

IT WILL TAKE MORE THAN PARENTAL USE OF FILTERING SOFTWARE TO PROTECT CHILDREN FROM INTERNET PORNOGRAPHY

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I.

INTRODUCTION

Though more than a decade has passed since pornography first became readily available on the Internet, there are still no enforceable laws that require persons who commercially distribute pornography on the Internet to take reasonable steps to restrict children's access to the material.

In 1997 the United States Supreme Court decided *Reno v. ACLU*.¹ This decision invalidated the Communications Decency Act (CDA),² a law intended to restrict children's access to "indecent" commercial and noncommercial content on the Internet. The *Reno* Court reasoned in part:

In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a 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 purposes that the statute was enacted to serve.³

Agreeing with the district court's assessment on the availability of a "less restrictive" alternative, the *Reno* Court stated, "[T]he 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 widely available.'"⁴

Congress responded to the Court's rejection of the CDA by enacting the Child Online Protection Act (COPA),⁵ which prohibits, by means of the World Wide Web, the making of "any communication for commercial purposes that is

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1. 521 U.S. 844 (1997).

2. Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended at 47 U.S.C. § 223 (2000)).

3. *Reno v. ACLU*, 521 U.S. at 874 (emphasis added).

4. *Id.* at 855 (quoting from the district court's findings).

5. Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified as amended at 47 U.S.C. § 231 (2000)).

available to any minor⁶ and that includes any material that is harmful to minors.”⁷ Unlike the CDA, which applied to all Internet modalities and to both commercial and noncommercial “indecent” speech, COPA applies only to the World Wide Web and to commercial speech that is “harmful to minors.” The statute defines “material that is harmful to minors” as:

any communication, picture, image, graphic image file, article, recording, writing, or other matter 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.⁸

In spite of these more narrowly tailored provisions, the courts have refused to uphold COPA, persisting in the belief that parental use of filtering technology can protect children from Internet smut. Shortly after COPA’s passage, a federal district court enjoined enforcement.⁹ The Court reasoned 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.”¹⁰ The Third Circuit affirmed the decision below, but on different grounds,¹¹ and the Supreme Court vacated that judgment.¹² On remand, the Third Circuit again affirmed the preliminary injunction, this time agreeing with the district court that blocking and filtering technology might constitute a less restrictive alternative.¹³ Next, the Supreme Court affirmed the Third Circuit decision and remanded the case to the federal district court to

6. *Id.* § 231(e)(7) (defining the term “minor” to mean any person under 17 years of age).

7. *Id.* § 231(a)(1).

8. *Id.* § 231(e)(6).

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

10. *Id.* at 497.

11. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), *aff’d on other grounds* *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999). The Third Circuit upheld the district court’s judgment on the grounds that requiring publishers to comply with potentially strict and conservative community standards of decency was an impermissible burden on constitutionally protected speech because publishers cannot restrict access to their materials to specific geographic locales. 217 F.3d at 166.

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

13. *ACLU v. Ashcroft*, 322 F.3d 240, 265 (3d Cir. 2003) (“[T]he various blocking and filtering techniques which [the district court] discussed may be substantially less restrictive than COPA in achieving COPA’s objective of preventing a minor’s access to harmful material.”).

determine if there are less restrictive alternatives to COPA.¹⁴ Justice Kennedy, who delivered the opinion of the Court, wrote:

COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties. The closest precedent on the general point is our decision in *Playboy Entertainment Group*. . . . [which], like this case, involved a content-based restriction designed to protect minors from viewing harmful materials. The choice was between a blanket speech restriction and a more specific technological solution that was available to parents who chose to implement it. Absent a showing that the proposed less restrictive alternative would not be as effective, we concluded, the more restrictive option preferred by Congress could not survive strict scrutiny In the instant case, too, the Government has failed to show . . . that the proposed less restrictive alternative will be less effective.¹⁵

Applying the standard, on March 22, 2007, the Eastern District of Pennsylvania entered a permanent injunction against the enforcement of COPA, concluding in part, “Defendant has failed to successfully defend against the plaintiffs’ assertion that filter software and the Government’s promotion and support thereof is a less restrictive alternative to COPA.”¹⁶

Thus, as a result of the Supreme Court’s holdings, there are still no enforceable¹⁷ federal or state laws that require persons who commercially distribute pornography on the Internet to take reasonable steps to restrict children’s access to the material. Today, if a minor or an adult who “looks young” walks into an “adult bookstore,” that minor or adult is normally asked to provide identification, because it is against the law to sell pornography to a minor in real space. But if a ten-year-old child unintentionally or purposefully clicks to a commercial website that distributes hardcore pornography, more often than not that child is able to view hardcore pornography without proof of age and free of charge.¹⁸ When it comes to cyberspace, the Supreme Court has

14. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

15. *Id.* at 670 (citing *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 825 (2000)).

16. *ACLU v. Gonzalez*, 478 F. Supp. 2d 775, 813 (E.D. Pa. 2007).

17. Injunctions have been issued against the enforcement of COPA and similar state laws. *See, e.g., id.*; *see also Southeast Booksellers Ass’n v. McMaster*, 371 F. Supp. 2d 773, 781 (D.S.C. 2005) (citing list of cases striking down statutes regulating Internet access as overbroad, impermissible content-based legislation in support of decision to permanently enjoin South Carolina statute restricting Internet access through means of age verification and labeling websites).

18. As recognized by the National Research Council:

In a survey of adult-oriented commercial sites, the majority of adult oriented sites (about 74 percent) were found to display adult content on the first page (accessible to anyone who visits the page), often through the display of sexually explicit banner ads to other sites About 25 percent employed practices that hindered the user from leaving the site (e.g.,

decided that it is totally up to parents to keep their children away from the harmful material.

Parents are indeed the “first line of defense” when it comes to protecting children from harmful Internet content. But no matter how hard government tries to educate and motivate parents, many parents will not install and use filter technology on every computer under their control. Even assuming that many more parents could be persuaded to use filters at all times on each computer in the home, that filters blocked all pornography, and that they could not be circumvented as children get older, there would still be a very big problem; as children get older they increasingly have access to computers outside the home.

Even critics of COPA agree that filtering technology cannot be the whole answer to the question of how to protect children from pornography. For example, while Liz Perle¹⁹ did say that COPA was not going to work because “the bad guys out there don’t abide by the rules,”²⁰ she also said, “Filtering is a noble fool’s errand. Save your money.”²¹ Similarly, Parry Aftab²² said that filtering is better than COPA “because the law wouldn’t prevent kids from accessing porn on sites administered outside the U.S.,”²³ and lamented, “It annoys me a great deal that parents are not using software.”²⁴ But, she admitted that “filtering is ineffective” as a means to limit access to pornography beyond the preteen years because “[t]eens who are just a little tech-savvy can circumvent filters” and will “download it at a friend’s house to their cell phone or . . . iPod.”²⁵ Aftab went on to note that “many parents are frustrated by programs that offer too many set-up options or require too many steps to override when they block content they shouldn’t block.”²⁶

mousetrapping), and only 3 percent required a credit card or other “adult check” to proceed past the first page of the site (that is, most sites allow the user to take a “free preview” in which some additional content is provided).

NAT’L RESEARCH COUNCIL, YOUTH, PORNOGRAPHY, AND THE INTERNET 78–79 (Dick Thornburgh & Herbert S. Lin eds., 2002) [hereinafter YOUTH, PORNOGRAPHY, AND THE INTERNET] (citing Daniel Orr and Josephine Ferrigno Stack, *Childproofing on the World Wide Web: A Survey of Adult Webservers*, 41 JURIMETRICS 465–75 (2001)).

19. Editor-in-Chief of Commonsense Media, a parental advocacy group in San Francisco. Common Sense Media, *Who We Are*, http://www.common sense media.org/about_us/who_we_are.php (last visited Apr. 9, 2007).

20. Kim Zetter, *How Best to Protect Kids from Online Porn*, S.F. CHRON., Feb. 12, 2006, at A1 (recalling statements of Liz Perle).

21. *Id.*

22. Author of THE PARENT’S GUIDE TO PROTECTING YOUR CHILDREN IN CYBERSPACE (2000) and Executive Director of WiredSafety.org. WiredSafety.org, *Biographies*, Parry Aftab, Esq., <http://www.wiredsafety.org/resources/biographies/parry/index.html> (last visited Apr. 9, 2007).

23. Zetter, *supra* note 20 (recalling the statements of Parry Aftab).

24. *Id.*

25. *Id.*

26. *Id.*

II.

PARENTAL USE OF FILTERING TECHNOLOGY IS ONLY PART OF THE SOLUTION

When Justice Kennedy writes that “[b]y enacting programs to promote the use of filtering software, Congress could give parents [the] ability” to “monitor what their children see,”²⁷ I have to wonder what he and the four other Justices who joined him in *Ashcroft v. ACLU* have in mind.

