rights openly and protest any infringements" and comparing "freedom of expression to the canary in a coal mine. Like the collapse of the canary, which warned miners of poison gas, suppression of expression indicates that other violations will soon occur."

26. Pub. L. No. 104–104, 110 Stat. 56 (1996). The Telecommunications Act of 1996 was the first major revision of the Communications Act of 1934, 47 U.S.C. § 151 (1934).

27. 47 U.S.C. § 223(a)-(h) (1996).

28. Among the most controversial sections of the CDA were §§ 223(a) and 223(d). According to the trial court in *ACLU v. Reno*, § 223(a) provided in relevant part that: "[A]ny person in interstate or foreign communications who, 'by means of a telecommunications device,' 'knowingly . . . makes, creates, or solicits' and 'initiates the transmission' of 'any comment, request, suggestion, proposal, image or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age,' 'shall be criminally fined or imprisoned.' " The court noted that § 223(d): "[M]akes it a crime to use an 'interactive computer service' to 'send' or 'display in a manner available' to a person under age 18, 'any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.' " 929 F.Supp. 824, 828–829 (E.D. Pa. 1996).

29. 929 F.Supp. 824 (E.D. Pa. 1996).

30. 930 F.Supp. 916 (S.D.N.Y. 1996).

trial.[31] Courts in both cases declared the CDA unconstitutional.[32] The CDA provided for a special expedited appeals procedure to the U.S. Supreme Court.[33] The Government appealed,[34] the Court noted probable jurisdiction, and the cases were consolidated in *Reno v. ACLU*.[35] The expedited appeals process resulted in an unusually rapid decision in *Reno v. ACLU*, with the Court issuing an opinion at the end of the 1996–97 term.

Justice Stevens delivered the opinion of the Court in *Reno v. ACLU*.[36] The Court was unanimous in its decision that the CDA was an unconstitutional infringement on First Amendment free speech rights.[37] The Court held that: "Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three-judge District Court that the statute abridges 'the freedom of speech' protected by the First Amendment."[38]

Regarding the Internet's role as a vehicle for free speech, the Court noted that Internet users have the potential to communicate easily and inexpensively with millions of persons through this unique medium, and "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[39] Concerning the scope of issues discussed on the Internet, the Court noted that it is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."[40] Further, the Court stated that: "Any person or organization with a computer connected to the Internet can 'publish' information . . . No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web"[41] allowing unprecedented freedom of expression.

Some individuals, organizations, and members of Congress found the unbounded freedom of the Internet troubling, particularly because of the presence of pornography on the Internet.[42] Others viewed this vast freedom

31. 47 U.S.C. § 561(a) (1996).

32. For a more complete examination of these cases, *see* John Dayton, *Free Speech and the Communications Decency Act*, 117 Ed.Law Rep. [1](1997).

33. 47 U.S.C. § 561(a) (1996).

34. *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996) (defendant's notice of appeal).

35. 519 U.S. 1025, 117 S.Ct. 554, 136 L.Ed.2d 436 (1996).

36. 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

37. *Id.* Justice O'Connor, joined by Chief Justice Rehnquist, filed a separate opinion concurring in the judgement and dissenting in part. *Id.* at 886, 117 S.Ct. 2329.

38. *Id.* at 849, 117 S.Ct. 2329.

39. *Id.* at 870, 117 S.Ct. 2329.

40. *Id.* at 851, 117 S.Ct. 2329.

41. *Id.* at 853, 117 S.Ct. 2329. *See also ACLU v. Reno*, 929 F.Supp. 824, 832 (E.D. Pa. 1996) ("No single entity—academic, corporate, governmental, or non-profit—administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers").

42. *See* Letter to Thomas J. Bliley, Chairman of the U.S. House Committee on Commerce, and Larry Pressler, Chairman of the U.S. Senate Committee on Commerce, Science, and Transportation, from a coalition opposing indecent Internet speech (Oct. 16, 1995) ("We are writing to urge the conference committee seeking to reconcile the telecommunications bills passed by the House and Senate include in the final bill the strongest possible criminal law provisions to address the growing and immediate problem of computer pornography without any exemptions, defenses, or political favors

as the Internet's greatest strength. In *ACLU v. Reno* the trial court had noted that:

> True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of government regulation of Internet content has unquestionably produced a kind of chaos, but as one of plaintiffs' experts put it with such resonance at the hearing: "What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos." Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.[43]

Although many types of Internet speech may provoke some debate, it is the availability of sexually explicit material on the Internet that has generated the most controversy. The Court noted that: "Sexually explicit material on the Internet includes text, pictures, and chat and 'extends from the modestly titillating to the hardest-core.' "[44] However, relying on the factual findings of the trial court, the Court determined that:

> Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself ... and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content." For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."[45]

Concerning technologies designed to restrict access to unwanted sexually explicit materials, the Court noted that:

> Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features.[46]

Although filtering systems did not eliminate all potentially objectionable materials, the Court concluded that "the evidence indicates that 'a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available.' "[47]

... prosecute those involved in obscenity and indecency").

43. 929 F.Supp. 824, 883 (E.D. Pa. 1996).

44. *Reno v. ACLU*, 521 U.S. 844, 855, 117 S.Ct. 2329, 139 L.Ed.2d 874 (1997).

