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The Use of Community Standards by the Child Online Protection Act to Determine If Material Is Harmful to Minors Is Not Unconstitutional: *Ashcroft v. American Civil Liberties Union*

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The Use of Community Standards by the Child Online Protection Act to Determine if Material is Harmful to Minors is not Unconstitutional: *Ashcroft v. American Civil Liberties Union*

CONSTITUTIONAL LAW – FIRST AMENDMENT – THE MILLER TEST - The Supreme Court of the United States held that the Child Online Protection Act's use of "community standards" to determine if material is "harmful to minors" does not violate the First Amendment.

Ashcroft v. American Civil Liberties Union et al., 122 S. Ct. 1700 (2002)

The Internet[1] is a vast resource where users can easily access educational materials and international news or follow sporting events.[2] There are also numerous sexually-oriented web sites that are accessible to a person of any age with minimal effort.[3] The Communication Decency Act of 1996 (CDA) was enacted by Congress to attempt to protect children by making illegal the "knowing transmission over the Internet of obscene or indecent messages to any recipient less than 18 years of age."[4] The United

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1. Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). The web, or Internet, began in 1969 as a military program called "ARAPNET" (Advanced Research Project Agency) which allowed military, defense contractors, and universities to communicate, despite network damage. *Id.* at 849-850. ARAPNET was an example of networks of computers communicating with each other and was copied by many civilian networks. *Id.* at 850. ARAPNET is no longer in use but the Internet concept was extremely successful and now allows for international communication that is predominately based in the U.S. *Id.*

2. Ashcroft v. Civil Liberties Union, 122 S. Ct. 1700 (2002). The web can be used to read newspapers, purchase items, or follow sports. *Ashcroft*, 122 S. Ct. at 1703.

3. *Id.* at 1703-04. Access to the Internet is widely available throughout the country with approximately 176.5 million Americans having Internet access. *Id.* at 1703. Because of the ease of the Internet a child with very little computer ability can purposely or accidentally find explicit hardcore pornography. *Id.*

4. Id. at 1704. In addition The Communications Decency Act made the following illegal

d) Sending or displaying offensive material to persons under 18. Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that, in

States Supreme Court decided in *Reno v. American Civil Liberties Union*[5] that CDA was in opposition to the First Amendment because of its restrictions.[6]

In response to the decision, Congress passed the Child Online Protection Act (COPA) which narrowed the scope of CDA significantly by restricting charges to those who make the communication for "commercial purposes".[7] In addition, COPA does not apply to e-mail messages, but only to matter actually displayed on the web and it only stops "material that is harmful to minors", rather than the CDA's much broader "patently offensive" communications.[8] COPA looked to the three-prong test for obscenity that the Supreme Court defined in *Miller v. California*[9] and developed three standards to determine "material that is harmful to minors."[10] COPA carries both civil and criminal penalties and fines.[11]

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context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity.

47 U.S.C. §223 (1997).

5. *Reno*, 521 U.S. at 870-71.

6. *Id.*

7. *Ashcroft*, 122 S. Ct. at 1704-05. COPA prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. §231(a)(1) (1997). The Act provides that a communication will be considered commercial only if the person "is engaged in the business of making such communications." *Id.* According to COPA, one engaged in the business refers to a person:

who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

47 U.S.C. §.231(e)(2)(b) (1997).

8. *Ashcroft*, 122 S. Ct. at 1705.

9. 93 S. Ct. 2607 (1973).

10. *Ashcroft*, 122 S. Ct. at 1705. COPA defines material that is harmful to minors as: any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

A person can avoid the penalties imposed by COPA by restricting access of their website containing material "harmful to minors" by requiring a credit card, personal identification number, adult code, a digital certificate guaranteeing age, or any other possible options that are available and technologically probable.[12]

Before COPA took effect, a group of the respondents brought a lawsuit in the United States District Court for the Eastern District of Pennsylvania testing COPA's constitutionality, alleging that it was not in accordance with the First and Fifth Amendments and asked for an injunction to prevent its enforcement. [13] The group filing the suit consisted of several different and varying organizations that make income from their websites by selling advertising space, selling products or charging for displaying other's material.[14] The groups have varying content on their websites that they believe is sexually oriented and could be attacked by COPA because the material, although valuable for adults, could be construed as "harmful to minors".[15] The district court decided to grant the injunction stopping the enforcement of COPA because

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

47 U.S.C.§ 231(e)(6) (1997).

11. *Ashcroft,* 122 S. Ct. at 1705. Violations of COPA can incur a civil penalty of up to $50,000 for each violation of the Act and criminal fines of up to $50,000 and/or up to six months in prison with an additional $50,000 fine if the Act is violated intentionally. 47 U.S.C. §231(a) (1997).

