

Obscenity and Indecency: Constitutional Principles and Federal Statutes

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Summary

The First Amendment provides: "Congress shall make no law ... abridging the freedom of speech, or of the press." In general, the First Amendment protects pornography, with this term being used to mean any erotic material. The Supreme Court, however, has held that the First Amendment does not protect two types of pornography: obscenity and child pornography. Consequently, they may be banned on the basis of their content, and federal law prohibits the mailing of obscenity, as well as its transport or receipt in interstate or foreign commerce.

Most pornography is not legally obscene; to be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct." The Supreme Court has created a three-part test, known as the *Miller* test, to determine whether a work is obscene. Pornography that is not obscene may not be banned, but may be regulated as to the time, place, and manner of its distribution, particularly in order to keep it from children. Thus, the courts have upheld the zoning and licensing of pornography dealers, as well as restrictions on dial-a-porn, nude dancing, and indecent radio and television broadcasting.

Federal statutes, in addition to making it a crime to mail obscenity or to transport or receive it in interstate or foreign commerce, provide for criminal and civil forfeiture of real and personal property used in making obscenity pornography, and of the profits of obscenity—in some instances even when they were already used to pay a third party. In addition, obscenity crimes are included among the predicate offenses that may give rise to a violation of the Federal Racketeer Influenced and Corrupt Organizations Act (RICO).

The Internet has given rise to three federal statutes designed to protect minors from sexual material posted on it. The Communications Decency Act of 1996 makes it a crime knowingly to use a telecommunications device (telephone, fax, or e-mail) to make an obscene or indecent communication to a minor, or knowingly to use an interactive computer service to transmit an obscene communication to anyone or an indecent communication to a minor. In 1997, however, the Supreme Court held the inclusion of "indecent" communications in this statute unconstitutional. In 1998, Congress, in response, enacted the less-broad Child Online Protection Act (COPA), but it was also held unconstitutional and never took effect. Finally, the Children's Internet Protection Act (CIPA), enacted in 2000, requires schools and libraries that accept federal funds to purchase computers or Internet access to block or filter obscenity, child pornography, and, with respect to minors, material that is "harmful to minors." Filters may be disabled, however, "for bona fide research or other lawful purpose." In 2003, the Supreme Court held CIPA constitutional.

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I. Constitutional Principles

To be constitutional, a federal statute must be enacted pursuant to a power of Congress enumerated in the Constitution and must not contravene any provision of the Constitution. Two powers enumerated in Article I, Section 8 of the Constitution give Congress the power to enact statutes regulating or banning pornography: the power "To regulate Commerce with foreign Nations, and among the several States," and the power "To establish Post Offices and post Roads." Thus, Congress may enact statutes, provided they do not contravene any provision of the Constitution, that regulate pornography that crosses state or national boundaries, is imported or exported, or is mailed.

The provision of the Constitution that federal statutes regulating pornography are most likely to be in danger of contravening is the First Amendment's provision that "Congress shall make no law ... abridging the freedom of speech, or of the press."[1] Although pornography in general is protected by the First Amendment, two types of pornography—obscenity and child pornography—are not.[2] Therefore, pornography that does not constitute obscenity or child pornography may ordinarily be regulated only with respect to its time, place, and manner of distribution.[3] An outright ban on pornography other than obscenity or child pornography would violate the First Amendment unless it served "to promote a compelling interest" and was "the least restrictive means to further the articulated interest."[4] Obscenity and child pornography, however, being without First Amendment protection, may be totally banned on the basis of their content, not only in the absence of a compelling governmental interest, but in the absence of any evidence of harm.

Obscenity apparently is unique in being the only type of speech to which the Supreme Court has denied First Amendment protection without regard to whether it can cause harm. According to the Court, there is evidence that, at the time of the adoption of the First Amendment, obscenity "was outside the protection intended for speech and press."[5] Consequently, obscenity may be banned simply because a legislature concludes that banning it protects "the social interest in order and morality."[6]

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[1] Despite its mentioning only "Congress," the First Amendment applies equally to all branches of the federal government and the states. Herbert v. Lando, 441 U.S. 153, 168 n.16 (1979).

[2] Child pornography is material that visually depicts sexual conduct by children. New York v. Ferber, 458 U.S. 747, 764 (1982). It is unprotected by the First Amendment even when it is not legally obscene; *i.e.*, child pornography need not meet the *Miller* test to be banned. For additional information, see CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes*, by Henry Cohen.

[3] In *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), the Supreme Court noted: "The State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral [*i.e.*, "are *justified* without reference to the content of the speech," *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (emphasis in original)], are narrowly tailored to serve a significant [not necessarily a compelling] government interest, and leave open ample alternative channels of communication [but need not necessarily be the least restrictive means to further the government interest]."

[4] Sable Communications of California v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

[5] Roth v. United States, 354 U.S. 476, 483 (1957). However, Justice Douglas, dissenting, wrote: "[T]here is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment." *Id.* at 514.

[6] *Id.* at 485.

A. The Miller Test

Most pornography is not legally obscene (i.e., most pornography is protected by the First Amendment). To be obscene, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct."[7] The Supreme Court has created a three-part test, known as the *Miller* test, to determine whether a work is obscene. The *Miller* test asks:

> (a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[8]

In *Pope v. Illinois*, the Supreme Court clarified that "the first and second prongs of the *Miller* test—appeal to prurient interest and patent offensiveness—are issues of fact for the jury to determine applying contemporary community standards."[9] However, as for the third prong, "[t]he proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."[10]

When a federal statute refers to "obscenity," it should be understood to refer only to pornography that is obscene under the *Miller* standard, as application of the statute to other material would ordinarily be unconstitutional. However, narrowly drawn statutes that serve a compelling interest, such as protecting minors, may be permissible even if they restrict pornography that is not obscene under *Miller*.[11] In *Sable Communications of California, Inc. v. Federal Communications Commission*, the Supreme Court

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[7] Miller v. California, 413 U.S. 15, 27 (1973).

[8] *Id.* at 24 (citation omitted). In *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1984), the Court struck down a state statute to the extent that it defined "prurient" as "that which incites lasciviousness or lust." The Court held that a publication was not obscene if it "provoked only normal, healthy sexual desires." To be obscene it must appeal to "a shameful or morbid interest in nudity, sex, or excretion." In *Manual Enterprises v. Day*, 370 U.S. 478, 480 (1962), the Court indicated that photographs of nude male models, although they appealed to the prurient interest and lacked literary, scientific, or other merit, were not patently offensive merely because they were aimed at homosexuals. In *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974), the Court held that the film "Carnal Knowledge" was not obscene, writing: "Even though questions of appeal to the 'prurient interest' or of patent offensiveness are 'essentially questions of fact,' it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'" In *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), Justice Stewart, concurring, noted that "criminal laws in this area are constitutionally limited to hard-core pornography, which he would not attempt to define. Then followed his famous remark: "But I know it when I see it, and the motion picture involved in this case is not that." The motion picture was a French film called "Les Amants" ("The Lovers").

[9] 481 U.S. 497, 500 (1987). In *Hamling v. United States*, 418 U.S. 87, 105 (1974), the Court noted that a "community" was not any "precise geographic area," and suggested that it might be less than an entire state. In *Jenkins v. Georgia*, *supra* note 8, 418 U.S. at 157 (1974), the Court approved a "trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.'"

[10] Justice Scalia concurred in the result in *Pope v. Illinois*, but wrote: "[I]n my view it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can. Since ratiocination has little to do with esthetics, the fabled 'reasonable man' is of little help in the inquiry, and would have to be replaced with, perhaps, the 'man of tolerably good taste'—a description that betrays the lack of an ascertainable standard.... I think we would be better advised to adopt as a legal maxim what has long been the wisdom of mankind: *De gustibus non est disputandum*. Just as there is no arguing about taste, there is no use litigating about it." *Id.* at 504-505.

[11] In *Federal Communications Commission v. Pacifica Foundation,* 438 U.S. 726, 749-750 (1978), the Supreme Court, (continued...)

> recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. The government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations without unnecessarily interfering with First Amendment freedoms." It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieved those ends.[12]

In *Sable*, the Supreme Court applied these principles to the government's attempt to proscribe dial-a-porn; see, Section II. B., below.

The Supreme Court has allowed one exception to the rule that obscenity, as defined by *Miller*, is not protected under the First Amendment. In *Stanley v. Georgia*, the Court held that "mere private possession of obscene material" is protected. The Court wrote:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch.[13]

Subsequently, however, the Supreme Court rejected the claim that under *Stanley* there is a constitutional right to provide obscene material for private use,[14] or to acquire it for private use.[15] The right to possess obscene material does not imply the right to provide or acquire it, because the right to possess it "reflects no more than ... the law's 'solicitude to protect the privacies of the life within [the home].'"[16]

(...continued)

upholding the power of the Federal Communications Commission to regulate a radio broadcast that was "indecent" but not obscene, wrote:

We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. *Id.,* at 640 and 639. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 878 (1997), the Supreme Court suggested that the strength of the government's interest in protecting minors may vary depending upon the age of the minor, the parental control, and the artistic or educational value of the material in question.

[12] 492 U.S. 115, 126 (1989) (citations omitted). It might appear that regulations could be "narrowly drawn" or "carefully tailored" without being the "least restrictive means" to further a governmental interest. But *Sable*, on the same page, also uses the latter phrase (quoted above in the text accompanying note 4), and the Court has elsewhere made clear that the "narrow tailoring" required for content-based restrictions is more stringent than that required for time, place, and manner restrictions (*see*, note 3, *supra*), where "least-restrictive-alternative analysis is wholly out of place." Ward v. Rock Against Racism, 491 U.S. 781, 798-799 n.6 (1989).

[13] 394 U.S. 557, 565, 568 (1969). The Court has held that there is no right even to private possession of child pornography. Osborne v. Ohio, 495 U.S. 103 (1990).

[14] United States v. Reidel, 402 U.S. 351 (1971).

[15] United States v. 12 200-Ft. Reels of Film, 413 U.S. 123 (1973).

[16] *Id.* at 127. *See*, Edwards, *Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for* Stanley v. Georgia*(?), a National Obscenity Standard, and Other Miscellany*, 33 William and Mary Law Review 949 (1992).

B. Zoning and Licensing of Pornography Dealers

In *Young v. American Mini Theatres, Inc.*, the Supreme Court held that "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."[17] In *Young*, the Court upheld ordinances that required dispersal of "adult" establishments; specifically, the ordinances provided that an adult theater could not be located within 1,000 feet of any two other "regulated uses" (adult bookstores, cabarets, bars, hotels, etc.) or within 500 feet of a residential area. In *Renton v. Playtime Theatres, Inc.*, the Court upheld an ordinance that required that adult theaters be concentrated in limited areas; it prohibited adult "theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."[18]

In *Young*, the Court reasoned that

> what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited, even though the determination of whether a particular film fits that characterization turns on the nature of its content.... The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech.[19]

In *Renton*, the Court wrote:

> The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views.... In short, the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that "are *justified* without reference to the content of the regulated speech."[20]

In both *Young* and *Renton*, the Court found the ordinances in question to be narrow enough to affect only those theaters shown to produce the unwanted secondary effects, such as crime.[21] In this respect they were unlike the regulations the Court struck down as overbroad in two other cases. In *Erznoznik v. City of Jacksonville*, the ordinance prohibited drive-in theaters from showing films containing nudity when the screen was visible from a public street.[22] In *Schad v. Mount Ephraim*, the ordinance prohibited live entertainment from a broad range of commercial uses permitted in a commercial zone; the ordinance in this case was used to prosecute an adult bookstore that featured coin-operated booths that permitted customers to watch nude dancing.[23]

In *Freedman v. Maryland*, the Court struck down a statute that required the owner or lessee of a fil, prior to exhibiting a film, to submit the film to the Maryland State Board of Censors and

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[17] 427 U.S. 50, 62 (1976).