How much additional government money must now be spent to satisfy the courts that filter technology “will be less effective”²⁸ than regulation? What is the measure of success, in terms of the percentage of parents who say they utilize filter technology? How long must this grand experiment with children’s well-being run? What if a “well-promoted blocking provision” encourages children to see what all the fuss is about or to rebel?

A study published in the *American Journal of Public Health*²⁹ found that youth exposure to “parent-targeted” smoking prevention ads was associated with:

[A]mong students in grade 8, greater . . . exposure was related to . . . a greater likelihood of perceiving the harms associated with smoking have been exaggerated . . . and stronger intentions to smoke in the future. . . Among students in grades 10 and 12, higher advertising exposure was also associated with . . . stronger approval of smoking . . . , lower perceived harm of smoking . . . , stronger intentions to smoke in the future. . .³⁰

Consider also the analogous situation of teen drug abuse, which also occurs both inside and outside the home. The National Youth Anti-Drug Media Campaign has spent hundreds of millions of dollars in advertising³¹ to discourage teen drug use and drinking, including ads directed at parents.³² But according to the National Center on Addiction and Substance Abuse at Columbia

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

28. *Id.*

29. Melanie Wakefield, Yvonnee Terry-McElrath, Sherry Emery, Henry Saffer, Frank J. Chaloupka, Glen Szczypka, Brian Flay, Patrick M. O’Malley & Lloyd D. Johnston, *Effects of Televised, Tobacco Company-Funded Smoking Prevention Advertising on Youth Smoking-Related Beliefs, Intentions, and Behavior*, 96 Am. J. Pub. Health 2154 (2006).

30. *Id.* at 2156.

31. See, e.g., Donna Leinwand, *Anti-Drug Advertising Campaign a Failure*, GAO Report Says; *Drug Czar Disputes Results of Study*, USA TODAY, Aug. 29, 2006, at A5.

32. See, e.g., Parents. The Anti-Drug., <http://www.theantidrug.com> (last visited Apr. 18, 2007). Most recently, full-page advertisements with the “Parents. The Anti-Drug.” logo ran in the New York Times, USA TODAY, and the N.Y. Daily News. Advertisement, *Parents. The Anti-Drug.*, N.Y. TIMES, Mar. 26, 2007, at A7; Advertisement, *Parents. The Anti-Drug.*, N.Y. TIMES, Apr. 2, 2007, at A5; Advertisement, *Parents. The Anti-Drug.*, USA TODAY, Apr. 2, 2007, at 5A; Advertisement, *Parents. The Anti-Drug.*, USA TODAY, Mar. 26, 2007, at 10A; Advertisement, *Parents. The Anti-Drug.*, N.Y. DAILY NEWS, Mar. 26, 2007, at 13; Advertisement, *Parents. The Anti-Drug.*, N.Y. DAILY NEWS, Mar. 31, 2007, at 30.

University “[o]ne third of teens and nearly half of seventeen year olds attend house parties where parents are present and teens are drinking, smoking marijuana, or using cocaine.” Furthermore, while “80% of parents believe that neither alcohol nor marijuana is usually available at parties their teens attend, 50% of teen partygoers attend parties where alcohol, drugs or both are available.”³³ Why do the courts think parents will be significantly more effective when it comes to monitoring their children’s use of the Internet to prevent exposure to pornography?

The explosion of Internet pornography, beginning in the mid-90s, and the efforts to protect children from it have already generated a tremendous amount of publicity. Stories in print³⁴ and broadcast media³⁵ have promoted the use of screening technology. Books have been written promoting screening technology.³⁶ There have been public hearings.³⁷ Government agencies have promoted filtering technology.³⁸ Telecommunications companies, software companies, and Internet service providers (ISPs) have promoted filtering technology.³⁹ Schools have promoted filtering technology.⁴⁰ Non-profit

33. Press Release, Nat’l Ctr. on Addiction & Substance Abuse, CASA 2006 Teen Survey Reveals: Teen Parties Awash in Alcohol, Marijuana and Illegal Drugs—Even When Parents Present (Aug. 17, 2006), available at <http://www.casacolumbia.org/absolutenm/templates/PressReleases.aspx?articleid=451&zoneid=56>.

34. See, e.g., Doug Abrahams, *Disney Designs a Place for Children on the Internet*, WASH. TIMES, Dec. 2, 1997, at B7; Edward C. Baig, *Keeping Internet Predators at Bay*, USA TODAY, Jan. 29, 2003, at D5; Allyce Bess, *Cranky Consumer: Porn-Blocking Software for Kids*, WALL ST. J., July 23, 2002, at D2; Philip Elmer-DeWitt, Wendy Cole & Joshua Quittner, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38; Leonard Greene, *Kids’ Safety Net: Lawyer Tracks Online Creeps*, N.Y. POST, Sept. 15, 2002, at 19; Richard Jerome, Joanne Fowler, Devan Stuart, Joanne Blonska, *The Cyberporn Generation*, PEOPLE, Apr. 26, 2004, at 72; *Kids and the Net*, CHRISTIAN SCI. MONITOR, Dec. 8, 1997, at 16; Steven Levy & Brad Stone, *No Place for Kids?*, NEWSWEEK, July 3, 1995, at 46; L.A. Lorek, *Check Out Software, Books Before Sending Children Online*, SUN SENTINEL (Ft. Lauderdale), July 19, 1998, at F4; Howard Wolinsky, *Parents Have Options to Block Online Porn*, CHI. SUN-TIMES, June 16, 1996, at 16; Sara Woodard, *Out of Site, Out of Mind It’s 10 P.M. Do You Know What Your Kids Are Doing on the Internet?*, TIMES-PICAYUNE (New Orleans), Feb. 3, 1997, at C1.

35. *Today Show: For Kids, Danger Lurks a Click Away* (NBC television broadcast Feb. 1, 2005), available at www.msnbc.msn.com/id/6893488.

36. SUSAN CHAMBERS & ANNE MEYERS, WEB GUIDE TO ONLINE SAFETY FOR KIDS (2003); DONNA RICE HUGHES, KIDS ONLINE: PROTECTING YOUR CHILDREN IN CYBERSPACE (1998); JAMES R. ROBISON & CHRISTIAN OPHUS, WICKED WILD WEB (2000); FRANK YORK & JAN LARUE, PROTECTING YOUR CHILD IN AN X-RATED WORLD (2002).

37. See, e.g., YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at app. A (listing “information gathering sessions” of the relevant National Research Council Committee); COPA Comm’n, COPA Commission Meetings and Hearings List, <http://www.copacommission.com/meetings> (last visited Apr. 13, 2007). Congress established the COPA Commission when it enacted the Child Online Protection Act of 1998. See COPA Comm’n, FAQ on the COPA Commission, <http://www.copacommission.com/commission/faq.shtml> (last visited Apr. 13, 2007).

38. See, e.g., Child Exploitation and Obscenity Section, U.S. Dep’t of Justice, Parent’s Guide to Children’s Online Safety, <http://www.usdoj.gov/criminal/ceos/onlinesafety.html> (last visited Apr. 18, 2007).

39. See, e.g., Associated Press, *Internet Companies Supporting Filtering*, NEWSDAY, Oct. 24,

organizations have promoted filtering technology.⁴¹ Even the “adult entertainment industry” has promoted filtering technology.⁴²

Similarly, during the heyday of dial-a-porn (which first appeared in its commercial form in 1981), there was considerable publicity about phone smut⁴³ and about parental opportunities to block children’s access to it.⁴⁴ Presumably, therefore, to the extent that parents could block access to dial-a-porn services, children should have been protected. But as the Second Circuit observed in *Dial Information Services v. Thornburgh*⁴⁵ a decade after dial-a-porn got its start:

It seems to us that voluntary blocking would not even come close to eliminating as much access of children to dial-a-porn . . . as would the pre-subscription requirement Blocking has been available for over two years in the New York area, but only four percent of the 4.6 million residential telephone lines in the area having access to the 970 prefix assigned by the telephone company for adult messages have been blocked Even if voluntary blocking is assumed to be the least restrictive means . . . it is clearly not an effective means.⁴⁶

Echoing this logic, in *Information Providers Coalition for Defense of the*

2001; *Net Nanny and Microsoft Co-Sponsor Internet Seminar for Educators*, BUS. WIRE, May 13, 1998; *SearchHelp Supports Americares*, BUS. WIRE, Jan. 14, 2005; ICRA—Part of the Family Online Safety Institute, www.icra.org (last visited Apr. 18, 2007). See also *GetNetWise*, *GetNetWise Supporters*, <http://www.getnetwise.org> (last visited Apr. 18, 2007).