12. *Ashcroft*, 122 S. Ct. at 1705. According to 47 U.S.C. §231

an individual may qualify for a defense if he: in good faith, has restricted access by minors to material that is harmful to minors-- (A) by requiring the use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology.

47 U.S.C.§ 231(c)(1) 1997.

13. *Ashcroft*, 122 S. Ct. at 1705-06.

14. *Id.* at 1706. Filers are the American Civil Liberties Union, Androgony Books, Inc., d/b/a A Different Light Bookstores, the American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, BlackStripe, Addazi Inc. d/b/a Condomania, the Electronic Frontier Foundation, the Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, PlanetOut Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc., now known as ImageState North America, Inc. *Id.*

15. *Id.* In the lower court decision the opinion describe the respondents as follows:

The plaintiffs represent a broad range of individuals, entities, and organizations suing on behalf of their members, who are speakers, content providers, and ordinary users on the Web. Some of the plaintiffs post, read, and respond to content including, *inter alia*, resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines.

Id. American Civil Liberties Union v. Reno, 31 F. Supp. 2d 473 (1999).

the respondents had shown a substantial likelihood that COPA would encumber free speech and that the respondents would probably establish at trial that it was invalid.[16]

The Attorney General appealed the decision and the court of appeals affirmed on a different basis than the parties and the district court cited.[17] The court of appeals focused on COPA's reliance on the use of "community standards" to determine if material is not suitable for minors and subject to COPA's penalties.[18] The court concluded that because of the nature of the web and the inability to restrict materials geographically there is undue burden placed on Web publishers because it forces them to conform to the standards set by the strictest and least tolerant communities.[19] By using the least tolerant standard the court feared that "vast amounts of material" would be screened and, therefore, there was a high probability that COPA would be unconstitutional.[20] The Attorney General, John Ashcroft, petitioned The Supreme Court of the United States for *certiorari* and the Court granted it to examine the court of appeals' decision that COPA is unconstitutional because of its reliance on "community standards" and, therefore, in violation of the First Amendment.[21] The Supreme Court vacated the court of appeals' decision.[22]

The Court examined free speech and the first amendment, noting that obscene speech has always been outside the protection of the First Amendment.[23] The Court decided in *Miller* what constitutes obscene, and therefore unprotected, speech by using "community standards".[24] The majority developed *Miller* to avoid using

16. *American Civil Liberties Union,* 31 F. Supp. 2d at 493. The court believed that COPA was not the least restrictive way to protect minors and keep them from accessing materials on the web. *Id.* at 497.

17. American Civil Liberties Union v. Reno, 217 F.3d 162 (2000).

18. *Id.* at 174. The court wrote: "We base our particular determination of COPA's likely unconstitutionality, however, on COPA's reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." *Id.*

19. *Id.* at 166.

20. *Id.* at 174.

21. *Ashcroft,* 122 S. Ct. at 1707.

22. *Id.*

23. *Id. See* Roth v. United States, 354 U.S. 376 (1957) (Supreme Court decided that obscene material is not constitutionally protected speech or press).

24. *Ashcroft,* 122 S. Ct. at 1707. The court developed a three-prong test:

(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.

a "sensitive person" standard, and to establish an average person criteria so as not to be constitutionally restrictive. The Miller test prevents speech from being judged by an individual opinion or group of opinions.[25] The court conceded that despite this, juries throughout the country will inevitably be swayed by their geographic location and local standards.[26] Because COPA has not yet been enforced, the court did not speculate as to what different jury instructions would be needed, but did note that community standards do not need to be determined by an actual geographic area.[27] Because of this, the court of appeals was afraid that all web publishers would be forced to apply the least tolerant communities' standard.[28]

The majority looked again at the CDA and remarked that COPA covered significantly less material and had two important restrictions that the CDA did not that narrowed its scope.[29] COPA defined "particular sexual acts or parts", as those having a prurient interest and that have no educational value for minors.[30] Justice Thomas explained that the serious value concept is especially significant because "serious value" would not differ between communities, but would be decided on whether a reasonable person would find value in the material. As a result courts can impress some limitations on the term.[31] For the prurient interest prong to be met there must be something erotic about the material.[32]

In *Hamling v. United States*[33] the Supreme Court explored the same issues and decided that if a statute is narrowed adequately by requiring both a prurient interest and a lack of serious value it is not unconstitutional to apply community standards when a publisher is distributing information to a national audience with differing community standards.[34] In *Sable Communications of Cali-*

Miller v. California, 413 U.S. 15 (1973).

