

Obscenity, Child Pornography, and Indecency: Recent Developments and Pending Issues

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Summary

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press. ..." The First Amendment applies, with two exceptions, to pornography, with that term being used to refer to any words or pictures of a sexual nature. The two exceptions are obscenity and child pornography; because these are not protected by the First Amendment, they may be, and have been, made illegal. Pornography and "indecent" material that are protected by the First Amendment may nevertheless be restricted in order to limit minors' access to them.

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Obscenity

To be legally obscene, and therefore unprotected by the First Amendment, pornography must, at a minimum, "depict or describe patently offensive 'hard core' sexual conduct."[1] The Supreme Court has created the three-part *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.[2]

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." 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."[3] In *Brockett v. Spokane Arcades*, the Supreme Court held that material is not obscene if it "provoke[s] only normal, healthy sexual desires." To be obscene it must appeal to "a shameful or morbid interest in nudity, sex, or excretion."[4]

Obscenity: Recent Developments

The Communications Decency Act of 1996 (P.L. 104-104, § 507) expanded the law prohibiting interstate commerce in obscenity (18 U.S.C. §§ 1462, 1465) to apply to the use of an "interactive computer service" for that purpose. It defined "interactive computer service" to include "a service or system that provides access to the Internet." 47 U.S.C. § 230(e)(2). These provisions were not affected by the Supreme Court's decision in *Reno v. ACLU* declaring unconstitutional two provisions of the CDA that would have restricted indecency on the Internet.[5]

Obscenity: Pending Issues

In *Reno*, the Court noted, in dictum, that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message."[6] This suggested that, at least with respect to material on the Internet, the Court might replace the community standards

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[1] Miller v. California, 413 U.S. 15, 27 (1973). For additional information, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen.

[2] *Id*. at 24 (citation omitted).

[3] 481 U.S. 497, 500 (1987).

[4] 472 U.S. 491, 498 (1984).

[5] 521 U.S. 844 (1997).

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

criterion, except perhaps in the case of Internet services where the defendant makes a communication available only to subscribers and can thereby restrict the communities in which he makes a posting accessible. Subsequently, however, the Court held that the use of community standards does not by itself render a statute banning "harmful to minors" material on the Internet unconstitutional.[7]

Child Pornography

Child pornography is material "that *visually* depict[s] sexual conduct by children below a specified age."[8] It is unprotected by the First Amendment even when it is not obscene (i.e., child pornography need not meet the *Miller* test to be banned).[9] The reason that child pornography is unprotected is that it "is intrinsically related to the sexual abuse of children. ... Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies."[10]

Federal law bans interstate commerce (including by computer) in child pornography (18 U.S.C. §§ 2252, 2252A), defines "child pornography" as "any visual depiction" of "sexually explicit conduct" involving a minor, and defines "sexually explicit conduct" to include not only various sex acts but also the "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256.

Child Pornography: Recent Developments

In 1994, Congress amended the child pornography statute to provide that "lascivious exhibition of the genitals or pubic area of any person" "is not limited to nude exhibitions or exhibitions in which the outlines of those areas were discernible through clothing." 18 U.S.C. § 2252 note. Then, in the Child Pornography Prevention Act of 1996 (CPPA), Congress enacted a definition of "child pornography" that included visual depictions that *appear* to be of a minor, even if no minor was actually used. 18 U.S.C. § 2256(8). The statute thus banned visual depictions using adult actors who appear to be minors, as well as computer graphics and drawings or paintings done without any models.

In *Ashcroft v. Free Speech Coalition*, the Supreme Court declared the CPPA unconstitutional to the extent that it prohibited pictures that were not produced with actual minors.[11] Child pornography, to be unprotected by the First Amendment, must either be obscene or depict actual children engaged in sexual activity (including "lascivious" poses), or actual children whose images have been "morphed" to make it appear that the children are engaged in sexual activity. The Court observed in *Ashcroft* that statutes that prohibit child pornography that use real children

[7] Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002).

[8] New York v. Ferber, 458 U.S. 747, 764 (1982) (italics in original). For additional information, see CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes*, by Henry Cohen.

[9] This means that child pornography may be banned even if does not appeal to the prurient interest, is not patently offensive, and does not lack literary, artistic, political, or scientific value. See Ferber, *supra* note 8, 458 U.S., at 764.

[10] *Ferber*, *supra* note 8, 458 U.S., at 759-760.

[11] 535 U.S. 234 (2002).

are constitutional because they target "[t]he production of the work, not the content." The CPPA, by contrast, targeted the content, not the means of production. The government's rationales for the CPPA included that "[p]edophiles might use the materials to encourage children to participate in sexual activity" and might "whet their own sexual appetites" with it, "thereby increasing ... the sexual abuse and exploitation of actual children." The Court found these rationales inadequate because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" and "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"

The government also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because, "[a]s imaging technology improves ... , it becomes more difficult to prove that a particular picture was produced using actual children." This rationale, the Court found, "turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech." In response to *Ashcroft*, Congress enacted Title V of the PROTECT Act, P.L. 108-21 (2003), which prohibits any "digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." It also prohibits "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.[12] It also makes it a crime to advertise, promote, present, distribute, or solicit any material in a manner that reflects the belief, or that is intended to cause another to believe, that the material is child pornography that is obscene or that depicts an actual minor.[13]

The Adam Walsh Child Protection and Safety Act of 2006 (P.L. 109-248) amended 18 U.S.C. § 2257, which requires by producers of material that depicts actual sexually explicit conduct to keep records of every performers' name and date of birth; it also enacted 18 U.S.C. § 2257A, which requires essentially the same thing with respect to simulated sexual conduct. The Effective Child Pornography Prosecution Act of 2007 (P.L. 110-358, Title I) and the Enhancing the Effective Prosecution of Child Pornography Act of 2007 (P.L. 110-358, Title II) expanded existing law by, among other things, making it applicable to intrastate child pornography violations that affect interstate or foreign commerce. P.L. 110-358 was signed into law on October 8, 2008.