45. *Id.*, *citing ACLU v. Reno*, 929 F.Supp. 824, 844–845 (E.D. Pa. 1996).

46. *Id.*

47. *Reno v. ACLU*, 521 U.S. 844, 855, 117 S.Ct. 2329, 139 L.Ed.2d 874 (1997).

In *ACLU v. Reno* the trial court had found that the CDA violated First Amendment free speech rights and was also unconstitutionally vague in violation of the Fifth Amendment.[48] But because the Supreme Court found the CDA unconstitutional on First Amendment grounds, the Court declined to address Fifth Amendment vagueness claims in *Reno v. ACLU*, except to the extent that vagueness was relevant to the Court's First Amendment overbreadth inquiry.[49] In considering the free speech challenge, the Court's prior cases recognized limited governmental authority in regulating radio and television broadcasting.[50] This authority was premised on legitimate public interests associated with allocating scarce broadcast band resources and the invasive nature of radio and television broadcasts.[51] In contrast the Court explained that "the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds."[52] Further, the Court found that "the Internet is not as 'invasive' as radio or television ... communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden ... 'odds are slim' that a user would come across a sexually explicit sight by accident."[53]

Arguments that the CDA merely imposed reasonable time, place, and manner regulations were rejected by the Court. Although government may impose reasonable time, place, and manner regulations on speech, so long as these regulations are content-neutral and leave open adequate alternative routes of communication, the Court determined that "the CDA is a content-based blanket restriction on speech, and, as such, cannot be 'properly analyzed as a form of time, place, and manner regulation.' "[54] Because the CDA was a content-based restriction on speech, strict scrutiny was appropriate and required "the most stringent review of its provisions" by the Court.[55]

To survive this stringent review, the Government had to prove that the CDA's impingement on free speech rights was necessary to a compelling interest and narrowly tailored to achieving that interest.[56] The Court noted in *Reno v. ACLU* that: "Appellees ... do not dispute that the Government generally has a compelling interest in protecting minors from 'indecent' and 'patently offensive' speech."[57] In determining whether the CDA was narrowly tailored to achieving that interest, the Court held that:

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a

48. 929 F.Supp. 824 (E.D. Pa. 1996).

49. 521 U.S. 844, 865, 117 S.Ct. 2329, 139 L.Ed.2d 874 (1997).

50. *See Turner Broadcasting System v. F.C.C.*, 512 U.S. 622, 637–638, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (based on scarcity of available frequencies); *Sable Communications v. F.C.C.*, 492 U.S. 115, 128, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (based on invasive nature of broadcasts).

51. *Id.*

52. *Reno v. ACLU*, 521 U.S. 844, 870, 117 S.Ct. 2329, 139 L.Ed.2d 874 (1997).

53. *Id.* at 869, 117 S.Ct. 2329.

54. *Id.* at 868, 117 S.Ct. 2329 *citing Renton v. Playtime Theatres*, 475 U.S. 41, 46, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

55. *Id.*

56. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

57. 521 U.S. 844, 863 n.30, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

> constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. In evaluating the free speech rights of adults, we have made it perfectly clear that "sexual expression which is indecent but not obscene is protected by the First Amendment" ... "[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression" ... "the fact that society may find speech offensive is not a sufficient reason for suppressing it" ... It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials ... But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population ... to ... only what is fit for children" ... "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox" ... the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity.[58]

The Court determined that: "We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid constitutional provision."[59] The Court noted that in *Sable Communications v. F.C.C.*[60] "we remarked that the speech restriction at issue there amounted to 'burn[ing] the house to roast the pig.' The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community."[61] The Court concluded that: "The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[62]

### b) The CPPA and *Ashcroft v. Free Speech Coalition*

In 1996 the Child Pornography Prevention Act (CPPA) was signed into law.[63] The CPPA expanded criminal prohibitions against child pornography to also include "any visual depiction, including any photograph, film, video, picture, or computer or computer generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct."[64] The CPPA also prohibits sexually explicit images that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impres-

58. *Id.* at 875, 117 S.Ct. 2329 (citations omitted).

59. *Id.* at 882, 117 S.Ct. 2329. The CDA provides some affirmative defenses to liability under the Act. *See* 47 U.S.C. § 223(e) (1996).

60. 492 U.S. 115, 127, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) (declaring a ban on "dial-a-porn" messages unconstitutional).

61. *Reno v. ACLU*, 521 U.S. 844, 882, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

62. *Id.* at 885, 117 S.Ct. 2329.

63. P.L. 104–128 (1996). *See also*, Lydia W. Lee, *Child Pornography Prevention Act of 1996: Confronting the Challenges of Virtual Reality*, 8 S. CAL. INTERDISC. L.J. 639 (1999).

64. 18 U.S.C. § 2256(8)(a-b) (1996).

sion" that the images depict "a minor engaged in sexually explicit conduct."[65] Plaintiffs challenged the "appears to be" and "conveys the impression" provisions as unconstitutionally overbroad and vague. In a 7–2 opinion in *Ashcroft v. Free Speech Coalition,*[66] the U.S. Supreme Court held that these provisions were unconstitutional.