25. *Ashcroft*, 122 S. Ct. at 1708.

26. *Id.*

27. *Id.*

28. *Id.* at 1709.

29. *Id.* at 1709-10.

30. Ashcroft, 122 S. Ct. at 1710.

31. *Id.* The court explained: "This is because 'the value of [a] work [does not] vary from community to community based on the degree of local acceptance it has won.'" *Reno*, 117 S. Ct. at 2345. The limitation on the definition allows for a standardization of the requirement of serious value. *Ashcroft*, 122 S. Ct. at 1710.

32. *Ashcroft*, 122 S. Ct. at 1710.

33. 418 U.S. 87 (1979).

34. *Ashcroft*, 122 S. Ct. at 1710. *Hamling* involved the mailing of brochures with sexually explicit photographs and the court found that jurors could use their knowledge of what the average person in the community would think and that a national standard was not

fornia, Inc. v. FCC[35], fifteen years after *Hamling*, the court once again decided that the use of community standards was permissible.[36] The Supreme Court rejected the court of appeals' contention that the present case was distinguished from *Sable* and *Hamling* because Web publishers cannot control the geographical dissemination of their material.[37] Justice Thomas explained that the control of the distribution of materials was not important to the decisions in either case and the Court decided that the responsibility remains with the sender to comply with the standards and did not consider if this was feasible.[38]

The majority rejects assigning the Internet a different approach to determining what constitutes unsuitable material because the medium varies so greatly from mail and telephone communications.[39] Justice Thomas wrote that it is the publishers' responsibility to obey a particular community's standards if the publisher chooses to send material to that community.[40] A publisher must use a medium that allows him to reach only a certain community if he wants to be judged by that community's standards only.[41] The Court emphasizes that material that is deemed "harmful to minors" is not completely removed from the web; it is merely placed behind a screen that requires adult identification to view it.[42] The Court found no other grounds to distinguish the present case from *Hamling* and *Sable* and noted that if it were to find COPA to be unconstitutional because of the use of community standards it would be in opposition to previous findings of the Court and make federal obscenity statutes unconstitutional.[43]

Justice Thomas rejected the respondents' argument that COPA is unconstitutional because it is overbroad, because the respondents have not yet proven that COPA's reliance on community standards alone makes it violate the First Amendment.[44] The over-breadth must also be substantial, which it is not in regards to

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necessary. They did not have to suit their messages to the most restrictive community. *Hamling*, 418 U.S. 87 (1979).

35. 492 U.S. 115 (1989). *Sable* involved prerecorded sexually explicit phone messages.
36. *Ashcroft*, 122 S. Ct. at 1711.
37. *Id.*
38. *Id.* at 1712.
39. *Id.*
40. *Id.*
41. *Ashcroft*, 122 S. Ct. at 1712.
42. *Id.*
43. *Id.* at 1712-13.
44. *Id.* at 1713.

COPA.[45] The majority believes that the respondents, and Justice Stevens, in his dissent, offer only speculation and did not meet the burden necessary for the court to affirm the court of appeals' decision.[46] The decision made in this case is restricted only to COPA's reliance on community standards and does not consider any other questions raised by this case.[47]

In her concurring opinion, Justice O'Connor agrees and points out the respondents' lack of any examples of material that does not contain the serious value necessary, and would still result in differences in different communities.[48] However, she believes a national standard is necessary for regulation on the Internet because of the nature of the medium, otherwise too much material would be barred.[49] The Justice argued that the Court has never before forbade a national standard to evaluate material and that the option should now be considered because of the unique character of the Internet.[50] Justice O'Connor concurred with the judgment but wants the Court to adopt a national standard for deciding if material is harmful to minors.[51]

Justice Breyer concurred in judgment, but wrote separately to advise of his desire that the word "community" be taken as "the Nation's adult community taken as a whole, not to geographically separate local areas" and believes that Congress intended for it to be taken as such.[52] He believes that to do otherwise would subject web publishers to the most "puritan" of standards and to allow the most restrictive communities to have veto power over displayed material.[53] Justice Breyer states that the differences in community standards as applied by different local juries do not violate the First Amendment.[54]