40. See, e.g., i-Safe, Inc., <http://www.isafe.org> (last visited Apr. 18, 2007). The Congressionally funded i-Safe, Inc. conducts programs in schools nationwide. *Id.*

41. See, e.g., Common Sense Media, <http://www.common sense media.org> (last visited Apr. 18, 2007); Filter Review Home Page, <http://www.filterreview.com> (last visited Apr. 18, 2007); Net Family News, Kid Tech News for Parents, <http://www.netfamilynews.org> (last visited Apr. 18, 2007); NetSafeKids Home Page, <http://www.netsafekids.org> (last visited Apr. 18, 2007); NetSmartz.org, <http://www.netsmartz.org> (last visited Apr. 18, 2007); ObsenityCrimes.org, Help for Parents, <http://www.obsenitycrimes.org/helpparents.cfm> (last visited Apr. 18, 2007); Protect Kids.org, Parental Controls & Internet Child Safety, <http://www.protectkids.org> (last visited Apr. 18, 2007).

42. See Links for Parents, www.rtalabel.org/parents.php (last visited September 18, 2007).

43. See, e.g., ROBERT W. PETERS, MORALITY IN MEDIA, DIAL-A-PORN AND CELL PHONE PORN: HOW THEY COMPARE, HOW THEY DIFFER, HOW WE CAN PROTECT CHILDREN AND SOCIETY FROM BOTH (2005), <http://www.obsenitycrimes.org/DialandCellPorn.cfm>.

44. See, e.g., *Hanging up on Porn*, N.Y. DAILY NEWS, Apr. 4, 1988, at 28. (“The State Public Service Commission has given New York Telephone a go-ahead to make dial-a-porn messages less accessible to children. . . . Pre-recorded pornographic messages are on two exchanges now. . . . The plan is to group all of them on 970. Then parents can block access to 970 on their home phones”); *No Lines Forming For Call Blocking*, NEWSDAY, May 9, 1988, at Bus. 5 (“The fuss and fury that accompanied the availability of call blocking in other parts of the country is not happening here Since . . . New York Telephone began advising customers that they could block calls . . . only a relative few have asked for the service.”); R.B. Plunkett, Jr., *Porn Free Is Calling*, N.Y. DAILY NEWS, Oct. 19, 1987, at 24 (“By early next year New York Telephone will be able to offer customers the ability to screen Dial-a-Porn . . . from home telephones. Whether the service will be used is another question.”).

45. 938 F.2d 1535 (2d Cir. 1991).

46. *Id.* at 1542.

First Amendment v. Federal Communication Commission,⁴⁷ the Ninth Circuit said:

[T]he Coalition . . . urged the Commission to conclude that dial-a-porn providers should not be prosecuted . . . if they operated in areas where telephone subscribers may ask local carriers to block calls from their homes

The Commission concluded that blocking alone would be insufficient to achieve realistically the goal of the statute: the protection of children The Commission noted that only a small number of phones were likely to be blocked through the central office system

We are satisfied that substantial evidence supports this finding⁴⁸

Similarly, despite considerable publicity surrounding the “V-Chip,” a Kaiser Family Foundation survey in 2004 found that only 15% of all parents had used the V-Chip and only 42% of those who reported that they had a V-Chip equipped television said they had used it.⁴⁹ A July 24, 2001 Kaiser Family Foundation release reported that “despite high levels of concern about children’s exposure to TV sex and violence,” only 7% of all parents were using it, and just 36% of parents who knew they had a V-Chip equipped television had used it.⁵⁰

Parental use of screening technology on computers under their control is, of course, *an important part* of the solution—especially for younger children. But it will never adequately protect children from pornography on the Internet.

In the first place, as children get older they have opportunities outside the home to access the Internet. A 2005 study of youth ages 10 to 17 conducted by researchers at the University of New Hampshire Crimes against Children Research Center found that youth spent time on the Internet in the past year at a friend’s home,⁵¹ at school,⁵² on a cell phone⁵³ and at other places.⁵⁴ The same study found that while most (79%) *unwanted* exposures to sexual pictures while online happened when the youth were at home, 9% happened at school, 5%

47. 928 F.2d 866 (9th Cir. 1991).

48. *Id.* at 872–73.

49. HENRY J. KAISER FAMILY FOUNDATION, PARENTS, MEDIA AND PUBLIC POLICY, 7 (2004).

50. Press Release, Henry J. Kaiser Family Foundation, Few Parents Use V-Chip to Block TV Sex and Violence, but More Than Half Use TV Ratings to Pick What Kids Can Watch (July 24, 2001), *available at* <http://www.kff.org/entmedia/3158-V-Chip-release.cfm>.

51. JANIS WOLAK, KIMBERLY MITCHELL & DAVID FINKELHOR, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 12 (2006) (showing that 69% of Internet users ages 10 to 17 said they had accessed the Internet at a friend’s home).

52. *Id.* (showing that 90% of Internet users ages 10 to 17 said they had accessed the Internet from school). *See also*, Jessica Vascellaro, *Saying No to School Computers*, WALL ST. J., Aug. 31, 2006, at D1 (“Some of those cases [of students violating the school’s acceptable-use policy] involved students using school computers to search for pornography.”).

53. *Id.* (showing that 17% of Internet users ages 10 to 17 said they had accessed the Internet from a cellular phone).

54. *Id.* (43% of Internet users ages 10 to 17 said they had accessed the Internet from a library or other place).

occurred at a friend's home, and 5% appeared on the screen at a library or some other place.⁵⁵ With mobile devices that provide access to the Internet growing in popularity,⁵⁶ children can be expected to spend even more time accessing the Internet outside the home.

Additionally, tech-savvy children can circumvent screening technology,⁵⁷ and no filtering technology blocks *all* pornography.⁵⁸ Nor is it likely that anyone in the foreseeable future will create a filter that cannot be circumvented and that blocks all pornography.

Equally important, many parents do not utilize any technology that filters or monitors their children's access to Internet websites.⁵⁹ Possible reasons for the lack of widespread filter use include the cost and difficulty of installing and using filtering technology;⁶⁰ parental concerns about over-blocking;⁶¹ parental

55. *Id.* at 36.

56. Dionne Searcey, *Keeping Junior On a Wireless Leash: Parents Gain More Options To Limit Kids' Cellphone Use; AT&T Raises Bar on Controls*, WALL ST. J., Sept. 4, 2007, at D1 ("Boston-based research firm the Yankee Group estimates that 72% of children ages 13 to 17 have a cellphone now. Analysts expect that more than 10.5 million kids ages 8 to 12 will carry a cellphone by the end of the decade.").

57. *See, e.g.*, Alina Tugend, *Tools to Keep the Web Safe for Children*, N.Y. TIMES, Apr. 14, 2007, at C5 ("Neil Rubenking, lead analyst for operating systems and security for PC Magazine, reviews filtering and monitoring software. . . [A] tech-savvy child who is determined to get around a block will always find a way to do it, he said. 'They'll find another place if your home is totally locked down.'"); MARIBEL D. LOPEZ, FORRESTER RESEARCH, INC., ONE IN FOUR TEENS BREACHES PARENTAL CONTROLS 3 (2006) (Of teens ages 13 to 18 who know that their parents or guardians "put parental controls or restrictions on the computer you use most often," 28% said they "find ways to get around or override these controls."); Marilyn Elias, *Survey Paints Different Portrait of Online Abuser*, USA TODAY, Aug. 2, 2004, at D8 (quoting psychologist Kimberly Mitchell of the Crimes Against Children Research Center noting that "filtering software can protect teens too, but many know how to bypass the programs"); Luis Cabrera, *Web Filter Buster*, ASSOCIATED PRESS, June 17, 2002 ("Internet activist Bennett Haselton has made a name for himself by helping minors disable filtering programs designed to block Web sites that their parents deem . . . pornographic.").

58. ConsumerReports.org, *Filtering Software: Better, But Still Fallible*, <http://www.consumerreports.org/cro/electronics-computers/internet-filtering-software-605/overview/> (last visited Nov. 1, 2006); Michelle Roberts, *AT&T Sells Parental Cell Phone Controls*, ASSOCIATED PRESS, Sept. 4, 2007 ("The AT&T service also allows filtering of Web sites parents don't want their children accessing from their phones, but that function will not work on Apple, Inc.'s iPhone. . . The Web site filter will also be inoperable when a phone is using a Wi-Fi network. . .").

59. AM. ONLINE & THE NAT'L CYBER SEC. ALLIANCE (2005) (while 33% of those who responded to the survey said they had one or more children under the age of 18 living in the home, only 8% were currently using filtering/blocking software on their computer); LOPEZ, *supra* note 57, at 3 (Just 32% of parents say they use "parental controls on the computer you use most often"); LIFE PROJECT, *PROTECTING TEENS ONLINE 7* (2005) (showing that only 54% of Internet connected families now use some sort of filter or monitoring software); NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN & COX COMM'NS, *PARENTS' INTERNET MONITORING STUDY* (2005) (49% of parents either do not have, or do not know if they have, software that blocks specific websites or key words); WOLAK, MITCHELL & FINKELHOR, *supra* note 51, at 46 (noting that only 55% of parents and guardians with home Internet access said they had filtering, blocking, or monitoring software currently installed on the computers used by their children).