In *Ashcroft v. Free Speech Coalition*, the Court noted that generally pornography can only be banned when it is obscene as defined by the Court's test in *Miller v. California.*[67] Under *Miller,* the test for whether materials are obscene and not entitled to constitutional protection is:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) 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.[68]

However, in *New York v. Ferber*, the Court recognized a legitimate governmental interests in protecting children from sexual exploitation in the production of pornography, noting that the *Miller* standard as a general definition of "what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children."[69]

In declaring the challenged provisions of the CPPA unconstitutional, however, the Court determined that these provisions were not directed at speech that was obscene under *Miller*. Further, the CPPA went beyond the legitimate governmental interests recognized in *Ferber*, to protect children from exploitation, and instead imposed criminal penalties on protected speech, serving to chill the expression of protected speech through fear of criminal penalties. The Court stated:

> The First Amendment commands, "Congress shall make no law ... abridging the freedom of speech." The government may violate this mandate in many ways ... but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe [including imprisonment for 5 to 30 years]. While even minor punishments can chill protected speech ... this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression.[70]

65. 18 U.S.C. § 2256(8)(D) (1996).

66. 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

67. 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

68. *Id.* at 24, 93 S.Ct. 2607.

69. 458 U.S. 747, 761, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

70. 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

The Court determined that under the CPPA:

> Any depiction of sexually explicit activity [that appears to depict a minor], no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. It is not necessary, moreover, that the image be patently offensive [under the *Miller* standard]. Pictures of what appear to be 17–year-olds engaging in sexually explicit activity do not in every case contravene community standards. The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute prohibits the visual depiction of an idea–that of teenagers engaging in sexual activity–that is a fact of modern society and has been a theme in art and literature throughout the ages.[71]

The Court concluded by noting famous examples of artistic works that were potentially subject to prosecution under the CPPA, including productions of William Shakespeare's Romeo and Juliet, and more modern works depicting the realities of teen sexuality, the degradations associated with teen-age drug addiction, prostitution, and sexual abuse.[72]

### c) The CIPA and *United States v. American Library Association*

In 2000 Congress enacted the Children's Internet Protection Act (CIPA) based on concerns that Internet access in public libraries, partly funded by federal funds, was being used by patrons of all ages to access pornography, including obscenity and child pornography. Further, in some instances library staff, adult patrons, and children had been involuntarily exposed to these materials as passers by, or when pornographic images had been left on computer screens or printers. The CIPA required that libraries receiving federal funds for Internet access must have "a policy of Internet safety for minors that includes the operation of a technology protection measure" that protects against access by all persons to visual depictions of obscenity or child pornography, and that protects minors from access to visual depictions that are "harmful to minors."[73]

A coalition of libraries, library patrons, and Internet publishers asserted that the CIPA was an unconstitutional exercise of Congress' spending power, because it attempted to coerce libraries into violating the First Amendment by restricting free speech. Although six Justices in *United States v. American Library Association.*[74] determined that the CIPA was a valid exercise of congressional authority, this 2003 case failed to produce a majority opinion. Justice Rehnquist, writing for a plurality of Justices including Justices O'Con-

71. *Id.* at 246, 122 S.Ct. 1389.

72. The Court noted that one of the ironies of the Government's reliance on *Ferber* to justify the CPPA's prohibitions on "virtual images" or conveying the impression that a minor was involved in a sexually explicit act was that in *Ferber* the Court had allowed an extension of criminal penalties for the use of actual children even in non-obscene artistic or literary works because there was an alternative for any legitimate artistic or literary expression: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *New York v. Ferber*, 458 U.S. 747, 763, 102 S.Ct. 1389, 152 L.Ed.2d 403 (1982).

73. 20 U.S.C. § 9134(f)(1)(A)(i)-(B)(i) (2000).

74. 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 403 (2003).

nor, Scalia, and Thomas, noted both the "vast amount of valuable information" on the Internet, and that "there is also an enormous amount of pornography on the Internet, much of which is easily obtained."[75] The CIPA's required safety policies, including electronic blocking devices, was a valid means of addressing legitimate governmental interests in protecting minors. Justice Rehnquist recognized that "a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material, but that nevertheless trigger the filter."[76] Justice Rehnquist, however, noted that the CIPA also permits a library to disable the filter "to enable access for bona fide research or other lawful purposes" by any person.[77] Justice Rehnquist concluded: "Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose an unconstitutional condition on public libraries."[78]

### d) The COPA and *Ashcroft v. ACLU*

In response to the Court's 1997 decision in *ACLU v. Reno*,[79] Congress passed the Child Online Protection Act (COPA) in 1998.[80] Like the CDA, the COPA imposed criminal penalties for certain types of electronic speech. Any person in violation of the COPA could be subjected to a fine of $50,000 and six months in prison for knowingly posting on the World Wide Web, for "commercial purposes," any content that was "harmful to minors."[81] Under the COPA, minors were defined as anyone under 17 years of age, and "harmful to minors" was defined as:

> [A]ny communication, picture, image, graphic image file, article, recording, writing, or other material of any kind that is obscene or that–
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[82]

Any speech falling within these parameters was deemed criminal under the COPA and these speakers were subject to criminal fines and imprisonment. The COPA, however, provided an affirmative defense to conviction under the statute by demonstrating that the defendant employed specific means of preventing minors from gaining access to the prohibited materials, by showing that the defendant:

> [H]as restricted access by minors to material that is harmful to minors–

75. *Id.* at 200, 123 S.Ct. 2297.
76. *Id.* at 201, 123 S.Ct. 2297.
77. *Id.*
78. *Id.* at 214, 122 S.Ct. 2297.
79. 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).
80. 47 U.S.C. § 231 (1998).
81. 47 U.S.C. § 231(a)(1) (1998).
82. 47 U.S.C. § 231(e)(6) (1998).