Justices Kennedy, Souter, and Ginsburg, concurred in judgment and wrote separately, exploring the different questions that arise with a medium such as the Internet.[55] Because of the nature of web pages, more consideration is necessary to decide to evaluate

45. *Id. See* Broadrick v. Oklahoma, 413 U.S. 601 (1973).
46. *Ashcroft*, 122 S. Ct. at 1713.
47. *Id.*
48. *Id.* at 1714 (O'Connor, J., concurring).
49. *Id.* (O'Connor, J., concurring).
50. *Id.* at 1715 (O'Connor, J., concurring).
51. *Ashcroft*, 122 S. Ct. at 1715 (O'Connor, J., concurring).
52. *Id.* (Breyer, J., concurring).
53. *Id.* at 1716 (Breyer, J., concurring).
54. *Id.* (Breyer, J., concurring).
55. *Id.* at 1717.

them on each individual page as a whole, or to consider interlinking pages as one.[56] Because of this and the other problems discussed by the district court, Justice Kennedy wrote that the combination with the community standards might make the Act unenforceable.[57] The Justice fears that because it is so inexpensive and easy to post on the web, and anyone can access it, COPA makes the person that wonders onto a particular site the judge and authority of the web.[58]

Justice Kennedy does not agree with Justice Breyer's proposition of the "national adult community", and does not believe it reflects what Congress meant by the statutory word "community".[59] Because of the inevitable differing community standards, the Justice wrote that there is a burden on free speech, but this alone does not make the Act void or enjoinable without examination of the extent of speech covered.[60] Justice Kennedy urged an examination of whom and what will be covered by the "commercial" stipulation of the Act and how inter-connecting web pages will be evaluated.[61] Although he concurred in judgment, he stated it is necessary for the court of appeals to fully analyze the case in the first instance.[62]

Justice Stevens wrote in his dissenting opinion that because the web publisher cannot control where his materials reach it is excessively restrictive to confine him to the community standards that any particular community holds.[63] Although COPA is much narrower than CDA, Justice Stevens does not believe it is sufficiently narrow for the medium and will not only protect children but also restrict adults from significant amounts of material.[64] The Justice fears that standards will be determined by the least tolerant community and, therefore, what is available for viewing will be that which is suitable to that community.[65]

Justice Stevens criticized the petitioner's reliance on the decision in *Ginsberg*, noting that that decision involved the selling of offensive materials to minors, not merely the possibility that they

56. *Ashcroft*, 122 S. Ct. at 1717 (Kennedy, J., concurring).
57. *Id.* (Kennedy, J., concurring).
58. *Id.* at 1719 (Kennedy, J., concurring).
59. *Id.* (Kennedy, J., concurring).
60. *Id.* at 1720 (Kennedy, J., concurring).
61. *Ashcroft*, 122 S. Ct. at 1722 (Kennedy, J., concurring).
62. *Id.* (Kennedy, J., concurring).
63. *Id.* at 1724 (Stevens, J., dissenting).
64. *Id.* at 1725 (Stevens, J., dissenting).
65. *Id.* at 1726 (Stevens, J., dissenting).

may access the materials.[66] Because of the nature of the medium, the Internet, there is no way to control where the information is displayed or to limit particular persons' or communities' access to it.[67] Stevens dislikes the comparisons to Sable and Hamling also because of the ease of tailoring messages when sending traditional mail and the obvious problems created by difficulty in directing e-mail and messages sent over the World Wide Web.[68] The Justice fears that using community standards will unfairly burden speech:

> There is no reason to think the differences between communities' standards will disappear once the image or description is no longer within the context of a work that has serious value for minors. Because communities differ widely in their attitudes toward sex, particularly when minors are concerned, the Court of Appeals was correct to conclude that, regardless of how COPA's other provisions are construed, applying community standards to the Internet will restrict a substantial amount of protected speech that would not be considered harmful to minors in many communities.[69]

If the least tolerant community standard determines what is permissible to display Justice Stevens believes that legitimate and valuable material will be kept from the segments of the population that do not find them to be offensive.[70] The Justice closed his dissent with this prediction: "As a result, in the context of the Internet this shield also becomes a sword, because the community that wishes to live without certain material not only rids itself, but the entire Internet of the offending speech."[71]

Free speech is protected by the First Amendment to the Constitution of the United States, but that protection is not absolute, and does not include obscene communications.[72] In *Roth v. United*

66. *Ashcroft,* 122 S. Ct. at 1723 (Stevens, J., dissenting). In *Ginsberg* the Supreme Court upheld the conviction of the defendant for the violation of a New York statute prohibiting the sale to minors of material harmful to them because it was not unconstitutional. Ginsberg v. New York, 390 U.S. 1274.

