

# Finding the Right Approach: A Constitutional Alternative for Shielding Kids from Harmful Materials Online

TODD A. NIST\*

*Congressional attempts to regulate pornography and other materials deemed "harmful to minors" on the Internet have been unsuccessful. The difficulty stems from the fact that the nature of the Internet itself does not comport with the Supreme Court's historical analysis of speech regulation. The inability of Web publishers to prevent access to materials, either on an individual or regional basis, impedes the application of the Court's traditional tests for regulation of harmful materials. This Note examines the problems the Internet poses to Congressional regulation of harmful materials online, and discusses why past Congressional regulations have been unconstitutional. The author concludes that regulation of harmful materials online is possible within the confines of the First Amendment and suggests an alternative approach focusing on juvenile access to harmful materials, rather than directly limiting the materials themselves.*

## I. INTRODUCTION

Within the vast amount of information available on the Internet that may help educate, enlighten, or entertain this nation's youth exists a seemingly unbridled abundance of material most would consider unfit for a child's eyes. But that is not the problem. Over 60,000 adult Web sites exist on the World Wide Web,<sup>1</sup> and the number is only getting larger,<sup>2</sup> but this, too, is not the problem. The real problem

---

\* B.A., University of California at Los Angeles, 2000; J.D., The Ohio State University Moritz College of Law, 2004 (expected). Special thanks must go to Marliese Dion, for putting up with my overall grumpiness throughout this process; it would not have been worth it without you. This Note is dedicated to my mother, who had but one response to something I thought beyond my means: "then go do it."

<sup>1</sup> Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 981 (2002). This number may or may not be completely accurate, as the actual number is hard to calculate. Another source reported the number was somewhere between 200,000 and 7 million. *Sex on the Web: A CNET Special Report* (Sept. 1999), at <http://www.cnet.com/techtrends/0-6014-7-28011.html> (last visited Sept. 15, 2003).

<sup>2</sup> Compared to the current numbers, congressional research in 1998 reported 28,000 adult sites, estimating that nearly 70% of the activity on the World Wide Web revolved around materials unsuitable for children. See H.R. REP. NO. 105-775, at 7, 10 (1998); Timothy Zick, *Congress, the Internet, and the Intractable Pornography Problem: The Child Online Protection Act of 1998*, 32 CREIGHTON L. REV. 1147, 1147 (1998) (estimating the number of adult sites at 30,000). Best estimates the year before had the number somewhere around 10,000. See Seth Schiesel, *A Father, a Friend, a Seller of Cyberporn*, N.Y. TIMES, June 30, 1997, at D1. Research in 2000 reported 40,000 adult sites. *Recent Statistics on Internet Dangers*, at

is not that such harmful material exists online, but that such material is widely available and often specifically sent to children every day in a number of different ways. The reality is that a child is only nineteen clicks of a mouse away from pornographic material on the Internet.<sup>3</sup> Trying to attack this situation by legislating against the material itself misses the point, for there is no constitutional reason why pornographic material should not be available to the adult community online.<sup>4</sup> The core of the problem is not a First Amendment issue; Congress should focus its attention on the ways this material reaches children, instead of trying to proscribe certain materials from an entire medium.

The United States Congress has attempted, on more than one occasion, to protect children from harmful material on the Internet.<sup>5</sup> However, the Supreme Court has determined that all of these attempts have been in violation of the Constitution.<sup>6</sup> The reason for Congress's failures stems from one inescapable fact: they are addressing the problem from the wrong angle, limiting the amount of material that is *potentially accessible* to children instead of limiting the ways in which children access that material. At the heart of the problem is a semantic flaw in defining the issue: the popular phrase that most have used to label this dilemma distorts the real goal. The phrase "protecting children from harmful materials"—as if a provocative picture of a naked woman is actively seeking out eight-year-old boys, trying to force them to look at it—inevitably focuses on the material itself. Past congressional approaches to this problem have focused on proscribing against the material itself, instead of the mechanisms that expose the material to children. Attacking this problem requires precision; past congressional failures demonstrate that a wholesale approach to regulating harmful material online violates the First Amendment.

This article argues that the only way to "protect" minors from speech is to prevent them from being exposed to it. The only way to shield children from harmful material on the Internet is to ensure that they do not have access to it. Part II focuses on the constitutional issues underlying the difficulty in proscribing an

---

<http://www.protectkids.com/dangers/stats.htm> (citing Brendan I. Koerner, *A Lust for Profits*, U.S. NEWS & WORLD REP., Mar. 27, 2000, at 36) ("There are now at least 40,000 porn sites on the World Wide Web and probably thousands more. No one has been able to count them all.").

<sup>3</sup> Matthew Fordahl, *World Wide Web Pages Average 19 Clicks of Separation*, PEORIA J. STAR (Peoria, Illinois), Sept. 9, 1999, at A8; see also Tim Specht, *Untangling the World Wide Web: Restricting Children's Access to Adult Materials While Preserving the Freedoms of Adults*, 21 N. ILL. U. L. REV. 411, 419 (2001) ("The use of links on various web pages has created a very interconnected, though decentralized, environment on the Web.").

<sup>4</sup> Pornographic material is distinct from obscene material, which has no constitutional protection. The only time Congress can regulate protected pornographic material is when it is harmful to minors—but Congress must narrowly tailor that regulation so that it does not burden adult access to protected speech. See *infra* Part II.A.

<sup>5</sup> See *infra* Part III; see also *infra* note 45.

<sup>6</sup> See *infra* Part III.

entire form of expressive material from a medium that, by its very nature, has no limitations on who can access the material. Part III explores the past congressional attempts to regulate this area without violating the First Amendment, and how these attempts have failed. Part IV considers possible approaches that fit within the confines of the First Amendment, including the approach taken by the Ohio General Assembly, which focuses on individuals who intentionally send harmful materials to children. Part V explains how Ohio's limited approach can be the starting point, but insists that an effective solution to this problem requires two-tiered protection. Effective regulation of harmful material on the Internet requires: (1) extending Ohio's approach to cover anyone who intentionally sends harmful material to minors, including both commercial dealers who advertise to minors and child predators who send harmful material to minors, and (2) creating a zoning structure on the Internet to prevent unintentional access by minors.

## II. PROSCRIBING SPEECH ON THE INTERNET: LIMITING ADULTS TO WHAT IS SUITABLE FOR CHILDREN

The legislature's goal of protecting children from harmful materials cannot be achieved in a way that places impermissible burdens on free speech.<sup>7</sup> In the words of the Supreme Court, the Government may not "reduce the adult population . . . to reading only what is fit for children."<sup>8</sup> Congress faces an impasse: The legislature has not found a way to prevent children from viewing harmful materials online without infringing on an adult's ability to access protected speech. Ultimately, the problem comes down to a simple distinction: Congress has the ability to regulate some pornographic material even though it is constitutionally protected for adults because the standard for obscenity varies when applied to minors rather than adults.<sup>9</sup> The first part of this section focuses

---

<sup>7</sup> *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) [hereinafter *Reno II*] ("[The Communications Decency Act's Internet indecency provisions'] 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."); *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.")).

<sup>8</sup> *Butler v. Michigan*, 352 U.S. 380, 383 (1957). In *Butler*, the Court struck down a Michigan statute that prohibited making books that would be harmful to minors available to the general public. *Id.* The Court found that the "legislation [was] not reasonably restricted to the evil with which it is said to deal." *Id.*

<sup>9</sup> See *infra* note 15 and accompanying text.

on how legislatures have successfully prohibited materials that are harmful to juveniles without infringing on adults' constitutionally protected right to view pornography. Part B explores the ways in which the Internet, as a unique medium, presents exceptional difficulties in applying the historical approaches.

### A. *A Brief History of Regulating Material Harmful to Minors*

The First Amendment to the United States Constitution guarantees that Congress cannot pass a law "abridging the freedom of speech."<sup>10</sup> The Supreme Court has held that material posted on the Internet constitutes a form of expression that enjoys the same First Amendment protection as traditional speech.<sup>11</sup> However, there are limits to First Amendment protection,<sup>12</sup> and a few narrow categories of expression fall outside of the scope of protected speech.<sup>13</sup> There are two potential ways that Internet pornography can lack First Amendment protection. First, Congress can regulate any pornographic material that meets the standard for obscenity.<sup>14</sup> Additionally, Congress can regulate types of pornography that do not reach the obscenity standard for adults but are still considered harmful to minors, because such material falls outside the scope of minors' First Amendment freedoms.<sup>15</sup>

---

<sup>10</sup> U.S. CONST. amend. I, § 2.

<sup>11</sup> *Reno II*, 521 U.S. at 870 ("We agree with [the lower court's] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

<sup>12</sup> See Lawrence Lessig and Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 MICH. L. REV. 395, 395 (1999) ("Speech . . . divides into three sorts— (1) speech everyone has a right to . . . (2) speech that no one has a right to (obscene speech, child porn); and (3) speech that some have a right to but others do not ( . . . speech that is 'harmful to minors' . . .).").

<sup>13</sup> The Supreme Court has recognized libel, defamation, obscenity, and fighting words as categories of speech that do not enjoy First Amendment protection. See *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (defamation); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

<sup>14</sup> The modern approach for determining a standard for obscenity began with the Supreme Court decision in *Roth v. United States*, 354 U.S. 476 (1957). However, the Supreme Court outlined the current standard for obscenity in *Miller v. California*, 413 U.S. 15 (1972). Under the *Miller* standard for obscenity, the government may regulate expressive material that depicts or describes sexual conduct if (1) an average person who applies contemporary community standards would find that the material, taken as a whole, appeals to the prurient interest in sex; (2) the material portrays sexual conduct in a patently offensive way; and (3) the material does not have serious literary, artistic, political, or scientific value. *Id.* at 24. Any material that falls under this standard is outside the scope of the First Amendment and can be regulated.

<sup>15</sup> *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (finding that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches

The standard for obscenity applies differently to minors than it does adults, and the term “harmful to minors” refers to obscenity as applied to minors. In *Ginsberg v. New York*,<sup>16</sup> the Supreme Court held that the State of New York could regulate material that is harmful to minors by limiting their access to that material.<sup>17</sup> The *Ginsberg* Court found constitutional a New York statute that regulated material which was determined to be unsuitable for children by applying contemporary community standards.<sup>18</sup> Although the Court acknowledged that the regulated material did not meet the standard for obscenity as applied to adults,<sup>19</sup> it held that New York had the power to prohibit minors from accessing materials defined as obscene for minors.<sup>20</sup> The decision allows for differing definitions of obscenity when applied to minors rather than adults.

Today, *Ginsberg* must be read in light of the obscenity standard developed in *Miller v. California*.<sup>21</sup> In effect, applying *Miller* to the context of minors requires reading *Miller* in light of the standard developed by the Court in *Ginsberg*.<sup>22</sup> Under the *Miller* standard modified in light of *Ginsberg*, the government may limit a minor’s access to illicit material if *community standards* conclude that the material appeals to a minor’s interest in sex and if the material is utterly without

---

beyond the scope of its authority over adults . . .” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

The government has a greater interest in regulating speech when dealing with minors, so the scope of First Amendment protection is diminished. See *Prince*, 321 U.S. at 165 (arguing that the state has interest “to protect the welfare of children” in order to ensure that they are “safeguarded from abuses,” which might prevent their “growth into free and independent well-developed men and citizens”); *Ginsberg*, 390 U.S. at 637 (“We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors.”). Although there are several forms of expression that can be harmful to minors, this Note focuses exclusively on obscene and pornographic materials that fall under the *Ginsberg* standard as being unsuitable for minors.

<sup>16</sup> 390 U.S. 629 (1968).

<sup>17</sup> 390 U.S. at 636–37. The “New York criminal obscenity statute . . . prohibit[ed] the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.” *Id.* at 631.

<sup>18</sup> *Id.* at 637.

<sup>19</sup> *Id.* at 634 (“The ‘girlie’ picture magazines involved in the sales here are not obscene for adults.”).

<sup>20</sup> Essentially, the right of minors to access pornographic material is less than that of an adult. The Court allowed the greater restriction of the *Ginsberg* statute because it “simply adjusts the definition of obscenity” to apply more strongly to minors. *Id.* at 638.

<sup>21</sup> 413 U.S. 15 (1973). See *supra* note 13 and accompanying text.

<sup>22</sup> See *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 946 (S.D. Ohio 2002) (“The [*Miller*] test is modified in accordance with *Ginsberg*, so that the second prong of the test focuses upon whether the material is ‘patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.’”) (citations omitted).

redeeming social importance for minors.<sup>23</sup> Therefore, the *Ginsberg/Miller* approach is to look at the prevailing standards in the adult community to determine what is appropriate material for minors.

The Supreme Court has required subsequent regulations that limit the ability of minors to access certain materials and activities to conform to the *Ginsberg* standard, regardless of why the material is deemed harmful.<sup>24</sup> However, this standard poses several problems when attempting to regulate expressive material on the Internet.<sup>25</sup> When creating a regulation attempting to control children's ability to access materials on the Internet, applying the *Miller* and *Ginsberg* standards to this new medium creates special difficulties.