[18] 475 U.S. 41, 43 (1986).

[19] *Young*, *supra* note 17, at 71-72 n.35.

[20] *Renton*, *supra* note 18, at 48 (emphasis in original).

[21] 427 U.S. at 71; 475 U.S. at 52.

[22] 422 U.S. 205 (1975).

[23] 452 U.S. 61 (1981).

obtain its approval.[24] The Court held that, for such a statute to be constitutional, "the burden of proving that the film is unprotected expression must rest on the censor," and the censor must, "within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution.... [T]he procedure must also assure a prompt final judicial decision."[25] The Court cited a "model" for a constitutional procedure: "In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books.... The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing."[26]

In *FW/PBS, Inc. v. Dallas*, the Supreme Court considered a challenge to a city ordinance that regulated "sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections," and prohibited "individuals convicted of certain crimes from obtaining a license to operate a sexually oriented business for a specified period of years."[27] The ordinance defined a "sexually oriented business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, escort agency, nude model studio, or sexual encounter center."[28] The Court held that the licensing scheme

> does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold that the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity.[29]

In *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, the Court upheld a city's "adult business" licensing ordinance.[30] The Court first rejected the city's argument that, because the Court, in *FW/PBS, Inc. v. Dallas*, had used the phrase "prompt judicial review," rather than "prompt final judicial decision," which it had used in *Freedman*, "[t]he First Amendment, as applied to an 'adult business' licensing scheme, demands only an assurance of speedy access to the courts, not an assurance of a speedy court decision."[31] The Court noted, "A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a licence from being 'issued within

[24] 380 U.S. 51 (1965).

[25] *Id.* at 58-59.

[26] *Id.* at 60.

[27] 493 U.S. 215, 220-221 (1990).

[28] *Id.* at 220.

[29] *Id.* at 229. A type of business that the ordinance covered that did not engage in First Amendment activity was adult motels, which the ordinance defined as motels that rented rooms for less than 10 hours. Inclusion of these motels was challenged on two grounds: (1) that the city had "violated the Due Process Clause by failing to produce adequate support for its supposition that renting rooms for less than 10 hours results in increased crime or other secondary effects," and (2) "that the 10-hour limitation on the rental of motel rooms places an unconstitutional burden on the right to freedom of association...." *Id.* at 236-237. The Court rejected both arguments. As for the first, it found "it reasonable to believe that shorter rental time periods indicate that the motels foster prostitution." *Id.* at 236. As for the second, it found that the associations "that are formed from the use of a motel room for less than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" *Id.* at 237.

[30] 541 U.S. 774 (2004).

[31] *Id.* at 780.

a reasonable period of time.'"[32] The Court held, however, that the city's ordinance satisfied the First Amendment's requirement of a prompt judicial decision.

The Court noted that, in a case such as *Freedman*, involving "a scheme with rather subjective standards and where a denial likely meant complete censorship," there was a need "for special procedural rules imposing special 2- or 3-day decisionmaking time limits."[33] *Littleton*, however, involved a scheme that "applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials,"[34] but related instead to matters such as whether the applicant had had an adult business license revoked or suspended and had timely paid taxes, fees, fines, or penalties. "Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria ... and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type.... Of course, those denied licenses in the future remain free to raise special problems of undue delay in individual cases as the ordinance is applied."[35]

In *Los Angeles v. Alameda Books, Inc.*, the Supreme Court reversed a grant of summary judgment that had struck down a municipal ordinance that prohibited "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof."[36] A federal district court had granted summary judgment and the Court of Appeals for the Ninth Circuit had affirmed on the ground "that the city failed to present evidence upon which it could reasonably rely to demonstrate a link between multiple-use adult establishments and negative secondary effects."[37] The Supreme Court reversed, finding that "[t]he city of Los Angeles may reasonably rely on a study it conducted some years before enacting the present version of § 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime."[38] It therefore remanded the case so that the city would have the opportunity to demonstrate this at trial.

The four-judge plurality opinion in *Alameda Books* "held that a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a causal connection between speech and a substantial, independent governmental interest," such as reducing crime or maintaining property values.[39] Justice Kennedy, whose concurring opinion was necessary for a majority, added that, not only must the city demonstrate that its ordinance "has the purpose and effect of suppressing secondary effects"; it must also demonstrate that it will leave "the quantity and accessibility of speech substantially intact."[40] The four dissenting justices found that "the city has failed to show any causal relationship between the breakup policy and elimination or

[32] *Id.* at 781.

[33] *Id*. at 782.

[34] *Id.* at 783.

[35] *Id*. at 784. Similarly, a "content-neutral time, place, and manner regulation of the use of a public forum" need not "adhere to the procedural requirements set forth in *Freedman*." Thomas v. Chicago Park District, 534 U.S. 316, 322 (2002).

[36] 535 U.S. 425, 429 (2002).

[37] *Id*. at 430.

[38] *Id.*

[39] *Id*. at 438.

[40] *Id*. at 449.

regulation of secondary effects," and, therefore, that summary judgment had been properly granted.[41]

C. Nude Dancing

The Supreme Court has twice upheld the application of laws banning public nudity to nudity in "adult" entertainment establishments where the viewers are all consenting adults who have paid to see the dancers. In *Barnes v. Glen Theatre, Inc.*, the Supreme Court held that the First Amendment does not prevent the government from requiring that dancers wear "pasties" and a "G-string" when they dance (nonobscenely) in such establishments.[42] Indiana sought to enforce a state statute prohibiting public nudity against two such establishments, which asserted First Amendment protection. The Court found that the statute proscribed public nudity across the board, not nude dancing as such, and therefore imposed only an incidental restriction on expression. A statute that is intended to suppress speech will be upheld only if it serves a compelling governmental interest and is the least restrictive means to further that interest. By contrast, under *United States v. O'Brien*, a statute that imposes an incidental restriction, like one that imposes a time, place, or manner restriction, will be upheld if it is narrowly tailored to further a substantial, but not necessarily compelling, governmental interest.[43]

There was no majority opinion in the case. Justice Rehnquist, joined by Justices O'Connor and Kennedy, found the statute no more restrictive than necessary to further the governmental interest of "protecting societal order and morality."[44] Justice Souter found the relevant governmental interest to be "combating the secondary effects of adult entertainment establishments," such as prostitution, sexual assaults, and other criminal activity.[45] The fifth Justice necessary to uphold the nude dancing prohibition, Justice Scalia, thought that the case raised no First Amendment issue at all, because the incidental restriction was on conduct, not speech, and "virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for expressive purposes."[46] Four Justices dissented, finding insufficient "the plurality and Justice Scalia's simple references to the State's general interest in promoting societal order and morality.... The purpose of forbidding people to appear nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theaters and barrooms since the viewers are exclusively consenting adults who paid money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates."[47] This purpose is impermissible under the First Amendment.

In *Erie v. Pap's A.M.*, the Supreme Court again upheld the application of a statute prohibiting public nudity to an "adult" entertainment establishment.[48] Although there was again only a plurality opinion, this time by Justice O'Connor, Parts I and II of that opinion were joined by five

[41] *Id*. at 460.

[42] 501 U.S. 560 (1991).

[43] 391 U.S. 367 (1968).

[44] *Barnes*, *supra* note 42, at 568.

[45] *Id.* at 582.

[46] *Id.* at 576 (emphasis in original).

[47] *Id.* at 590-591 (White, J., dissenting, joined by Justices Marshall, Blackmun, and Stevens).

[48] 529 U.S. 277 (2000).

justices. These five adopted Justice Souter's position in *Barnes*, that the statute satisfied the *O'Brien* test because it was intended "to combat harmful secondary effects," such as "prostitution and other criminal activity."[49] Justice Souter, however, though joining the plurality opinion, also dissented in part in *Erie*. He continued to believe that secondary effects were an adequate justification for banning nude dancing, but did not believe "that the city has made a sufficient evidentiary showing to sustain its regulation," and therefore would have remanded the case for further proceedings.[50] He acknowledged his "mistake" in *Barnes* in failing to make the same demand for evidence.[51]

The plurality opinion in *Erie* found that the effect of Erie's public nudity ban "on the erotic message ... is *de minimis*" because Erie allows dancers to perform wearing only pasties and G-strings.[52] It may follow that "requiring dancers to wear pasties and G-strings may not greatly reduce ... secondary effects, but *O'Brien* requires only that the regulation further the interest of combating such effects," not that it further it to a particular extent.[53] Justice Scalia, this time joined by Justice Thomas, again took the view that, "[w]hen conduct other than speech itself is regulated ... the First Amendment is violated only '[w]here the government prohibits conduct precisely because of its communicative attributes."[54] He found, therefore, that the statute should be upheld without regard to "secondary effects," but simply as an attempt "to foster good morals."[55]

Justice Stevens, dissenting in *Erie* and joined by Justice Ginsburg, wrote: "Until now, the 'secondary effects' of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech. Indeed, the plurality opinion concludes that admittedly trivial advancements of a State's interest may provide the basis for censorship."[56] It concludes, that is, that the *O'Brien* "test can be satisfied by nothing more than the mere possibility of *de minimis* effects on the neighborhood."[57]

The plurality in *Erie* did not address the question of whether statutes prohibiting public nudity could be applied to ban serious theater that contains nudity. In *Barnes*, Justice Souter wrote: "It is difficult to see ... how the enforcement of Indiana's statute against nudity in a production of 'Hair'

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[49] *Id*. at 292, 291.

[50] *Id*. at 310-311.

[51] *Id*. at 316.

[52] *Id*. at 294. The plurality said that, though nude dancing is "expressive conduct" [which ordinarily means it would be entitled to full First Amendment protection], "we think that it falls only within the outer ambit of the First Amendment's protection." *Id*. at 289. The opinion also quotes Justice Stevens to the same effect with regard to erotic materials generally. *Id*. at 294. In *United States v. Playboy Entertainment Group, Inc.*, *infra* note 108, 529 U.S. at 826, however, the Court wrote that it "cannot be influenced ... by the perception that the regulation in question is not a major one because the speech is not very important."

[53] *Id*. at 301.

[54] *Id*. at 310.

[55] *Id*.

[56] *Id*. at 317-318.

[57] *Id*. at 324. Justice Stevens also wrote that the plurality was "mistaken in equating our secondary effects cases with the 'incidental burdens' doctrine applied in cases such as *O'Brien*.... The incidental burdens doctrine applies when speech and non-speech elements are combined in the same course of conduct"[internal quotation marks omitted], whereas secondary effects "are indirect consequences of protected speech." *Id*.

or 'Equus' somewhere other than an 'adult' theater would further the State's interest in avoiding harmful secondary effects...."[58]

II. Federal Obscenity and Indecency Statutes

A. Postal Service Provisions

Sections 3008 and 3010 of Title 39 allow people to prevent mail that they find offensive from being sent to them. Section 3008 provides that a person who receives in the mail "any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative" may request the Postal Service to issue an order directing the sender to refrain from further mailings to the addressee, and the Postal Service must do so. If the Postal Service believes that a sender has violated such an order, it may request the Attorney General to apply to a federal court for an order directing compliance.