67. *Ashcroft*, 122 S. Ct. at 1724 (Stevens, J., dissenting).

68. *Id.* at 1724 (Stevens, J., dissenting).

69. *Id.* at 1727 (Stevens, J., dissenting).

70. *Id.* (Stevens, J., dissenting).

71. *Id.* at 1728 (Stevens, J., dissenting).

72. U.S. CONST. amend. I. "Congress shall make no law abridging the freedom of speech, or of the press." Roth v. United States, 354 U.S. 476 (1957). *Roth* involved two businessmen that mailed sexually explicit catalogs and circulars and were charged and convicted with violating the federal obscenity statute. *Id.* at 480-82. The businessmen both

States[73] the Court found that any speech or idea that has some value to society is protected, but that those "utterly without redeeming social importance" are subject to the obscenity laws imposed by the state or government.[74] Because the preservation of free speech is essential to the United States, the Court realized that the judging of obscene speech must be carefully tailored so as not to violate the important right guaranteed by the Constitution.[75] Obscene material was deemed to be "material which deals with sex in a manner appealing to prurient interest", as determined by applying community standards.[76] The majority found that defining obscenity does not violate the First Amendment and that it is not protected speech.[77]

In 1964, *Roth* was upheld in *Jacobellis v. Ohio*[78], a case that reiterated the use of "contemporary community standards" to determine if a movie could be considered obscene.[79] Several years later the Supreme Court found that a book could have literary value that would prevail over its prurient interest.[80] The Court decided that because a book was not "utterly without redeeming social value", as in *Roth,* it is not obscene even if it does appeal to the prurient interest and is offensive according to community standards.[81] That same year the court upheld the convictions of an individual and his three corporations, deciding that although the material itself was not patently obscene, the manner in which they sold and emphasized the sexuality was sufficient to convict.[82]

Despite the formulation in *Roth* and the following cases, the court was not able to formulate a clear and definite test to apply to

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contended that obscene speech was covered by the protection offered by the First Amendment. *Id* at 478-79. *See also* Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Reidel, 402 U.S. 354 (1971) (obscene material is not protected speech).

73. *Roth*, 354 U.S. at 484-85.

74. *Id.*

75. *Id.* at 488.

76. *Id.*

77. *Id.* at 493-94.

78. 378 U.S. 184 (1964).

79. *Id.* at 185.

80. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" Et Al. v. Attorney General of Massachusetts, 383 U.S. 413 (1966). The book written by John Cleland, Memoir's of a Woman of Pleasure, describing the life of a prostitute was written in 1750. *Id.* at 415.

81. *Id.* at 419-20.

82. Ginzburg v. United States, 383 U.S. 463 (1966). Although the materials were not obscene, they were sold with an emphasis on the sexuality of the content, or pandering. *Id.* at 466. The mailers even asked for mailing privileges from Blueball and Intercourse Pennsylvania in an effort to exploit the sexual nature of the towns' names. *Id.* at 467-68.

the cases. As a result, each case was decided on a subjective basis.[83] Because of the problems caused by this dilemma, the Supreme Court articulated a three-part test for determining if and how material was to be considered obscene in *Miller v. California*.[84] First the jury must decide "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[85] Second, the jury must consider "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law", and third "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[86] By applying this test, subject matter that may contain sexual or vulgar substance must also have some educational, artistic, or literary value or it will be deemed obscene.[87] In *Miller* the Court attempted to provide functional and practical guidance to state and federal courts, as well as to those that might find themselves charged according to stipulations defined by the decision, and to discard the Court's past untailored custom of decisions on a case-by-case basis.[88]

The Court emphasized the necessity to carefully examine works so that no educational, scientific or politically relevant material could be found obscene, because of such material's value to the nation, whether controversial or not.[89] Because of differing views previously expressed by the Court, before a standard was determined, there was no objective standard and free speech was not rightfully protected.[90] When the Court decided *Redrup v. New York*[91] in 1967 the majority chose to reverse three separate convictions on an obscenity issue that was not raised in the parties'

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83. *Miller*, 413 U.S. at 23.