### B. *Free Speech Online: A Revolutionary Medium Requires a Revolutionary Approach*

Applying *Ginsberg* to the Internet creates difficulties because of the nature of the Internet itself and its global reach. The Internet is a global marketplace for ideas—Congress does not have jurisdiction to legislate over all the material that exists online, so it should not even try.<sup>26</sup> The Internet provides a vast resource of material that anyone with a connection can access; it opens a user up to the global community, and to the different cultures, perspectives, or ideas one can imagine.<sup>27</sup> It is a medium that reaches the global community, whether one wants

---

<sup>23</sup> The New York statute defined “harmful to minors” as: “(i) predominantly appeal[ing] to the prurient, shameful or morbid interest of minors, and (ii) [the material] is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.” See *Ginsberg v. New York*, 390 U.S. 629, 633 (1968).

<sup>24</sup> See *Bellotti v. Baird*, 443 U.S. 622, 635–39 (1979) (acknowledging the application of a lower standard of minors’ right to abortion than for adults, while ultimately rejecting a statute that required parental consent for abortion); *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978) (allowing regulation of indecent broadcasts on the airwaves); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (allowing regulation of obscene materials at adult theaters).

<sup>25</sup> See *infra* Part II.B.

<sup>26</sup> This is due to the Internet’s global reach—Congress has no authority to regulate individuals posting materials on the World Wide Web from outside of the United States. “No single entity or group of entities controls the material made available on the Internet or limits, or is able to limit, the ability of others to access such materials.” Zick, *supra* note 2, at 1153; see also *id.* at 1203 (arguing that blocking technology will be more effective than legislative regulation because it will enable parents to “block materials that are posted on overseas sites”); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996) (arguing that absence of territorial borders in cyberspace destroys local governments’ ability to regulate and control online behavior).

<sup>27</sup> Technically speaking, the Internet is just a system of cables and a computers that are interconnected. See Specht, *supra* note 3, at 420 (“Technically, the Internet is a collection of interconnected computer networks based on a standard known as . . . (TCP/IP).”). The World

it to or not, and thus it is unlike any medium for the expression of ideas the world has known.<sup>28</sup>

The peculiar dilemma the Internet poses to free speech is that the creator of the expression has little or no ability to control who views the contents of that expression.<sup>29</sup> This creates two problems when attempting to prevent minors from accessing harmful material: (1) having to do with who can access the material, and (2) relating to what material is harmful in the first place. First, because the individuals posting the material know nothing about the people who try to access the information, they cannot prevent access based on the characteristics (e.g., age) of the individual attempting to gain access.<sup>30</sup> Second, because there is no way to

---

Wide Web is the “body of information” on the Internet. See Peter Jacobson, *The Child Online Protection Act: Taming the World “Wild” Web*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 421, 427 (1999) (describing the distinction between the Internet and the World Wide Web). While the Web constitutes the body of information available, and the Internet refers only to the means by which one can access that information, this Note uses the terms interchangeably.

<sup>28</sup> *Reno v. ACLU*, 929 F. Supp. 824, 844 (E.D. Pa. 1996) [hereinafter *Reno I*] (“The Internet is . . . a unique and wholly new medium of worldwide human communication.”) What distinguishes the Internet from broadcast media—radio and television—is that it is limitless in scope. Whereas television channels and radio signals are a limited resource, “there is no limit to the amount of Web space to distribute and any server can be established and added to the Internet.” Johanna M. Roodenburg, Note, “*Son of CDA*”: *The Constitutionality of the Child Online Protection Act of 1998*, 6 COMM. L. & POL’Y 227, 245 (2001). Roodenburg points out another distinction between the Internet and broadcast media: “[The Internet] is distinctly ‘interactive.’ Users of the Web are not passive receivers of information as with traditional broadcast media, and users can easily respond to the material they receive or view online.” *Id.*; see also Jacobson, *supra* note 27, at 426 (“[The Internet] presents a number of problems for a Government that wants to regulate it by following the same rules for regulating broadcast and print media because the Internet is just so completely different than those media . . .”).

<sup>29</sup> See *infra* Part II.B.1.

<sup>30</sup> *Reno I*, 929 F. Supp. at 845. Entering cyberspace gives an individual the ability to “mask” ones identity—the Web user determines what others will know about her. See Zick, *supra* note 2, at 1158 (“In cyberspace, we have the ability to hide absolutely who we are.”). As Professor Lessig writes:

One enters cyberspace as one wants. One can enter identifying who one is, or one can hide who one is. One can enter speaking a language that anyone can understand, or one can encrypt the language one speaks, so only the intended listeners can understand what one says. What others see of you is within your control; whether others understand of you is within your control as well.

Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 876 (1996) (citations omitted). Therefore, it is up to the Web user, and not the publisher, whether or not the publisher knows the user’s age. Without the ability to determine someone’s characteristics, it is impossible to screen a person out based on those characteristics. Unlike when an 18-year-old goes into a liquor store trying to buy beer, there is no way for the Web publisher to ask for an ID. See Specht, *supra* note 3, at 421 (arguing that the nature of cyberspace makes it much more difficult to verify identification). For a discussion of one potential age verification system, albeit

prevent access on a regional basis, the question of community standards becomes a problem—when different communities across the country have access to the same material, whose community standards apply? *Ginsberg* and *Miller* require applying contemporary community standards to determine if the material appeals to a minor's interest in sex, but the Internet is not limited to a given community.

### 1. *Chilling Speech: The Problem of Age Verification on the Internet*

The first problem with applying *Ginsberg* to the Internet is that Web publishers cannot verify the age of the person accessing their Web sites, which leads to a chilling effect on speech. In some areas of cyberspace it is impossible for the person posting the material to determine who accesses it, and thus to determine whether that person is a minor or an adult.<sup>31</sup> For these types of Internet uses, it is simply impossible to verify the age or identity of an individual—minors can simply sign up for an email account and give a false date of birth.<sup>32</sup>

Lack of age verification means that Web publishers cannot make the distinction between whether or not to allow a Web user to access harmful pornography. This makes applying *Ginsberg* to the Internet impossible.<sup>33</sup>

---

one that is not adaptable to most commercial online services that exist in the United States, see Zick, *supra* note 2, at 1158.

<sup>31</sup> For the most widely-used aspect of cyberspace—the World Wide Web—age verification is possible but often not feasible. Although it is possible to limit access to Web pages—such as requiring payment or creation of a password to visit a site—these modes of limiting access require costs that most non-commercial publishers are unable to bear. See *Reno I*, 929 F. Supp. at 846 (Among the 410 findings made by the District Court in *Reno I*, the court concluded that requiring credit cards for proof of age would impose unbearable costs for most non-commercial publishers.). Without one of these limitations on access, there is no way for a Web publisher to prevent anyone from accessing the information they publish on the Web.

<sup>32</sup> See *id.* at 845 (The District Court categorically determined that “[t]here is no effective way to determine the identity or the age of a user who is accessing material through E-mail, mail exploders, newsgroups, or chat rooms.”). For example, in various chat rooms or other newsgroups, those posting messages know almost nothing about the people who can access their messages, even when they know the other individuals in that group, because others can read these postings and messages without being a member of the group. See *Reno II*, 521 U.S. 844, 851 (1997). It is impossible to adequately determine the identity of someone when using other aspects of the Internet as well, such as E-mail.

<sup>33</sup> In *Ginsberg*, the Supreme Court allowed the State of New York to adjust the definition of obscenity when dealing with children—what was obscene for adults was not necessarily obscene to a minor. *Ginsberg v. New York*, 390 U.S. 629, 638, 649 (1968) (“We do not regard New York’s regulation . . . [as unconstitutional] . . . [because it] simply adjusts the definition of obscenity ‘. . . by permitting the appeal of this type of material to be assessed in term of the sexual interests . . .’ of such minors.”) (citation omitted). The nature of the Internet does not allow this adjustment to take place—adults and minors both have access to the material, so government cannot limit access to certain materials for children only. Kathleen Conn,



Without the ability to distinguish between particular viewing audiences, the only way to ensure that no child accesses inappropriate material is to limit the content of the material to that which is appropriate for children.<sup>34</sup> This chills speech in two ways: (1) it prevents Web publishers from posting constitutionally protected material because it is unacceptable for children, and (2) it thwarts adults' ability to access sites they would normally be free to access without restriction, thereby preventing expression from reaching at least a portion of the intended audience.<sup>35</sup>

A statute with this chilling effect on speech is an unconstitutional violation of the First Amendment.<sup>36</sup> In order for Congress to create a constitutionally permissible limitation on children's access to harmful material online, the statute cannot restrict speech in a manner whereby adults no longer have access to the harmful material.<sup>37</sup> In order to follow the *Ginsberg* standard and treat adults' and minors' ability to view pornography differently, one must be able to identify whether the person accessing the material is a minor or adult. Lack of age verification thus prevents Web publishers from adhering to any "adjustment" in the definition of obscenity for minors.

## 2. *The Applicability of "Community Standards" to the Internet*

The second major obstacle the Internet presents to First Amendment jurisprudence is that its global nature does not comport with past notions defining obscenity and materials harmful to juveniles. The very nature of the Internet makes Web material accessible worldwide, and that is one of the main advantages to Web publishers.<sup>38</sup> This is the problem posed by community standards—in *Miller* and *Ginsberg*, the Supreme Court said defining obscenity required looking to the prevailing standards in the adult community, but the Internet destroys all geographical barriers, so "community" lines are erased.<sup>39</sup>

---

*Protecting Children From Internet Harm (Again): Will the Children's Internet Protection Act Survive Judicial Scrutiny?*, 153 ED. LAW REP. 469, 477 (2001).

<sup>34</sup> However, this is the exact approach the Supreme Court denounced in *Denver* as an unacceptable limitation on the First Amendment right to freedom of speech. *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 759 (1996).

<sup>35</sup> See *supra* note 8 and accompanying text.

<sup>36</sup> *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392–93 (1988).

<sup>37</sup> The chilling effect on speech has been the problem with past congressional approaches to restricting children's access to pornography online. See *infra* Part III.C.

<sup>38</sup> Conn, *supra* note 33, at 475–76.

<sup>39</sup> Under the current state of technology, Web publishers cannot restrict access to certain communities or otherwise limit access based on geographical boundaries; the very reason it is called the World Wide Web is because it is precisely that—it reaches world wide. *ACLU v. Reno*, 31 F. Supp. 2d 473, 484 (E.D. Pa. 1999) [hereinafter *Reno III*]; *ACLU v. Reno*, 217 F.3d 162, 175–76 (3d Cir. 2000) [hereinafter *Reno IV*] (noting that the Internet is a borderless medium without geographic boundaries); see also, Conn, *supra* note 33, at 475–76 ([W]ith

The difficulty this poses to the First Amendment is that a statute without a clear standard defining what material is inappropriate is not narrowly tailored.<sup>40</sup> Although material posted online may be appropriate for children as determined by the standard of the community in which the publisher lives, it may still be deemed harmful to minors based on the standard in another community three states away or on the other side of the country. In order to be perfectly safe—in order to ensure that his material fulfills the *Ginsberg* standard—the publisher is forced to conform his expression not just to what is acceptable to children, but to what the most conservative community considers suitable for children.<sup>41</sup> It follows, then, that a Web publisher in Los Angeles cannot post material on the Internet even though the community in which he lives would consider that material suitable even for children. This result has led some to argue that a top-down approach to regulating pornography on the Internet will never be constitutionally viable.<sup>42</sup>

When applying contemporary community standards to define harmful materials, the nature of the Internet necessarily dictates that Web publishers will limit their speech based on the dictates of the most conservative community. This means that Web publishers will refrain from posting what would be considered constitutionally protected materials, because a child in a more conservative community may access that material.

---

current technology, Web page creators cannot geographically limit their communications.”); Specht, *supra* note 3, at 421 (“[O]nce material is published on the Web, it is available to any anonymous web surfer in any community.”); William D. Deane, Comment, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standard in Las Vegas and New York?*, 51 CATH. U. L. REV. 245, 281 (2001) (noting that “[e]very Web site has the potential to reach a world-wide audience”).

<sup>40</sup> The Supreme Court reviews content-based regulations on speech under strict scrutiny, requiring that the regulation be narrowly tailored to serve a compelling government interest. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1990); see also *supra* note 7. When the standard for harmful materials is unascertainable, the statute is not narrowly tailored to serve the compelling interest of protecting children from harmful material. In order to create an Internet regulation that survives strict scrutiny, Congress must replace “community standards” with something more definitive. See *infra* Part IV.A.2.

<sup>41</sup> Henry Cohen, *Community Standards: Child Online Protection Act Raises Old Question of What's Indecent*, 111 FULTON COUNTY DAILY REP. 162, August 31, 2000 (“Applying community standards to determine what may or may not be put online would inevitably mean that the standards of the most puritanical community would govern the entire nation.”).

<sup>42</sup> See Alexander, *supra* note 1, at 990–91 (“Congress cannot regulate the Internet from Washington, D.C., i.e., top, down, because there is no constitutionally workable community standard to judge whether the material in question is protected by the First Amendment.”); Cohen, *supra* note 41 (“Simply put, ‘community standards’ cannot be used to determine whether or not speech is harmful to minors. At least, not if the statute is to survive First Amendment scrutiny.”); see also *infra* Part IV.B.