The language of 39 U.S.C. § 3008 is broad enough to apply to any unwanted advertisement, regardless of content, as the Supreme Court indicated in upholding the constitutionality of the statute. "We ... categorically reject," the Court said, "the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another."[59]

Section 3010 provides that any person may file with the Postal Service a statement "that he desires to receive no sexually oriented advertisements through the mails." The Postal Service shall make the list available, and "[n]o person shall mail or cause to be mailed any sexually oriented advertisement to any individual whose name and address has been on the list for more than 30 days." Section 3011 provides that, if the Postal Service believes that any person is violating section 3010, it may request the Attorney General to commence a civil action against such person in a federal district court. The court may employ various remedies to prevent future mailings.

Violations of sections 3008 and 3010 are also subject to criminal penalties under 18 U.S.C. § 1737.

B. Dial-a-Porn

The federal law concerning dial-a-porn is section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b). Prior to April 1988, it banned both obscene and indecent dial-a-porn in interstate commerce and foreign communications, but only if it involved persons under eighteen. Although pornography that is indecent but not obscene is protected by the First Amendment, restricting minors' access to pornography, even to non-obscene pornography, generally presents no constitutional problems, as minors do not have the same rights as adults under the First Amendment.

[58] *Barnes*, *supra* note 42, 501 U.S. at 585 n.2.

[59] Rowan v. Post Office Department, 397 U.S. 728, 738 (1970).

Therefore, the pre-April 1988 version of section 223(b) apparently was constitutional. In April 1988, however, P.L. 100-297, § 6101, amended section 223(b) to ban obscene and indecent dial-a-porn in interstate and foreign communications, whether involving adults or children.

In June 1989, the Supreme Court declared section 223(b) unconstitutional insofar as it applies to indecent messages that are not obscene.[60] The Court noted "that while the Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages, § 223(b) was not sufficiently narrowly drawn to serve that purpose and thus violated the First Amendment."[61] "[C]redit card, access code, and scrambling rules ... [would have] represented a 'feasible and effective' way to serve the Government's compelling interest in protecting children."[62] The government argued that these methods "would not be effective enough," but the Court found "no evidence in the record ... to that effect...."[63] The Court concluded:

> Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.[64]

The upshot of *Sable* was that Congress's 1988 extension to adults of the ban on dial-a-porn that is indecent but not obscene resulted in federal law's not banning such dial-a-porn at all, even if used by minors. Section 223(b) after the decision banned dial-a-porn only if it was obscene.

Therefore, in 1989, Congress enacted P.L. 101-166, known as the "Helms Amendment," which amended section 223(b) to ban indecent dial-a-porn, if used by persons under 18. Under the 1988 law, section 223(b) applied "in the District of Columbia or in interstate or foreign communications"; under the Helms Amendment, it applies to all calls "within the United States."

The Helms Amendment also added section 223(c), which prohibits telephone companies, "to the extent technically feasible," from providing access to any dial-a-porn "from the telephone of any subscriber who has not previously requested [it] in writing...." In order to enable telephone companies to comply with this provision, Federal Communications Commission regulations require dial-a-porn providers to give written notice to the telephone company that they are providing indecent communications. 47 C.F.R. § 64.201.[65]

The Helms Amendment was challenged as unconstitutional, but a federal court of appeals upheld it, and the Supreme Court declined to review the case.[66] The court of appeals found that the word "indecent" as used in the statute was not void for vagueness,[67] that the statute was the least

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[60] Sable Communications of California, Inc. v. F.C.C., *supra* note 4, 492 U.S. 115 (1989).

[61] *Id.* at 126.

[62] *Id.* at 128.

[63] *Id.*

[64] *Id.* at 131.

[65] Section 223(b) provides that a person found guilty of knowingly communicating *obscene* dial-a-porn "shall be fined in accordance with title 18 of the United States Code, or imprisoned not more than two years, or both." Title 18, § 3571, provides for fines of up to $250,000 for individuals and up to $500,000 for organizations. A person found guilty of knowingly communicating *indecent* dial-a-porn "shall be fined not more than $50,000 or imprisoned not more than six months, or both." Section 223(b) also provides for additional fines.

[66] Dial Information Services Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992).

[67] The court noted that the word has been "defined clearly" by the Federal Communications Commission, in the dial-a-porn context, "as the description or depiction of sexual or excretory activities or organs in a patently offensive manner (continued...)

restrictive means to achieve a compelling governmental interest,[68] and that the requirement that the dial-a-porn provider inform the telephone company that its message was indecent did not constitute prior restraint.

C. Obscenity Provisions at 18 U.S.C. §§ 1460-1470

Federal law contains no outright ban on all obscenity; it leaves this to state law. However, the following federal statutes prohibit, among other things, obscenity on federal land or in federal buildings, in the mail, on radio and television, in interstate or foreign commerce, and on interstate highways and railroads even when the obscene material is transported intrastate.

Section 1460

This section makes it a crime, "in the special maritime and territorial jurisdiction of the United States or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States," or "in the Indian country as defined in section 1151 of this title," to sell or to possess with intent to sell, any obscene visual depiction.

Section 1461

This section declares to be "nonmailable matter" any "obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance," and makes it a crime knowingly to mail non-mailable matter. This statute should be read to prohibit only what constitutionally may be prohibited.[69]

Section 1462

This section prohibits importation of, and interstate or foreign transportation of, "any obscene, lewd, lascivious, or filthy" printed matter, film, or sound recording, "or other matter of indecent character." The Supreme Court has written that, if and when serious doubt is raised as to the vagueness of the terms used in section 1462,

> we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California*, *ante*, at 25.... Of course, Congress could always define other specific "hard core" conduct.[70]

In 1996, P.L. 104-104, § 507(a), amended 18 U.S.C. § 1462 to apply to any "interactive computer service."

(...continued)

as measured by contemporary community standards for the telephone medium." 938 F.2d at 1540. The court noted that this definition tracks the one quoted in the text accompanying note 79, *infra*. *Id.* at 1541.

[68] *Id.* at 1541-1543; *see*, text accompanying note 4, *supra.*

[69] *See*, United States v. Merrill, 746 F.2d 458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165 (1985).

[70] United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973).

Section 1463

This section prohibits mailing matter, "upon the envelope or outside cover or wrapper of which, and all postal cards, upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, or obscene character are written or printed or otherwise impressed or apparent." Under this provision, "language of an 'indecent' character must be equated with language of an 'obscene' character" (and does not include "writing [on a post card] that a female runs around a dwelling house naked").[71]

Section 1464

This section provides, in full:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.[72]

This statute, unlike the others cited thus far, may be applied to language that is not obscene under *Miller*. This is because broadcasting has more limited First Amendment protection than other media. As the Supreme Court explained in *Red Lion Broadcasting Co. v. Federal Communications Commission*:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[73]

In *Federal Communications Commission v. Pacifica Foundation*, the FCC had taken action against a radio station for broadcasting a recording of George Carlin's "Filthy Words" monologue at 2 p.m., and the station had claimed First Amendment protection.[74] The Supreme Court upheld the power of the FCC under § 1464 "to regulate a radio broadcast that is indecent but not obscene."[75] The Court cited two distinctions between broadcasting and other media: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans ... confront[ing] the citizen, not only in public, but also in the privacy of the home...," and "Second, broadcasting is uniquely accessible to children...."[76]

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[71] United States v. Keller, 259 F.2d 54, 57, 58 (3d Cir. 1958).

[72] This statute dates back to section 326 of the Communications Act of 1934, 48 Stat. 1091, which is why it refers only to "language" (and not pictures) and to "radio" (and not television). The term "radio," however, today includes broadcast television; *i.e.*, television transmitted over radio waves. In dictum, the Supreme Court quoted the FCC with approval as noting that "the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464...." Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 741 n.16 (1978) (not addressing whether nudes are "language" under § 1464). "Radio communication" is defined for purposes of Title 47, U.S. Code, to mean "the transmission by radio of writing, signs, signals, *pictures*, and sounds of all kinds...." 47 U.S.C. § 153(33) (emphasis added).

[73] 395 U.S. 367, 388 (1969). In this case, the Supreme Court upheld the constitutionality of the Federal Communication Commission's "fairness doctrine," which required broadcast media licensees to provide coverage of controversial issues of interest to the community and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.

[74] 438 U.S. 726 (1978).

[75] *Id.* at 729.

[76] *Id.* at 748-749.

Nevertheless, the broadcast media have some First Amendment protection, and the Court emphasized the narrowness of its holding:

> This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction.... The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience....[77]

Section 1464, as quoted above, refers to "obscene, indecent, or profane language." The Court in *Pacifica* noted that, to be indecent, a broadcast need not have prurient appeal; "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[78] The FCC holds that the concept "is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[79]

In 1988, Congress enacted P.L. 100-459, § 608, which required the FCC to promulgate regulations to ban indecent broadcasts 24 hours a day. The FCC did so, but the regulations never took effect because the court of appeals declared the ban unconstitutional because "the Commission may not ban such broadcasts entirely."[80] In 1992, Congress enacted P.L. 102-356, § 16 of which required the FCC to promulgate regulations that prohibit broadcasting of indecent programming on radio and television from 6 a.m. to midnight, except for *public* radio and television stations that go off the air at or before midnight, which may broadcast such material beginning at 10 p.m. 47 U.S.C. § 303 note. In 1993, a three-judge panel of the U.S. Court of Appeals for the District of Columbia held the law unconstitutional, but, on June 30, 1995, the full court of appeals, by a 7-4 vote, overturned the panel and upheld the statute, except for its 10 p.m.-to-midnight ban imposed on non-public stations.[81]

The court of appeals found "that the Government has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves,"[82] and "that the Government has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts."[83] The court found, in addition, that the statute used the least restrictive means to serve these interests.[84] However, the court found that "Congress has failed to explain what, if any,

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[77] *Pacifica*, *supra*, note 74, 438 U.S. at 750. A federal court of appeals subsequently held unconstitutional a federal statute that banned "indecent" broadcasts 24 hours a day, but, in a later case, the same court upheld the present statute, 47 U.S.C. § 303 note, which bans "indecent" broadcasts from 6 a.m. to 10 p.m. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992); Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

[78] *Pacifica*, *supra*, note 74, 438 U.S. at 740.

[79] *Id.* at 732. *See*, note 67, *supra*.

[80] Action for Children's Television v. Federal Communications Commission (ACT II), 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992).

[81] Action for Children's Television v. Federal Communications Commission (ACT III), 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

[82] *Id.* at 661.

[83] *Id.* at 663.