84. *Id.* In *Miller* the appellant was convicted of mailing obscene "adult" materials in violation of a California obscenity statute. *Id.* at 18. The definition of obscenity used was:

> 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

CAL. PENAL CODE §311a (1969). The trial court told the jury to apply "contemporary community standards". *Id.* at 19-20.

85. *Id.* (as decided in *Kois*, 408 U.S. at 230).

86. *Miller*, 413 U.S. at 24 (quoting from *Roth*, 354 U.S. at 489).

87. *Miller*, 413 U.S. at 26.

88. *Id.* at 29.

89. *Id.* at 23.

90. *Id.*

91. 386 U.S. 767, 772 (1967).

briefs rather than deal with those issues that brought the cases to the Court.[92] The dissent in *Redrup,* authored by Justice Harlan, criticized the Court's refusal to deal with the issues presented and its summary analysis of the obscenity of the materials in question.[93] Justice Harlan feared that the majority's decision in *Redrup,* due to the lack of definable standards, made the Court an "unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us."[94]

In *Miller* the majority eschewed a "national standard" despite the inevitable variance from community to community.[95] Because the United States is a large and diverse country, the majority recognized and accepted that there will be inconsistencies in juries across the U.S., but also realized the impossibility of imposing a uniform national community standard to which everyone must conform.[96] The Court found no requirement in the First Amendment that a national standard be adhered to and found it unrealistic to impose the standards of one community on another.[97] Justice Burger stated that the effect is not to be determined by an especially sensitive or especially tolerant person, but by the average person of average tolerance in the contemporary community.[98]

One year later, in *Hamling v. United States*[99], the Supreme Court reiterated the use of community standards and wrote that the lack of some national standard does not make a statute unconstitutional.[100] The majority again emphasized that material is not to be judged by the least sensitive or most sensitive person, or to any one particular person, but by the average person in a community.[101] The jurors can take their own personal knowledge from the community and apply it to their determination. The application of the standards of a predetermined geographical area is not

92. *Id. Redrup* involved three separate acts in three different states of retailers selling pornographic magazines or books in violation of state criminal laws. *Id* at 768-69. All three cases were brought to the Supreme Court for reasons other than deciding if the materials should be determined obscene. Obscenity was not argued in the petitioner's or the respondent's brief. *Id.* at 771-72.

93. *Id.* at 772.

94. *Miller,* 413 U.S. at 23 (quoting from Walker v. Ohio, 398 U. S. 434 (1970)).

95. *Miller,* 413 U.S. at 30.

96. *Id.*

97. *Id.* at 33.

98. *Id.* at 33-34.

99. *Hamling,* 418 U.S. at 106.

100. In *Hamling,* the petitioners were convicted of mailing sexual material in violation of a federal statute. *Id.* at 107.

101. *Id.* at 107.

necessary for a statute to be constitutional.[102] The same year in *Jenkins v. Georgia*[103] the Court said that a state can stipulate a precise geographic area if it chooses, or merely rely on the "contemporary community standards" description without specifying the exact community.[104]

Fifteen years later in *Sable Communications Inc., of California v. F.C.C*[105], the Court stated that the *Miller* standard is not unconstitutional when used in federal statutes, even if the communications in question reach numerous communities with varying standards.[106] Furthermore, the majority stated that it was not unconstitutional to place the duty of compliance with varying community standards on the messenger, including all costs and considerations.[107] No matter the medium, *Sable* requires the sender to tailor its communication to the differing audiences and to bear the responsibility of complying with each of its audiences' community standards as applied to obscenity.[108] Because of this, messages could be barred because they were obscene in one community even if not in another.[109]

In 1996, the Communications Decency Act (CDA) was passed by Congress to protect minors under the age of 18 from receiving indecent or obscene messages via the World Wide Web.[110] The Court was asked to examine the constitutionality of CDA in *Reno v. ACLU*[111] and found it to be unconstitutional for several reasons.[112] First, CDA was vague and did not clearly decipher between what is obscene and what is not. It, therefore, had a stifling effect on

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102. *Id.* at 104-05.

103. 418 U.S. 153, 157 (1974).

104. Jenkins was convicted of distributing obscene materials in violation of a Georgia Obscenity statute for showing the film "Carnal Knowledge" in a Georgia theatre. Id. at 154.

105. *Sable*, 492 U.S. at 25.