### III. CONSTITUTIONAL FOLLY: CONGRESSIONAL FAILURES TO REGULATE HARMFUL MATERIALS ONLINE

Protecting children from pornography on the Internet is not a new idea.<sup>43</sup> Although Congress has been trying to address the issue for the past several years, it has been unsuccessful in its attempts to protect children from the harmful material available online.<sup>44</sup> There have been two main attempts by Congress to prevent people from posting pornographic material in an area where minors will have access: the Communications Decency Act (“CDA”)<sup>45</sup> and the Child Online Protection Act (“COPA”).<sup>46</sup> In order to find a workable solution posed by the problems of age verification and community standards on the Internet, it is necessary to examine prior congressional failures to avoid repeating the mistakes of the past.

#### A. *The Communications Decency Act of 1996*

The first congressional attempt to prevent minors’ access to pornography on the Internet, the Communications Decency Act, failed to pass constitutional scrutiny because the age verification and community standards problems posed by the Internet led to the conclusion that the statute was overbroad.<sup>47</sup> The statute

---

<sup>43</sup> For an argument that it is unnecessary for Congress to specifically address the Internet as a medium for distributing pornography, see Kelly M. Doherty, Comment, *WWW.OBSCENITY.COM: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259 (1999). Doherty points out that courts have successfully applied existing obscenity regulations to the Internet. *Id.* at 278–79, 292–94. Some of these existing statutes include: 18 U.S.C. § 1460 (2000) (criminalizing possession of obscene materials with an intent to distribute), 18 U.S.C. § 1462 (2000) (distributing obscene materials through interstate or foreign commerce), 18 U.S.C. §§ 1465–66 (2000) (transporting or selling obscene material through interstate commerce). Doherty specifically points out that the cases *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), and *United States v. Carroll*, 105 F.3d 740 (1st Cir. 1997), held that transporting materials over the Internet constituted transportation through interstate commerce. Doherty, *supra* at 293. However, all of these statutes apply to obscene materials, not materials harmful to minors. None of these statutes would apply to a person who posts harmful material on the Internet.

<sup>44</sup> See Robert MacMillan, *Primer: Children, the Internet, and Pornography*, WASH. POST, June 23, 2003, available at <http://www.washingtonpost.com/ac2wp-dyn/A39748-2002May31?language=printer>. MacMillan outlines recent congressional legislation involving children and pornography on the Internet, including legislation aimed at preventing access to pornography as well as other issues such as digitally “morphed” images that show children having sex.

<sup>45</sup> Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133 (1996).

<sup>46</sup> Pub. L. No. 105-277, 112 Stat. 2681-736 (1998).

<sup>47</sup> *Reno II*, 521 U.S. 844, 874 (1997) (“We are persuaded that the CDA lacks the precision that the First Amendment requires . . . . In order to deny minors access to potentially harmful

prohibited the knowing transmission of “indecent” materials over the Internet, and displaying “patently offensive” materials online.<sup>48</sup> A three judge panel of the United States District Court for the Eastern District of Pennsylvania found the statute unconstitutional,<sup>49</sup> and the Supreme Court upheld that decision in *Reno v. ACLU*. There were three major problems with the statute: (1) the two provisions of the statute at issue were unconstitutionally vague,<sup>50</sup> (2) the statute was a content-based restriction on speech that is presumptively invalid,<sup>51</sup> and (3) the statute’s chilling effect on speech made it unconstitutionally overbroad.<sup>52</sup>

The first problem with the CDA was that it did not have a proper definition of the material it regulated—any possible definition was unconstitutionally vague.<sup>53</sup> To begin with, the two provisions of the bill that were at issue in the case used two different terms.<sup>54</sup> Neither provision contained a definition for the term it used. The Court concluded, “Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean.”<sup>55</sup> With the varying language of the CDA, it was unclear precisely which materials fell under the scope of the statute. The Court found this problematic because it was a criminal statute with high penalties, and because it restricted speech.<sup>56</sup>

---

speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.”)

<sup>48</sup> See 47 U.S.C. §§ 223(a), 223(d) (1994 & Supp. II 1996).

<sup>49</sup> *Reno I*, 929 F. Supp. 2d 824, 824 (E.D. Pa. 1996).

<sup>50</sup> *Reno II*, 521 U.S. at 871.

<sup>51</sup> *Id.* at 874.

<sup>52</sup> *Id.* at 868.

<sup>53</sup> *Id.* at 870–71 (“[T]he many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment.”); see also Alexander, *supra* note 1, at 986 (“[T]he New York statute in *Ginsberg* included a properly narrow definition of unprotected material, but the CDA vaguely defined its proscribed material as ‘indecent’ and eliminated the requirement that ‘patently offensive’ material must lack serious literary, artistic, political, or scientific value.”).

<sup>54</sup> See 47 U.S.C. §§ 223(a), 223(d) (1994 & Supp. II 1996). The “indecent transmission” provision prohibited the transmission of “any comment, request, suggestion, proposal, image, or other communication which is obscene . . . or indecent . . .” *Id.* at § 223(a). The “patently offensive display” provision prohibited the transmission of “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 . . .” *Id.* at § 223(d).

<sup>55</sup> *Reno II*, 521 U.S. 844, 871 (1997) (citations omitted).

<sup>56</sup> *Id.* at 871–72 (“The vagueness of the CDA is a matter of special concern . . . First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the CDA is a criminal statute.”) (citation omitted).

In addition, because the CDA was a content-based restriction on expression, it was presumptively invalid unless it restricted speech that fit within one of the narrow categories of unprotected expression, such as obscenity.<sup>57</sup> The CDA represented a content-based restriction because it only restricted speech that was “indecent” or “patently offensive.” However, the Court noted that neither the use of the term “indecent” nor the definition of “patently offensive” conformed with the definition of material harmful to juveniles in *Ginsberg*.<sup>58</sup> Specifically, the CDA did not contain the third prong of the obscenity standard, that the material lacked serious literary, artistic, political, or scientific value.<sup>59</sup> As such, the statute restricted speech that did not constitute obscene material or material harmful to juveniles and therefore was not narrowly tailored.

The final First Amendment hurdle that the CDA could not clear was that it had a chilling effect on speech and was therefore unconstitutionally overbroad. Under the statute, the problems created by the Internet’s lack of a feasible age verification system would force Web publishers to self-regulate the materials they posted, resulting in a burden on speech the Court found unacceptable.<sup>60</sup> The Court concluded that because the definitions of the material were unclear, and because Web publishers could not ensure that only adults were witnessing the materials they posted, Web publishers would be weary of posting constitutionally-protected material in light of potential prosecution under the statute.<sup>61</sup> In effect, the CDA reduced the type of material that would be available on the Internet to what is fit for children, the exact problem that faces regulation of the Internet.<sup>62</sup> Although the CDA provided for two affirmative defenses if the Web publisher took steps to verify age,<sup>63</sup> these defenses did not reduce the burden

---

<sup>57</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (“The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.”) (citations omitted).

<sup>58</sup> *Reno II*, 521 U.S. at 865 (“The CDA fails to provide us with any definition of the term ‘indecent’ as used in [the statute] . . .”).

<sup>59</sup> *Id.* (“[I]mportantly, [the CDA] omits any requirement that the ‘patently offensive’ material covered by [the statute] lack serious literary, artistic, political, or scientific value.”).

<sup>60</sup> *Id.* at 876 (“Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it . . . [This] would surely burden communication among adults.”).

<sup>61</sup> *Reno II*, 521 U.S. 844, 874 (1997) (“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.”).

<sup>62</sup> See Alexander, *supra* note 1, at 988 (“Because adults would lack confidence as to what speech would be immune to prosecution, they would have to adapt their speech to that which would always be suitable for minors.”); see also *supra* Part II.

<sup>63</sup> 47 U.S.C. §§ 223(e)(5)(A) & (B) (1994 & Supp. II 1996). The first affirmative defense existed if one took “good faith, reasonable, effective, and appropriate actions” to prevent minors

on speech.<sup>64</sup> The fact that Web publishers could not effectively determine what material was covered under the statute, coupled with the finding of the district court that Web publishers could not feasibly identify those who accessed their material, meant that many Web publishers would refrain from publishing material that was constitutionally protected out of fear of prosecution under the statute.

### *B. The Child Online Protection Act of 1998*

Congress's second attempt to protect minors from harmful materials on the Internet was the Child Online Protection Act (COPA). The COPA represents Congress's attempt to remedy the First Amendment issues that plagued its predecessor, the CDA.<sup>65</sup> In its revived attempt to protect children from the dangers of the Internet, Congress made three substantial changes in an effort to pass constitutional scrutiny, all of which limited the scope of the COPA's coverage.<sup>66</sup> First, the restrictions on communication in the COPA apply only to the World Wide Web—other aspects of the Internet, such as E-mail and newsgroups, are not covered.<sup>67</sup> Second, the COPA only covers materials posted on the Internet by commercial publishers.<sup>68</sup> Finally, the COPA applies only to

---

from accessing. *Id.* The other provided a defense if the Web publisher used an age verification system, such as requiring a credit card or adult identification number. *Id.*

<sup>64</sup> *Reno II*, 521 U.S. at 881–82 (“[I]t is not economically feasible for most noncommercial speakers to employ such verification. Accordingly, this defense would not significantly narrow the statute’s burden on noncommercial speech.”).

<sup>65</sup> Alexander, *supra* note 1, at 989 (“With the CDA declared dead, Congress went back to work . . . [T]he COPA modeled the spirit of the CDA . . . [i]n response to the constitutional defects of the CDA . . .”); Specht, *supra* note 3, at 425 (“In response to the constitutional problems associated with the CDA, Congress passed the Child Online Protection Act (the COPA) in October 1998.”); Brian Hodge, *The Debate Over the COPA: Protecting Children Online is Nearly as Complex as the Internet Itself*, PLUGGED IN, Apr. 2002, at 92–94 (“By narrowing their focus and tailoring the bill’s provisions, the COPA’s sponsors believed they had resolved the constitutional issues that doomed the CDA.”).

<sup>66</sup> See *Ashcroft v. ACLU*, 535 U.S. 564, 569–70 (2002); Alexander, *supra* note 1, at 989.

<sup>67</sup> 47 U.S.C. § 231(a)(1) (1994 & Supp. V 1999) (The COPA prohibits “knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, [making] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.”).

<sup>68</sup> 47 U.S.C. § 231(e)(2)(A) (1994 & Supp. V 1999) (“A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.”).

It must be noted, of course, that commercial expression receives similar First Amendment protections. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001) (“[T]he Court has afforded commercial speech a measure of First Amendment protection ‘commensurate’ with its position in relation to other constitutionally guaranteed expression.”); see also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995); *Bd. of Trs. of St. Univ. of N.Y. v. Fox*, 492 U.S. 469,

materials that are harmful to minors.<sup>69</sup> This final change represents Congress' attempt to cure the main ailments of the CDA by bringing the statute in line with *Ginsberg* and *Miller*; instead of applying vaguely to materials that are "patently offensive" or "indecent," Congress limited the COPA to apply to a specific area of unprotected speech.

The Internet's lack of an age verification system created problems for the COPA, just as it had the CDA. Although the COPA provided an affirmative defense that, similar to the defenses in the CDA, allowed a defendant to demonstrate that they had taken affirmative steps to determine the age of the minor,<sup>70</sup> the defense did not save the statute in the district court's eyes.<sup>71</sup> The court noted that the affirmative defense created to solve the age verification problem placed too much of a financial burden on smaller companies, because the

---

477 (1989). The Court has developed a four-part analysis for speech promoting a commercial transaction:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (reaffirmed in *Lorillard Tobacco*, 533 U.S. at 538).

<sup>69</sup> 47 U.S.C. § 231(a)(1) (1994 & Supp. V 1999).

<sup>70</sup> 47 U.S.C. § 231(c) (1994 & Supp. V 1999). The defense provides:

1) DEFENSE: It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(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.

*Id.* The significant difference between the COPA's affirmative defenses and the CDA's is found in subsection (C), allowing the use of any other "feasible" means available. The court apparently did not believe this referred to economic feasibility, but only technologic feasibility, since it specifically examined the costs to commercial publishers of such technology. *Reno III*, 31 F. Supp. 2d 473, 488–90 (E.D. Pa. 1999).

<sup>71</sup> The court found that the statute put too much of a financial burden on the Web publisher: "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Reno III*, 31 F. Supp. 2d at 493 (quoting *Simon & Schuster, Inc. v. Members of the N.Y. St. Crim. Victims Bd.*, 502 U.S. 105, 115 (1991)); see also *Specht*, *supra* note 3, at 429 & n.156.

age verification technology that existed at the time was far too expensive.<sup>72</sup> Consequently, the court struck down the statute as placing an impermissible burden on free speech.<sup>73</sup>

In addition to the problems caused by age verification, the COPA was plagued by its reliance on community standards. The remaining vitality of applying *Ginsberg's* use of community standards to restrict the material available to minors online came to the forefront of the Supreme Court's review of the COPA. The Third Circuit Court of Appeals originally did not follow the conclusion of the district court, but instead found that the COPA was unconstitutional in that its reliance on community standards for determining whether materials are harmful to juveniles rendered the statute substantially overbroad.<sup>74</sup> The Third Circuit determined that the peculiar characteristics of the Internet—namely that Web publishers cannot limit access to their materials based on geographical boundaries—meant that the COPA imposed the community standards of the most conservative community on the whole of the nation, thereby restricting speech that would not be harmful in more liberal communities (and would have First Amendment protection).<sup>75</sup> In *Ashcroft v. ACLU*,<sup>76</sup> the Supreme Court reversed this decision, and, in a very limited holding, found that the statute's use of community standards to define materials harmful to minors did not, in itself, make the statute unconstitutional.<sup>77</sup>

---

<sup>72</sup> *Reno III*, 31 F. Supp. 2d at 488–90.