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
(B) by accepting a digital certificate that verifies age, or
(C) by any other reasonable measures that are feasible under available technology.[83]

In a 5–4 opinion in *Ashcroft v. ACLU*, the U.S. Supreme Court in 2004 upheld an injunction against enforcement of the COPA, because it was likely that the statute violated the First Amendment's free speech provisions.[84] The Court stated that:

> Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality ... This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question ... The Government has failed, at this point, to rebut the plaintiffs' contention that there are plausible less restrictive alternatives to the statute.[85]

The Court cited the trial court's finding that "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators."[86] The Court stated:

> Filters are less restrictive than the COPA. They impose selective restrictions on speech at the receiving end, not the 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 their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential for chilling effect is eliminated, or at least much diminished ... Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted on the Web from America ... 40% of harmful-to-minors content comes from overseas ... COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress' goals. Effectiveness is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas ... [further, COPA's] verification systems may be subject to evasion and circumvention, for example by minors who have their own credit cards ... Finally, filters also may be more effective because they can be applied to all forms of

**83.** 47 U.S.C. § 231(c)(1) (1998).

**84.** 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

**85.** *Id.* at 660, 124 S.Ct. 2783.

**86.** *Id.* at 663, 124 S.Ct. 2783.

Internet communication, including e-mail, not just communications available via the World Wide Web.[87]

The Court noted "not only has the Government failed to carry its burden of showing the District Court that the proposed alternative is less effective, but also a Government Commission appointed to consider the question has concluded just the opposite."[88] Legislation in the COPA created a "blue-ribbon commission" to review this question, the Commission on Child Online Protection. The Commission confirmed that filtering software "may well be more effective than COPA" in protecting children from harmful materials.[89] The Court recognized that: "Filtering software, of course, is not a perfect solution to the problems of children gaining access to harmful-to-minors materials. It may block some materials that are not harmful to minors and fail to catch some that are" but "[w]hatever the deficiencies of filters ... the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA."[90]

The Court also rejected the Government's argument that filters were not an acceptable alternative because Congress could not require that filters be used. The Court noted that while Congress could not mandate filter use by private citizens, Congress could "act to encourage the use of filters. We have held that Congress can give strong incentives to schools and libraries to use them" in *United States v. American Library Association*, and that Congress "could also take steps to promote their development by industry, and their use by parents."[91] Further, the Court noted that since the passage of COPA, Congress had passed "at least two further statutes that might qualify as less restrictive alternatives to COPA–a prohibition on misleading domain names, and a statute creating a minors-safe 'Dot kids' domain."[92]

### 3) ANALYSIS

From the written word to the printing press, all new and powerful communications technologies initially generated not only great interest, enthusiasm and optimism for the future, but also great concern, fear and calls for control.[93] Internet technology has provoked similar mixed reactions. Even

87. *Id.* at 668, 124 S.Ct. 2783.

88. *Id.*

89. *Id.* at 667, 124 S.Ct. 2783.

90. *Id.* at 668, 124 S.Ct. 2783.

91. *Id.* at 669, 124 S.Ct. 2783.

92. *Id.* at 672, 124 S.Ct. 2783.

93. Those technologies that presented the greatest potential for change, and threat to the status quo, generated the greatest opposition and efforts to control. Nonetheless, the technological power that initially fueled opposition also assured that once established these valuable technologies were here to stay, at least until superceded by some more powerful technology. *See* Zack Kertcher & Ainat N. Margalit, *Challenges to Authority, Burdens of Legitimization: The Printing Press and the Internet*, 8 YALE J.L. & TECH. 1, 26 (2006) (describing early actions by the Catholic Church banning Jewish books and unauthorized hand copied Christian books, but noting that because the production of books was a slow and limited process mostly controlled by the Church hand written books posed little threat to the authority of the Church. In contrast: "The production of books spread like wildfire in Western Europe following the invention of the printing press in 1450 ... Within a relatively short period of time the Catholic Church lost its hegemony over public opinion and the traditional socio-political structure began to transform").

those that have concerns about the Internet, however, generally recognize the power and potential of this new technology. The advent of the Internet is a significant event in human history, creating unprecedented potential for human communications.[94] What distinguishes the Internet from prior communications technologies is the instant access and relative lack of limits in the cyberworld. A virtual world can provide virtually unlimited opportunities for communication.[95] But while the Internet has the potential to serve as a vehicle for a global expansion of knowledge and opportunity, the realities of the Internet also create some serious potential problems. Along with the works of the World's great artists, philosophers, scientists, and theologians, Internet users, including children, will also find a much darker domain populated by pornographers, hate mongers, and Internet predators, creating a serious dilemma for parents and educators.