[12] To the extent that the prohibitions described in the two preceding sentences apply to non-obscene child pornography that was produced without the use of an actual child, they would apparently be unconstitutional under *Ashcroft*.

[13] In *United States v. Williams*, 128 S. Ct. 1830 (2008), the Supreme Court upheld the constitutionality of this prohibition. It noted that, under the provision, "an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute." *Id.* at 1839. The Court found that these activities are not constitutionally protected because "[o]ffers to engage in illegal transactions [as opposed to abstract advocacy of illegality] are categorically excluded from First Amendment protection," even "when the offeror is mistaken about the factual predicate of his offer," such as when the child pornography that one offers to buy or sell does not exist or is constitutionally protected. *Id*. at 1841, 1842, 1843.

Indecency

The Federal Communications Commission defines "indecent" material as material that "describe[s] or depict[s] sexual or excretory organs or activities" in terms "patently offensive as measured by contemporary community standards for the broadcast media."[14]

Indecent material is protected by the First Amendment unless it constitutes obscenity or child pornography. Except on broadcast radio and television, indecent material that is protected by the First Amendment may be restricted by the government only "to promote a compelling interest" and only by "the least restrictive means to further the articulated interest."[15] The Supreme Court has "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."[16]

There are federal statutes in effect that limit, but do not ban, indecent material transmitted via telephone, broadcast media, and cable television.[17] There are also many state statutes that ban the distribution to minors of material that is "harmful to minors." Material that is "harmful to minors" under these statutes tends to be defined more narrowly than material that is "indecent," in that material that is "harmful to minors" is generally limited to material of a sexual nature that has no serious value for minors. The Supreme Court has upheld New York's "harmful to minors" statute.[18]

Indecency: Recent Developments

In 1997, the Supreme Court declared unconstitutional two provisions of the Communications Decency Act of 1996 that would have prohibited indecent communications, by telephone, fax, or e-mail, to minors, and would have prohibited use of an "interactive computer service" to display indecent material "in a manner available to a person under 18 years of age."[19] This latter prohibition would have banned indecency from public (i.e., non-subscription) websites.

The CDA was succeeded by the Child Online Protection Act (COPA), P.L. 105-277 (1998), which 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. "Material that is harmful to minors" is defined as material that (A) is prurient, as determined by community standards, (B) "depicts, describes, or represents, in a manner patently offensive with respect to minors," sexual acts or a lewd exhibition of the genitals or post-pubescent female breast, and (C) "lacks serious literary, artistic, political, or scientific value for minors." COPA never took effect

[14] *In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, File No. EB-00-IH-0089 (April 6, 2001).

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

[16] *Id.*

[17] 47 U.S.C. § 223(b) (commercial dial-a-porn), 18 U.S.C. § 1464, 47 U.S.C. § 303 note (broadcast media), 47 U.S.C. §§ 531(e), 532(c)(2), 532(h), 559-561 (cable television). The Supreme Court declared section 561 unconstitutional. United States v. Playboy Entertainment Group, Inc. v. United States, 529 U.S. 803 (2000).

[18] Ginsberg v. New York, 390 U.S. 629 (1968).

[19] Reno v. American Civil Liberties Union, *supra* note 5.

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because, in 2007, a federal district court found it unconstitutional and issued a permanent injunction against its enforcement; in 2008, the U.S. Court of Appeals affirmed, finding that COPA "does not employ the least restrictive alternative to advance the Government's compelling interest" and is also vague and overbroad.[20]

Indecency: Pending Issues

In 2003, at the Golden Globe Awards, the singer Bono, in response to winning an award, said, "this is really, really f[***]ing brilliant." The FCC found the word to be indecent, even when used as a modifier, because, "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation ... ."[21] The question arises whether this ruling is consistent with the First Amendment, in light of the fact that the Supreme Court has left open the question whether broadcasting an occasional expletive would justify a sanction.[22] In 2006, the FCC took action against four other television broadcasts that contained fleeting expletives, but on June 4, 2007, the U.S. Court of Appeals for the Second Circuit found "that the FCC's new policy regarding 'fleeting expletives' is arbitrary and capricious under the Administrative Procedure Act."[23] The court also noted that expletives "are often used in everyday conversation without any 'sexual or excretory' meaning." Having overturned the FCC policy on statutory grounds, the court had no occasion to decide whether the agency had also violated the First Amendment. The U.S. Supreme Court has agreed to hear the case.

In 2008, the U.S. Court of Appeals for the Third Circuit overturned 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.[24] 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.

The Children's Internet Protection Act (CIPA), P.L. 106-554 (2000)

CIPA restricts access to obscenity, child pornography, and material that is "harmful to minors," and so is discussed here separately. CIPA 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, unless the school or library enforces a policy to block or filter minors' Internet access to images that are obscene, child pornography, or harmful to minors; and enforces a policy

[20] 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, 198 (3d Cir. 2008).

[21] *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, File No. EB-03-IH-0110 at 4 (March 18, 2004). For additional information, see CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Henry Cohen and Kathleen Ann Ruane.

[22] Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 750 (1978).

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

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

to block or filter adults' Internet access to visual depictions that are obscene or child pornography. It provides, however, that filters may be disabled "for bona fide research or other lawful purposes."

In 2003, the Supreme Court held CIPA constitutional.[25] A plurality opinion 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." 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." The plurality also found that 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."

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[25] United States v. American Library Association, 539 U.S. 194 (2003).