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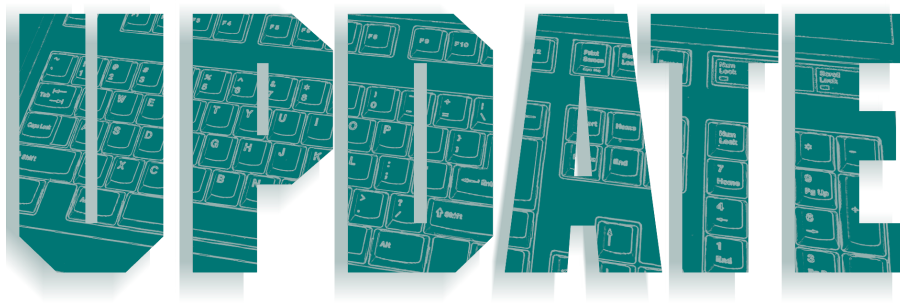
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Protecting Children from Child Pornography and the Internet: Where Are We Now?

By Mary G. Leary¹

The United States Supreme Court “does not hold that Congress is incapable of enacting any regulation of the internet designed to protect minors from gaining access to harmful materials.”² Seemingly generous, this sentiment is belied by a review of the Court’s recent responses to legislative efforts to protect children from both child pornography and the dangers of the internet. Legislators and prosecutors seeking to affect, interpret or defend these efforts are left more confounded than ever about how to address these growing threats to our nation’s children. This article will discuss efforts to regulate child pornography and the internet, provide a historical analysis of relevant legislation, and propose some guidance for interpreting current legislation as well as considering new directions.

The Need to Protect Children by Ending Child Pornography

Over the last 20 years, “child pornography ha[s] become a highly organized multimillion dollar industry.”³ Today, computer networks play a substantial role in the exchange of child pornography.⁴ All 50 states and the District of Columbia have enacted statutes regulating child pornography, and 34 states have statutes regulating online sexual exploitation of children.⁵

“The existence of traffic in child pornography images presents a clear and present danger to all children. . . . [T]he sexualization and eroticization of minors . . . [encourages] a societal perception of children as sexual objects leading to further sexual abuse and exploitation, . . . [and] creates an unwholesome environment which affects the psychological, mental and emotional development of children.”⁶ Research indicates that many perpetrators of internet crimes against children possess child pornography, 25% of minors using the internet are exposed to unwanted sexual material, and nearly 20% of minors using the internet receive unwanted sexual solicitations.⁷

Even the United States Supreme Court recognized both the compelling interest of the government to regulate child pornography as well as its “legitimate interest in prohibiting the dissemination of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”⁸ More broadly, the Court has “repeatedly recognized the government interest in protecting children from harmful materials.”⁹

History of Legislation Addressing Child Pornography and the Internet

The first foray by the federal government into actual regulation of child pornography was the Sexual Exploitation of Children Act of 1977 (SEOC).¹⁰ It aimed at the commercial production and dissemination of visual or print depictions of minors engaged in sexually explicit conduct.¹¹ Failing to address the non-commercial trading of pornography and non-obscene pornography, SEOC proved largely ineffectual.¹²

In 1982, the Supreme Court began its inconsistent record of interpreting child pornography legislation in

New York v. Ferber.¹³ It upheld a state statute outlawing the promotion of a sexual performance of a child by, among other acts, selling non-obscene material depicting minors engaged in sexual conduct.¹⁴

In response to the ineffectiveness of SEOC and the issuance of *Ferber*, the United States Congress passed the Child Protection Act of 1984.¹⁵ This, among other actions, eliminated the need for the material to be obscene, raised the protected age to under 18, and included material traded, not just involved in commercial sales.¹⁶ This was followed by the Child Sexual Abuse and Pornography Act of 1986, which prohibited advertisements for child pornography.¹⁷ Also to follow was the Child Protection and Obscenity Enforcement Act of 1988, which addressed for the first time the relationship between computer technology and child pornography.¹⁸ This act prohibited the use of computers in the transportation, distribution, or receipt of child pornography.¹⁹

The next relevant Supreme Court review of this area of legislation also protected children and recognized the expansive ways in which child pornography harms children.²⁰ *Osborne v. Ohio* upheld a state statute prohibiting the possession of child pornography.²¹ It distinguished its previous ruling in *Stanley v. Georgia*, which struck down a state statute outlawing the private possession of obscene material, by noting that *Stanley* left open the possibility that “compelling reasons may exist for overriding the right of an individual to possess [obscene] material.”²² *Osborne* explicitly made clear that children’s safety and the myriad of ways child pornography injures children provides such reasons.²³ Although the Court relied on its *Ferber* analysis of child pornography involving real children, the Court explicitly noted that the destruction of child pornography was desirable because “evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.”²⁴

As Congress’s regulation of child pornography modernized, it attempted to protect children from the perils of the internet as well as “virtual” pornography, i.e. child pornography that does not use real children in its production. The Supreme Court’s previous support of Congressional efforts markedly changed with such legislation.