[84] The court wrote: "While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast media." *Id*. at 660. Chief Judge Edwards, in his dissent, wrote: "This is the heart of the case, (continued...)

relationship the disparate treatment accorded certain public stations bears to the compelling Government interest—or to any other legislative value—that Congress sought to advance when it enacted section 16(a)."[85] The court therefore held "that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight."[86]

In 2003, on the broadcast of the Golden Globe Awards, the singer Bono said that his winning an award was "f[***]ing brilliant." The FCC Enforcement Bureau found that use of the word "as an adjective or expletive to emphasize an exclamation" did not fall within the definition of "indecent." The Commission, however, overturned the Bureau, ruling that "any use of that word or a variation, in any context, inherently has a sexual connotation...." The Commission also found that Bono's phrase was "profane" under § 1464, defining "profane" as "those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[87]

In 2006, the FCC took action against four other television broadcasts that contained fleeting expletives, but, in 2007, the U.S. Court of Appeals for the Second Circuit found "that the FCC's new policy regarding 'fleeting expletives' represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry. We further find that the FCC has failed to articulate a reasoned basis for this change in policy. Accordingly, we hold that the FCC's new policy regarding 'fleeting expletives' is arbitrary and capricious under the Administrative Procedure Act."[88] Having overturned the FCC policy on statutory grounds, the court had no occasion to decide whether it also violated the First Amendment. It explained, however, why it was "skeptical that the Commission can provide a reasonable explanation for its 'fleeting expletive' regime that would pass constitutional muster."[89] The Supreme Court has agreed to hear the case.

In 2008, the U.S. Court of Appeals for the Third Circuit issued a unanimous decision invalidating the FCC's fine against CBS broadcasting station affiliates for broadcasting Janet Jackson's exposure of her breast for nine-sixteenths of a second during a SuperBowl halftime show.[90] The court found that the FCC had acted arbitrarily and capriciously in finding the incident indecent; the court did not address the First Amendment question.

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plain and simple," as "[t]he majority appears to recognize that section 16(a) could not withstand constitutional scrutiny if applied against *cable* television operators." *Id.* at 671.

[85] *Id.* at 668.

[86] *Id.* at 669. Note that the court struck down the 10 p.m.-to-midnight ban not because it failed strict scrutiny under the First Amendment, but because it applied only to non-public stations. Chief Judge Edwards, in his dissent, commented that "the majority appears to invite Congress to extend the 6 a.m. to midnight ban to all broadcasters, without exception." *Id.* at 670 n.1.

[87] In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, File No. EB-03-IH-0110 (March 18, 2004). For additional information, including an analysis of whether prohibiting the broadcast of "indecent" words regardless of context would violate the First Amendment, see CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Henry Cohen and Kathleen Ann Ruane.

[88] Fox Television Stations, Inc. v. Federal Communications Commission, 489 F.3d 444, 447 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

[89] *Id.* at 462.

[90] CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008).

Section 1465

This section, as amended by P.L. 109-248 (2006), § 506, makes it a crime knowingly to "produce[ ] with the intent to transport. distribute, or transmit in interstate or foreign commerce," or knowingly to "transport[ ] or travel[ ] in, or use[ ] a facility or means of interstate or foreign commerce or an interactive computer service ... in or affecting commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy" material, "or any other matter of indecent or immoral character." Section 1465 should be read as limited by the *Miller* standard.[91] The President's message that accompanied the original proposal that became P.L. 100-690 (the 1988 amendment to this provision) states:

> The term "facility of commerce" would include such things as the federal interstate highway system, federally numbered highways, and interstate railroads, even if such facility were used only intrastate. The term "means of interstate commerce" would include motor vehicles, boats, and airplanes capable of carrying goods in interstate commerce. The new offense would be committed, for example, by transporting obscene material by truck via Interstate 95 from Richmond to Alexandria, Virginia, with the intent that at least part of it would then be sold to customers outside of Virginia.[92]

In 1994, in Memphis, Tennessee, Robert and Carleen Thomas, a husband and wife from Milpitas, California, were convicted and sentenced to prison under 18 U.S.C. § 1465 for transmitting obscenity, from California, over interstate phone lines through their members-only computer bulletin board. The Sixth Circuit affirmed, holding that 18 U.S.C. § 1465 applies to computer transmissions.[93] The defendants had also raised a First Amendment issue, arguing that they "cannot select who gets the materials they make available on their bulletin boards. Therefore, they contend, BBS [bulletin board service] operators like Defendants will be forced to censor their materials so as not to run afoul of the standards of the community with the most restrictive standards."[94] The court did not decide the issue because it found that, in this case, the defendants had transmitted only to members whose addresses they knew, so "[i]f Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability."[95]

In 1996, P.L. 104-104, § 507(b), amended 18 U.S.C. § 1465 to apply to any "interactive computer service."

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[91] *See*, United States v. Alexander, 498 F.2d 934, 935-936 (2d Cir. 1974).

[92] H.R. Doc. No. 100-129, 100th Cong., 1st Sess. 78 (1987).

[93] United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996). The court cited another conviction under 18 U.S.C. § 1465 for computer pornography—this one by an Air Force court. United States v. Maxwell, 42 M.J. 568 (A.F.Ct.Crim. App. 1995).

[94] *Id.* at 711. In *Reno v. American Civil Liberties Union*, *supra* note 11, the Supreme Court noted that "the 'community standards' criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message." In *Ashcroft v. American Civil Liberties Union*, *infra* note 132, the Supreme Court held that the use of community standards to assess "harmful to minors" material on the Internet is not by itself unconstitutional.

[95] *Id.*

Section 1466

This section, as amended by P.L. 109-248 (2006), § 506, makes it a crime for any person "engaged in the business of producing with intent to distribute or sell, or selling or transferring obscene matter" knowingly to "receive[ ] or possess[ ] with intent to distribute any obscene [material] which has been shipped or transported in interstate or foreign commerce." Offering to sell or transfer, at one time, two or more copies of any obscene publication, or a combined total of five, shall create a rebuttable presumption that the person so offering them is "engaged in the business." In other words, if the government proved that the defendant had offered to sell, at one time, two or more copies of any obscene publication, or a combined total of five, then the defendant would be deemed to be "engaged in the business" unless he could prove otherwise.

Section 1466A

Section 504 of the PROTECT Act, P.L. 108-21 (2003), created this section, which makes it a crime knowingly to produce, distribute, receive, or possess, with or without intent to distribute, "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting," that depicts a minor engaging in sexually explicit conduct and is obscene or lacks serious literary, artistic, political, or scientific value. Section 1466A applies whether an actual minor is used or not, but covers only depictions of minors engaged in specified sexual activities, and not in lascivious exhibition of the genitals or pubic area. To the extent that § 1466A applies to non-obscene material produced without the use of an actual minor, it would be unconstitutional under *Ashcroft v. Free Speech Coalition*.[96]

Section 1467

This section provides for criminal forfeiture in obscenity cases. Specifically, it provides that a person convicted under the federal obscenity statute (18 U.S.C. §§ 1460-1469) shall forfeit to the United States (1) the obscene material, (2) property traceable to gross profits or other proceeds obtained from the obscene material, (3) property used or intended to be used to commit the offense. In 2006, P.L. 109-248, § 505(a), repealed subsections (b) through (n) of section 1467 and made "section 413 of the Controlled Substances Act (21 U.S.C. 853), with the exception of subsections (a) and (d)," applicable to the criminal forfeiture of property pursuant to section 1467. Section 505(b) of the 2006 amendment provided that any property subject to forfeiture pursuant to section 1467 may be forfeited to the United States in a civil case in accordance with the procedures set forth in 18 U.S.C. §§ 981-986.

Section 1468

This section, enacted in 1988, makes it a crime "knowingly to utter[ ] obscene language or distribute[ ] any obscene matter by means of cable television or subscription services on television." The section defines "distribute" to include transmissions by "wire, microwave, or satellite." Similarly, 47 U.S.C. § 559, enacted in 1984, makes it a crime to "transmit[ ] over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States." The President's message that accompanied the original proposal that became section 1468 explained that the reason for its enactment was that ambiguities in Title 47 of the U.S. Code

[96] 535 U.S. 234 (2002).

made it "unclear under what circumstances, if any, the federal government could enforce [47 U.S.C. § 559]."[97]

Section 1468 also provides that no provision of federal law is intended to preempt the power of the states, including their political subdivisions, "to regulate the uttering of language that is obscene or otherwise unprotected by the Constitution or the distribution of matter that is obscene or otherwise unprotected by the Constitution."

There are also other statutes codified in title 47 of the U.S. Code that regulate obscenity and indecency on cable television; see below.

Section 1469

This section creates a rebuttable presumption that an item produced in one state and subsequently located in another, or produced outside the United States and subsequently located in the United States, was transported in interstate or foreign commerce. This means that, if the government proves the change of location, then, unless the defendant shows that the allegedly obscene material had not been transported in interstate or foreign commerce, it would be deemed to have been so transported.

Section 1470

This section, added by P.L. 105-314, § 401 (1998), makes it a crime to use the mail or interstate or foreign commerce knowingly to transfer obscene matter to a person under 16, knowing that such person is under 16.

D. Cable Television

In addition to 18 U.S.C. § 1468 and 47 U.S.C. § 559 (discussed above under "Section 1468"), both of which prohibit obscenity on cable television, various provisions in the Communications Act of 1934, codified in title 47 of the U.S. Code, regulate obscenity and indecency on cable television.

In 1994, in *Turner Broadcasting System v. Federal Communications Commission*, which did not involve obscenity or indecency, the Supreme Court held that cable television is entitled to full First Amendment protection.[98] It wrote in *Turner*: "In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny, adopted in *Red Lion* and other broadcast cases is inapt when determining the First Amendment validity of cable regulation."[99] In 1996, in *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, a plurality of the Justices retreated from the Court's position in *Turner*. They wrote: "The Court's distinction in *Turner*,... between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable.... While that distinction was relevant in *Turner* to the justification for

[97] H.R. Doc. No. 100-129, *supra* note 92, at 93.

[98] 512 U.S. 622 (1994).

[99] *Id.* at 639.

structural regulations at issue there (the 'must carry' rules), it has little to do with a case that involves the effects of television viewing on children."[100]

In Part II of the *Denver Consortium* opinion, a plurality (four justices) upheld § 10(a) of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 532(h), which permits cable operators to prohibit indecent material on leased access channels.[101] In upholding § 10(a), the Court, citing *Pacifica*, noted that cable television "is as 'accessible to children' as over-the-air broadcasting," has also "established a uniquely pervasive presence in the lives of all Americans," and can also "'confron[t] the citizen' in 'the privacy of the home,'... with little or no prior warning."[102] Applying something less than strict scrutiny, the Court concluded "that § 10(a) is a sufficiently tailored response to an extraordinarily important problem."[103] It also found that "the statute is not impermissibly vague."[104]

In Part III of *Denver Consortium*, a majority (six justices) struck down § 10(b) of the 1992 Act, 47 U.S.C. § 532(j), which required cable operators, if they do not prohibit such programming on leased access channels, to segregate it on a single channel and block that channel unless the subscriber requests access to it in writing. In this part of the opinion, the Court appeared to apply strict scrutiny, finding "that protection of children is a 'compelling interest,'" but "that, not only is [§ 10(b)] not a 'least restrictive alternative,' and is not 'narrowly tailored' to meet its legitimate objective, it also seems considerably 'more extensive than necessary.'"[105]

In Part IV, which only three justices joined, the Court struck down § 10(c), 42 U.S.C. § 531 note, which permitted cable operators to prohibit indecent material on public access channels. Without specifying the level of scrutiny they were applying, the justices concluded "that the Government cannot sustain its burden of showing that §10(c) is necessary to protect children or that it is appropriately tailored to secure that end."[106]

Another relevant statute concerning cable television is 47 U.S.C. § 544(d)(1), which provides that a franchising authority and a cable operator may specify, in granting or renewing a franchise, "that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States." In addition, 47 U.S.C. § 544(d)(2)(A) provides: "In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during a period selected by that subscriber."