Increasingly, computer and Internet use are becoming part of basic literacy in our society. Americans commonly use the Internet for access to news, weather, government services, and other daily activities including shopping, banking and paying bills. Even as Internet use becomes increasingly common, however, an economic divide persists in Internet access. Children from more affluent homes are much more likely to have home access to the Internet.[96] With computer and Internet skills becoming an increasingly important part of basic literacy in our society, poorer children are likely to be further disadvantaged if they do not have an opportunity to acquire adequate computer and Internet skills.

Given this reality, it would be difficult to defend not allowing all children to have Internet access in public schools. But if students are allowed Internet access in schools, how do educators defend a situation in which a child has been exposed to sexually explicit or otherwise harmful materials on the Internet while at school? Shocked and angry parents concerned about potential harm to their child do not want to hear that government officials cannot protect their children from harmful materials on the Internet because of constitutional limitations and the international scope of the Internet. Nonetheless, a full decade of legislative-judicial dialogue over these issues

94. *Murdoch on the Internet, at* http://blog.exclusiveconcepts.com/archives/2005/11/murdoch_on_the.html (Nov. 16, 2005) (statement of Rupert Murdoch) ("the Internet has been the most fundamental change during my lifetime and for hundreds of years. Someone the other day said, 'It's the biggest thing since Gutenberg,' and then someone else said, 'No, it's the biggest thing since the invention of writing.' With the technology that goes with it, the fact is that everybody now is empowered: Anyone can buy what they want, shop where they want, talk to anybody in the world that they want (and) state their own opinions. There's no mystery to a blog: Put up your thoughts (and) find friends. And the younger people are, the more time they're spending on it—it's extraordinary").

95. *Reno v. ACLU*, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer").

96. Susanna Frederick Fischer, *The Global Digital Divide: Focusing on Children*, 24 HASTINGS COMM. & ENT. L.J. 477, 479 (2003) (noting that home Internet access is significantly divided along both race and income lines).

confirms the difficulty of establishing constitutional and effective protections for children on the Internet.

In *Reno v. ACLU,* the Court held that merely invoking a governmental interest in protecting children from inappropriate materials did not empower Congress to "torch a large segment of the Internet community."[97] Congress' passage of the CDA placed "an unacceptably heavy burden on protected speech."[98] Further, even though advocates of the CDA argued that restrictions on free speech were justified in order to protect children, there was substantial evidence that even if limits on speech were allowed the CDA would still fail to protect children from pornography on the Internet. As the trial court found in *ACLU v. Reno*:

> [T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United states, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.[99]

The court in *ACLU v. Reno* also noted that the CDA could cause pornographers to omit warning labels on pornographic materials and relocate or remail materials to evade detection, stating that:

> Arguably, a valid CDA would create an incentive for overseas pornographers *not* to label their speech. If we upheld the CDA, foreign pornographers could reap the benefit of unfettered access to American audiences. A valid CDA might also encourage American pornographers to relocate in foreign countries or at least use anonymous remailers from foreign servers.[100]

Evidence showed that in addition to being ineffective, the CDA was superfluous in controlling obscenity. As the Court noted in *Reno v. ACLU*:

> Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles ... In fact, when Congress was considering the CDA, the Government expressed its view that the law was unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity, child pornography, and child solicitation.[101]

In addition to federal laws, states also have laws protecting minors from inappropriate materials.[102] As the trial court found in *ACLU v. Reno*:

97. 521 U.S. 844, 882, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

98. *Id.*

99. *ACLU v. Reno*, 929 F.Supp. 824, 882–883 (E.D. Pa. 1996). *See also Shea v. Reno*, 930 F.Supp. 916, 941 (S.D.N.Y. 1996) ("Because the CDA only regulates content providers within the United States, while perhaps as much as thirty percent of the sexually explicit material on the Internet originates abroad ... the CDA will not reach a significant percentage of the sexually explicit material currently available").

100. *ACLU v. Reno*, 929 F.Supp. 824, 883 n.22 (E.D. Pa. 1996).

101. 521 U.S. 844, 878 n.44, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

102. *Id.* at 887 nn.1–2, 117 S.Ct. 2329 (1997) (O'Connor, J., concurring in the judgment and dissenting in part) (listing state statutes denying children access to adult establish-

> The Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography . . . As we learned at the hearing, there is also a compelling need for public education about the benefits and dangers of this new medium, and the Government can fill that role as well.[103]

Despite many public speeches and press releases by politicians supporting the CDA, little effort was spent on hearings or debates concerning the necessity, efficacy, or constitutionality of legislation criminalizing "indecent" speech on the Internet. This lead critics to question whether the passage of the CDA was primarily motivated by the asserted need to protect children or the desire of some politicians to exploit fears of new technology and to appear publicly advocating "decency" legislation. Other politicians may have supported the CDA, fearing the attacks of political opponents if they were on record as having voted against a law to "protect children" and promote "decency." Regarding whether Congress engaged in serious investigations or debates concerning legislation to protect children and promote "decency" U.S. Senator Leahy stated: "The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor."[104]

Available evidence indicated that the CDA was likely both ineffective and unconstitutional, leading some members of Congress to assert that passage of the CDA would "involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected."[105] Congress was so certain of a constitutional challenge that they included an expedited judicial review process in the CDA.[106] Further, Congress had been notified by the Department of Justice that the CDA was not necessary in view of existing legislation.[107] Despite this evidence, and a judicial declaration that the CDA was unconstitutional, politicians continued to make election year speeches expressing their support for the CDA.[108] But ultimately courts reviewing the

ments and limiting their access to speech deemed harmful to minors).