60. Jessica E. Vascellaro & Anjali Athavaley, *Foley Scandal Turns Parents Into Web Sleuths*, WALL ST. J., Oct. 18, 2006, at D1 ("Despite the warnings, experts say parents are relatively complacent—in part because they are intimidated by the software involved. . ."). *See*

belief that use of filter technology “is censorship,”⁶² parental language barriers,⁶³ parental fear of negatively affecting their relationship with their children,⁶⁴ parental naiveté (as in, “My child wouldn’t be interested in that”),⁶⁵ and neglect.⁶⁶

When you stop and think about it, between 1996 (when Congress first enacted the CDA to protect children from Internet pornography) and the present, we have had a great opportunity to determine whether parental use of screening technology really works. During that period there was a great deal of publicity about children accessing Internet pornography and the availability of filtering technology. At the same time, no state or federal laws restricting children’s access to Internet porn have been upheld or enforced, except for the Children’s Internet Protection Act (CIPA)—a law requiring public libraries receiving federal funds to install filtering technology.⁶⁷

also DEP’T OF COMMERCE, NTIA, REPORT TO CONGRESS: STUDY OF TECHNOLOGY PROTECTION MEASURES IN SECTION 1703, at 27 (2003), available at <http://www.ntia.doc.gov/ntiahome/ntiageneral/cipa2003> (“The majority of comments from educational institutions noted that some educators often lack the training necessary to use fully the available technology tools. For example, although CIPA includes several provisions giving adults the authority to override technology for certain . . . research, some educators often do not know how to disable the technology.”); Edwin Garcia, *Shielding Kids From Online Sex Predators*, MERCURY NEWS (Sacramento), Mar. 28, 2006, at 1A (“Software filters can help . . . but only a ‘relatively small percentage’ of parents use them—in some cases because they lack the knowledge to install them.”).

61. Cf., MARJORIE HEINS, CHRISTINA CHO & ARIEL FELDMAN, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCH. OF LAW, INTERNET FILTERS: A PUBLIC POLICY REPORT (2d ed. 2006) (discussing the problem of over-blocking), available at <http://www.fepproject.org/policyreports/filters2.pdf>.

62. Cf., Tugend, *supra* note 57, at C5 (“although most of the opposition to blocking software is aimed at its use in public spaces. . . some critics object in general to the technology. . . it is censorship, plain and simple. . .”).

63. Nina Bernstein, *Proficiency in English Decreases Over a Decade*, N.Y. TIMES, Jan. 19, 2005, at B1 (“The number of New York adults who have a problem speaking English increased by more than 30% between 1990 and 2000, to more than 1.5 million throughout the city . . .”); Andrew Friedman, *Do Schools Need Translators?*, N.Y. DAILY NEWS, Mar. 20, 2005, at 44 (“Fully 25% of New York City parents do not speak English, according to the 2000 Census, but the Education Department has failed to provide translation services necessary to ensure that these parents partner with their children’s school . . .”).

64. Kimberly J. Mitchell, David Finkelhor & Janice Wolak, *The Exposure of Youth to Unwanted Sexual Material on the Internet: A National Survey of Risk, Impact, and Prevention*, 34 YOUTH & SOC’Y 330, 354 (2003) (“Another problem identified by the survey is the relatively low level of filtering and blocking software adoption . . . [I]n particular, parents may feel that imposing such software would negatively affect their relationship with their teenage children.”).

65. David Batty, *Half of Young People View Web Porn*, SOCIETYGUARDIAN.CO.UK, July 21, 2004, <http://society.guardian.co.uk/children/story/0,,1265858,00.html> (“[T]he proportion of nine to 19-year-olds who reported seeing pornography online (57%) is nearly four times greater than their parents believe. Only 16% of parents think their children have seen it.”).

66. Cf., Mike Males, *This Is Your (Father’s) Brain on Drugs*, N.Y. TIMES, Sept. 17, 2007, at A19 (“Our most reliable measures show Americans ages 35 to 54 are suffering ballooning crises: . . . More than 4 million arrests. . . 21 million binge drinkers . . . 370,000 people treated in hospital emergency rooms for abusing illegal drugs . . .”).

67. Children’s Internet Protection Act of 2000 (CIPA), 20 U.S.C. § 9134(f) (2000); 47 U.S.C. § 254(h)(6) (2000), upheld by *U.S. v. Am. Library Ass’n, Inc.*, 539 U.S. 194 (2003). CIPA

Thankfully, between 2000-2005 the percentage of parents who said they utilized filtering or monitoring software on the computer their child used did rise from 33% to 55%.⁶⁸ However, the percentage of Internet users ages 10 to 17 who were exposed to unwanted pornography in the previous year also increased from 25% in 2000 to 34% in 2005;⁶⁹ and 13% of these youthful Internet users said they had “gone to an X-rated site on purpose in the past year,” compared to 8% in 2000.⁷⁰ According to the authors of this study, one “key” reason for the increase was the rise in number of youth who had Internet access in three or more places.⁷¹

Other surveys also indicate that a large number of children have been exposed to Internet pornography:

- A survey conducted in 2004 by the National Center on Addiction and Substance Abuse found that 45% of teens have friends who regularly view and download pornography from the Internet.⁷²
- A recent study conducted by the University of Alberta also found that 74% of students aged 13-14 in Alberta, Canada reported viewing pornography on the Internet.⁷³
- According to a December 2001 Kaiser Family Foundation study, 70% of teens ages 15 to 17 had “accidentally come across” pornography while on the Internet.⁷⁴
- According to Nielsen/Net Ratings for February 2002, nearly 16% of visitors to “adult” websites were younger than 18 years of age. One source in the “adult entertainment industry” reported that traffic sent to some “adult” websites is 20 to 30%

withholds federal assistance from public libraries that do not install blocking and filtering software.

68. WOLAK, MITCHELL & FINKELHOR, *supra* note 51, at 46. According to a study by America Online and the National Cyber Security Alliance, however, while 33% said they had one or more children under the age of 18 living in the home, only 8% were “currently” using “any parental control software” on their computer. This is less than one-quarter of respondents with children at home. AOL/NCSA Online Safety Study, 9 (2005), *available at* www.staysafeonline.info/pdf/safety_study_2005.pdf.

69. WOLAK, MITCHELL & FINKELHOR, *supra* note 51, at 8. This same study also found that 79% of unwanted exposure occurred while the youth were at home. *Id.* at 36. In the 2000 study, only 67% of unwanted exposure occurred while the youth were at home. Mitchell, Finkelhor & Wolak, *supra* note 64, at 341.

70. *Id.* at 51.

71. *Id.* at 9–10 (noting that there was a 45% increase in access to the Internet from three or more sites).

72. NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE IX: TEEN DATING PRACTICES AND SEXUAL ACTIVITY 6 (2004).

73. Bev Betkowski, *Rural teen boys most likely to access pornography, study shows*, Faculty News, University of Alberta, Feb. 23, 2007, *available at* <http://www.afhe.ualberta.ca/Index.asp?page=News&news=952>.

74. Press Release, Henry J. Kaiser Family Found., Generation Rx.com (Dec. 11, 2001).

children⁷⁵

- According to a 2002 Girl Scout Research Institute survey, “most girls (ages 13 to 18) say they can get around parents’ rules . . . Nearly half say they’re able to . . . get into a porn site (42%).”⁷⁶

Furthermore, it is not just teens who are accessing Internet porn. In April 2006, a mother sent an email to Morality in Media complaining about a hardcore pornographic commercial website accessed by her young children. She wrote:

I have just filed a report on your [www.obscuritycrimes.org] website about a URL that has many parents in my community very upset [website name omitted here]. Information about this website has been shared on the playground, at ball games and in the classroom with children as young as 6 years old. My two sons are included . . . I could not believe the blatant content, which did not require a credit card to access. I am furious. My sons saw this site at a friend’s house whose parents did not have parental controls set up . . .⁷⁷

A trained investigator followed up on her complaint and provided a detailed description of what he observed on the website. His five-page report includes a description of what any child can also view, free of charge and without proof of age:

In the upper left corner of the page was a color cartoon of a blonde white female with naked breasts. Below this cartoon were approximately twenty-eight pornography site categories that included the printed words, “Amateur,” “Anal Sex,” “Anime & Cartoon,” “Asian,” “BSBD & Fetish,” “BBW,” “Big Cocks,” “Bisexual,” “Boobs,” “Celebs,” “Ebony,” “Foot Fetish,” “Gay,” “Group Sex,” “Hardcore,” “Interracial Sex,” “Latina,” “Lesbian,” “Lingerie & Bikini,” “Mature MILFs,” “Porn Movies,” “Pornstars,” “Reality Porn Sites,” “Single Models,” “Teens,” “Transexuals,” and “Web Cams.” Near the bottom of the page were nine sexually oriented color photographs including a photograph depicting a naked brown skin female (shown from the breasts up) as she gripped her left breast with her left hand. This female was also depicted with the end of a white male’s erect penis touching her right breast A second photograph

75. NAT’L RESEARCH COUNCIL, YOUTH, PORNOGRAPHY, AND THE INTERNET 78 (Dick Thornburgh & Herbert S. Lin eds., 2002), available at http://bob.nap.edu/html/youth_internet/ch3.html.