Congress enacted the Communications Decency Act of 1996 (CDA) as one of seven titles of the Telecommunications Act.²⁵ It criminalized the “knowing transmission of obscene or indecent messages” to minors as well as knowingly sending or displaying to a minor certain patently offensive messages. Although, in *Reno v. A.C.L.U.*, the Court reiterated the legitimacy of the Congressional goal to protect children, it found the statute overbroad pursuant to the First Amendment.²⁶ The Court was particularly troubled by the fact that, although the CDA was part of a heavily debated Telecommunications Act, the CDA lacked any true legislative findings.²⁷ The Court distinguished these regulations from upheld FCC regulations limiting the broadcast of offensive language by finding that broadcast media were completely different from internet media.²⁸ While the Court again recognized the government interest in protecting children from harmful materials in

words, its actions said otherwise. The Court balanced this harm to children against a perceived right of adults to enjoy such messages or postings, and ruled in favor of allowing adults to enjoy material with such de minimis social value.²⁹

The Child Pornography Prevention Act of 1996 (CPPA), expanded the definition of child pornography to include “virtual” child pornography (images that “appear to be” or “convey the impression” of involving minors).³⁰ Unlike with the CDA, Congress made extensive findings to support the CPPA regarding the harms of child pornography, virtual child pornography, and the trading of such material throughout the internet and otherwise.³¹ Consistent with precedent, in *Ferber* the Court “refused to second guess legislative judgment” and in *Osborne*, the Court accepted less substantial but similar legislative findings than those for the CPPA. However, with the CPPA, in *Ashcroft v. Free Speech Coalition*, the Court noted the lengthy Congressional findings, but went on to hold that speech “within rights of adults to hear may not be silenced completely in an attempt to shield children from it.”³² The Supreme Court struck down the statute and limited *Ferber* to child pornography which involves only actual children in its production.³³

In response to *Reno* and its invalidation of the CDA, Congress enacted the Child Online Protection Act (COPA).³⁴ COPA prohibited the posting for “commercial purposes” on the internet material that is harmful to minors. Notwithstanding these responses to the concerns of *Reno*, *Ashcroft v. A.C.L.U.* upheld the district court’s ruling that prevented the enforcement of the statute.³⁵ The Court essentially found the government unable to establish that the prohibitions were narrowly tailored, citing to two subsequent statutes prohibiting misleading internet names and establishing a “dot. kids” section of the internet, as more narrowly tailored alternatives.

What Guidance Do These Cases Provide?

There is a clear recognition of the government’s interest not only to regulate child pornography, but also to protect children from harmful or patently offensive and indecent material.³⁶ There are also recognized findings of the damage caused by child pornography well beyond the victimization of children depicted in the material.³⁷ Yet, even with these recognized harms and the de minimis value of child pornography, efforts to limit virtual child pornography or shield minors from indecent and harmful material have been rejected.

The Supreme Court was not swayed by the clear legislative findings of the link between child molestation and child pornography. Research firmly establishing this link, long known anecdotally in the field, must be completed. Just as it makes no difference to the child victim of a molester that the images used to “whet his appetite” or groom the victim were virtual, so should it make no difference in our laws.

Legislatures would do well to follow the advice of Justice O’Connor in her dissents in both *Reno* and *Ashcroft*. With regard to the internet, Justice O’Connor would not have struck down the CDA’s provision regarding indecent transmissions to a known minor because she interpreted the CDA as an attempt by Congress to create an “adult only” zone that would be constitutional.³⁸ With regard to virtual child pornography, Justices Rehnquist, Scalia, and O’Connor were deeply concerned about the ability to make virtual pornography indistinguishable from actual child pornography and thus impede law enforcement’s ability to apprehend true traffickers in actual child pornography.³⁹ Justice O’Connor suggests a constitutionally permissible label for such virtual pornography as “virtually indistinguishable from” a real child.⁴⁰ Such language would ensure that a statute would be narrowly tailored to exclude cartoons, statues, and other material which fell under CPPA, but could not have actually been used to aid in the sexual abuse of children.

Finally, prosecutors must adhere to the lesson learned from *Ashcroft v. A.C.L.U.* and establish the factual basis for both a regulation and its narrow tailoring. Moreover, they must guard against false claims becoming part of the record for appellate review.⁴¹ Through such attention to detail, perhaps legislatures can encourage the Supreme Court to return to its roots, so beautifully articulated by the Court years ago: “A democratic society rests for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens.”⁴²

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² *Ashcroft v. A.C.L.U.*, 124 S.Ct. 2783, 2795 (2004).

³ S. Rep. No. 95-438 (1977); e.g. *New York v. Ferber*, 458 U.S. 747, 749 (1982).