103. 929 F.Supp. 824, 883 (E.D. Pa. 1996).

104. *See Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action: Hearings on S. 892 Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 7–8 (1995) (statement of Senator Leahy), *cited in Reno v. ACLU*, 521 U.S. 844, 859, 117 S.Ct. 2329, 138 L.Ed.2d 874 n.24 (1997).

105. *Reno v. ACLU*, 521 U.S. 844, 859 n.24, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

106. *See* 47 U.S.C. § 561(a) (1996) (providing for an expedited hearing procedure by a special three judge panel with direct appeal to the U.S. Supreme Court).

107. Although the Administration ultimately argued before the Court in support of the CDA in Reno v. ACLU, as the Court noted, prior to the passage of the CDA the Administration had communicated to Congress a belief that the CDA was unnecessary. *See* 141 CONG. REC. S8342 (June 14, 1995) (letter to Senator Leahy from Kent Markus, Acting Assistant Attorney General, U.S. Dept. of Justice) *cited in Reno v. ACLU*, 521 U.S. 844, 877 n.44, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

108. The day after the court issued its opinion in ACLU v. Reno, 929 F.Supp. 824 (E.D. Pa. 1996), President Clinton stated that: "I remain convinced, as I was when I signed the bill, that our Constitution allows us to help parents by enforcing this Act to prevent children from being exposed to objectionable material transmitted though computer networks. I will continue to do everything I can in my Administration to

CDA found that the CDA was ineffective,[109] as well as superfluous,[110] and every court that reviewed the CDA declared it unconstitutional.[111]

Most of Congress' further efforts to limit Internet speech have met a similar fate. In a 7–2 opinion in *Ashcroft v. Free Speech Coalition,* the U.S. Supreme Court held that the government's expansion of child pornography laws in the Child Pornography Prevention Act (CPPA) of 1996 to include "virtual" pornography and any depiction that "appears to be" or "conveys the impression" of a minor engaged in sexual conduct was unconstitutionally vague and overbroad.[112] Although the Court in *United States v. American Library Association* upheld the authority of Congress to require libraries receiving federal funding to use an Internet filtering system under the Children's Internet Protection Act (CIPA), the case failed to produce a majority opinion and the reach of the statute is relatively limited and of questionable efficacy in protecting children. [113]

Nonetheless, Congress' difficulties in addressing these issues does not mean that children are left entirely unprotected. Although the Court declared the CPPA unconstitutional in *Ashcroft v. Free Speech Coalition,* the Court's decision did not in any way limit the reach of existing criminal sanctions on the prosecution of obscenity consistent with *Miller,*[114] or the prosecution of child pornography under *Ferber.*[115] If the virtual work is obscene, or if children were involved in the production of any pornography, these actions remain subject to criminal prosecution.

Whether sexually explicit materials fall within the parameters of protected speech[116] or constitute unprotected obscenity defines what sexually explicit materials may be lawfully posted on the Internet. All sexually explicit materials, however, are inappropriate for viewing by children. The critical issue remaining is whether Internet speakers or parents (and educators acting in loco parentis) should bear the primary responsibility for protecting children from these inappropriate materials. To date, the Court has resolved these issues by placing the ultimate responsibility on parents. As the Court noted in *Reno v. ACLU*: "It is cardinal with us that the custody, care and

give families every available tool to protect their children from these materials." *See* Statement by the President, Bill Clinton, Office of the Press Secretary, (June 12, 1996).

109. *See Shea v. Reno*, 930 F.Supp. 916, 941 (S.D.N.Y. 1996); *ACLU v. Reno*, 929 F.Supp. 824, 882–883 (E.D. Pa. 1996).

110. *Reno v. ACLU*, 521 U.S. 844, 877 n.44, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)

111. *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997); *Shea v. Reno*, 930 F.Supp. 916 (S.D.N.Y. 1996); *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996).

112. 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

113. 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003). Not even members of Congress believed that the CIPA resolved the problems children faced in surfing the Internet, as evidenced by continued Congressional action on these matters following the Court's decision upholding the CIPA.

114. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

115. *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

116. *See Reno v. ACLU*, 521 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that 'sexual expression which is indecent but not obscene is protected by the First Amendment' ").

nurture of the child reside first in the parents."[117] The Court referred to its "consistent recognition of the principle that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[118] This authority is accompanied by the responsibility of providing parental guidance and proper supervision of the activities of children under their care.[119] The Court also recognized the potential for the CDA to substitute governmental authority for parental guidance, noting that: "Under the CDA ... neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute."[120] As the Court recognized:

> Under the CDA, a parent allowing her 17–year-old to use the family computer to obtain information on the Internet that she, in her parental judgement, deems appropriate could face a lengthy prison term ... Similarly, a parent who sent his 17–year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material "indecent" or "patently offensive," if the college town's community thought otherwise.[121]