76. Karen Thomas, *Teen Girls Know Way Around the Net, Their Parents*, USA TODAY, Feb. 13, 2002, at B13. According to an article about the same study published in the *New York Daily News*, “the girls report they also get unsolicited e-mails with porn links and often accidentally go to porn sites when looking for legitimate teen sites.”

76. Michelle Megna, *Safety Net: How to Protect Teenage Girls From Online Harassment*, N.Y. DAILY NEWS, Mar. 3, 2002, at 6.

77. Email on file with author.

depicted a naked white female (shown from the waist up) while engaged in oral/penile sex on a white male's erect penis. She was also depicted gripping the penis with her left hand A third photograph depicted a naked white male in a standing position as a naked white female (shown from the waist up) engaged in oral/penile sex on his erect penis To the right of these photographs were ten pornography site titles under the heading, "Top 10 Porn Sites."⁷⁸

Such exposure to pornography is not harmless. First, children are harmed when they learn the wrong things about sex and relationships from viewing pornography—most of which depicts adulterous, degrading, high-risk, illegal, perverse, promiscuous, or violent sexual behaviors.⁷⁹ Second, children are harmed when their addiction to pornography robs them of the opportunity to develop in a healthy manner psychologically and morally.⁸⁰ Third, children are harmed when sexually abused by other children who have imitated sexual behaviors that they viewed in pornography.⁸¹ Fourth, children are harmed when sexually abused by adults who use pornography to desensitize, instruct, and sexually arouse their child victims.⁸²

III.

HOW COPA CAN HELP PROTECT CHILDREN

Given the weaknesses apparent in a policy consisting exclusively of parental monitoring and filtering, let us consider whether the legislative measure Congress has imposed will *help* protect children from exposure to pornography

78. Report on file with author.

79. See, e.g., *Hearing on The Science Behind Pornography Addiction Before S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (2004) (testimony of Mary Anne Layden, Ph.D.), available at http://commerce.senate.gov/hearings/testimony.cfm?id=1343&wit_id=3912 ("Pornography, by its very nature, is an equal opportunity toxin It is toxic mis-education about sex and relationships. It is more toxic the more you consume, the 'harder' variety you consume, and the younger and more vulnerable the consumer.").

80. Cf. Victor B. Cline, *Effect of Pornography on Adults and Children*, MORALITYINMEDIA, 2001, <http://www.moralityinmedia.org/pornsEffects/clineart.htm> ("I have had boys in their early teens getting into this wasteland with really disastrous consequences. They told me they actively search for porn on the Internet [T]hey go back again and again, just like drug addicts."); Susan Gilbert, *A Conversation with Lynn Ponton: An Expert's Eye on Teenage Sex, Risk & Abuse*, N.Y. TIMES, Jan. 15, 2002, at F6 ("I see boys who are addicted to sex on the Internet [I]t affects those boys' sexual lives.").

81. See, e.g., Tom Sheehan, *Young Rape Offenders on Rise*, COLUMBUS DISPATCH (Ohio), July 12, 2006, at 1E (quoting assistant county prosecutor Melinda Seeds stating that she "thinks easy access to pornography through the Internet and elsewhere is a factor in the number of youthful offenders."); Patrick Goodenough, *Online Porn Driving Sexually Aggressive Children*, CNSNEWS.COM, Nov. 11, 2003, <http://www.cnsnews.com> (search for "Online Porn").

82. Cf. KENNETH LANNING, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, *CHILD MOLESTERS: A BEHAVIORAL ANALYSIS* 57 (2001) ("Adult pornography is frequently left out for the children to 'discover.' A collection of adult pornography is effective in sexually arousing and lowering the inhibitions of adolescent boys.").

on the Internet. In *ACLU v. Gonzales*,⁸³ the district court concluded that COPA is “underinclusive” because a “significant amount of sexually explicit material on the Internet . . . originates from outside of the United States.”⁸⁴

COPA, however, clearly applies to U.S.-based pornographers; and California’s San Fernando Valley is still the “capital of the porn world.”⁸⁵ Likely, much, if not most, of the pornography that children are exposed to in the United States is produced here, even though some of it is first “re-routed” through other countries.⁸⁶ U.S.-based pornographers also have affiliation agreements with foreign-based Web sites.⁸⁷ Moreover, children in the U.S. are more likely to learn about Web sites based in the U.S., in part because they read about, hear about, and view prominent U.S. pornography producers and performers in the news and entertainment media. American children are also more likely to come across advertisements for U.S.-based websites (e.g., on cable or satellite TV, on palm cards, and in publications distributed in street vending machines). Searches using the English language also omit the many foreign-based pornography sites that use other languages.

COPA also has value as a statement of cultural ethics. Law is a teacher and even if only Web sites based in the United States were blocked, youth would learn that in the U.S., adults think it is wrong or hurtful for youth to look at pornography. This legislation might have the added benefit of spurring other countries to follow suit.⁸⁸

In *ACLU v. Gonzales*, the district court also concluded that the affirmative defenses in COPA “[d]o [n]ot [a]id in [n]arrowly [t]ailoring [i]t to Congress’ [c]ompelling [i]nterest” for the reason that “credit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age.”⁸⁹ However, to the extent that COPA discourages pornographers from

83. 478 F.Supp.2d 775 (E.D. Pa. 2007).

84. *Id.* at 810.

85. See, e.g., Martin Bashir, *Porn in Hi-Definition: Too Much Detail?*, NIGHTLINE, (ABC television broadcast Feb. 27, 2007), available at <http://www.abcnews.go.com/Nightline/story?id=2854981&page=1>.

86. In 2005, U.S. citizens were indicted in Phoenix on obscenity and other charges for running an “international” porn spam operation. The Department of Justice stated that the emails were sent “from Internet Protocol addresses registered in the Netherlands and domain names registered in Mauritius” to make it more difficult to identify the senders. Press Release, Dept. of Justice, Three Defendants Indicted, Fourth Pleads Guilty In Takedown Of Major International Spam Operation (Aug. 25, 2005), available at http://www.usdoj.gov/opa/pr/2005/August/05_crm_431.htm

87. See e.g., adameve.com affiliate program, at <http://adamevecash.com/Default.aspx>. Adam & Eve’s affiliate program accepts affiliates from most foreign countries. See Affiliate Signup, at <https://adamevecash.com/WebModules/SignUp.aspx> (excluding certain countries because of the prevalence of fraudulent activity). This particular affiliate agreement does require that, “any depiction of actual sexual conduct should be viewed only following a user passing through age verification.” <http://adamevecash.com/WebModules/TandC.aspx>.

88. Presumably, if COPA is upheld, Congress will also resume its attempts to enact needed laws to help shield children from pornography in other Internet modalities.

89. 478 F.Supp.2d at 811.

displaying material harmful to minors as a free teaser, either on the home page or via a click of the mouse,⁹⁰ any age verification system (even a system that cannot accurately determine a customer's age) would help prevent *unintended* exposure to pornography when children surf the web.⁹¹ Furthermore, younger children would be less likely to take steps to circumvent any type of age verification.⁹² Requiring use of a credit or debit card would also help reduce younger children's access to Internet pornography since most young children do not have a traditional payment card.⁹³ Congress or the States could also prohibit the sale of unrestricted pre-payment cards to minors. Even if a child has a credit or debit card she might be wary of using it to pay for porn, since at least some parents check their children's payment records.

Furthermore, just because a particular form of "age verification" can be circumvented does not mean it will not deter children. Presumably, the mere fact that circumvention requires thought and time will deter at least some children, and at least some other children will be deterred because they do not want to be dishonest.

IV.

THE APPROPRIATE STANDARD OF REVIEW

In *Ginsberg v. New York*,⁹⁴ the Supreme Court upheld a New York State law that made it a crime to sell or loan to a minor material deemed "harmful to minors."⁹⁵ In so holding, the Court stated:

First of all, constitutional interpretation has consistently recognized 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 The

90. See *supra* text accompanying note 18.

91. WOLAK, MITCHELL & FINKELHOR, *supra* note 51, at 9 (83% of incidents of unwanted exposure to sexual material on the Internet happened while youth were "surfing the web.").