106. Sable Communications was a California based company that offered pre-recorded sexual messages and had asked for injunctive relief from a federal statute. *Id* at 117-18. The statute opposed by *Sable,* 49 U.S.C. §223 (Obscene or harassing phone calls), was overturned because it was unconstitutional due to not being narrowly defined enough to serve the government's purpose. *Id.* at 131.

107. *Id.* at 125-26.

108. *Id.* at 126.

109. *Id.* at 125-26.

110. *Reno,* 521 U.S. at 844. Communications Decency Act 47 U.S.C.S § 223 (repealed 1997).

111. *Id.* at 845.

112. Because of the ease of accessing material on the World Wide Web, for both adults and children, the legislature was attempting to protect children from sexually explicit matter. *Id.* at 845-55.

free speech.[113] Secondly, it included speech that is not obscene but only indecent and protected by the First Amendment.[114] And finally, the statute was too narrow.[115] Due to its content-based regulations it controlled what was said, not how, and it was decided to be overly broad.[116] The majority opinion, delivered by Justice Stevens, declared the statute overbroad and unconstitutional because of its violation of the First Amendment.[117] The United States Congress passed the Child Online Protection Act (COPA) in response to the Court's decision in *Reno*.[118]

COPA was limited in several ways in comparison to CDA.[119] COPA does not include e-mail, it limits its purview to commercial purposes, and only applies to material that is harmful to minors, rather than just "patently offensive".[120] COPA then uses the three-part test developed in *Miller* to define what is harmful to minors.[121] Despite its differentiation from CDA, the Child Online Protection Act was challenged immediately by free speech advocates and injunctive relief was sought.[122]

In *American Civil Liberties Union v. Reno*[123] the district court found the statute to be unconstitutional.[124] The district court decided that because COPA would include web sites that had some content, and not necessarily all its content, devoted to material that could be found harmful to minors it was not sufficiently limited.[125] COPA's requirement of an age verification system would discourage publishers from posting some material, while preventing others entirely from posting material due to economic reasons, therefore imposing an unacceptable burden on speech.[126] Because the statute was overbroad and not the least restrictive manner of achieving the desired result, the district court found that COPA

113. *Id.* at 871.
114. *Id.* at 875.
115. *Reno,* 521 U.S. at 875..
116. *Id.* at 876-77. The Court stated, "The breadth of the CDA's coverage is wholly unprecedented." *Id.* at 877.
117. *Id.* at 885.
118. *Ashcroft*, 122 S. Ct. at 1705.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1706.
123. *American Civil Liberties Union*, 31 F. Supp. 2d. at 479-481
124. *Id. See supra* note 13.
125. *Id.* at 480.
126. *Id.* at 495.

did violate the First Amendment.[127] The Court believed that COPA would not survive further scrutiny.[128]

The government appealed the district court's ruling and the Court of Appeals for the Third Circuit affirmed the preliminary injunction because the court believed COPA would be found to be unconstitutional when adjudicated on its merits.[129] The opinion written by Judge Garth finds fault with COPA's use of "community standards" to determine what constitutes violative material because of the nature of the World Wide Web.[130] Because of the lack of geographic boundaries of the Web, the court believed that "community standards" is not an adequate remedy and fear it will force every web publisher to abide by the strictest community's view.[131] Judge Garth wrote that the use of *Miller's* "community standards" is inappropriate for the Web because the Web is distinguished from all other forms of communication due to its vast reach.[132] Because there is no uniform community standard and the Web reaches so many different places, the court decided that COPA's reliance on *Miller's* "contemporary community standards" was unrealistic and unconstitutional for the medium it governed.[133] In addition, because there could be irreparable harm caused by the enforcement of COPA, as well as significant injury outweighing any harm to the movant and benefit to the public interest, the district court affirmed the sought injunction, preventing the statute from being enforced.[134] The Supreme Court of the United States of America then granted *certiorari* to review the issue of "community standards" under the Child Online Protection Act.[135]

The proliferation and importance of the World Wide Web has created numerous issues with which we have only just begun to deal. Because the medium has such a unique nature that has never before been considered, the conflicts that have yet to arise are numerous. The Internet offers an extremely cheap and lightening fast alternative to traditional methods of advertising, education, research and media. With very little training or knowledge

127. *Id.* at 498.
128. *American Civil Liberties Union*, 217 F.2d.at 492-93.
129. *Id.* at 166.
130. *Id.* at 174.
131. *Id.* at 175.
132. *Id.* at 176-77.
133. *American Civil Liberties Union*, 217 F.2d. at 177-78.
134. *Id.* at 180.
135. *Ashcroft*, 122 S. Ct. at 1707.