Children in most schools now have access to the Internet. When parents place their children in these schools, they delegate part of their supervisory responsibilities to educators. Educators then acquire a duty to supervise the children in their care, including protecting these children from exposure to inappropriate materials on the Internet.[122] While the Internet offers tremendous educational potential, the presence of pornography and other inappropriate or harmful materials on the Internet is an inescapable reality.[123] Those charged with the responsibility of supervising children must take reasonable measures to protect these children from known dangers, including the use of up-to-date filters, the establishment of safe Internet use policies, safe Internet use instruction, and adequate, age appropriate adult supervision of children using the Internet. For younger children, a software program that limits these junior surfers to only pre-selected and approved child-friendly websites may be a safer alternative to full Internet access.[124]

117. *Id.* at 865 n.31, 117 S.Ct. 2329 (1997) *citing Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.ed. 645 (1944).

118. *Id.* at 865, 117 S.Ct. 2329.

119. *See ACLU v. Reno*, 929 F.Supp. 824, 857 (E.D. Pa. 1996) ("Those responsible for minors undertake the primary obligation to prevent their exposure to such material").

120. *Reno v. ACLU*, 521 U.S. 844, 865, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

121. *Id.* at 879, 117 S.Ct. 2329.

122. *See* MARTHA M. MCCARTHY & NELDA H. CAMBRON-MCCABE, PUBLIC SCHOOL LAW 457 (1992) ("One of the primary responsibilities of teachers is to provide adequate supervision of students under their care").

123. *See ACLU v. Reno*, 929 F.Supp. 824, 882 (E.D. Pa. 1996) ("Speech on the Internet can be unfiltered, unpolished, and unconventional, even emotionally charged, sexually explicit, and vulgar—in a word, 'indecent' in many communities. But we should expect such speech to occur in a medium in which citizens from all walks of life have a voice").

124. Although much older students may arguably have legitimate cause for broader access to the Internet, in order to for example access a wider range of political speech, religious speech, or information on dating, sexual health and safety, there is little reason for four and five year olds to wander the vast expanses of the Internet unguided. Separate Internet domains for adult content and child friendly materials have been proposed as a partial solution, but were rejected in a decision by the Internet Corporation for Assigned Names and Numbers

Educators have a duty to instruct and supervise students properly so that they may safely participate and learn, but students also have a share of responsibility. If students are capable of understanding and following reasonable school rules, students have a duty to obey these rules, and they can be punished for willful disobedience.[125] As juveniles approach maturity they must accept increased responsibility for their own actions if they are to become responsible adults. Legislation cannot serve as a substitute for adequate adult supervision and responsible student behavior.

Although Congress may have been closer to success with COPA than with the CDA, Congress still has not yet hit the mark.[126] Moreover, the limits of the First Amendment and the limited jurisdiction of U.S. law over the World Wide Web may make it impossible to achieve an effective legislative solution to this problem. After a decade of congressional efforts, the core problem is little closer to resolution, and parents and educators are rightly concerned about the exposure of children to harmful materials on the Internet. A decade after the Court's decision in *Reno v. ACLU*, many persons familiar with the Internet would disagree with judicial findings about the Internet in that case. For example, the findings that the "odds are slim that a user would enter a sexually explicit site by accident" or that "[a] child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."[127] To the contrary, sexually explicit material is very common on the Internet, searches involving innocent search terms often retrieve sexually oriented sites, sellers of pornography are very aggressive in marketing their materials, filters are only a partial solution to the problem, and any child old enough to click a mouse can surf the Internet.[128]

(ICANN) in May 2006 after a preliminary approval in June 2005 to create an ".xxx" domain. *See, Internet Agency Rejects "xxx." Domain Name,* BOSTON GLOBE, May 11, 2006, at http://business.bostonherald.com/technologyNews/view.bg?articleid=138819 (the reversal by the ICANN appears to have been the result of pressure from an odd political coalition of conservative groups and producers of pornography who shared an opposition to the creation of a specific Internet domain for pornography).

125. *See Bethel v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 [32 Ed.Law Rep. [1243]] (1986) (upholding a school's punishment of a student for intentional use of language that violated conduct rules). *See also,* Philip T.K. Daniel & Patrick Pauken, *The Electronic Media and School Violence: Lessons Learned and Issues Presented*, 164 ED.LAW REP. [1] (2002) (DISCUSSING STUDENT CONDUCT ON THE INTERNET AND SCHOOL AUTHORITY CONCERNING THESE ISSUES).

126. The 5–4 decision on the COPA in *Ashcroft v. ACLU*, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004), makes the COPA just as unconstitutional as the CDA was found to be in the unanimous decision in *ACLU v. Reno*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Nonetheless, it may indicate that Congress' efforts might be getting closer to meeting constitutional standards, or are at least less obviously unconstitutional.

127. *Reno v. ACLU*, 521 U.S. 844, 855, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), *citing ACLU v. Reno*, 929 F.Supp. 824, 844–845 (E.D. Pa. 1996).