92. According to 2001 survey, "Overall, 15% of online teens say they have lied about their age to gain access to a Web site—an action that is often required in gaining access to pornographic sites. . . . Teens with several years of Internet experience are more likely than newcomers to have lied about their age to gain access to a Web site." AMANDA LENHART, Lee Rainee & Oliver Lewis, PEW INTERNET & AM. LIFE PROJECT, TEENAGE LIFE ONLINE 33 (2001), available at http://www.pewinternet.org/pdfs/PIP_Teens_Report.pdf.

93. 478 F. Supp. 2d at 801 (noting that a significantly larger proportion of sixteen-year-olds have access to such payment cards than do twelve-year-olds).

94. 390 U.S. 629 (1968).

95. N.Y. PENAL LAW §§ 235.20 (McKinney 2007):

"Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it: (a) Considered as a whole, appeals to the prurient interest in sex of minors, and (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (c) Considered as a whole, lacks serious literary, artistic, political, and scientific value for minors."

Id. § 235.20(6)(a)–(c). The language of COPA tracks that of the New York statute. See 47 U.S.C. § 231(e)(6) (2000).

legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility⁹⁶

The Court further noted that:

The State also has an independent interest in the well-being of its youth “While the supervision of children’s reading habits may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society’s transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.”⁹⁷

In upholding the New York “harmful to minors” law, the Supreme Court in *Ginsberg v. New York* applied a “rational basis” test;⁹⁸ and to my knowledge, *Ginsberg* has not been overruled. If *Ginsberg* has not been overruled, then COPA is constitutional because COPA furthers the government’s interest in both aiding parents in the “discharge” of their authority (for the reasons that no filter blocks all pornography, technology can be circumvented, and children can access computers outside the home) and furthering the government’s “independent interest in the well-being of its youth” (because many parents won’t use filters no matter what Congress does).

In *Ashcroft v. ACLU*, however, the Court applied “strict scrutiny”,⁹⁹ and as I see it, there are three problems with the application of this standard in the COPA case. First, it is disingenuous for the Supreme Court to say that harmful to minors content is unprotected speech for minors¹⁰⁰ and that the government has a compelling interest in protecting children against such content¹⁰¹ and later to say, as it did in the *Playboy* case,¹⁰² that “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.”¹⁰³ The word “compel,” as defined in *Webster’s New Colligiate Dictionary*, means: “1 to drive or urge forcefully or irresistibly 2 to cause to do or occur by overwhelming pressure.”¹⁰⁴

96. 390 U.S. at 639.

97. *Id.* at 640 (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. 1965)).

98. *Id.* at 641–43.

99. 542 U.S. 656, 670 (2004).

100. *Ginsberg*, 390 U.S. at 636–37 (“It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York . . . to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.”).

101. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.”).

102. *Playboy Entm’t Group v. United States*, 529 U.S. 803 (2000) (overturning a federal law that required cable TV operators to either *completely* scramble the signals for pay pornography channels, so that the signals wouldn’t “bleed” into TV sets of non-subscribers, or air imperfectly scrambled signals only between 10 p.m. and 6 a.m.).

103. *Id.* at 818.

104. WEBSTER’S NEW COLLIEIGATE DICTIONARY, 227, (1981).

If a governmental interest is truly “compelling,” then other interests (including those grounded in the First Amendment) must yield, at least to some extent. But judging from the *Playboy* and *Ashcroft v. ACLU* decisions,¹⁰⁵ rarely will a law intended to protect children from pornography disseminated electronically withstand “rigorous scrutiny.”¹⁰⁶ As a result of the Court’s application of “strict scrutiny” to laws intended to protect children from content that is harmful to minors and unprotected by the First Amendment *for minors*, sexual materials that not too many decades ago could have been banned for adults,¹⁰⁷ can no longer be regulated to protect minors. Surely, our nation’s founding fathers never intended such an absurd and hurtful result.

Second, there is or certainly ought to be a difference between a law that is intended to ban or restrict adult access to content that is presumptively protected for adults,¹⁰⁸ and a law that only incidentally burdens adult access to such speech when the law’s primary intention is to shield children from content that is harmful to children and to which their access is not protected. For the latter type of law, the appropriate level of scrutiny should be “intermediate” scrutiny, which the Court has applied in evaluating restrictions on so-called “adult entertainment” businesses.¹⁰⁹

In *Nortown Theatre, Inc. v. Gribbs*,¹¹⁰ the U.S. District Court for the Eastern District of Michigan upheld a Detroit “Anti-Skid Row” zoning ordinance that prohibited operation of any “adult” movie theater, bookstore and similar establishments within one thousand feet of any other such establishment, or within five hundred feet of a residential area. The District Court reasoned:

105. The Court’s decision in *Ashcroft v. ACLU* clearly rests on its earlier *Playboy* decision: COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote the use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties. The closest precedent on the general point is our decision in *Playboy Entertainment Group v. Playboy Entertainment Group*, like this case, involved a content-based restriction designed to protect minors from viewing harmful materials.

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

106. I would add here that the courts did not apply “strict scrutiny” when evaluating the constitutionality of laws that restricted the display of harmful to minors material in retail stores and other public places. See, e.g., *American Booksellers v. Webb*, 919 F.2d 1493, 1500–01 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991) (“We are content to note that (1) content-based restrictions on speech survive constitutional scrutiny only under extraordinary circumstances; but (2) material judged ‘obscene’ under the appropriate constitutional standard is not protected by the First Amendment; (3) indirect burdens placed on protected speech in an effort to regulate obscenity must be supported by important state interests and should not be unnecessarily burdensome; and (4) the state’s interest in protecting its youth justifies a limited burden on free expression.”).

107. Under the test enunciated in *Roth v. United States*, 354 U.S. 476, 487 (1957), material is obscene if it “deals with sex in a manner appealing to prurient interest.”

108. See, e.g., *Boos v. Barry*, 485 U.S. 312 (1988) (applying strict scrutiny and holding unconstitutional a statute limiting political speech in front of embassies).

109. See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 442 (2002). See also *id.* at 447 (Kennedy, J., concurring).

110. 373 F. Supp. 363 (E.D. Mich. 1974).

[T]he Court [may not] substitute its judgment for that of the Common Council of the City of Detroit as to the methods adopted to deal with the City's legitimate concern to preserve neighborhoods, so long as there is some rational relationship between the objective of the Ordinance and the methods adopted.¹¹¹

The Court of Appeals reversed,¹¹² subjecting the ordinances to "close scrutiny"¹¹³ and stating that, while Detroit had "demonstrated a compelling and legitimate interest"¹¹⁴ in preserving neighborhood values, "to be valid, a statutory classification that affects fundamental freedoms must be necessary . . . and not just rationally related to a valid public purpose."¹¹⁵ However, in *Young v. American Mini Theatres, Inc.*,¹¹⁶ the Supreme Court reversed the Court of Appeals on grounds that on their face ought to apply to COPA: "There is no claim that distributors or exhibitors of adult films are denied access to the market or . . . that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained."¹¹⁷ Justice Powell agreed, stating in his concurring opinion:

In this case, there is no indication that the application of the Anti-Skid Row Ordinance to adult theaters has the effect of suppressing production of or, to any significant degree, restricting access to adult movies Detroit has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view them.

. . . .

In these circumstances, . . . a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest."¹¹⁸

111. *Id.* at 367.

112. *Am. Mini Theatres, Inc. v. Gribbs*, 518 F.2d 1014 (6th Cir. 1975).

113. *Id.* at 1019.

114. *Id.* at 1018.

115. *Id.* at 1019.

116. 427 U.S. 50 (1976).

117. *Id.* at 62.

118. *Id.* at 77-80 (applying the four-part test set forth in *United States v. O'Brien*, 391 U.S. 367, 377(1968)). To justify the application of *O'Brien* to the present case, Powell reasons that while the "factual distinctions between . . . destruction of a Selective Service registration certificate . . . and this case are substantial . . . the essential weighing and balancing of competing interests are the same." *Id.* In his dissent in *Alameda Books*, Justice Souter, joined by Justice Stevens and Justice Ginsburg, also expressed the view that the test set forth in *United States v. O'Brien* is the appropriate test for evaluating zoning ordinances which regulate "adult" establishments. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 456 (2002) (Souter, J.,

In that part of his opinion in which only the Chief Justice, Justice White, and Justice Rehnquist joined, Justice Stevens wrote:

Even within the area of protected speech, a difference in content may require a different governmental response . . . More directly on point are opinions dealing with the question whether the First Amendment prohibits the State and Federal governments from wholly suppressing sexually oriented materials on the basis of their obscene character. In *Ginsberg v. New York* . . . the Court upheld a conviction for selling to a minor magazines which were concededly not ‘obscene’ if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution . . . of such materials to juveniles.¹¹⁹

Like the ordinance at issue in *American Mini Theatres*, COPA would affect expression protected for adults only incidentally, and would do so in furtherance of governmental interests wholly unrelated to the suppression of free expression. It would be an anomaly indeed if intermediate scrutiny were applied to an ordinance that regulates the places where “adult businesses” (which prohibit minors) can locate, for the purpose of preserving neighborhoods, while applying strict scrutiny to a law that regulates the manner in which sexually explicit content on the Internet is distributed, for the purpose of preventing children from viewing pornography.