⁴ Debra Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 Harvard J. on Legis. 229, 451 (citing, *inter alia*, Computer Pornography and Child Exploitation Act; Hearings on S. 1305 Before the Subcommittee on Juvenile Justice of the Senate Comm. on the Judiciary, 99th Cong (1985); Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987; Hearings on S. 704 and S. 2033 Before Senate Comm. on the Judiciary, 100th Cong (1988).

⁵ For a digest of state statutes, see www.ndaa-apri.org/apri/programs/ncpca/statutes.html

⁶ *Id.*, Finding 11. Congressional Findings, September 30, 1996, P.L. 104-208, 110 Stat. 3009-26, Findings 3, 4, 6, 8, 10-14.

⁷ Janis Wolak et. al, *Internet Sex Crimes Against Minors: The Response of Law Enforcement*, 7 (Nov. 2003); David Finkelhor, et. al, *Online Victimization: A Report on the Nation’s Youth*, 1, 33 (June 2000).

⁸ *New York v. Ferber*, 458 U.S. 747, 754 (1982).

⁹ *Reno v. A.C.L.U.*, 521 U.S. 844, 874 (1997), citing, *Ginsberg v. New York*, 390 U.S. 629 (1968) and *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹⁰ Pub. L. No. 95-225, 92 Stat. 7 (1977).

¹¹ *Id.*

¹² *Id.*; Ryan Kennedy, *Ashcroft v. Free Speech Coalition: Can We Roast the Pig Without Burning Down the House in Regulating ‘Virtual’ Child Pornography?*, 37 Akron L. Rev. 379, 384 (2004).

¹³ 458 U.S. 747 (1982)

¹⁴ *Id.*

¹⁵ Pub. L. No. 98-292, 98 Stat. 204 (1984).

¹⁶ Burke, *supra* n. 4 at 450.

¹⁷ Pub. L. No. 99-628, 100 Stat. 3510 (1986).

¹⁸ Pub. L. No. 100-690, 102 Stat. 4486 (1988).

¹⁹ *Id.*

²⁰ *Osborne v. Ohio*, 495 U.S. 103 (1990).

²¹ *Id.*

²² *Id.* at 110, citing *Stanley v. Georgia*, 394 U.S. 557, 568, n.11 (1969).

²³ *Id.* at 111.

²⁴ *Id.*, citing, Attorney General’s Commission on Pornography, Final Report 649 (1986) and D. Campagna & D. Poffenberger, *Sexual Trafficking in Children* 118 (1988) and S. O’Brien, *Child Pornography*, 89 (1983).

²⁵ Pub. L. No. 104-104, 110 Stat. 56 (1996).

²⁶ 521 U.S. 844, 849 (1997).

²⁷ *Id.*

²⁸ *Id.* at 867-869. Ironically, one of the distinctions was that broadcast media had a history of extensive governmental regulation. *Id.* at 868-869. Congress, however, cannot establish such a history with the internet when all efforts to regulate it are struck down by the Court.

²⁹ *Id.* at 875, 877 (“[T]he government may not reduce the adult population . . . to . . . only what is fit for children.”).

³⁰ Pub. L. No. 104-208, 110 Stat. 3009-26 (1996).

³¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), 244-245.

³² *Id.* at 252.

³³ *Id.* at 258.

³⁴ Pub. L. No. 105-277, 112 Stat. 2687-736 (1998).

³⁵ 124 S.Ct. 2783. Notably, in 2003 the Court did uphold the Children’s Internet Protection Act which forbids public libraries from receiving federal funds unless they utilize software to block obscene and pornographic material from their use of the internet. *United States v. American Library Association*, 539 U.S. 194, 203 (2003).

³⁶ *Ferber*, 458 U.S. at 755 (child pornography); *Ginsberg*, 390 U.S. 629 (harmful material); *Pacifica*, 438 U.S. at 749 (patently offensive and indecent material; *Reno*, 521 U.S. at 874 (same).

³⁷ *Osborne*, 495 U.S. at 111; *Ashcroft*, 124 S.Ct. 2783.

³⁸ *Reno*, 521 U.S. at 886, 892 (J. O’Connor dissenting). Congress has enacted some legislation regarding a child friendly internet domain. *See*, 47 U.S.C.A. § 941.

³⁹ *Ashcroft*, 535 U.S. at 259 (J. Rehnquist concurring in judgment and dissenting), 264 (J. O’Connor dissenting).

⁴⁰ *Ashcroft*, 535 U.S. at 264 (J. O’Connor dissenting).

⁴¹ *Reno*, 521 U.S. 869 (finding that almost all sexually explicit images on the internet are preceded by warnings and that “odds are slim” that a user would hit such information by accident).

⁴² *Prince v. Massachusetts*, 321 U.S. 158 (1944).

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