The Communications Decency Act of 1996, P.L. 104-104, which is known primarily for its provisions regulating computer-transmitted indecency, also contained provisions concerning cable

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[100] 518 U.S. 727, 748 (1996).

[101] The Cable Communications Policy Act of 1984, P.L. 98-549, had required cable operators to provide leased access and public access channels free of operator editorial control. 47 U.S.C. §§ 531(e), 532(c)(2). These two provisions were amended in 1996 by § 506 of the Communications Decency Act to permit cable operators to refuse to transmit "obscenity, indecency, or nudity."

[102] *Denver Consortium*, *supra*, note 100, 518 U.S. at 744-745.

[103] *Id.* at 743.

[104] *Id.* at 753.

[105] *Id.* at 755.

[106] *Id.* at 766. Two other justices concurred in the judgment that § 10(c) is invalid, but for different reasons.

television. Section 504 added § 640 to the Communications Act of 1934, 47 U.S.C. § 560, which provides:

> Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

This section includes no restriction on the type of material that a subscriber may request to have blocked.

Section 505 added § 641, 47 U.S.C. § 561, which provides:

> (a) In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber does not receive it.
>
> (b) Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to be viewing it.

In 2000, the Supreme Court declared § 505 unconstitutional, making clear, as it had not in *Denver Consortium*, that strict scrutiny applies to content-based speech restrictions on cable television.[107] The Court noted that "[t]he purpose of § 505 is to shield children from hearing or seeing images resulting from signal bleed," which refers to images or sounds that come through to non-subscribers, even though cable operators have "used scrambling in the regular course of business, so that only paying customers had access to certain programs."[108] Section 505 requires cable operators to implement more effective scrambling—to *fully* scramble or otherwise *fully* block programming so that non-subscribers do not receive it—or to "time channel," which, under an F.C.C. regulation meant to transmit the programming only from 10 p.m. to 6 a.m.

"To comply with the statute," the Court noted, "the majority of cable operators adopted the second, or 'time channeling,' approach.[109] The effect ... was to eliminate altogether the transmission of the targeted programming outside the safe harbor period [6 a.m. to 10 p.m.] in affected cable service areas. In other words, for

two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so."[110] The Court also noted that "[t]he speech in question was not thought by Congress to be so harmful that all channels were subject to

[107] United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 813 (2000).

[108] *Id*. at 806.

[109] *Id*. They may have done so because fully blocking or fully scrambling "appears not be economical" (*id.* at 808) or because the technology is imperfect and cable operators attempting to fully block or fully scramble might have still been "faced with the possibility of sanctions for intermittent bleeding" (*id*. at 821).

[110] *Id*. at 806-807.

restriction. Instead, the statutory disability applies only to channels 'primarily dedicated to sexually-oriented programming.'"[111]

"Since § 505 is a content-based speech restriction," the Court wrote, "it can stand only if it satisfies strict scrutiny.... If a statute regulates speech based on content, it must be narrowing tailored to promote a compelling Government interest.... If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[112] The Court did not explicitly say in this case that protecting children from sexually oriented signal bleed is a compelling interest, but would "not discount the possibility that a graphic image could have a negative impact on a young child."[113] Instead, it addressed the question of whether § 505 constituted the least restrictive means to advance that interest.

The Court noted that there is "a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis.... [T]argeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners...."[114] Furthermore, targeted blocking is already required—by § 504 of the CDA, which, as noted above, requires cable operators, upon request by a cable service subscriber, to, without charge, fully scramble or otherwise fully block audio and video programming that the subscriber does not wish to receive. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goal. The Government has not met that burden here."[115] The Court concluded, therefore, that § 504, with adequate publicity to parents of their rights under it, constituted a less restrictive alternative to § 505.

One additional provision of the CDA affected cable television: § 506 amended 47 U.S.C. §§ 531(e) and 532(c)(2) to permit cable operators to refuse to transmit "obscenity, indecency, or nudity" on public access and leased access channels.[116]

E. The Communications Decency Act of 1996

The Communications Decency Act of 1996 (CDA) is Title V of the Telecommunications Act of 1996, P.L. 104-104. This report has previously noted amendments the act made to 18 U.S.C. §§ 1462 and 1465, and provisions relating to cable television that it added to Title 47 of the U.S. Code. This section of the report examines § 502 of the act, which would have limited indecent

[111] *Id*. at 812.

[112] *Id*. at 813.

[113] *Id*. at 826. This suggests the possibility that the Court might not find a compelling interest in shielding older children from sexually oriented material. The Court rejected another interest as compelling: "Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." *Id*. at 825.

[114] *Id.* at 815.

[115] *Id.* at 816.

[116] Justice Kennedy, in the only footnote to his concurring and dissenting opinion in *Denver Consortium*, wrote that the constitutionality of the amendments made by § 506, "to the extent they differ from the provisions here [§§ 10(a) and 10(c) of the 1992 Act], is not before us." 518 U.S. at 782.

material transmitted by telecommunications devices and interactive computer services, and *Reno v. American Civil Liberties Union*, the Supreme Court decision holding it unconstitutional.[117]

Section 502 rewrote 47 U.S.C. § 223(a) and added subsections (d) through (h) to 47 U.S.C. § 223. It did not amend subsections (b) or (c), which restrict commercial dial-a-porn services (see Section II. B., above). In *Reno*, the Supreme Court struck down § 223(a) in part and § 223(d) in whole.

47 U.S.C. § 223(a)

Prior to its amendment by § 603 of the PROTECT Act, P.L. 108-21 (2003), § 223(a)(1)(A) made it a crime, by means of a telecommunications device, knowingly to transmit a communication that is "obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person." Prior to its amendment by § 603 of the PROTECT Act, § 223(a)(1)(B) made it a crime, by means of a telecommunications device, knowingly to transmit a communication that is "obscene or indecent, knowing that the recipient of the communication is under 18 years of age...." Section 223(a)(2) makes it a crime knowingly to permit any telecommunications facility under one's control to be used for any activity prohibited by § 223(a)(1) with the intent that it be used for such activity.[118]

Although the CDA defines "telecommunications,"[119] it does not define "telecommunications device." However, it provides in § 223(h)(1)(B) that the term "does not include the use of an interactive computer service."[120] Thus, it appears that § 223(a)(1)(A) and (B) are intended to apply to communications, by telephone, fax machine, or computer, that are sent to particular individuals, not those that can be accessed by multiple users.

In *Reno v. American Civil Liberties Union*, the Supreme Court declared § 223(a)(1)(B) unconstitutional insofar as it applies to "indecent" communications.

Section 603 of the PROTECT Act amended § 223(a)(1)(A) by substituting "or child pornography" for "lewd, lascivious, filthy, or indecent." Thus, § 223(a)(1)(A) now bans only

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[117] *Reno*, *supra*, note 11, 521 U.S. 844 (1997). The CDA also prohibits the transmission to minors of obscene material, and the Supreme Court, without a written opinion, affirmed the decision of a three-judge federal district court that rejected a claim that this prohibition is unconstitutionally overbroad. Nitke v. Gonzales, 413 F. Supp. 2d 262 (S.D.N.Y. 2005), *aff'd*, 547 U.S. 1015 (2006).

[118] In *ApolloMedia Corp. v. Reno*, 19 F. Supp. 2d 1081, 1084 (N.D. Cal. 1998), *aff'd*, 526 U.S. 1061 (1999), the plaintiff sought to enjoin enforcement of § 223(a)(1)(A) and § 223(a)(2) "on the grounds that ..., to the extent that they prohibit 'indecent' communications made 'with an intent to annoy,' [they] are impermissibly overbroad and vague...." The three-judge court denied the plaintiff's request because it found that "the provisions regulate only 'obscene' communications." The Supreme Court affirmed without a written opinion. The plaintiffs reportedly had appealed because they believed that the fact that the word "indecent" was in the statute could have a chilling effect on indecent nonobscene expression, even if the law was not enforceable against such expression.

[119] Section 3 of P.L. 104-104 added to 47 U.S.C. § 153 the following definition of "telecommunications": "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the format or content of the information as sent and received." The conference report adds that this information includes "voice, data, image, graphics, and video."

[120] Section 230(f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

obscenity and child pornography, both of which are unprotected by the First Amendment. Section 223(a)(1)(A) thereby no longer raises the constitutional issue raised by *ApolloMedia Corp. v. Reno.*[121]

Section 603 of the PROTECT Act amended § 223(a)(1)(B) by substituting "child pornography" for "indecent," so that it too now bans only obscenity and child pornography, and no longer raises the constitutional issue that gave rise to *Reno v. American Civil Liberties Union*.[122]

47 U.S.C. § 223(d)

Prior to its amendment by § 603 of the PROTECT Act, § 223(d) made it a crime knowingly to use "an interactive computer service to send to a specific person or persons under 18 years of age, or ... to display in a manner available to a person under 18 years of age, any ... communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs...." (italics added) This prohibition seems equivalent to a prohibition of "indecent" material, but § 223(d) does not use the word "indecent," a fact of which the Supreme Court took note in *Reno* when it held § 223(d) unconstitutional.[123]

Section 603 of the PROTECT Act amended § 223(d)(1) by substituting "is obscene or child pornography" for the words italicized above. Section 223(d) thus no longer raises the constitutional issue that gave rise to *Reno v. American Civil Liberties Union*.

Reno v. American Civil Liberties Union

The Supreme Court found in this case that "the CDA is a content-based blanket restriction on speech...."[124] As such, it may be found constitutional only if it serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."[125] As for whether the CDA promotes a compelling interest, although the Court referred to "the legitimacy and importance of the congressional goal of protecting children from harmful materials,"[126] it suggested that there may be less of a governmental interest in protecting older children from indecent material—at least such material as had artistic or educational value.[127]

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[121] See note 117, *supra*.

[122] Section 223(a)(1)(C) makes it a crime for a person, in interstate or foreign communications, to "make[ ] a telephone call or utilize[ ] a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person...." Section 223(h)(1) was amended by P.L. 109-162, § 113 (2005) to define "telecommunications device," as used in section 223(a)(1)(C), to "include[ ] any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet...."

[123] *See*, *Reno*, *supra* note 11, 521 U.S. at 871.

[124] *Id*. at 868.

[125] *Sable*, *supra* note 4.

[126] *Reno*, *supra* note 11, 521 U.S. at 849.

[127] *See*, *id.* at 878. The Court wrote: "[A] parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material 'indecent' or 'patently offensive,' if the college town's community thought otherwise." *Id*.