In *Renton v. Playtime Theatres*,¹²⁰ the Court indicated that protecting children was a valid purpose of an “adult use” zoning ordinance.¹²¹ In upholding the ordinance, the *Renton* Court said that the City was “entitled to rely on the ‘detailed findings’ summarized [by] the Washington Supreme Court”¹²² in *Northend Cinema*¹²³ as follows:

In short, the goal of the City in amending its zoning code was to preserve the character and quality of residential life in its neighborhoods, as specifically found by the court below. A second and related goal, the court found, was to protect neighborhood children from increased safety hazards, and offensive and dehumanizing influence created by location of adult movie theaters in residential areas¹²⁴

The *Renton* Court also observed specifically, with apparent approval, that the trial court in the *Northend Cinema* case had “heard expert testimony on the

dissenting).

119. *Id.* at 66, 69 (citations omitted).

120. 475 U.S. 41 (1986).

121. *Id.* at 51. The ordinance at issue prohibited “adult theaters” from locating within one thousand feet of any residential zone, single- or multiple-family dwelling, church, park, or school.

122. *Id.*

123. *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153 (Wash. 1978).

124. *Id.* at 1155.

adverse effects of the presence of adult motion picture theaters on neighborhood children.”¹²⁵

In *City of Los Angeles v. Alameda Books, Inc.*,¹²⁶ the Supreme Court examined a law prohibiting “the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof.”¹²⁷ The Supreme Court denied summary judgment against the City, leaving the possibility that the law could withstand constitutional scrutiny. In his concurrence, Justice Kennedy stated:

Speech can produce tangible consequences. It can change minds. It can prompt actions Speech can also cause secondary effects, however, unrelated to the impact of the speech on its audience These secondary consequences are not always immune from regulation by zoning laws even though they are produced by speech.¹²⁸

Like the ordinance at issue in *Alameda Books*, COPA is not concerned about the “impact” of pornography on its intended audience, namely, adults. Rather, COPA is concerned about a “secondary consequence” of the availability of pornography—children’s exposure to pornography. COPA’s focus is not the pornography per se, but rather, the manner in which most sexually oriented web businesses are conducted and one damaging consequence of that.

A third problem with the Court’s application of “strict scrutiny” in *Ashcroft v. ACLU* is that when it comes to protecting children from Internet pornography, the government does not realistically have a choice between two or more means, each of which can “achieve”¹²⁹ or “accomplish”¹³⁰ the “legitimate purpose that the statute was enacted to serve.”¹³¹ In this respect the law at issue in *Ashcroft v. ACLU* is unlike that the law addressed in *Sable Communications of California, Inc. v. FCC*, which banned the making, by means of telephone facilities, of obscene or indecent communications for commercial purposes to any person under eighteen years of age.¹³² In invalidating this ban, the *Sable* Court emphasized the existence of a strong regulatory alternative to the total ban:

The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. The Court of Appeals, after careful consideration, agreed that

125. *Renton*, 475 U.S. at 51.

126. 535 U.S. 425 (2002).

127. *Id.* at 429.

128. *Id.* at 444.

129. *Sable Communications v. FCC*, 492 U.S. 115, at 129 (1989) (“to achieve the Government’s interest in protecting minors”).

130. *Ashcroft v. ACLU*, 542 U.S. at 673 (“to accomplish Congress’s goal”).

131. *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004).

132. 492 U.S. 115 (1989).

these rules represented a “feasible and effective” way to serve the Government’s compelling interest in protecting children.¹³³

Some societal problems, however, do not permit any feasible either-or choice to achieve the governmental purpose. For example, the problem of children using the Internet to make unauthorized copies of music or movies will not be solved *either* by enacting more laws to protect the “creative community,”¹³⁴ *or* by encouraging parents to teach their children right from wrong and monitor their children’s use of computers,¹³⁵ *or* by involving schools and community organizations in various efforts,¹³⁶ *or* by improving technologies to prevent copying.¹³⁷ To effectively curb “piracy,” all of the above will be needed; and according to a Harris Interactive online survey published in *USA Today*,¹³⁸ the effort is apparently paying off: The percentage of youth who reported downloading music without paying dropped from 53% in 2004 to 32% in 2006.¹³⁹ For movies, the drop was from 17% in 2004 to 10% in 2006.¹⁴⁰

Similarly, to protect children from online sexual exploitation, parental involvement,¹⁴¹ technology,¹⁴² schools,¹⁴³ nonprofit organizations,¹⁴⁴ and laws¹⁴⁵ are all needed.¹⁴⁶ Now, even Internet service providers, credit card companies, and banks are fully cooperating with this effort.¹⁴⁷ Given the

133. *Id.* at 128 (citations omitted).

134. Jube Shiver Jr., *Battle Stirs Over Copyright Laws*, L.A. TIMES, Apr. 15, 2002, at C7.

135. *See, e.g.*, Dennis K. Berman & Anna Wilde Mathews, *Is the Record Industry About to Bust Your Teenager?*, WALL ST. J., Jan. 28, 2003, at D1.

136. *See, e.g.*, Laura M. Holson, *Studios Moving to Block Piracy of Films Online*, N.Y. TIMES, Sept. 25, 2003, at A1.

137. *See, e.g.*, Amy Harmon, *Studios Using Digital Armor to Fight Piracy*, N.Y. TIMES, Jan. 5, 2003, at 1.

138. Harris Interactive, *Unauthorized Downloading Drops Among Kids*, INSIDE USA TODAY, Oct. 18, 2006, at 3, available at education.usatoday.com (follow “teaching guide archives” hyperlink; and then follow the hyperlink for Oct. 18, 2006).

139. *Id.*

140. *Id.*

141. Wendy Koch, *Kids Run, Shout, Fight—and Foil Abductions: Study Identifies How Parents Can Keep Their Children Safe*, USA TODAY, Sept. 6, 2006, at A3.

142. Vascellaro & Athavaley, *supra* note 60.

143. The Congressionally funded i-Safe, Inc. conducts programs in schools nationwide. *See* i-SAFE Inc., <http://www.isafe.org> (last visited May 16, 2007).

144. *See, e.g.*, ECPAT USA, <http://www.ecpatusa.org> (last visited May 16, 2007); Wired-Safety—The World’s Largest Internet Safety and Help Group, <http://www.wiredsafety.com> (last visited May 16, 2007).

145. Wendy Koch, *In Shadows of Net, War on Child Porn Rages*, USA TODAY, Oct. 17, 2006, at A13.

146. Sam Diaz, *A Multi-Front Battle Against Web Predators*, WASH. POST, Jul. 31, 2007, at D1 (“Those on the front lines of the fight against predators on the Web . . . say the battle is complex and will take a combination of education, high-tech security, old-fashioned investigative work, and cooperation among police, lawmakers, schools, parents, teens and the sites.”).

147. Press Release, Nat’l Ctr. for Missing & Exploited Children, Financial and Internet Industries to Combat Internet Child Pornography (Mar. 15, 2006), available at http://www.ncmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2314.

ubiquity of Internet porn, the Court in *Ashcroft v. ACLU* states correctly that COPA, standing alone, cannot completely protect children from Internet pornography because COPA does not apply to websites located overseas,¹⁴⁸ and because it does not apply to all forms of Internet communication.¹⁴⁹

But as Justice Breyer pointed out in his dissent, screening technology standing alone does not provide adequate protection either:

Filtering software, as presently available, does not solve the ‘child protection’ problem. It suffers from four serious inadequacies that prompted Congress to pass the legislation instead of relying on its voluntary use. First, its filtering is faulty, allowing some pornographic material to pass through without hindrance . . . Second, filtering costs money. Not every family has the \$40 to install it . . . Third, filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility. More than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents. Fourth, software blocking lacks precision, with the result that those who wish to use it to screen out pornography find that it blocks a great deal of material that is valuable . . . In sum, a “filtering software status quo” means filtering that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision.¹⁵⁰

Furthermore, if the United States does get serious about curbing material harmful to minors, it is likely that other nations will cooperate and address this problem within their own borders.¹⁵¹ The COPA Commission, a congressionally appointed panel, had this to say about the international dimension of the material harmful to minors problem:

The Internet’s global nature presents law enforcement with an additional concern, because a substantial amount of obscene material, child pornography, and harmful to minors material originates abroad.

148. 542 U.S. 656, 667 (2004).

149. *Id.* at 668. On this point, it should be remembered that the CDA did apply to all forms of communications on the Internet; and in *Reno v. ACLU*, 521 U.S. 844, 876–79 (1997), the Supreme Court found this to be problematic. *Id.* at 879.

150. *Ashcroft*, 542 U.S. at 684–686 (Breyer, J., dissenting).