<sup>73</sup> *Id.* at 493.

<sup>74</sup> *Reno IV*, 217 F.3d 162, 173–74 (3d Cir. 2000) (“We base our particular determination of the COPA’s likely unconstitutionality . . . on the COPA’s reliance on ‘contemporary community standards’ . . . to identify material that is harmful to minors.”).

<sup>75</sup> *Id.* at 175 (“Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users . . .”).

<sup>76</sup> 535 U.S. 564 (2002).

<sup>77</sup> *Id.* at 585. (“We hold only that the COPA’s reliance on community standards to identify ‘material that is harmful to minors’ does not *by itself* render the statute substantially overbroad for purposes of the First Amendment.”).

The opinion in *Ashcroft* did little to settle the issue of the continuing vitality of applying community standards in the determination of whether Internet materials are harmful to minors. Although eight justices agreed that community standards alone did not render the statute unconstitutional, only three—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—concurred in full with the majority opinion, finding that the use of community standards to judge pornography on the Internet was constitutionally valid. *See id.*; *see also* Alexander, *supra* note 1, at 1014 (arguing that Justice Thomas found the COPA’s use of community standards constitutional). Justices O’Connor, Breyer, and Kennedy (with Justices Souter and Ginsburg joining Justice Kennedy’s concurrence) all wrote concurring opinions in which they disagreed on whether community standards could be applied in determining what material is harmful to juveniles. *Ashcroft*, 535 U.S. at 586 (O’Connor, J., concurring) (“[R]espondents have not shown that [the COPA] is overbroad solely on the basis of the variation in the standards of different communities.”); 535 U.S. at 589–91 (Breyer, J., concurring) (Breyer expressed no



The Court's limited holding only ensured that the district court's injunction preventing enforcement of the COPA would continue, thus keeping the COPA on life support. However, on remand the Third Circuit pulled the plug, effectively killing the COPA and putting Congress back at square one, at least for the time being.<sup>78</sup> The next step appears uncertain, especially with the constitutionality of the community standards approach in doubt. What is known is that the past congressional attempts to restrict minors' access to harmful materials failed because they looked at the speech itself, rather than the machinations that put this speech in front of children. The lesson to be learned from the past congressional failures is that new tactics are needed in order to bring a regulation like the COPA in line with the First Amendment.

#### IV. INTERNET REGULATION WITHIN THE CONFINES OF THE CONSTITUTION

The CDA and the COPA failed because Congress tried to solve an intricate problem with one broad stroke. The result was a statute that swept too much speech under its gargantuan reach. However, nothing in the Supreme Court's analysis of regulating speech on the Internet suggests that constitutional regulation of harmful materials online is not possible. Instead, the Court's analysis suggests that Congress must approach this intricate problem with precision. Any restriction on harmful materials is necessarily going to be a content-based regulation on speech that is presumptively invalid, requiring that the statute be narrowly tailored to serve a compelling government interest.<sup>79</sup> The Court recognizes the compelling government interest in protecting children from

---

opinion on whether community standards were valid, arguing instead the Congress intended to use a national standard in the statute); 535 U.S. at 593 (Kennedy, J., concurring) (“[T]he variation in community standards might well justify enjoining enforcement of the Act.”); see also Alexander, *supra* note 1, at 1014; Cohen, *supra* note 41. In addition, Justice Stevens held that the use of community standards to judge whether material is harmful to juveniles violated the First Amendment. *Ashcroft*, 535 U.S. at 602–03 (Stevens, J., dissenting) (arguing that in the area of the Internet, “community standards become a sword, rather than a shield”).

<sup>78</sup> It bears remembering that the district court originally found the COPA unconstitutional for entirely different reasons—that the Act constituted a content-based regulation that failed strict scrutiny. *Reno III*, 31 F. Supp. 2d 473, 493 (E.D. Pa. 1999). On remand, the Third Circuit agreed, holding that the statute was not narrowly tailored. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003), *cert granted*, 124 S. Ct. 399 (2003). The court also found that the COPA was substantially overbroad “in that it places significant burdens on the Web publishers’ communication of speech that is constitutionally protected.” *Id.* at 266. Finally, the court held that the statute was not susceptible to a narrowing construction. *Id.* at 270–71. The United States Supreme Court granted certiorari on October 14, 2003, and the Court heard oral arguments of March 2, 2004, but at the time of this publication had not issued an opinion.

<sup>79</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of N.Y. St. Crim. Victims Bd.*, 502 U.S. 105, 115 (1991).

material that is potentially harmful.<sup>80</sup> However, as of yet, Congress has been unable to craft a statute that is sufficiently narrow enough to address that interest without infringing on the First Amendment rights of adults.<sup>81</sup> In order to narrowly tailor a statute to the goal of protecting children from harmful materials, congressional regulation must be limited to the ways in which that material reaches children.

#### *A. Minimizing the Restriction on Speech: The Focus on “Bad” Actors*

Statutes like the CDA and the COPA focused on the speech itself, rather than the actor who uploaded the material to the Internet. In doing so, the statutes criminalized actors who had, if not completely honorable, at least not “bad” intentions. In addition, the CDA and the COPA failed to specifically identify the material people could not upload.<sup>82</sup> The results were statutes that criminalized acts with no harmful intent without giving clear notice as to what constituted the criminal act. In short, there are two problems that have plagued congressional attempts at drafting a narrowly tailored statute: (1) a quantitative problem in the sense that the CDA and the COPA broadly covered all actors who posted material on the Internet, and (2) a qualitative problem stemming from an inability to effectively define harmful materials.

##### *1. Curing the COPA’s Overbreadth: The Limited Approach of Ohio’s House Bill 8*

Effective regulation of harmful materials online must address the manner in which that material becomes available. The past congressional attempts to regulate harmful material failed because they attempted to regulate all harmful material on the Internet, regardless of the manner in which it becomes available. By attacking such a broad spectrum of expression, the COPA failed to minimize the restriction on speech. The reality, however, is that a significant portion of material online that is harmful to minors was never intended to be viewed by minors.<sup>83</sup> The difficulty underlying the CDA and the COPA is that they never took this fact into account.

---

<sup>80</sup> See *infra* note 87 and accompanying text.

<sup>81</sup> See *supra* Part III.

<sup>82</sup> See *supra* Part III.

<sup>83</sup> Many pornographic Web sites contain the following disclaimer:

We strongly support parental controls on the Internet. *These web pages, and others like them, were never intended to be viewed by minors.* We feel that the new security/monitoring programs being developed are a big step toward self-moderation & allowing everyone to take part in the responsibility of moderating this new environment—instead of waiting for the government to step in and begin censorship.

The problem with the CDA and the COPA is that the statutes looked only at the material itself and not at the actor. The COPA prohibits a commercial carrier from “knowingly and with knowledge of the character of the material . . . [making] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.”<sup>84</sup> The courts interpreting this statute have recognized its overbreadth; the Internet’s age verification problem prevents Web publishers from limiting access to adults only.<sup>85</sup> There is a solution to the age verification problem, however: draft a statute that only covers material reaching an identifiable recipient. In order for Congress to regulate the material on the Web, a statute can only reach material that is specifically placed in front of a child, rather than material that is put out there for all the world to see.

The approach Congress needs to take is similar to the one taken recently by the State of Ohio. Instead of focusing on whether or not a Web publisher posts material that a minor may access, Congress should instead focus on those actors who purposely seek out minors and solicit their business. In 2001, the Ohio General Assembly passed House Bill 8, which was a statute similar to the COPA. The one significant difference, however, was that in defining the material that was covered under the statute, “material” only includes material on the Internet that is specifically sent to specific minors.<sup>86</sup> This approach narrows the speech prohibited in a way that does not encroach on an adult’s ability to view material

---

at <http://www.aemmegroup.com/warning.html> (last visited Mar. 5, 2003) (emphasis added).

<sup>84</sup> 47 U.S.C. § 231(a)(1) (1994 & Supp. V 1999).

<sup>85</sup> See *supra* Parts II.B.1 and III.

<sup>86</sup> The language of the bill is a bit convoluted, first defining “material” and then creating exceptions, which, in turn, have further exceptions. “Material” includes images that appear on a computer monitor, OHIO REV. CODE ANN. § 2907.01(J)(1)(a) (Anderson 2002), but it does not include images on a computer monitor when the computer is connected to the Internet, OHIO REV. CODE ANN. § 2907.01(J)(1)(b)(i) (Anderson 2002), except that it does include images on a monitor when the computer is connected to the Internet “if the image or text is contained in an E-mail message or if the image or text is so appearing on a monitor . . . during a direct presentation to a specific, known juvenile or group of known juveniles.” OHIO REV. CODE ANN. § 2907.01(J)(1)(b)(ii) (Anderson 2002).

It is important to point out that the United States District Court for the Southern District of Ohio found House Bill 8 unconstitutional. See *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932 (S.D. Ohio 2002). However, that decision did not address the merits of Ohio’s approach to protecting children from harmful material, but instead focused on the definition of “harmful to juveniles.” *Id.* at 945 (“[T]he definition of ‘harmful to juveniles,’ . . . is substantially overbroad. Accordingly, the Court need not consider whether the definition of ‘harmful to juveniles’ is unconstitutionally vague or whether ‘the [I]nternet provision’ is unconstitutional . . .”). The Ohio Revised Code uses the term “harmful to juveniles” instead of “harmful to minors.” See OHIO REV. CODE ANN. § 2907.01(E) (Anderson 2002). This definition of harmful material did not incorporate the standards of *Miller* and *Ginsberg*, causing Judge Rice to find House Bill 8 unconstitutional. *Bookfriends*, 223 F. Supp. 2d at 945. Once the General Assembly cures this defect in the statute, it should survive constitutional analysis.

on the Internet. When an online publisher specifically targets certain individuals, then the technological realities that prevent regulation within the confines of the First Amendment—the inability to limit access and the lack of knowledge about who is viewing your material—are no longer issues. The First Amendment is only an obstacle to regulating harmful material when a statute is not narrowly tailored to keep harmful material outside of the purview of children.<sup>87</sup> Opening up a statute to cover everything on the Internet means that the statute covers material adults access as well. However, a statute limited to occurrences of an individual sending material to a specific person that he knows is underage is narrowly tailored to protect children.

Ohio's narrowly tailored approach solves the Internet's age verification problem by ensuring that the offender knows the recipient is a minor. By limiting the restriction on speech so that it only applies when the recipient is known, Ohio's approach creates a limited restriction on free speech that is narrowly tailored to achieve a compelling state interest. First, this approach avoids the problem of chilling speech. The statute would not limit the adult population in the Internet community to what is appropriate to children, because you can post material online whether it is harmful to minors or not (therefore not infringing on adult access). There is no fear of criminal prosecution from posting material alone.<sup>88</sup> Second, this statute allows the government to achieve the compelling interest of preventing people from sending harmful materials to juveniles. Even though the statute necessarily does not cover the entire breadth of the Internet, it would still protect minors by making sure that they are not specifically targeted to receive this type of material. Finally, this type of regulation has a minimal restriction on free speech—in effect, it only restricts material in a way that is constitutionally permissible under *Ginsberg*.

## 2. Defining "Harmful to Minors" in a Constitutionally Permissible Manner

Constitutional regulation of commercial dealers of pornography must overcome one final obstacle: contemporary community standards. Clearing the obstacle requires the Court to accept that a national standard for defining

---

<sup>87</sup> See *supra* note 7 and accompanying text.

<sup>88</sup> The statute specifically states that material accessed while a computer is connected to the Web is not included. OHIO REV. CODE ANN. § 2907.01(J)(1)(b)(ii). Furthermore, House Bill 8 contains several affirmative offenses similar to the COPA, and the statute protects against the very thing that makes statutes like the COPA overbroad. The statute creates an affirmative defense that protects an individual who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by juveniles to material that is harmful to juveniles, including any method that is feasible under available technology." OHIO REV. CODE ANN. § 2907.35(F).

materials harmful to minors is necessary.<sup>89</sup> Although a majority of the Court held in *Ashcroft* that the use of community standards for judging material on the Internet alone does not render a statute per se invalid,<sup>90</sup> it is clear that any statute relating to the Internet that incorporates this standard is constitutionally suspect.<sup>91</sup>

The nature of the Internet prohibits the use of “community standards” as applied in *Ginsberg*, so that standard cannot apply to the Internet issue today. Henry Cohen points out that while the Court in *Ginsberg* applied a rational basis review to the New York statute, any regulation of the Internet by Congress will have to pass strict scrutiny.<sup>92</sup> Since a regulation of pornography is without question a content-based regulation on speech, strict scrutiny applies; this is the

---

<sup>89</sup> For an argument why a national standard is necessary, see Scott Winstead, *The Application of the “Contemporary Community Standard” to Internet Pornography: Some Thoughts and Suggestions*, 3 LOY. INTEL. PROP. & HIGH TECH. J. 28 (2000). See also Jacobson, *supra* note 27, at 446 (“Where Congress thinks it is being extremely careful by abiding by Supreme Court precedent [in adopting the contemporary community standards aspect of *Miller*], it is in fact making a large error.”). But see Conn, *supra* note 33, at 480 (“A national standard for obscenity is inadmissible as a matter of law.”).