As for whether the CDA is the least restrictive means to further the governmental interest, the Court found that "the Government [failed] to explain why a less restrictive provision would not be as effective as the CDA."[128] The CDA's "burden on adult speech," the Court held, "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[129] "[T]he Government may not 'reduc[e] the adult population ... to ... only what is fit for children.'"[130]

Could Congress reenact the CDA be reenacted in a narrower form that would be constitutional? The Supreme Court did not say, but it did not foreclose the possibility. It wrote:

> The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently from others, such as chat rooms.[131]

F. Child Online Protection Act

On October 21, 1998, President Clinton signed into law the Omnibus Appropriations Act for FY1999 (P.L. 105-277), title XIV of which is the Child Online Protection Act (COPA), 47 U.S.C. § 231. COPA was an attempt to enact a constitutional version of the CDA. It has never taken effect, however, because a federal district court issued a preliminary injunction against its enforcement pending trial. The preliminary injunction was affirmed on appeal, most recently by the Supreme Court, which, in 2004, remanded the case for trial.[132] In 2007, a federal district court found COPA to be unconstitutional and issued a permanent injunction against its enforcement; in 2008, the U.S. Court of Appeals for the Third Circuit affirmed, and, in 2009, the Supreme Court declined to review the case.[133]

COPA differs from the CDA in two main respects: (1) it prohibits communication to minors only of material that is "harmful to minors," rather than material that is indecent, and (2) it applies only to communications for commercial purposes on publicly accessible websites. It defines "material that is harmful to minors" as pictures or words that—

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

[128] *Id.* at 879.

[129] *Id*. at 874.

[130] *Id*. at 875.

[131] *Id.* at 879.

[132] American Civil Liberties Union v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated and remanded sub nom.* Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002), *aff'd on remand*, 322 F.3d 240 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004).

[133] American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom.* American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, No. 08-565 (U.S. Jan. 21, 2009).

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[134]

A communication is deemed to be for "commercial purposes" if it is made in the regular course of a trade or business with the objective of earning a profit; a communication need not propose a commercial transaction to be deemed to be for "commercial purposes." Requiring a viewer to use a credit card, or to verify his age, to gain access to material on the Internet would constitute a defense to prosecution.

In light of the Supreme Court's decision in *Reno*, is COPA constitutional? The fact that COPA makes exceptions for messages with serious literary, artistic, political, or scientific value for minors, and that it applies only to commercial websites, makes it more likely than the CDA to be upheld. Nevertheless it may well, like the CDA, be found to "suppress[ ] a large amount of speech that adults have a constitutional right to receive and to address to one another."[135] This is because a website that is freely accessible, but is deemed "commercial" because it seeks to make a profit through advertisements, would apparently have to stop making its website freely accessible, or, in the alternative, would have to remove all words and pictures that might be deemed "harmful to minors" "by the standards of the community most likely to be offended by the message."[136]

COPA was scheduled to take effect on November 20, 1998, but a coalition of 17 civil liberties groups filed suit challenging it, and, on November 19, Judge Reed of the federal district court in Philadelphia, finding that there was a likelihood that the plaintiffs would prevail, issued a temporary restraining order against enforcement of the law. On February 1, 1999, he issued a preliminary injunction against enforcement pending a trial on the merits. The preliminary injunction applies to all Internet users (not just the plaintiffs in this case) and provides that, even if the law is ultimately upheld, the Administration may not prosecute online speakers retroactively. On June 22, 2000, the U.S. Court of Appeals for the Third Circuit upheld the preliminary injunction, as it was "confident that the ACLU's attack on COPA's constitutionality is likely to succeed on the merits."[137] On May 13, 2002, the Supreme Court vacated the Third Circuit's opinion and remanded the case for further proceedings. It did not, however, remove the preliminary injunction against enforcement of the statute. On March 6, 2003, the Third Circuit again affirmed the district court's preliminary injunction, and, on June 29, 2004, the Supreme Court also affirmed the preliminary injunction, and it remanded the case for trial. On March 22, 2007, a federal district court found COPA to be unconstitutional and issued a permanent injunction against its enforcement; on July 22, 2008, the Third Circuit affirmed. We now consider these seven opinions in turn.

In issuing the preliminary injunction, the district court found that "[i]t is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards."[138] It also found, however, that "it is not apparent to this Court that the defendant can meet its burden to prove that COPA is the least restrictive means available

[134] Despite the fact that only the first prong of this test refers to "community standards," community standards are also to be used in applying the second prong. See the Supreme Court's first decision in *Ashcroft v. ACLU*, *supra* note 132, 535 U.S. at 576, n.7.

[135] *Reno*, *supra* note 11, 521 U.S. at 874.

[136] *Id.* at 877-878.

[137] *Id.*, 217 F.3d at 166.

[138] *Id.*, 31 F. Supp. 2d at 495.

to achieve the goal of restricting the access of minors to this material."[139] This is because "[t]he record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or website operators."[140] In addition,

> the sweeping category of forms of content that are prohibited—"*any communication*, picture, image, graphic image file, article, recording, *writing*, or *other matter of any kind*" (emphasis added [by the court])—could have been less restrictive of speech on the Web and more narrowly tailored to Congress' goal of shielding minors from pornographic teasers if the prohibited forms of content had included, for instances, only pictures, images, or graphic image files, which are typically employed by adult entertainment websites as "teasers." In addition, perhaps the goals of Congress could be served without the imposition of possibly excessive and serious criminal penalties, including imprisonment and hefty fines, for communicating speech that is protected as to adults or without exposing speakers to prosecution and placing the burden of establishing an affirmative defense on them instead of incorporating the substance of the affirmative defenses in the elements of the crime.[141]

On appeal, the Third Circuit affirmed on a different ground:

> because the standard by which COPA gauges whether material is "harmful to minors" is based on identifying "contemporary community standards" the inability of Web publishers to restrict access to their websites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.[142]

This is because it results in communications available to a nationwide audience being judged by the standards of the community most likely to be offended. Applying strict scrutiny, the Third Circuit concluded that, though "[i]t is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards,"[143] the government "may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations."[144]

The Supreme Court held that COPA's "use of 'community standards' to identify 'material that is harmful to minors' ... does not render the statute facially unconstitutional"—it "does not *by itself* render the statute substantially overbroad for purposes of the First Amendment."[145] Although there were five separate opinions in the case, eight of the nine justices favored remanding the case to the Third Circuit to consider whether the act was nevertheless unconstitutional. Only Justice Stevens dissented, as only he believed that the use of community standards was a sufficient problem to warrant an affirmance of the Third Circuit's opinion.

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[139] *Id*. at 497.

[140] *Id*.

[141] *Id*.

[142] *Id*., 217 F.3d at 166.

[143] *Id*. at 173.

[144] *Id*. at 179.

[145] *Ashcroft*, *supra* note 132, 535 U.S. 564, 585 (2002) (emphasis in original).

The Court's statement that COPA's use of community standards does not *by itself* render the statute unconstitutional implies that COPA's use of community standards may nevertheless prove a factor among others that renders the statute unconstitutional. Justice Thomas, however, despite writing the opinion for the Court, including the *by itself* language quoted above, wrote, in a section of the opinion joined only by Chief Justice Rehnquist and Justice Scalia, "that any variance caused by the statute's reliance on community standards is not substantial enough to violate the First Amendment."[146] Justice Thomas also commented: "If a publisher wishes for its material to be judged only by the standards of particular communities [and not by the most puritanical community], then it need only take the simple step of utilizing a medium [a medium other than the Internet] that enables it to target the release of its materials into those communities."[147] Justice Stevens responded that the Court should "place the burden on parents to 'take the simple step of utilizing a medium that enables' ... them to avoid this material before requiring the speaker to find another forum."[148]

Justice Kennedy, in a concurring opinion joined by Justices Souter and Ginsburg, found that "[w]e cannot know whether variation in community standards renders the act substantially overbroad without first assessing the extent of speech covered and the variations in community standards with respect to that speech."[149] Justice Kennedy believed that, before an assessment could be made, the Third Circuit should consider such questions as how much material COPA prohibits, how much the standard of the most puritanical community in the nation differ from standards of other communities, "what it means to evaluate Internet material 'as a whole,'" and the number of venues in which the government could prosecute violations of the act.[150]

Justices O'Connor and Breyer wrote separate concurring opinions. Justice O'Connor agreed with Justice Kennedy that the plaintiffs had failed "to demonstrate substantial overbreadth due solely to the variation between local communities,"[151] and Justice Breyer, to avoid a First Amendment problem, would have construed the phrase "community standard" in the statute to mean a national standard.

On remand, the Third Circuit again affirmed the district court's preliminary injunction. It held "that the following provisions of COPA are not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful material and therefore fail the strict scrutiny test: (a) the definition of 'material that is harmful to minors,' ... (b) the definition of 'commercial purposes,'... and (c) the '*affirmative defenses*' available to publishers, which require the technological screening of users for the purpose of age verification."[152]

As for the definition of "material that is harmful to minors," the court found that the requirement that material be judged "as a whole" in determining whether it was designed to appeal to the prurient interests of minors and to lack serious value for minors meant "that each individual communication, picture, image, exhibit, etc. be deemed 'a whole' by itself," rather than in

[146] *Id*.

[147] *Id*. at 583.

[148] *Id*. at 606 n.2.

[149] *Id*. at 597.

[150] *Id*. at 600.

[151] *Id*. at 589.

[152] 322 F.3d 240, 251 (3d Cir. 2003) (emphasis in original).

context.[153] Yet "one sexual image, which COPA may proscribe as harmful material, might not be deemed to appeal to the prurient interest of minors if it were to be viewed in the context of an entire collection of Renaissance artwork."[154] The court also found the word "minor" in the definition of "material that is harmful to minors" to be "not narrowly drawn to achieve the statute's purpose," because it precludes Web publishers from knowing whether "an infant, a five-year old, or a person just shy of age seventeen ... should be considered in determining whether the content of their website has 'serious ... value for [those] minors'" or "will trigger the prurient interest, or be patently offensive with respect to those minors...."[155]

As for the definition of "commercial purposes," the court was "satisfied that COPA is not narrowly tailored to proscribe commercial pornographers and their ilk, as the Government contends, but instead prohibits a wide range of protected expression."[156] As for the affirmative defense available to publishers, the court found that it "will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content...."[157]

The Third Circuit also found that voluntary "blocking and filtering techniques ... may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material."[158] Finally, it held "that the plaintiffs will more probably prove at trial that COPA is substantially overbroad, and therefore, we will affirm the District Court on this independent ground as well."[159]

In 2004, the Supreme Court, by a 5-4 vote, affirmed the preliminary injunction and remanded the case for trial. The Court, in an opinion by Justice Kennedy, found that the district court had not abused its discretion in granting a preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The Court did not address the Third Circuit's conclusions that various terms used in COPA rendered it unconstitutional.

The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source."[160] In addition filters may be more effective than COPA because "a filter can prevent minors from seeing all pornography, not just [the 60% of all Internet] pornography posted to the Web from America," and filters "can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web."[161] Furthermore, "[m]ore and better filtering alternatives may exist than when the District Court entered its findings," and "a congressionally appointed commission issued a report that found that filters are more effective than [age] verification screens."[162] Nevertheless, the

[153] *Id*. at 252.

[154] *Id.* at 253.

[155] *Id*. at 254.

[156] *Id.* at 257.

[157] *Id.* at 259.

[158] *Id*. at 265.

[159] *Id.* at 271.

[160] *Ashcroft*, *supra* note 132, 542 U.S. at 667.