151. See, e.g., YOUGOV OMNIBUS SURVEY RESULTS: THE SPECTATOR—SEXUAL ATTITUDES 7 (2006), available at http://www.yougov.com/archives/pdf/OMI060101031_1.pdf (finding that 71% of adults in Briton agree that “there should be greater restrictions on what sexual material is allowed on the internet today.”); Simon Hayes, *Porn filtering back on agenda*, AUSTRALIAN IT, Oct. 11, 2005 (“A Newspoll done for *The Australian* . . . found . . . eighty per cent of women and 59 per cent of men wanted tougher controls on porn A Newspoll done for the Australia Institute . . . found 93 per cent of parents wanted mandatory filtering.”).

While issues of extradition, need for legal assistance from foreign law enforcement, and conflict of law issues make prosecution difficult, these problems have been addressed previously in the narcotics, fraud, and intellectual property areas. U.S. leadership in this area may lead to models of international cooperation.¹⁵²

But if some nations refuse, does that mean that Congress should be prevented from doing what it can to address the problem? At this time less than half of the 184 Interpol member countries have laws addressing child pornography.¹⁵³ Even without international cooperation, if COPA is upheld, Congress can enact laws to address the international dimension of the Internet pornography problem.¹⁵⁴ COPA is one part of the necessary, legal solution; and as the district court below stated, “reform may take one step at a time, addressing itself to the phase of the problem that seems most acute to the legislative mind.”¹⁵⁵

In its report, *Youth, Pornography, and the Internet*, the National Academies’ National Research Council also emphasizes that there is no one solution to protecting kids, advocating a mix of social, technological, and public policy strategies.¹⁵⁶ The Council’s report states:

Technology solutions seem to offer quick and inexpensive fixes that allow the adult caregiver to believe that the problem has been addressed, and it is tempting to believe that the use of technology can drastically reduce or even eliminate the need for human supervision. Public policy approaches promise to eliminate sources of the problem.

....

[N]either technology nor public policy alone can provide a complete—or even a nearly complete—solution. As a rule, public policy aimed at eliminating sources of sexually explicit material can affect only indigenous domestic sources and a substantial fraction of such material originates overseas. Nor is technology a substitute for

152. COMMISSION ON ONLINE CHILD PROTECTION (COPA), REPORT TO CONGRESS 39 (2000).

153. Press Release, Nat’l Ctr. for Missing & Exploited Children, *New Study Reveals Child Pornography Not a Crime in Most Countries* (Apr. 6, 2006), available at http://www.ncmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2336.

154. For example, Congress could clarify that COPA does have extraterritorial reach and could also make it a crime for U.S. based pornographers to knowingly enter into affiliation agreements with foreign-based websites that are not in compliance with COPA and for credit card companies to knowingly process transactions with foreign-based websites that are not in compliance with COPA. Congress could also push for an international treaty to address the worldwide problem of children accessing pornography on the Internet.

155. *ACLU v. Gonzalez*, 478 F. Supp. 2d at 816.

156. YOUTH, PORNOGRAPHY, AND THE INTERNET, *supra* note 18, at ch. 14.3, (“Social and educational strategies are central to such development, but technology and public policy are important as well—and the three can act together to reinforce each other’s value . . .”).

education, responsible adult supervision and ethical Internet use.¹⁵⁷

Similarly, in its *Report to Congress*, the National Telecommunications and Information Administration concluded: “While the education community has had success with technology measures, however, the education community also recognizes that comprehensive child protection solutions do not rest solely with technology.”¹⁵⁸

CONCLUDING THOUGHTS

In *United States v. Playboy*, the Court held that government could not bar distribution to children of objectionable material if, in the eyes of the Court, “a less restrictive alternative would serve the Government’s purpose.”¹⁵⁹ But Justice Breyer observed in the *Playboy* case: “As Justice Blackmun pointed out, a ‘judge would be unimaginative indeed if he could not come up with something a little less “drastic” or a little less “restrictive” in almost any situation, and thereby enable himself to vote to strike legislation down.’”¹⁶⁰ Which brings me to a question: Did Justice Kennedy and the four Justices who joined him in *Ashcroft v. ACLU* honestly think that parental use of filtering technology alone would effectively shield children from content available on websites that commercially distribute pornography?

Perhaps I have lived in New York City too long and read too much, but for the life of me I do not know how anyone can honestly think that parents alone can and will protect their children from harmful media content in general and Internet pornography in particular. Fifty years ago, most children had two parents, one of whom stayed home. Public schools supported what was taught in the home. In society as a whole, there was a general respect for Judeo-Christian values. The main forms of media were print publications, motion picture films, and broadcasting; and two of those forms, film and broadcasting, posed little risk to children. Some print publications did pose a risk, but back then there were obscenity laws that encompassed a broader range of objectionable content than current laws and they were easier to enforce. Hardcore pornography was openly sold in very few communities.

Today, a much higher percentage of children live in single parent homes. Even in homes with two parents, both parents often work. Public schools have become a battlefield in our nation’s cultural war, and the secular news and entertainment media often exhibit contempt for religion. Today, parents not only have to be concerned about more print publications and films (the latter shown in multiplex theaters) and more broadcast TV and radio channels, they must also be concerned about hundreds of cable and satellite TV and radio channels, the

157. *Id.*

158. NAT’L TELECOMMS. & INFO. ADMIN., DEP’T OF COMMERCE, STUDY OF TECHNOLOGY PROTECTION MEASURES IN SECTION 1703, at 34 (2003).

159. *United States v. Playboy*, 529 U.S. 803, 813 (2000).

160. *Id.* at 840–41 (Breyer, J., dissenting) (citations omitted).

telephone and cell phone, video tapes and games (DVDs), and the Internet, which combines various forms of communication (e.g., websites, chat rooms, peer-to-peer, etc.). And along with this proliferation of media has come a proliferation of means to identify or curb objectionable content.¹⁶¹

In her statement before the Senate Committee on Commerce, Science, and Transportation, United States Senator Blanche Lincoln summed up the reality for most parents today:

As the mother of two young boys, this issue hits home to me [W]ithout a doubt, I know in my heart . . . that parents are truly the first line of defense. Parents must monitor their children's activities online and elsewhere. They must educate them about potential dangers, whether it's sexual predators or inappropriate materials on adult Web sites. But I have to emphasize: They can't do it alone. Parents in today's world cannot do that alone.¹⁶²

This is not to say that laws alone can protect children from Internet pornography. But laws will be necessary, and our nation is not well-served by courts that seem far more concerned about any embarrassment or trepidation that some grown-ups may experience if they are required to provide proof of age to view or purchase smut¹⁶³ than about the impact on America's children of pornographic materials that depict, among other things, "barely legal" teens, bestiality, bondage, domination, flogging, gangbangs, "golden showers" (urine), group sex, incest, marital infidelity, prostitution, rape, "scat" (feces), torture, and unsafe sex galore.

And it is not to say that the Supreme Court should turn a "blind eye" to every government intrusion or burden on adult access to materials that are or may be protected by the First Amendment. In cases where there is a realistic choice between two approaches to *achieve* or accomplish the desired end, the courts properly require government to use means less restrictive of First Amendment rights. It is to say that what goes on in cyberspace can and does have real-world adverse effects on children and that government has important interests in reducing or minimizing those effects for reasons that are unrelated to the suppression of freedom of speech.

By invalidating reasonable and necessary laws intended to protect children from Internet pornography, the Court has turned a deaf ear to the warning enunciated in *Columbia Broadcasting System v. Democratic National*

161. See, e.g., John Eggerton *Parental Control*, BROADCASTING & CABLE, July 31, 2006, <http://www.broadcastingcable.com/article/CA6357451.html>; Cox Communications, Take Charge! Smart Choices for Your Digital Home, <http://www.cox.com/takecharge/takecharge.asp> (last visited May 16, 2007); see also Press Release, User Centric, Inc., Study Finds Usability Problems with Parental Controls (Sept. 25, 2007) (on file with author).

162. *Protecting Children on the Internet: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. 2-3 (2006) (statement of Sen. Blanche Lincoln).

163. 478 F. Supp. 2d, at 805-07 (describing website users' privacy and security concerns).

Committee:¹⁶⁴

[I]n evaluating the First Amendment claims . . . we must afford great weight to the decisions of Congress Professor Chafee aptly observed: "Once we get away from the bare words of the Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks. The Amendment should be interpreted so as to not cripple the regular work of government."¹⁶⁵

When Justice Souter said in his dissent in *Alameda Books*, "strict scrutiny leaves few survivors,"¹⁶⁶ he was referring to laws enacted by Congress and the States. But if something is not done soon to impede the flow of pornographic materials pouring into our nation's communities and homes, he might as well have been referring to America's children.

164. 412 U.S. 94, (1973).

165. *Id.* at 103–04 (citing 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 640–41 (1947)).

166. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 455 (2002) (Souter, J. dissenting).