128. *See* Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 980–982 (citing various studies Alexander notes "seventy-three percent, of twelve-to-seventeen-year-olds use the Internet, plus an increasing number of very young children are connected as well (fourteen percent of the children online are five year olds or younger, n.15). There is an almost infinite array of material–particularly sexually explicit material–available within a few keystrokes ... The

Pornography on the Internet will never go away. From ancient cave paintings to computer-generated graphics, sexually oriented expression is part of human thought and communication. The Internet is simply the latest medium for disseminating graphic material including pornography. Further, sex sells. The commercial value of sexually oriented materials on the Internet greatly increases the risk of exposure for children and others not seeking these materials.[129] It may be that the primary intent of most sellers of Internet pornography is not to expose children to their pornographic materials. But the fact is that sellers of pornography wish to make as much money as possible selling their products. Experienced sellers know that: 1) The websites that are at the top of the list of search results are much more likely to make a sale; and 2) the most frequent buyers of pornography are also the most jaded, and—seeking novelty—they will likely tend to choose the more extreme and bizarre websites over the more common websites. These factors lead Internet pornographers to design their websites so that they are readily retrieved in searches, and so that the opening pages tend to present shocking, bizarre and highly graphic materials up front to entice potential customers to purchase their materials. These market factors greatly increase the risk to children, but because they also greatly increase sales, they are likely to continue as part of the reality of the Internet.

It would be comforting to simply turn the issue over to government officials for a quick resolution. But rarely is the answer to a complex problem that simple. Legislation can be a powerful tool in dealing with some serious and more particularized threats to the well being of children, such as punishing and deterring blatant obscenity, child pornography or abuse.[130] The problem of materials on the Internet that are inappropriate for children but constitutional protected for adults, however, presents a challenge that is not well suited for a legislative solution. The problem begins as free speech at the global level of the cyberworld and manifests its potential damage at the level of the individual child. U.S. legislation is unlikely to be effective in reaching either end of this problem. Government authority is limited to the jurisdic-

great majority of pornographic websites are actually free and serve as 'bait' or 'teasers' meant to lure people into commercial websites. Therefore, children online may have free and unhindered access to almost all of the available adult content on the Internet ... inadvertent exposures are common (twenty-five percent of minors had at least one inadvertent exposure to online pornography within the last year, n. 24)").

129. *Id.* at 981 ("Pornography websites are among the most popular sites ... Internet pornography is big business, comprising eleven percent of the entire $9 billion e-commerce pie in 1998").

130. *See* 152 CONG. REC. H229–01 (daily ed. Feb. 14, 2006) (statement of Rep. Gingrey) (statement supporting "H.R. 4703, called Masha's law after 13 year-old Masha Allen, whose adoptive father posted pornographic images of her at age 5 on the Internet. Thankfully, law enforcement officials tracked and convicted her father ... However, hundreds of her images are still on the Internet; and her photographs are some of the most widely downloaded pictures in the world ... we absolutely must do something to harshly reprimand those who produce, distribute and consume child pornography. Did you know that under current law the penalties for illegally downloading music are three times higher than the penalties for downloading child pornography? This is absurd and unjust. My legislation would increase the statutory damages for victims of child exploitation and ensure victims can sue those who downloaded their pictures. We must protect those who have no way of protecting themselves from this horrific and sickening crime, and I ask that you join me in supporting Masha's law").

tion and lawful authority of the government, and mere words on paper provide little meaningful protection for a child surfing the vast expanses of the Internet.

In the final analysis, we are left with the inescapable reality that the price of living in a free society is the acceptance of individual responsibility for the conduct and well being of ourselves and our children. Children sophisticated enough to purposely search for and retrieve indecent materials on the Internet independently are also likely to be sophisticated enough to understand prohibitions given to them by their parents and teachers, and to choose between acceptable and unacceptable conduct in Internet use. In the absence of this maturity, as the trial court found in *ACLU v. Reno*: "[P]arents can supervise their children's use of the Internet or deny their children the opportunity to participate in the medium until they reach an appropriate age."[131]

## CONCLUSION

Notwithstanding the legitimate governmental interest in protecting children from harmful materials, restrictions on free speech that are not narrowly tailored to achieving that purpose are unconstitutional. Nonetheless, children are not left completely unprotected from harmful materials on the Internet. Government can continue to protect children from pornography and obscenity on the Internet and elsewhere by enforcing existing constitutionally valid laws. Legislation, however, is not the most effective tool for dealing with the realities of the Internet. The First Amendment places rigorous limits on the authority of government to enact legislation controlling private speech, including a general prohibition against content-based restrictions on speech. Further, government authority is generally limited to the government's geographical jurisdiction, making it very difficult for government to control the content of private speech in the vast expanses of the cyberworld. The consistent message from the courts appears to be that the best way to protect both children and freedom of speech is to fight fire with fire in the cyberworld: Use technology to help control the problems of technology, and use government resources to help empower parents and educators to better protect and supervise children when they use the Internet. Government officials may play an important role in guarding children from the dangers of the Internet by encouraging and supporting the development and distribution of effective technologies aimed at mitigating the dangers of the Internet, and by educating parents, educators, and children in safer Internet practices. Parents and educators can also instruct children regarding safe and responsible Internet use and enforce age appropriate rules for their children. Children capable of conforming to these rules can be held responsible for willful violations. Children incapable of conforming to the rules can be more closely supervised or denied access to the Internet until they can follow appropriate rules for safe Internet use.

131. *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996).