[161] *Id.* at 667, 668

[162] *Id*. at 671-672.

Court's "opinion does not foreclose the District Court from concluding, upon a proper showing by the Government that meets the Government's constitutional burden as defined in this opinion, that COPA is the least restrictive alternative available to accomplish Congress' goal."[163]

Justice Breyer, in his dissent, found that COPA's "burden on protected speech ... is no more than modest," as it would limit "legally obscene material, and very little more."[164] Further, COPA "does not censor the material it covers," but merely "requires providers of the 'harmful to minors' material to restrict minors' access to it by verifying age."[165] Justice Breyer then wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo," and "[i]t is always less restrictive to do *nothing* than to do *something*."[166] In addition, Breyer asserted, "filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision."[167] (The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative."[168]) Justice Breyer also noted "four serious inadequacies" of filters, and found that COPA's application to "60% percent of the Internet's commercial pornography" is not "insignificant."[169] Justice Breyer's dissent was joined by two other justices, and Justice Scalia wrote a separate dissent, claiming that "harmful-to-minors" material is not protected by the First Amendment.

Upon remand, the district court, as noted above, found COPA to be unconstitutional.[170] The grounds for its decision were that "COPA is not narrowly tailored to Congress' compelling interest," the Attorney General "failed to meet his burden of showing that COPA is the least restrictive, most effective alternative in achieving the compelling interest," and "COPA is impermissibly vague and overbroad."[171] The court found COPA to be overinclusive, which means that it prohibited "more speech than is necessary to further Congress' compelling interest," as it "covers more than just commercial pornographers" and "applies to speech that is obscene as to all minors from newborns to age sixteen, and not just to speech that is obscene as to older minors."[172] The court also found COPA to be underinclusive, as it does not apply to "a significant amount of sexually explicit material on the Internet which originates from outside of the United States," which is one reason, the court found, that COPA would not be not as effective as alternatives, such as filters, would be in achieving its ends.[173] In 2008, the Third Circuit affirmed, finding that COPA "does not employ the least restrictive alternative to advance the Government's compelling interest" and is also vague and overbroad.[174] In 2009, the Supreme Court declined to review the case.

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[163] *Id*. at 673.

[164] *Id*. at 678.

[165] *Id*. at 682.

[166] *Id*. at 684.

[167] *Id*. at 685.

[168] *Id*. at 669.

[169] *Id*. at 687.

[170] American Civil Liberties Union v. Gonzales, *supra* note 133, 478 F. Supp. 2d 775.

[171] *Id*. at 777-778.

[172] *Id*. at 810.

[173] *Id.*

[174] American Civil Liberties Union v. Mukasey, *supra* note 133, 534 F.3d at 198.

G. Children's Internet Protection Act

The Children's Internet Protection Act (CIPA), P.L. 106-554 (2000), 114 Stat. 2763A-335, amended three federal statutes to provide that a school or library may not use funds it receives under these statutes to purchase computers used to access the Internet, or to pay the direct costs of accessing the Internet, and may not receive universal service discounts (other than for telecommunications services), unless the school or library enforces a policy "that includes the operation of a technology protection measure" that blocks or filters minors' Internet access to visual depictions that are obscene, child pornography, or "harmful to minors"; and that blocks or filters adults' Internet access to visual depictions that are obscene or child pornography.[175]

The sections of CIPA (1711 and 1712) that require schools and libraries to block or filter if they use federal funds for computers or for Internet access, provide that the blocking or filtering technology may be disabled "to enable access for bona fide research or other lawful purpose." The section of CIPA (1721) that requires schools and libraries to block or filter if they receive universal service discounts, provides that the blocking or filtering technology may be disabled "during use by an adult, to enable access for bona fide research or other lawful purpose."

Sections 1711, 1712, and 1721 all contain identical definitions of "minor," "obscene," "child pornography," and "harmful to minors. They define a "minor" as a person under 17. They define "obscene" to have the meaning given such term in18 U.S.C. § 1460, but that section does not define "obscene."[176] In the absence of a statutory definition, the courts will no doubt apply the *Miller* test to define the word.

Sections 1711, 1712, and 1721 all define "child pornography" to have the meaning given such term in 18 U.S.C. § 2256. That section defines "child pornography" as any "visual depiction" of "sexually explicit conduct" that is or appears to be of a minor, and defines "sexually explicit conduct" as various "actual or simulated" sexual acts or the "lascivious exhibition of the genitals or pubic area of any person." Child pornography need not be obscene under the *Miller* test; it is unprotected by the First Amendment even if it does not appeal to the prurient interest, is not patently offensive, and does not lack serious literary, artistic, scientific, or political value.

Sections 1711, 1712, and 1721 define "material that is harmful to minors" as any communication that—

> (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
>
> (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

[175] Section 1711 amends Title III of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6801 *et seq*. Section 1712 amends section 224 of the Museum and Library Services Act, 20 U.S.C. § 9134, which is part of the Library Services and Technology Act (LSTA), which is Title II of the Museum and Library Services Act. Section 1721 amends section 254(h) of the Communications Act of 1934, 47 U.S.C. § 254(h), which establishes the "universal service discount," or "E-rate," for schools and libraries. Only sections 1712 and 1721 (insofar as it applies to libraries) were at issue in the case before the three-judge district court and the Supreme Court.

[176] Nor does any other section of the U.S. Code, except 20 U.S.C. § 952(*l*), which defines it for purposes of grants by the National Endowment for the Arts, and does so in a manner that parallels the *Miller* test, except that it does not apply community standards to the determination of whether material is patently offensive.

> (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[177]

In *United States v. American Library Association*, a three-judge federal district court unanimously declared CIPA unconstitutional and enjoined its enforcement insofar as it applies to libraries.[178] CIPA, like the CDA but unlike COPA, authorizes the government to appeal directly to the Supreme Court, and the government did so. In 2003, the Supreme Court reversed the district court, finding CIPA constitutional.[179]

The decision included a four-justice plurality opinion by Chief Justice Rehnquist, concurring opinions by Justices Kennedy and Breyer, and dissenting opinions by Justices Stevens and Souter (the latter joined by Justice Ginsburg). The plurality noted that "Congress may not 'induce' the recipient [of federal funds] 'to engage in activities that would themselves be unconstitutional.'"[180] The plurality therefore viewed the question before the Court as "whether [public] libraries would violate the First Amendment by employing the filtering software that CIPA requires."[181] Does CIPA, in other words, effectively violate library *patrons*' rights?

The plurality concluded that it does not. In so concluding, the plurality found that "Internet access in public libraries is neither a 'traditional' or a 'designated' public forum,"[182] and that therefore it would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[183] This means that the government did not have to demonstrate that CIPA serves a compelling interest (though Justice Kennedy in his concurrence noted that "all Members of the Court appear to agree" that it does[184]) or that CIPA does so by the least restrictive means (the district court had found "that less restrictive alternatives to filtering software would suffice to meet Congress' goals"[185]).

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[177] This three-part test is similar to that of the Child Online Protection Act, 47 U.S.C. § 231(e), but three differences are that CIPA applies only to visual depictions, whereas COPA applies also to words; CIPA does not, like COPA, provide that the determinations of prurience and patent offensiveness (*see* note 134, *supra*) be made in accordance with the views of "the average person applying contemporary community standards"; and CIPA does not, like COPA, allow a visual depiction of a "post-pubescent female breast" to be found harmful to minors.

[178] 201 F. Supp. 2d 401 (E.D. Pa. 2002). The district court struck down § 1712(a)(2), which concerns LSTA funds, and § 1721(b) which concerns E-rate discounts for libraries. The provisions affecting schools were not challenged.

[179] 539 U.S. 194 (2003).

[180] *Id*. at 203.

[181] *Id.*

[182] *Id*. at 205. The district court had found "that when the government provides Internet access in a public library, it has created a designated public forum," and that "content-based restrictions on speech in a designated public forum are most clearly subject to strict scrutiny when the government opens a forum for virtually unrestricted use by the general public for speech on a virtually unrestricted range of topics, while selectively excluding particular speech whose content it disfavors." 201 F. Supp. 2d 401, 457, 460 (E.D. Pa. 2002).

[183] The reason the plurality found that Internet access in public libraries is not a public forum is that "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." *Id.* at 206.

[184] *Id*. at 215.

[185] *Id*. at 207 n.3.

The plurality acknowledged "the tendency of filtering software to 'overblock'—that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block."[186] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."[187]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance—in other words, does it violate public *libraries*' rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized."[188] "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress' decision not to subsidize their doing so."[189]

In effect, then, the plurality seemed to view CIPA as raising no First Amendment issue other than the possible one of overblocking, which it found the statute to deal with adequately by its disabling provisions. Justice Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific websites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case."[190]

Justice Breyer would have applied "a form of heightened scrutiny," greater than rational basis scrutiny but "more flexible" than strict scrutiny, to assess CIPA's constitutionality.[191] He would ask "whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives."[192] Applying this test, he concurred that CIPA is constitutional.

Justice Stevens found CIPA unconstitutional because of its "vast amount of 'overblocking,'" which he found not cured by the disabling provisions, because "[u]ntil a blocked site or group of sites is unblocked, a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed."[193]

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[186] *Id.* at 208. The three-judge court had found that "At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies' own category definitions. Many erroneously blocked pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'" 201 F. Supp. 2d at 449.

[187] *Id.* at 209.

[188] *Id.* at 211. For additional information on the issue of unconstitutional conditions, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Henry Cohen.

[189] *Id.* at 212.

[190] *Id.* at 215.

[191] *Id.* at 216, 218.

[192] *Id.* at 217.

[193] *Id.* at 222, 224. Justice Stevens quoted from the district court opinion: "[T]he search engines that software companies use for harvestings are able to search text only, not images. This is of critical importance, because CIPA, by its own terms, covers only 'visual depictions.'" *Id.* at 221.

Justice Souter said that he would not "dissent if I agreed with the majority of my colleagues ... that an adult library patron could, consistently with the act, obtain an unblocked terminal simply for the asking.... But the Federal Communications Commission, in its order implementing the act, pointedly declined to set a federal policy on when unblocking by local libraries would be appropriate under the statute.... Moreover, the District Court expressly found that 'unblocking may take days, and may be unavailable, especially in branch libraries, which are often less well staffed than main libraries.'"[194] Further, "the statute says only that a library 'may' unblock, not that it must."[195]

H. Dot Kids Internet Domain

The Dot Kids Implementation and Efficiency Act of 2002, P.L. 107-317, 47 U.S.C. § 941, directs the National Telecommunication and Information Administration (NTIA), which is an agency in the Department of Commerce, to establish a "new domain" "that provides access only to material that is suitable for minors and not harmful to minors." The statute's definition of "harmful to minors" is essentially the same as COPA's.[196] Its definition of "suitable for minors" is "not psychologically or intellectually inappropriate for minors" and "serves (i) the educational, informational, intellectual, or cognitive needs of minors; or (ii) the social, emotional, or entertainment needs of minors." The URL for the new domain is http://www.kids.us; that site lists 22 websites that use the new domain.