<sup>90</sup> *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002); see *supra* note 66 and accompanying text.

<sup>91</sup> This goes back to Cohen’s argument that there cannot be a compelling interest in protecting children from something that may or may not be harmful to children depending on which community you are in—material is either harmful to minors or it is not, but the fact that it is will not vary depending on what community you live in. See Cohen, *supra* note 41. As Cohen states it:

For there to be a compelling governmental interest in protecting minors from material that is *assertedly* harmful to minors, the material must actually be harmful to minors. But whether material is harmful to minors cannot depend upon what a particular community thinks. One cannot seriously say that a child is more likely to be hurt by speech if he lives in a community that finds the speech objectionable than if he lives elsewhere.

*Id.* (emphasis added). Cohen’s argument is that defining what is harmful to minors by what any community thinks, be it local or nationwide, is unconstitutional. Cohen states that for something to be harmful to minors it *must actually harm* the minor. *Id.* This ultimate conclusion oversimplifies First Amendment jurisprudence. The government does have a compelling interest in protecting children from harmful materials, see *Reno II*, 521 U.S. 844, 869 (1997) (“We agreed that ‘there is a compelling interest in protecting the physical and psychological well-being of minors’ which extended to shielding them from indecent messages that are not obscene by adult standards . . .”), and it is up to the adult population to determine the standard for what it believes will harm minors. Cohen’s argument misses a fundamental principle: material is not harmful to minors because there is some readily apparent consequence of seeing the material. Rather, adults define material as harmful when society believes that it will be damaging to the child, whether the child believes it or not and whether the child knows that she has been harmed. See *Ginsberg v. New York*, 390 U.S. 629, 639 & n.6 (1968).

<sup>92</sup> See Cohen, *supra* note 41.

standard of review the Court has applied in recent First Amendment cases,<sup>93</sup> and it was the standard applied by the Third Circuit case in review of the COPA.<sup>94</sup> Passing strict scrutiny requires that a statute be necessary to achieve a compelling state interest and narrowly tailored to achieve that interest.<sup>95</sup> The “community standards” element of *Miller* and *Ginsberg* necessarily fails that analysis, because of its chilling effect on speech. Even though there may be a compelling interest in protecting children for pornographic and other harmful materials, and the Supreme Court has consistently found a compelling interest here,<sup>96</sup> a statute defining the covered materials by community standards cannot be narrowly tailored to that interest.<sup>97</sup>

There are limitations on the applicability of a national standard, however. The difficulty with a national standard is that there is a very real possibility that it will have the opposite effect: where community standards ultimately lead to adopting the values of the most conservative community, a national standard would ultimately adopt the standard of the most liberal community. In rejecting a national standard in *Miller*, Justice Burger commented, “It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”<sup>98</sup> This misses the point. The First Amendment exists to protect the expression. A national standard does not use the First Amendment as an instrument to force the views of one group on another; the fundamental value of the First Amendment freedom of speech is that the government cannot restrain expression because it is unpopular.<sup>99</sup> A national standard stops the

---

<sup>93</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

<sup>94</sup> For a discussion of the COPA, see *supra* Part III.B.

<sup>95</sup> See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *Carey v. Brown*, 447 U.S. 455, 461–62 (1980).

<sup>96</sup> *Conn.*, *supra* note 33, at 481.

<sup>97</sup> Some critics question whether a definition of obscenity based on community standards is even desirable. Cohen argues that if the goal is to protect children from harmful materials, then only materials that are actually harmful can be regulated. Cohen, *supra* note 41 (“One cannot seriously say that a child is more likely to be hurt by speech if he lives in a community that finds the speech objectionable than if he lives elsewhere.”). Basing our determination of harmful materials on what the community as a whole considers *might be* harmful to the average child, means that we leave it up to the jury to determine what the community thinks rather than whether a child was adversely affected. *Id.* For further discussion of whether it is possible to apply community standards to the Internet, see *supra* Part II.B.2.

<sup>98</sup> *Miller v. California*, 413 U.S. 15, 32 (1973).

<sup>99</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (noting that the purpose of the statute at issue was “not to suppress . . . unpopular views”); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 176 (1971) (“The First Amendment was intended to make speech free from government control, even speech which is dangerous

government from restraining expression that the more liberal communities deem to be okay; it stops the government from restraining unpopular expression.

It appears that the Supreme Court is starting to come to this conclusion as well. At least one justice, Justice Stevens, has stated the position that a definition of harmful material on the Internet that incorporates contemporary community standards is per se unconstitutional.<sup>100</sup> Three more justices stressed the difficulties of applying varying community standards when expression must necessarily reach the entire nation.<sup>101</sup> Moreover, in their concurring opinions in *Ashcroft*, Justices O'Connor and Breyer both called for the adoption of a national standard.<sup>102</sup> Justice O'Connor agreed only that the use of community standards

---

and unpopular.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (“In order for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”).

<sup>100</sup> *Ashcroft v. ACLU*, 535 U.S. 564, 611 (2002) (Stevens, J., dissenting) (determining that varying standards in different communities “will restrict a substantial amount of protected speech that would not be considered harmful to minors in many communities”). Justice Stevens argued that in *Miller* the use of community standards was to ensure that jurors did not apply their own standard or the standard of either the most sensitive or insensitive person, but the community as a whole. In the context of the Internet, according to Stevens, community standards instead forced a jury to apply the standard of the most “puritan village.” *Id.* at 603 (Stevens, J., dissenting).

<sup>101</sup> *Id.* at 595–97 (Kennedy, J., concurring). Justices Ginsburg and Souter joined this opinion. Justice Kennedy also noted that this may be a problem peculiar to Internet regulation, implying that even if a national standard is necessary to regulate expression on the Internet this would not require a complete overhaul of First Amendment jurisprudence. “Indeed, when Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes, for ‘differences in the characteristics of new media justify differences in the First Amendment standards applied to them.’ ” *Id.* at 595 (Kennedy, J., concurring) (citation omitted).

<sup>102</sup> *Id.* at 587–89 (O'Connor, J., concurring); *Id.* at 589 (Breyer, J., concurring). In O'Connor's view, even if a community standard did not in itself render the COPA overbroad, a national standard was necessary in light of the inability to limit expression on the Internet to certain localities. Justice O'Connor based her argument for the constitutionality of a national standard on two separate rationales. First, nothing in the Court's precedent stated that relying on the standards of local communities for judging material harmful to minors was mandated. *Id.* at 587–88 (O'Connor, J., concurring) (arguing that *Miller* approved community standards, but it did not require them). Second, there is intuitively no difference between combining all of the communities of one state into a single standard and doing the same on a national level. *Id.* at 588 (O'Connor, J., concurring) (pointing out that in *Miller* the district court instructed the jury to judge obscenity based on the standard of the entire state, which included communities that would undoubtedly have varying standards for what appeals to the prurient interest, noting the differences between Bakersfield and Berkeley).

Justice Breyer concluded that not only was a national standard permissible but also that a national standard was Congress's intention in the COPA from the beginning. Citing a House Committee Report, Breyer concluded that Congress intended by “community standards” to

alone did not make the COPA overbroad.<sup>103</sup> With at least six justices seemingly on the side of a national standard, it would behoove Congress to implement this into the next version of the COPA, if there is to be one.

One argument against having a national standard is that it will apply differently in different communities because jurors will always bring their own interpretation into the fold. Ultimately, the decision in each case is going to depend on how a jury *applies* the standard, and this will differ from jurisdiction to jurisdiction.<sup>104</sup> But as Justice O'Connor pointed out, this is going to be true anyway, and it is true even under *Miller*.<sup>105</sup> All juries apply standards relative to their own understanding, based on a judge's instructions, as to what that standard entails. This does not mean that the First Amendment requires that an individual be notified in advance about how a particular community might interpret a national standard. This has never presented a problem in other forms of First Amendment analysis, and it should not when dealing with issues of the Internet.<sup>106</sup> If it were constitutionally permissible to let one jury determine a standard that included the beliefs of both Bakersfield and Berkeley, then there can be nothing in the Constitution that would prevent a jury from considering views nationwide, from Savannah to San Francisco.

---

mean "adult standard" rather than any standard based on geographic boundaries. *Id.* at 590 (Breyer, J., concurring). Relying on the interpretive canon requiring that statutes should be construed constitutionally if possible, Justice Breyer determined that the Act must be read as including a national standard. *Id.* (Breyer, J., concurring). Justice Breyer apparently believed, like Justice Stevens, that use of Miller's community standards would render the Act unconstitutional, but he did not go so far as to say that alone required the Act be found unconstitutional:

To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto . . . . The technical difficulties associated with efforts to confine Internet material to particular geographic areas make the problem particularly serious.

*See id.* (Breyer, J., concurring).

<sup>103</sup> *Ashcroft*, 535 U.S. at 586–87 (O'Connor, J., concurring) Justice O'Connor noted,

[R]espondents have not shown that [the COPA] is overbroad solely on the basis of the variation in the standards of different communities. . . .

But respondents' failure to prove substantial overbreadth on a facial challenge in this case still leaves open the possibility that the use of local community standards will cause problems for regulation of obscenity on the Internet . . . in future cases.

*Id.*

<sup>104</sup> *Ashcroft v. ACLU*, 535 U.S. 564, 596 (2002) (Kennedy, J., concurring) ("If the statute does incorporate some concept of national community standards, the actual standard applied is bound to vary by community nevertheless.").

<sup>105</sup> *Id.* at 587–88 (O'Connor, J., concurring); *see also supra* note 98 and accompanying text.

<sup>106</sup> *See supra* note 98 and accompanying text.



### B. Constitutional Alternatives: The Focus on Accessibility

Although it is possible to solve the constitutional problems of regulating pornography online through a COPA-like statute, such a statute would only solve half the problem. A fundamentally more appropriate way of regulating harmful materials on the Internet is to focus on minors' ability to access material, rather than focusing on the availability of material in general.<sup>107</sup> That approach can reach the remaining mechanisms without infringing on First Amendment rights. The flaw in past congressional approaches is that they put the onus on the individual to limit what expressive material she uploads to the Internet—the First Amendment protects against such inevitable limitations on speech.<sup>108</sup> Instead, congressional regulation can protect children from reaching harmful material online by denying them access to such material. Preventing access by children minimizes the burden on an adult's right to protected expression.<sup>109</sup> Rather than focusing on who uploads harmful material to the Internet, Congress should address future Internet regulation at the ways in which children access harmful images and expression.

There are two ways children access harmful sites without any direct action by the Web publisher: (1) a minor, such as teenager, intentionally visits a site, and (2) a child unintentionally comes across a site with harmful material. The latter event occurs, not when someone specifically sends material over the Internet, but when children run into Web sites that contain harmful material. Either because the Web publisher intentionally created a site with a URL similar to a popular Web site,<sup>110</sup> or because a child clicks on a link without understanding the content

---

<sup>107</sup> John F. McGuire, Note, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 777 (1999) ("While . . . [recent] pieces of legislation focus on 'top-down' government regulation, alternatives have developed that focus not on what a user is offered on the Internet, but rather on what a user may retrieve."); see Alexander, *supra* note 1, at 978 ("Congress needs to work from the bottom, up, instead of trying to regulate Internet pornography from the top, down.").

<sup>108</sup> See *supra* Part II.B.1.

<sup>109</sup> By preventing access by children, there is no need to limit speech at all with respect to adult access. See *infra* Part IV.B.2.

<sup>110</sup> A familiar example is the Web site [www.whitehouse.com](http://www.whitehouse.com), which is a pornographic Web site containing material that most would consider harmful to minors, as opposed to the White House's official homepage, located at [www.whitehouse.gov](http://www.whitehouse.gov). See Jacobson, *supra* note 27 at 421 & n.1.

However, this particular method of exposing people to pornography online may no longer be a problem. On April 30, 2003, President George W. Bush signed into law the PROTECT Act. A provision of this Act provides:

(a) Whoever knowingly uses a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity shall be fined under this title or imprisoned not more than 2 years, or both.

of the site that link will direct her to, children often unintentionally run into harmful material online.<sup>111</sup>

There are a number of approaches the government can take in order to limit minors' access to Web sites containing harmful materials, without interfering with adult access to constitutionally protected material. Generally, these approaches fall into two main groups: filtering and zoning.<sup>112</sup> Many scholars who have addressed this issue contend that this dilemma should be left to parents to deal with, because there are several filtering mechanisms available that would allow parents to control their own child's ability to access harmful material.<sup>113</sup> As addressed below, relying on filtering mechanisms is undesirable for two reasons. First, parents lack the ability to control their children twenty-four hours a day, and relying on them to utilize filtering programs as the only safeguard will be largely ineffective.<sup>114</sup> Second, under current technology, filtering programs themselves are ineffective in screening out Web sites that contain harmful material. A zoning approach that demands the government protect against this problem, while still allowing flexibility to enable parents to raise their children in the manner they see fit, will control access without any infringement on adult ability to access constitutionally protected material.