anyone can start their own website and feasibly put anything they choose on the Web, and it will be just a simple click away from millions of eyes. As the Internet is available to the majority of the population, either at home, school or work, the interest of children surfing the web is an obvious concern to parents and legislators alike.[136] Congress approached the obvious problem with the enactment of CDA and then with COPA.[137]

The use of community standards to determine what is obscene, and therefore, unprotected speech is especially confounding when applied to the Internet because of its incredibly wide reach.[138] Since the Web can reach just about any community, town, village or hamlet throughout the world it is unbelievably daunting to imagine the many different "standards" through which it will be viewed. There is conceivably the most restrictive to the most free-spirited of values, by which material can be judged. Since of the importance of speech not being restricted the use of one community's standards to determine what should be readily available and not available is too restraining of a guideline. Because one community's determination can deem something "harmful to minors", speech that is not obscene, but merely questionable, can be placed behind a protective screen and banned from easily attainable viewing.

Although the argument can be made that COPA does not completely remove any potentially harmful websites, but rather puts them behind a screen that can be pierced with proper age verification, it is still a restrictive method that will limit ability to access materials and speech. People without credit cards, or those wary of using their card due to identity theft, credit card misuse, or identification, will be unfairly burdened or prevented from accessing possible relevant educational and informational tools. By placing a screen over any material that is judged by varying community standards to be harmful there will be material that is perfectly acceptable in some communities reserved from their ease of viewing due to another communities' intolerance. The burden placed on any publisher to abide by any community that may happen upon their web material is unrealistic and excessive. It hampers the flow of speech in a forum, the World Wide Web, where it is not only important, but necessary.

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136. *Id.* at 1704.
137. *Id.* at 1704-05.
138. *Id.* at 1724-25 (Stevens, J., dissenting).

Justice O'Connor urges that the community standard be a "national community standard."[139] Justice Breyer encourages a similar "Nation's Adult community as a whole."[140] A "national standard" or an "adult standard" creates no more easily discernable solution than the statute's "community standards" and are only facially deceptive differences. The "national standard" or "adult standard" will still differ depending on who is called upon to supply this standard. Ten different people, all with different views of the United States, will invoke ten different standards to attribute to the nation as a whole. It is ridiculous to think people will not bring with them their geographically imposed values, prejudices and morals when determining that which they believe to be offensive. By using any sort of standard to judge a medium with no discernable geographic boundaries, there will always be an unfair burden on the publisher to comply with the myriad of different communities their material may potentially enter. Until there is some mechanism to geographically limit the entrance of material into certain areas of cyberspace there should not be a geographically controlling "community standard" under which the material may be judged. There is commercially available filtering software that can prevent some questionable material from being viewed. That is the only feasible solution available at this point.

Obviously, the smallest community every American belongs to is their household or family community. It is this community that in the end should be the deciding force on what is viewed within its borders. Although there is a substantial amount of material on the World Wide Web that could be viewed as "harmful to minors" there is also a vast amount of material that is educational and informative for all ages and groups. It is the members of the household that one lives in whom ultimately decide the standards on what is, and what is not, acceptable for viewing. The task of deciding what each minor should be able to peruse and what

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139. *Id.* at 1714-15 (O'Connor, J., concurring).

140. *Ashcroft*, 122 S.Ct. at 1715-16 (Breyer, J., concurring). Justice Kennedy (with Justices Souter and Ginsburg concurring) criticized Justice Breyer's and Justice O'Connor's implication that the legislative intent was not a geographic community, but a "national" or "adult" community. Id. at 1719 (Kennedy, J., concurring).

> There is one statement in a House Committee Report to this effect, "reflecting," Justice Breyer writes, "what apparently was a uniform view within Congress." The statement, perhaps, reflects the view of a majority of one House committee, but there is no reason to believe that it reflects the view of a majority of the House of Representatives, let alone the "uniform view within Congress."

Id. at 1719 (Kennedy, J., concurring).

would be "harmful" is the job of that minor's guardians, educators and care-providers. The duty of protecting minors from harmful material should be placed with these people, not with the Web publishers. To do otherwise restricts speech and everyone's ability to access it. The job of taking care of the children should always reside in those that know and care for them, not a nameless, faceless group deciding an artificial standard that will subject the entire nation to their attitudes and values.

Kristin Ringeisen