I. Misleading Domain Names on the Internet

This provision, 18 U.S.C. § 2252B, which was enacted as § 521 of the PROTECT Act, P.L. 108-21 (2003), was placed in the child pornography statute, but it concerns obscenity and "harmful to minors" material, and not child pornography, except to the extent that obscenity or "harmful to minors" material may also be child pornography. It makes it a crime knowingly to use a misleading domain name on the Internet with the intent to deceive a person into viewing material that is obscene, or with the intent to deceive a minor into viewing material that is "harmful to minors." It defines "harmful to minors" to parallel the *Miller* test for obscenity, as applied to minors.

J. Misleading Words or Digital Images on the Internet

This provision, 18 U.S.C. § 2252C, which was created by § 703 of the Adam Walsh Child Protection and Safety Act of 2006, P.L. 109-248 (2006), was placed in the child pornography statute, but it concerns obscenity and "harmful to minors" material, and not child pornography, except to the extent that obscenity or "harmful to minors" material may also be child pornography. It makes it a crime to knowingly embed words or digital images into the source code of a website with the intent to deceive a person into viewing material that constitutes obscenity, or with the intent to deceive a minor into viewing material that is "harmful to minors." It defines "harmful to minors" as defined in section 2252B (the statute described immediately above under "I. Misleading Domain Names on the Internet").

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[194] *Id*. at 232-233.

[195] *Id*. at 233.

[196] *See*, text accompanying note 134, *supra*.

K. Sexually Oriented Spam

Section 5(d) of the CAN-SPAM Act of 2003, 15 U.S.C. §§ 7701 *et seq*., P.L. 108-187,[197] makes it a crime to send to a "protected computer" (which as defined in section 3 of the statute effectively means any computer) a commercial e-mail "that includes sexually oriented material," unless (1) "the recipient has given prior affirmative consent to receipt of the message," or (2) the e-mail includes in its subject heading "the marks or notices prescribed by the [Federal Trade] Commission," or (3) "the matter in the message that is initially viewable to the recipient includes only"—

> (i) to the extent required or authorized pursuant to paragraph (2), any such marks or notices;
>
> (ii) the information required to be included in the message pursuant to subsection (a)(5); and
>
> (iii) instructions on how to access, or a mechanism to access, the sexually oriented material.

Item (i) apparently should refer to paragraph (3) rather than paragraph (2). If read to refer to paragraph (3), then it would mean that the FTC-prescribed marks and notices may be in the body of the e-mail instead of in the subject heading. They may be in the body of the e-mail, however, only if the sender complies with items (ii) and (iii). Item (ii) refers to subsection (a)(5), which requires all spam to provide:

> (i) clear and conspicuous identification that the message is an advertisement or solicitation;
>
> (ii) clear and conspicuous notice of the opportunity under paragraph (3) to decline to receive further commercial electronic mail messages from the sender; and
>
> (iii) a valid physical postal address of the sender.

Item (iii) apparently means that the body of the e-mail may contain a link to sexually oriented material, but may not contain sexually oriented material itself.

The Federal Trade Commission issued a final rule, effective May 19, 2004, requiring that sexually oriented spam "exclude sexually oriented material from the subject heading ... and include in the subject heading the phrase 'SEXUALLY-EXPLICIT:' in capital letters as the first nineteen (19) characters at the beginning of the subject line."[198] The rule also requires—

> that the content of the message that is initially viewable by the recipient when the message is opened by any recipient and absent any further actions by the recipient, include only the following information:
>
> (i) the phrase "SEXUALLY-EXPLICIT:" in a clear and conspicuous manner;
>
> (ii) clear and conspicuous identification that the message is an advertisement or a solicitation;

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[197] "CAN-SPAM" is an acronym for "Controlling the Assault of Non-Solicited Pornography and Marketing."

[198] 69 Fed. Reg. 21024 (2004), 16 C.F.R. Part 316; http://www.ftc.gov/opa/2004/04/adultlabel.htm.

> (iii) clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial electronic mail messages from the sender;
>
> (iv) a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that ... a recipient may use to submit ... a reply ... requesting not to receive future commercial electronic mail messages from the sender....”

L. Video Voyeurism

The Video Voyeurism Prevention Act of 2004, Public Law 108-495,18 U.S.C. § 1801, makes it a misdemeanor—but only “in the special maritime and territorial jurisdiction of the United States,” as that phrase is defined at 18 U.S.C. § 7—for a person, having “the intent to capture an image of a private area of an individual without their consent.... knowingly [to do] so in circumstances in which the individual has a reasonable expectation of privacy.”

A “private area” refers to “naked or undergarment clad genitals, pubic area, buttocks, or female breast [below the top of the areola].” To “capture an image” means “to videotape, photograph, film, record by any means, or broadcast,” with “broadcast” meaning “electronically transmit.”

M. RICO

The Federal Racketeer Influenced and Corrupt Organizations Act (RICO) was amended in 1984 to add the obscenity crimes specified in 18 U.S.C. §§ 1461-1465 to the definition of “racketeering activity” in 18 U.S.C. § 1961(1)(B). RICO makes it a crime for any person employed by or associated with any “enterprise” engaged in or affecting interstate or foreign commerce to participate in the affairs of the enterprise “through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). A “pattern of racketeering activity” means at least two acts of racketeering activity within ten years (excluding any period of imprisonment). 18 U.S.C. § 1961(5). Thus, if a person engages in two such activities, including the obscenity offenses specified, he is subject to prosecution under RICO in addition to, or instead of, prosecution for the particular activities.

RICO also provides for criminal forfeiture (18 U.S.C. § 1963), and its criminal forfeiture provision has been used in obscenity prosecutions; see *Alexander v. United States*, *infra*. In *Fort Wayne Books, Inc. v. Indiana*, the Supreme Court held that *pretrial* seizure, under the Indiana RICO statute, of books or other expressive materials, was unconstitutional.[199] Although probable cause to believe that a person has committed a crime is sufficient to arrest him, “probable cause to believe that there are valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films.”[200] This presumption of First Amendment protection “is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding.”[201] The Federal RICO statute, in any event, does not provide for pretrial seizure.[202]

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[199] 489 U.S. 46 (1989).

[200] *Id*. at 66.

[201] *Id*. at 67.

[202] *Id.* at 67 n.13.

In *Fort Wayne Books*, the Court did, however, uphold the constitutionality of including obscenity violations among the predicate offenses under a RICO statute. The Court rejected the argument "that the potential punishments available under the RICO law are so severe that the statute lacks a 'necessary sensitivity to first amendment rights.'"[203] Further, the Court held that such obscenity violations need not be "affirmed convictions on successive dates ... in the same jurisdiction as that where the RICO charge is brought."[204]

The fact that the violations need not be affirmed convictions means that the obscenity violations may be proved as part of the RICO prosecution; no "warning shot" in the form of a prior conviction for obscenity is required. "As long as the standard of proof is the proper one with respect to all the elements of the RICO allegation—including proof, beyond a reasonable doubt, of the requisite number of constitutionally-proscribable predicate acts—all of the relevant constitutional requirements have been met."[205]

The fact that the predicate offenses need not be convictions in the same jurisdiction as that where the RICO charge is brought means that the predicate offenses can be violations which were based on community standards different from those of the jurisdiction where the RICO charge is brought.[206] "But, as long as, for example, each previous obscenity conviction was measured by the appropriate community's standard, we see no reason why the RICO prosecution—alleging a pattern of such violations—may take place only in a jurisdiction where two or more such offenses have occurred."[207]

In *Alexander v. United States*, the Supreme Court addressed a question it had left open in *Fort Wayne Books*: whether there are First Amendment limitations to RICO forfeitures of assets that consist of expressive materials that are otherwise protected by the First Amendment.[208] The defendant in the case had been found guilty of selling four magazines and three videotapes that were obscene, and, on that basis, had been convicted under RICO. He was sentenced to six years in prison, fined $100,000, and ordered to pay the cost of prosecution, incarceration, and supervised release. He was also ordered to forfeit all his wholesale and retail businesses, including more than a dozen stores and theaters dealing in sexually explicit material, all the assets of these businesses (i.e., expressive materials, whether or not obscene), and almost $9 million. The government chose to destroy, rather than sell, the expressive material.

The Supreme Court rejected the argument that the forfeiture of expressive materials constitutes prior restraint, as the forfeiture order "does not *forbid* petitioner from engaging in any expressive activities in the future, nor does it require him to obtain prior approval for any expressive

[203] *Id*. at 57.

[204] *Id*. at 61.

[205] *Id*.

[206] This could be the case even in a RICO prosecution based on predicate offenses in a different part of the same state, as the relevant community may be an area less than the entire state. *See*, Hamling v. United States, 418 U.S. 87, 105 (1974).

[207] 489 U.S. at 62. Although the Court uses the word "conviction" in this sentence, there appears to be no reason why a RICO prosecution could not be based on a violation in another jurisdiction that had not previously been prosecuted in that jurisdiction. In such a case, the prosecution would have to prove beyond a reasonable doubt that the laws (including, in an obscenity case, the community standards) of the state where the predicate offense occurred had been violated.

[208] 509 U.S. 544 (1993).

activities."[209] Consequently, the Court analyzed the forfeiture "under normal First Amendment standards," and could see no reason why, "if incarceration for six years and a fine of $100,000 are permissible forms of punishment under the RICO statute, the challenged forfeiture of certain assets directly related to petitioner's racketeering activity is not.... [T]he First Amendment does not prohibit either stringent criminal sanctions for obscenity offenses or forfeiture of expressive materials as punishment for criminal conduct."[210]

The Court did, however, remand the case to the court of appeals to decide whether the forfeiture constituted an "excessive fine" under the Eighth Amendment. The same day, in another case, the Court held that the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property imposed by criminal statutes.[211]

N. Wiretaps

18 U.S.C. § 2516(1)(i) authorizes federal judges to approve "the interception of wire or oral communications" to collect evidence of violations of the federal obscenity statute (18 U.S.C. §§ 1460-1469). Section 201 of the PROTECT Act, P.L. 108-21 (2003), amended 18 U.S.C. § 2516(1)(c) to provide the same authorization with respect to child pornography crimes.

O. The Customs Service Provision

This statute, which is codified at 19 U.S.C. § 1305, prohibits importation of, among other things, obscene material, and provides, upon the appearance of any such material at a customs office, for its civil forfeiture. P.L. 100-690, § 7522(e),[212] amended 19 U.S.C. § 1305 to coordinate seizure by customs officers with criminal prosecutions under 18 U.S.C. § 1462. As the message of the President that accompanied the original proposal that became P.L. 100-690 explained, "While most obscene material seized by the Customs Service is forfeited under section 1305, some is of such a nature that it is referred for criminal prosecution as a violation of 18 U.S.C. 1462, importation of obscene material...."[213] The amendment to section 1305 provides:

> [W]henever the Customs Service is of the opinion that criminal prosecution is appropriate or that further criminal investigation is warranted in connection with allegedly obscene material seized at the time of entry, the appropriate customs officer shall immediately transmit information concerning such seizure to the United States Attorney of the district of the *addressee's* residence....

The amendment then sets forth the subsequent procedures to be followed by the U.S. Attorney.

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[209] *Id.* at 550-551.

[210] *Id.* at 554-555.

[211] Austin v. United States, 509 U.S. 602 (1993).

[212] Subsection (e) apparently should have been "(d)," as there is no "(d)" following "(c)."

[213] H.R. Doc., *supra* note 92, at 82.

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