---

(b) Whoever knowingly uses a misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors on the Internet shall be fined under this title or imprisoned not more than 4 years, or both.

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 521, 117 Stat. 650, 686 (2003). Seemingly, the individuals running [www.whitehouse.com](http://www.whitehouse.com) and similar pornographic Webpages are subject to prosecution under this new law, although this does not eliminate the possibility of minors inadvertently coming across harmful material online. There are potential constitutional hurdles facing the PROTECT Act as well, but they are beyond the scope of this Note.

<sup>111</sup> H.R. REP. NO. 105-775 (1998).

<sup>112</sup> Specht, *supra* note 3, at 447–57 (“Means of restricting children’s access to adult materials can be divided into two categories: filtering and zoning.”). Specht discusses the benefits and drawbacks of both filtering and zoning, concluding that both alternative measures have problems of their own. He concludes that much of the problems of regulating the Internet will disappear as technology increases. *Id.* at 457. However, Specht seems to favor a zoning approach, as the only thing problematic in that approach is current technology. *Id.*

<sup>113</sup> Zick, *supra* note 2, at 1202–03.

<sup>114</sup> There is little doubt that at least some children have access to computers outside the home, either at school, the local library, or even a friend’s house. The argument that parents should be able to determine for themselves what material their children can access fails because such as if a parent takes every step available and installs a filtering program, the child would still be able to access harmful materials at other computers. Some type of government intervention is necessary in this area.

### 1. Filtering: The Illusory Solution

Internet “blocking” technology is available that allows schools, libraries, and parents to limit the ability of the computers their kids use to access the Internet.<sup>115</sup> Proponents of this solution argue that child welfare is foremost a parental responsibility, and therefore any limitation on freedom of speech that can be accomplished by this less restrictive means is necessarily not narrowly tailored.<sup>116</sup> Since parents should ultimately decide how to raise their own children, the argument goes, a process that allows parents to determine how much or how little “harmful” content a child views online is the most effective means of protection.

From a policy perspective, requiring parents to be the only line of defense would be an irresponsible delegation of duty by Congress. This approach asks too much of parents, who often lack the time, ability, and resources to address this

---

<sup>115</sup> See *Reno II*, 521 U.S. 844, 855 (1997); Conn, *supra* note 33, at 477. Legislation enacted since the COPA attempts to require all publicly funded schools and libraries to utilize filtering technology. See Children’s Internet Protection Act, Pub.L. 106–554 (to be codified at 20 U.S.C. § 9134 and 47 U.S.C. § 254(h)) [hereinafter CIPA]. For an outline of the CIPA, including a constitutional analysis, see Conn, *supra* note 33, at 473–75, 483–90.

The CIPA ultimately completed its journey, successfully, through the court system in June 2003. The United States District Court for the Eastern District of Pennsylvania concluded that CIPA was unconstitutional. *Am. Library Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401 (E.D. Pa. 2002) [hereinafter *American Library I*]. The court concluded that although there was a compelling interest in preventing minors from accessing harmful material at federally funded libraries, the CIPA was not narrowly tailored to that interest because there was too great an infringement on First Amendment values. *Id.* at 479.

However, the Supreme Court recently reversed this constitutional interpretation of the CIPA. *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 123 S.Ct. 2297 (2003) [hereinafter *American Library II*]. The major distinction between the CIPA and the COPA is that it represents a use of the Spending Power. First, Chief Justice Rehnquist, writing for a plurality, noted that the proper inquiry under the Spending Clause is whether the condition Congress requires for funding would be constitutional if the libraries performed it themselves. *Id.* at 2303 n.2. The question before the Court was therefore whether it would be constitutional for the libraries to install filtering technology. Second, the Court emphasized the need for libraries to have broad discretion in making collection decisions. *Id.* at 2304. For this reason, a public library’s collections decisions are not subject to heightened scrutiny. *Id.* at 2306. It is not unconstitutional, then, for a public library to choose to implement filtering technology because “libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion [in the collection] from all that is not.” *Id.* Therefore, the Court concluded that it is entirely rational for a public library to choose to implement filtering technology in order to facilitate collections decisions. *Id.* Thus, since it is not unconstitutional for the public library to use filtering technology, it is not an unconstitutional use of the Spending Power to condition federal funding on the use of the such technology.

<sup>116</sup> See Nadine Strossen, *Children’s Rights vs. Adult Free Speech: Can They Be Reconciled?*, 29 CONN. L. REV. 873 (1997) (arguing that cyber-censorship is not the least restrictive means for shielding children).

problem on their own.<sup>117</sup> Parents cannot watch their children all of the time, and they have little or no ability to control how their children access materials when using a computer other than the one at home.

Additionally, the argument that the government should not be interfering with how parents raise their children holds little weight in this area. If society deems these materials harmful to children, then the government has the authority to protect children from being exposed to these materials just as it has the ability to stop minors from drinking alcohol, from smoking, or from dropping out of school. When parents are unable, or unwilling to fulfill their duties as parents then government must step in as a surrogate.<sup>118</sup>

The second problem with relying on filtering technology is that filters do not always work. Filtering technology fails in two separate respects: (1) it is underinclusive in that the programs do not block all sites that contain harmful material, and (2) filtering is overinclusive in that the software programs often prevent access to material that is entirely appropriate, even educational.<sup>119</sup> First, these filtering software programs are ultimately unreliable for their stated purpose—they cannot hope to screen out all, or perhaps even most, harmful material.<sup>120</sup> The impossibility of recognizing all harmful material is not just a

---

<sup>117</sup> To begin with, parents often have less knowledge about the Internet compared to their kids. “Only 23% of parents say they know more about the Internet than their child does.” AMARACH CONSULTING, RESEARCH OF INTERNET DOWNSIDE ISSUES AUGUST 2001 ii (2001) (submitted to the Internet Advisory Board), available at <http://www.ispai.ie/docs%5Camarach.pdf> (last visited Mar. 4, 2004). Moreover, it simply is not possible for parents to protect their kids from all Internet harms. Even one expressed believer in parental responsibility over government regulation acknowledges that parents need help: “I’m afraid we’ll need something a bit stronger to protect our children. I hesitate to suggest new laws or further government intervention, but it’s the government’s job to protect kids against abusive commercial practices. . . . [P]arental controls go only so far. . . .” Lawrence J. Magid, *Worried About Porno Online? Marketers are a Bigger Threat to Your Kids*, COMPUTER CURRENTS, May 20, 1997, available at <http://www.larrysworld.com/articles/kidspriv.htm> (last visited Mar. 4, 2004).

<sup>118</sup> The Third Circuit Court of Appeals seems to agree with this position. In the decision striking down the COPA, the Third Circuit stated that “the parental hand should not be looked to as a substitute for a congressional mandate [regulating harmful material].” *Reno IV*, 217 F.3d 162, 181 & n.24 (3d Cir. 2000).

<sup>119</sup> Testing of individual filtering software systems has illustrated some absurd results, including blockage of access to university research pages, information pages on HIV/AIDS, safe-sex pages from Planned Parenthood and Johns Hopkins Medical School, and others. See Geoffrey Nunberg, *The Internet Filter Farce*, 12 THE AMERICAN PROSPECT ONLINE, Jan. 1–15, 2001, available at <http://www.prospect.org/print/V12/1/nunberg-g.html> (last visited Mar. 4, 2004). Nunberg also notes that one filtering program, SafeClick, blocked online accounts of testimony and hearings before the congressionally-appointed Commission on Online Child Protection, stating, “That must be the dream of every corporate publicist—to be able to prevent your customers from reading any negative comments about your products.” *Id.*

<sup>120</sup> *Id.* Nunberg notes:

logical conclusion; there are ways for Web publishers to get around filtering programs, thus rendering them completely ineffective.<sup>121</sup> Ultimately, it is impossible for these filtering systems to protect against all of the harmful material on the Internet, especially when one considers the rate of growth that the Internet has experienced over the last few years and will experience in the future. The bottom line is filtering software is not enough.

Perhaps even more problematic, filtering programs themselves have the effect of silencing large portions of constitutionally protected material.<sup>122</sup> Requiring parents, and worse, schools and libraries, to utilize filtering software means prohibiting people, adults as well as minors, from accessing constitutionally protected materials. A recent survey by The Kaiser Family Foundation of fifteen- to seventeen-year-olds reported that nearly half of those seeking health information online were blocked from educational and

---

*Consumer Reports* tested the four most common filtering programs against a list of sites that its investigators judged clearly unsuitable for young children. SurfWatch blocked 82 percent of the sites, the highest score of the group, and CYBERSitter blocked only 63 percent (both programs performed much better than NetNanny, which blocked none at all).

*Id.* Courts have struck down congressional regulation that requires libraries to utilize filtering software or risk losing federal funding. *American Library I*, 201 F. Supp. 2d 401 (E.D. Pa., 2002) (finding the Children's Internet Protection Act facially invalid); *see also* Sophia Cope, *Parents are Better than Technology at Protecting Children from Online Pornography*, EPOLICY (Nov. 2002), at <http://www.pacificresearch.org/pub/ecp/2002/epolicy11-26.html> (last visited Mar. 4, 2004) ("[The] court held that CIPA violates the free speech rights of adult library patrons because it 'induces' public libraries to use imprecise filtering software that 'overblocks' and thus denies access to significant amounts of constitutionally protected online information.").

<sup>121</sup> Without getting overly complex, the easiest way to get around text-based filtering problems is to not include written text at all, but you can also put words on a Web site without them being text-based, either by making them into an image or by using Javascript. *See* Nunberg, *supra* note 119. (outlining some of the ways Web publishers can get around the software).

<sup>122</sup> It was for this reason that the United States District Court for the Eastern District of Pennsylvania held that the CIPA, which required public libraries to implement filtering software or lose federal funding, was unconstitutional. *American Library I*, 201 F. Supp. 2d 401, 490 (E.D. Pa. 2002). In its decision, the court noted that "[t]he commercially available filters on which evidence was presented at trial all block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography." *Id.* at 475. The court found that it was "impossible as a practical matter" for filtering technology to block out unprotected expression "without also blocking significant amounts of constitutionally protected speech." *Id.* at 478. However, the Supreme Court overruled the district court's interpretation of the CIPA. *American Library II*, 123 S. Ct. 2297, 2303 (2003); *see supra* note 115.

informational sources that were decidedly non-pornographic.<sup>123</sup> The simple fact is that the process these filtering programs rely on is necessarily overbroad—most screen out Web sites that contain certain keywords, but it is simply impossible to screen for pornographic sites based solely on the words found in them without ultimately blocking other sites as well.<sup>124</sup> Not only do we have the problem that the filtering programs prevent access to a great many non-harmful sites, but parents are unable to determine which non-harmful sites the software has the potential to recognize as harmful.<sup>125</sup> Now parents who are actively trying to protect their children cannot even determine what they are protecting their children from.

Although an effective filtering system will avoid the constitutional problems that have thwarted congressional efforts to protect children, such a system does not exist at this time. The lack of effective filtering technology requires taking a different approach to regulating minors' access to pornography online.

---

<sup>123</sup> See THE KAISER FAMILY FOUNDATION, HOW YOUNG PEOPLE USE THE INTERNET FOR HEALTH INFORMATION 3 (2001) at [http://www.kff.org/entmedia/upload/13719\\_1.pdf](http://www.kff.org/entmedia/upload/13719_1.pdf) (last visited Mar. 4, 2004). The study found that 46 percent of students surveyed said they were prevented from accessing health related information by the blocking technology.

One recent study randomly selected 1,000 Web addresses in the dot-com domain and tested filtering software on those addresses. Of the Web sites the filter software SurfWatch blocked, four out of five of them were misclassified as containing harmful material. Bennett Hazelton, *SurfWatch Error Rates for First 1000 .com Domains*, (Aug. 2, 2000), at <http://www.copacommission.org/paper/peacefire.org/censorware/SurfWatch/first-1000-com-domains.html> (last visited Mar. 4, 2004).

<sup>124</sup> See Nunberg, *supra* note 119 (arguing that it is impossible to reach only harmful material with keyword filtering software). Nunberg notes:

The fact is, it's impossible to single out porn sites reliably simply by the words they use. Go to Disney's Go.com, turn on the GoGuardian filter, and do a search on sex; you will get no hits at all. Then turn it off and discover what you were missing: not just porn pages, but the text of the Scientific American article "Bonobo Sex and Society," the pages on sex discrimination of the Australian Equal Opportunity Commission, and the Michigan Sex Offender Registry.

*Id.* The problem is exacerbated by the fact that the software programming companies intentionally seek to make their products screen broadly in order to ensure blockage of the most amount of harmful material as possible. The fact that the software companies have successfully gotten courts to suppress such information when "free-speech advocates have hacked the filters." *Id.* Then, the problem is compounded yet again when the companies fail to inform the consumers exactly what their product is blocking against, since they continually refuse to produce their keyword searching algorithms. *Id.*

<sup>125</sup> *Id.* ("The problem is that parents who buy a commercial filtering program have no way of knowing exactly what speech it blocks, and the software companies are doing all they can to keep their customers in ignorance.").

## 2. Zoning: The Future of Regulating Harmful Materials on the Internet

Instead of putting the onus on the parents, guardians, and supervisors of children, regulation of pornography in the virtual world should take the form of pornography regulation in the real world. Present forms of pornography regulation do not require the parents to take steps to keep pornography away, but instead require those who want access to such materials to take affirmative steps to access such materials.<sup>126</sup> Regulation does this through zoning: adult bookstores are kept away from residential neighborhoods, adult videos reserved for a secluded section of the video store, strip clubs and bars exist only in certain places.<sup>127</sup> Real world zoning of activities and materials not fit for children is possible because age verification in the real world is relatively simple. In order to make zoning possible on the Internet, one must solve, or avoid, the age verification problems of Internet technology.

While the age verification problem has led some commentators to conclude that zoning on the Internet is both economically infeasible<sup>128</sup> and unworkable

<sup>126</sup> Adult phone “services” require age verification, buying pornography at a bookstore or video store requires age verification, access to a strip club requires age verification, etc. See Specht, *supra* note 3, at 421 (“Most taverns require that people entering be of a minimum age . . . . Indeed, bars will often employ people to stand at the door for the specific duty of checking people’s identification and denying minors’ access.”); Zick, *supra* note 2, at 1152 (“[G]eography and identity enable proprietors of adult establishments to permit adults to enter while preventing children, who generally cannot conceal their age, from coming inside.”).

Such regulations are constitutional as valid time, place, and manner restrictions on speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (upholding the constitutionality of a Washington statute that regulated the location of adult theaters). Time, place, and manner restrictions regulate the “secondary effects” of speech, because they restrict speech for some other legitimate reason unrelated to the content. *Id.* at 47.

<sup>127</sup> Lessig, *supra* note 30, at 885–86. Lessig argues that in “real space,” social norms and structures exist that keep pornography in its place:

Porn in real space is regulated by keeping it in its place, and by keeping it in its place, communities facilitate the restriction in its sale and distribution. Just think about the distribution of porn in any major city: There are places where porn is sold; it is not available everywhere. These places are either designed as ‘adult only,’ or if not adult only, then sales are restricted to adults only. Sales are restricted by both rules and by norms, and these restrictions can be effective because most who would try to escape them (kids) can’t easily escape identifying themselves as kids.

*Id.*; see also, Zick, *supra* note 2, at 1147 (“In real space, the government can create physical and geographical ‘zones’ within communities such that children are denied access to adult materials and shielded from adult activities.”).

<sup>128</sup> Both the CDA and the COPA included one aspect of zoning, as they provided for an affirmative defense if the individual took steps to determine the age of the user. See *supra* notes 60, 67. The courts found this affirmative defense unsatisfactory, because most smaller businesses would not be able to utilize such verification systems, at least not if they wanted to

under current technology,<sup>129</sup> there is one version of zoning that avoids the technological difficulties of verifying age on the Internet. By zoning harmful materials online into their own Internet domain,<sup>130</sup> the age verification problem can be avoided. This is because such a system could operate without the need to verify age *online*, but rather by verifying age the same way bars and adult bookstores verify age: by physically looking at an ID. To understand how this works, it is necessary to first examine how the age verification problem makes the other suggested forms of Internet zoning unworkable.

Most of the suggested Internet zoning options operate by identifying the Web user over the Internet, and thus seek to *solve* the age verification problem through technological advancement.<sup>131</sup> One example of this method of Internet zoning is the use of “digital certificates,” which contain information about the Web user.<sup>132</sup> A digital certificate would allow Web publishers to verify the age of an individual

---

operate at a profit. *See Reno III*, 31 F. Supp. 2d 473, 488–90 (E.D. Pa. 1999); *Reno II*, 521 U.S. 844, 881–82 (1997).

<sup>129</sup> Zick, *supra* note 2, at 1152–54; *see also* Lessig, *supra* note 30, at 889 (discussing zoning regulation in “real space,” and how it may relate to zoning in cyberspace). Lessig argues that “[z]oning is coming to cyberspace, with an efficiency unmatched in real space.” *Id.* However, Lessig finds that zoning of the Internet is not necessarily desirable, because it is completely antithetical to the nature of the Internet. *Id.* at 887. As Lessig describes it:

Indeed, zoning is just what cyberspace is, or at least was, against. . . . [C]yberspace was a place where this ideal of zoning was rejected. Here was one place where borders were not to be boundaries; access was to be open and free; people could enter and engage without revealing who they were. . . .

*Id.* However, zoning pornography can be achieved without fundamentally altering the nature of the Internet. As this Note argues, zoning pornography can occur without the individual giving away any identifying characteristics over the Internet—individuals would still be free to roam the Internet in anonymity. *See infra* this section.

<sup>130</sup> The domain name system is the hierarchical organization of the Internet. For an explanation of how this system operates, see April Mara Major, *Internet Red Light Districts: A Domain Name Proposal for Regulatory Zoning of Obscene Content*, 16 J. MARSHALL J. COMPUTER & INFO. L. 21, 25–29 (1997). The best known domain names are “.com” for commercial Web sites, “.org” for organizations, and “.gov” for government sites. “Widely accepted Internet policy already mandates that content belong in one of [the] top-level domains.” *Id.* at 25.

<sup>131</sup> Specht, *supra* note 3, at 453 (“Two basic types of [I]nternet zoning are available, both of which attempt to certify a web surfer’s age.”).

<sup>132</sup> *Id.* at 454 (“A digital certificate would reside on the web surfer’s hard drive, and would provide information about the surfer, including the surfer’s age.”); *see also* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 35 (1999). Computers could contain numerous numbers of digital certificates, so a particular computer would not be denied access to adult sites simply because one child uses it. Specht, *supra* note 3, at 454–55.



when the person attempts to log on to the Web page.<sup>133</sup> All material considered harmful would be “tagged,” requiring a digital certificate to access the material.<sup>134</sup> The problem with these types of age verification systems is that they attempt to verify age over the Internet. These systems can work, but they fail to solve the age verification problem because at the present time this is either too costly or unworkable.<sup>135</sup> Zoning that requires solving the age verification problem will never work until technology advances to the point where age verification over the Internet is both possible and economically feasible.

Rather than waiting for technology to catch up, zoning on the Internet can occur in a way that allows for the same type of age verification that exists in the real world. The alternative method of zoning, which the CDA and the COPA ignored, is to place all pornographic and other harmful material on the Internet into one “area” of cyberspace—it is possible to seclude pornography online the same way adult videos are secluded in their own section of the video store. This occurs by creating a separate domain name for all harmful materials.<sup>136</sup> Establishing a new domain for harmful materials would require all Web sites containing such material to register under the new domain name—“.xxx,” “.sex,” and “.obs” (for obscene) are suggested examples.<sup>137</sup> This would ensure, at the

---

<sup>133</sup> The COPA allowed the use of a digital certificate as an affirmative defense. *See supra* note 70 and accompanying text.

<sup>134</sup> *See* McGuire, *supra* note 107, at 761 n.53 (“[A] provider could [identify] indecent or patently offensive material with a tag . . . attached to the Uniform Resource Locator (URL).”); Elaine M. Spiliopoulos, *Legislative Update, The Communications Decency Act of 1996*, 7 DEPAUL-LCA J. ART & ENT. L. & POL’Y 336, 350 (1997) (discussing “tagging”—a way in which Web publishers could identify sexually explicit material).

<sup>135</sup> *See supra* note 126 and accompanying text. Unlike age verification in the real world, which is effective and relatively simple, the cost and difficulty of age verification in the virtual world puts a burden on speech by deterring people from access. *Reno II*, 521 U.S. 844, 856 (1997); *see supra* note 58 and accompanying text.

<sup>136</sup> This proposal appears to be first made by A. Michael Salim to the International Ad Hoc Committee (IAHC) which governs domain system registries. A. Michael Salim, *Proposal to Reserve Restricted TLD’s for Adult-Oriented Domains*, at <http://www.iahc.org/contrib/draft-iahc-salim-restricted-tld.txt> (Jan. 19, 1997) (last visited Oct. 23, 2003). The IAHC describes itself as “a coalition of participants from the broad Internet community, working to satisfy the requirement for enhancements to the Internet’s global Domain Name System (DNS).” *See* Int’l Ad Hoc Comm., at <http://www.iahc.org> (last visited Oct. 23, 2003).

<sup>137</sup> Sahara Stone, *Child Online Protection Act: The Problem of Contemporary Community Standards on the World Wide Web*, 9 MEDIA L. & POL’Y 1, 9–10 (2001); *see* Major, *supra* note 130, at 27; Zick, *supra* note 2, at 1161; *see also* McGuire, *supra* note 107, at 761 n.53; Connie Eccles, *Why We Should Require Porn Sites To Use the .Sex Extension In Their Domain Names*, at <http://www.comportone.com/connie/articles/antiporn.htm> (last visited Mar. 4, 2004).

very least, that no one, including minors, stumbles across illicit material online accidentally.<sup>138</sup>

Nevertheless, even a separate domain in and of itself does not solve the problem of child access<sup>139</sup>—there has to be some screening mechanism to ensure that minors do not have access to this domain. Some who have suggested a separate domain for harmful materials suggest that filtering technology be implemented that could screen against minors.<sup>140</sup> This would certainly avoid some of the problems filtering technology has had, due to the ease in which this filtering would operate. However, such a filtering system again rests responsibility for this on the parents, and the same realities of the physical world prevent such a system from fulfilling all parental expectations due to the ease with which minors would be able to get around their parents' use of such software programs.<sup>141</sup>

Instead, access to a .xxx domain should be granted the same way in which access to strip clubs and adult bookstores is granted—by making those who desire such access to take affirmative steps to gain access. Timothy Zick suggests that “[i]t would [still] be incumbent upon software manufacturers to develop blocking software to deny access to all sites in the new domain.”<sup>142</sup> This is not necessarily true. It would be incumbent upon software manufacturers, it is true, but the burden should be developing software that would allow access to the .xxx domain rather than deny access. The system would work like this: in the status quo, the .xxx domain would be inaccessible. In order to access the domain, an individual would have to purchase software that would enable access. By restricting the

---

<sup>138</sup> Of course, Congress would have no jurisdiction to require that foreign sites be listed under such a domain. The government jurisdictional aspects of the Internet are beyond the scope of this Note. For an examination of government jurisdiction over domain name systems, see generally, Johnson & Post, *supra* note 26; Major, *supra* note 130.

<sup>139</sup> Stone, *supra* note 137, at 10 (arguing that a .xxx domain would solve the problem of unintentional access, but “would not prevent a child from viewing the material intentionally”).

<sup>140</sup> Major, *supra* note 130, at 28 & n.35. Major noted that it is

important to consider the ease in which software could screen out the “.obs” domain for children. . . . “Once [the .obs top-level domain] is created and operational, it would be a simple matter for any software . . . to permit or block such sites based solely on the TLD extension.”

*Id.* (quoting Salim, *supra* note 136)).

<sup>141</sup> See *supra* note 114 and accompanying text. Again, parents cannot monitor their kids' activities twenty-four hours a day, and children may have access to materials on other computers. Parents' desires on how to raise their own children would still be subject to the desires of the kids' friends' parents, who may choose not to purchase such software.

<sup>142</sup> Zick, *supra* note 2, at 1161.

number of locations where this software would be available to purchase,<sup>143</sup> the system would allow age verification to take place in the real world. In order to access pornography, an individual would be required to go to the adult bookstore or adult video store and purchase the software that would allow access to the .xxx domain. In such a transaction, the age verification problem disappears.

While age verification online is much more difficult and costly, zoning online would allow for realistic age verification—in essence the exact same mechanisms that allow for age verification in the real world. This zoning solution would take one aspect of the Internet and return it to the way it was before the Internet existed, at least with regard to access. By doing so, such a system would ensure that minors had no access to pornography online.

## V. SOLVING THE PROBLEM: TARGETING THE MECHANISMS

Any limitation on the material found online is a limitation on speech,<sup>144</sup> and there is no viable way for this nation's government to prohibit uploading speech onto the Internet without violating the First Amendment—the physical realities of the Internet make this impossible.<sup>145</sup> The ultimate goal, however, should not be to limit the harmful material that is available online, but to thwart minors' access to it. This can be done without infringing on an adult's right to access constitutionally protected speech by focusing on the actor and the actions rather than the speech. The CDA and the COPA regulated passive behavior—letting children view harmful material that a Web publisher posted<sup>146</sup>—and this approach at regulating speech is constitutionally suspect because it necessarily restricts speech more than is necessary to limit access by a small portion of the population.<sup>147</sup> Regulating the passive act of allowing another individual to view one's own posted material requires looking at the expression rather than the fact that it is on the Internet. Rather than preventing people from putting harmful material “out there,” the solution must look at putting harmful material in a particular place, namely, where one knows children will not see it.

Ultimately, there are four mechanisms by which children view harmful materials online: (1) commercial actors send material to them, (2) child predators either send visual materials or talk with children in ways considered harmful, (3) intentional access to illicit sites by minors, and (4) accidental access when

---

<sup>143</sup> For obvious reasons, one limitation would be not allowing purchases of the software online.

<sup>144</sup> See *supra* note 11 and accompanying text.

<sup>145</sup> See *supra* Part II.B.1.

<sup>146</sup> For example, the COPA prohibited “mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.” 47 U.S.C. § 231(a)(1) (2000).

<sup>147</sup> See *supra* Part III.B.

children have no knowledge of the content of these Web pages. Preventing each of these possibilities requires taking different approaches, but to truly “protect” children from harmful material Congress needs to regulate all four. Complete regulation in this area requires a two-pronged attack: (1) targeting the individuals who intentionally send harmful materials to children over the Internet, and (2) preventing children from accessing, either intentionally or accidentally, harmful materials online.

*A. Regulating Those Who Intentionally Send Harmful Material to Minors: Commercial Dealers and Child Predators*

The first mechanism through which harmful materials reach children’s computer monitors is the intentional distribution of such materials to children over the Internet. Regulation of material harmful to minors on the Internet must begin by addressing these situations. In fact, Congress began to take this type of approach, albeit indirectly, when it limited the COPA to apply to commercial dealers. Although the constitutionality of the COPA is suspect,<sup>148</sup> it still represents the least restrictive approach Congress has taken to date.<sup>149</sup> Two things need to occur, however, to make a regulation like the COPA both effective and constitutional. The COPA was both too narrow in the sense that it did not apply to enough actors and too broad in the sense that it covered too much expression. First, an effective regulation of those who intentionally send harmful material to children must cover all such actors. Commercial dealers are not the only actors who intentionally send harmful material to children over the Internet,<sup>150</sup> the

---

<sup>148</sup> See *supra* Part III.B.

<sup>149</sup> By limiting the COPA to apply only to commercial carriers, and not to the average Web publisher, Congress started on the right track. There is less infringement on the freedom of speech when the regulation applies only to commercial dealers. This has less to do with regulating expression than it does with regulating commerce. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995):

Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment’s core. “[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’”

*Id.* (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989)).

<sup>150</sup> Commercial dealers certainly play a major role, however. The adult online pornography industry earns over \$1 billion dollars a year. *YOUTH, PORNOGRAPHY, AND THE INTERNET* 72 (Dick Thornburgh & Herbert S. Lin eds., 2002); see also Alexander, *supra* note 1, at 981 (“Industry followers project that e-porn alone will generate over \$3 billion by 2003.”) (citing Kim Wimpsett, *Net Vices: Sex, Violence and Gambling*, CNET (May 31, 2000), at <http://www.cnet.com/techtrends/0-1544318-7-1956441.html>) (last visited Oct. 23, 2003); Keith Regan, *Online Porn Profits Still Lurk in Shadows*, at <http://www.technewsworld.com/>

COPA must be expanded to cover such individuals as child predators.<sup>151</sup> Second, Congress must resolve the First Amendment issues by narrowly tailoring the regulation to only apply to material that lacks constitutional protection. Congress must address the following defects found in the COPA: use of community standards to define material harmful to minors, overbreadth, and vagueness.

Ohio has already developed a solution to the first problem in the form of House Bill 8. Rather than having the statute apply only to commercial dealers, Congress should expand the scope of the COPA's next version by including the language of Ohio's House Bill 8 that would apply to intentionally sending material to specific individuals.<sup>152</sup> In situations where the individual sending material via the Internet already knows the age of the recipient, the fact of whether that individual is a commercial dealer is irrelevant.<sup>153</sup> House Bill 8 illustrates a means of narrowly tailoring a statute to the compelling interest of protecting children from individuals who send harmful material over the Internet without limiting the statute to commercial dealers. The language of House Bill 8 would apply both to commercial dealers and to sexual predators who utilize areas of the Internet either to send visual images to children or to converse with minors in a manner society deems harmful.<sup>154</sup> If the compelling interest is to protect

---

perl/story/16088.html. (last visited Oct. 23, 2003) ("Offline, pornography is estimated to be a [sic] \$8 billion industry in the United States alone. If just a fraction of those sales take place online, the potential for riches is great.").

<sup>151</sup> The reason why the Court wanted to limit the CDA to commercial actors was apparently because they would have the ability to utilize age verification technology. *Reno II*, 521 U.S. 844, 856 (1997) ("Credit card verification is only feasible, however, . . . in connection with a commercial transaction . . . Using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down."). Age verification is not a problem for individuals who specifically send harmful materials to specific juveniles, so the need to limit the statute to commercial transactions disappears. Such a regulation would still avoid the overbreadth problem of encompassing individuals who have no idea who the recipient is.

<sup>152</sup> See *supra* note 86 and accompanying text.

<sup>153</sup> The Court noted in *Reno II*, "[i]n four important respects, the statute upheld in *Ginsberg* was narrower than the CDA. . . . Second, the New York statute applied only to commercial transactions . . ." *Reno II*, 521 U.S. at 865. However, nothing in the *Reno II* or *Ashcroft* decisions made limiting Internet regulation of this form to commercial dealers a necessity.

The reason why the Court wanted to limit the applicability of a statute like the CDA to commercial dealers was the problem the Internet poses to identifying the recipient of the materials. Non-commercial dealers would not be able to bear the financial burden required to determine the recipient's age. *Id.* A statute such as the one proposed, however, eliminates all identification problems. In this situation, when the actor knows the recipient is underage, there are no costs due to age verification.

<sup>154</sup> Those who call for parental supervision rather than congressional interference conveniently ignore these situations, though they are arguably the most troublesome situations in which children receive harmful materials online. See Donna Rice Hughes, *Kids Online:*

children from harmful material, any effective statute must cover these situations as well.

The second step is to meet the constitutional requirements. Creating a statute that comports with the First Amendment requires narrowly tailoring the statute so that there is a minimal restriction on speech. In order to narrowly tailor a statute, Congress must specifically define the materials covered and limit the restriction on adult speech.<sup>155</sup> Again, limiting the statute to cover only material that is intentionally sent to minors is one way to ensure that the statute protects children with as narrow an encroachment on the First Amendment rights of adults as possible, because such a statute solves the age verification problem of the Internet. Additionally, in order to cure the vagueness problems that plagued the CDA and the COPA, congressional regulation in this area must implement a national standard to define materials harmful to minors.<sup>156</sup> This approach meets First Amendment requirements because it encroaches only on unprotected expression. Material that is harmful to minors enjoys no First Amendment protection while limiting the statute's coverage to material that is specifically sent to minors eliminates restrictions on adult access. Therefore, there is no infringement on an adult's right to constitutionally protected material.

---

*Protecting Your Children In Cyberspace*, available at <http://www.protectkids.com/effects/harms.htm#1> (Sept. 1998) (last visited Mar. 4, 2004) ("The Internet has proven a useful tool for pedophiles and sexual predators as they distribute child pornography, engage in sexually explicit conversations with children, and seek victims in chat rooms.") Generally, the Protect Kids Web site is a useful source of information on how pornography and other material harm children, and how parents can help protect their children from the dangers of the Internet. Parental supervision may help limit the ability of minors to access certain areas of the Internet, *see supra* note 114 and accompanying text., but parents have less control over individuals who use the Internet, either for profit or for sick pleasure, to intentionally send specific materials to specific children. *See* Donna Rice Hughes, *For Parents Only*, at <http://www.protectkids.com/parentsafety/4parentonly.htm> (2001) (last visited Mar. 4, 2004). The limitations of parental supervision are exacerbated when sexual predators communicate with minors either through chat rooms or over E-mail. Filtering programs have greater difficulty in these areas. *See supra* Part IV.B.I. On these issues, parents have little or no control short of standing there looking over their children's shoulders while they are on the Internet. *See* Hughes, *For Parents Only*, at <http://www.protectkids.com/parentsafety/4parentonly.htm>. ("[Parents must] [r]ecognize that chat rooms are the playground of today's sexual predator. Only direct, over-the shoulder [sic] parental supervision of your child's chat-room session is advised in un-monitored chat-rooms.") This, of course, would be an entirely unrealistic expectation, especially when one considers that children can sometimes access their online accounts at school or at a public library. No community can afford to pay for individuals to monitor children online at school, and this is probably an unacceptable invasion of the minor's privacy.

<sup>155</sup> *See supra* Part II.B.

<sup>156</sup> *See supra* Part IV.A.2.

### B. Preventing Child Access

While adopting the approach taken by Ohio will solve Congress' inability to reconcile the COPA with the First Amendment, such an approach will ultimately be a limited solution. The real danger posed by the Internet, as opposed to alternative mediums, is that it allows for children to access such harmful materials without any adult ever knowing.<sup>157</sup> Addressing the final mechanisms through which harmful materials reach children—intentional access by minors and inadvertent access—requires separating pornographic materials from the rest of the information online. Utilizing a separate domain for pornographic materials creates a zoning environment similar to real space. In addition, while the age verification problem inhibits most zoning approaches, a separate domain can enable access through traditional means of age verification—physically checking identification—by forcing people to “buy-in” to the domain, rather than attempting to screen people out. Instead of waiting for technology to catch up and solve the age verification dilemma, current technology allows for the establishment of a separate zone on the Internet, accessible only through traditional means of age verification.<sup>158</sup>

A zoning approach such as this would pass all constitutional challenges.<sup>159</sup> By creating a zoning structure that would mirror the actual zoning that exists in real space, zoning in cyberspace would not be a content-based restriction on free speech, but the same time, place, and manner restriction the Supreme Court has upheld in the past.<sup>160</sup> A system utilizing a .xxx domain is essentially identical to

---

<sup>157</sup> There are two parts to this problem. First, parents and other guardians often do not have the ability to monitor children twenty-four hours a day, and therefore kids who intentionally try to access such materials are able to do so without parental knowledge. Second, those who upload such material to the Internet are not able to determine whether the person accessing such information is a minor. *See supra* Part II.B.1; *see also supra* note 114 and accompanying text.

<sup>158</sup> There may still be additional concerns with this solution, such as hackers and the like. It may be possible to get around the software. Such technical difficulties are beyond the scope of this Note.

<sup>159</sup> For an in-depth examination of the constitutional analysis, see Major, *supra* note 130, at 29–33.

<sup>160</sup> *See, e.g.,* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71–72 & n.34 (1976); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47 (1986). Such a regulation would not be a content-based restriction because it would look at the “secondary effects” of the speech. *See Young*, 427 U.S. at 71 n.34; *Renton*, 475 U.S. at 47; *see also* Major, *supra* note 130, at 32 (arguing that requiring harmful material to be placed in a specific domain would be equivalent to a time, place, and manner restriction); Conn, *supra* note 33, at 481 (arguing that time, place, and manner restrictions on the Internet would be constitutional, but that CIPA was not such a regulation).

valid zoning restrictions such as the one found in *Renton*.<sup>161</sup> This domain would structure the Internet such that pornographic material would be beyond the reach of children, but still accessible by adults. It would keep pornography out of those areas of the Internet utilized by minors for entertainment, school research, and commercial transactions, just as the statute in *Renton* kept harmful activities away from neighborhoods. It would protect children from the harms of the Internet. More importantly, as a time, place, and manner regulation, “domain zoning” would pass constitutional scrutiny.

## VI. CONCLUSION

While technological solutions may develop in time, American children are subjected to the harms of the Internet on a daily basis. When a solution presents itself, workable under current technology, there is no need to wait for the law to catch up to technology.<sup>162</sup> Regulation of harmful materials online is possible within the framework of the First Amendment, it is just a matter of being clear on what that regulation requires. With this growing problem, as pornography on the Internet multiplies every day, the need to protect children from such harmful materials increases as well. Waiting for technology is not good enough.

This two-tiered approach to regulating pornography on the Internet—prohibiting the intentional distribution of harmful materials to know juveniles and zoning the Internet to prevent inadvertent access—protects children from harmful materials without violating adults’ rights to constitutionally protected speech. Such an approach avoids the constitutional problems that exist inherent in the Internet’s nature: the inability to verify age or limit access based on geographical boundaries. The approach therefore allows for the achievement of a compelling interest—protecting children from harm—by the narrowest means. This approach does not limit material on the Internet to what is acceptable for children. In fact, it does not remove any material from the Internet at all, but rather forces it to a secluded location, off in the back, where children cannot go. As such, it is exactly like every other type of “pornography zoning” that exists in real space, and if those restrictions on speech are constitutional, so is this one.

---

<sup>161</sup> According to the Court, the statute in *Renton* “prohibited any ‘adult motion picture theater’ from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, or park, and within one mile of any school.” *Renton*, 475 U.S. at 44.

<sup>162</sup> *Contra* Zick, *supra* note 2, at 1148–49 (“In cyberspace, at least insofar as the First Amendment is concerned, it appears that the law, which generally is accustomed to leading, will, at least for the foreseeable future, have to follow and be guided by technology.”).