

Why Child
Welfare
Professionals
Should
Think
Twice
Before
Calling for
Online
Censorship

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PERSPECTIVES

It seems that whenever society identifies a potential threat, there are a number of people who have the knee-jerk reaction of calling on the government to make that threat illegal. Unfortunately, one of the first sacrifices people are willing to make is in the area of freedom of speech.

And so it is right now on the Internet. Under the guise of protecting children, several pieces of legislation have been passed by Congress and state legislatures, and many software products have been developed, to limit access to Internet speech. But neither the legislation nor the software protect our children from any actual threat, and the basic right to free speech for adults is in jeopardy. This article attempts to illustrate why we should be reluctant to support legislation that limits the rights of adults to access protected speech on this vital medium.

The Wrong Solution to the Wrong Problem

Congress has come up with two strategies for combating online threats to children. The first involves legislation geared toward requiring Internet content providers to restrict access when their materials are "indecent" (under the Communications Decency Act, or CDA) or, more recently, "harmful to minors" (under the Child Online Protection Act, or CDA II). Congress's second strategy involves legislation requiring schools, libraries and other public facilities that regularly provide Internet access to children to install software that filters out offending materials. Neither of these strategies is appropriate.

The main deficiency with all of the legislative fixes that have been designed to protect our children on the Internet is that the initial problem has been improperly identified. Our societal goal is to protect children from online sexual exploitation. This includes protection from online predators, child pornography and obscene materials. But these things are already illegal, and law enforcement has been doing a good job of locating and prosecuting those who violate the law through the FBI's Innocent Images Operation [see article by Special Agent Ken Lanning] and other initiatives.

Yet in spite of what you have probably heard, neither the CDA nor CDA II do anything to increase the capability of law enforcement officers to protect children from these evils. In fact, the Justice Department told Congress that the passage of CDA II would **impede** its ability to combat child exploitation. In a memo to the House Commerce Committee before it passed CDA II, the Justice Department stated that enforcement "could require an undesirable diversion of critical investigative and prosecutorial resources that the Department currently invests in combating traffickers in hard-core child pornography, in thwarting child predators, and in prosecuting large-scale and multi district commercial distributors of obscene materials." (Sutin, 1998)

Now you may ask, "If the enforcers of the law are saying this law will impede their ability to combat online child exploitation, what is the purpose of the law?" That is a good question. From the legislative history, it appears that Congress may have thought it was helping children, in spite of the Department of Justice's comments. (See House Report, October 5, 1998)

A Solution Looking for a Problem

Even if we were to concede that Congress's intention was not protecting children from exploitation but rather protecting children from speech that is constitutionally protected for adults but that may be inappropriate for children, the laws are still problematic. The legislative requirements are both overbroad and under-inclusive, and the net effect is that children are still unprotected and adult speech is unacceptably burdened.

Before I continue, I want to define "indecent speech" and speech that is "harmful to minors." The provisions of the CDA and CDA II that my organization and other civil liberties groups have been challenging are not about child pornography. They are not about obscenity. They are not about sexual perversion or violence. We are concerned about efforts to limit access to material that is constitutionally protected for adults but that may be inappropriate for children, such as:

- political speech, including reports of torture;
- birth control information, including instructions for putting on a condom;
- women's health issues, including how to do a breast self-examination;
- sexual orientation information, including information for and about gay men and lesbians;
- newsworthy speech, including the Starr Report;
- sexually explicit information, including Howard Stern's books and the Kama Sutra; and
- other speech that is constitutionally protected for adults but that may be inappropriate for children.

Before crafting the CDA, Congress looked to existing legal models to help it create new law to solve the new problem of children accessing adult materials on the Internet. Congress adopted the "broadcast model" of speech regulation for Internet speech when it passed both the CDA and the CDA II. The broadcast model holds that speech that is inappropriate to minors but protected for adults can only be broadcast during times of the day when children are unlikely to be in the audience. For broadcast, this limitation was constitutionally acceptable because of the

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intrusive nature of the media, i.e., a child could flip channels and happen upon inappropriate materials accidentally. (*FCC v. Pacifica Foundation*, 1978). But Internet searches are not accidental; one has to specifically access particular materials. And since materials placed on the Internet are there 24 hours a day, a restriction on the time of day could not work for Internet communications. So Congress required Internet content providers to either screen users as they entered sites to make sure that children were not accessing adult materials or remove adult materials from their sites altogether.

But these limitations on Internet content providers go to the very heart of the First Amendment. These providers are engaging in constitutionally protected speech. There is no reasonable way to ascertain whether someone accessing a site is a minor. (CDA II suggests requiring credit cards or digital certificates for age verification, but both of these suggestions are unworkable. Many of the content providers affected by these laws have much free information available at their sites and do not require people to make a purchase before they can access a site. Credit card companies do not do verification in the absence of a transaction. Further, there is no reasonable digital certification system in place for individuals that would provide age verification at no cost. Finally, these requirements do not account for the constitutional right to anonymously access these sites.) The only way to be in compliance with the law, then, is to remove all controversial material. This dumbs down the Internet to that which is acceptable to children. And the Supreme Court has held that such dumbing down is unconstitutional in that it "burns down the house to roast the pig." (*Reno v. ACLU*, 1997, citing *Sable Communications of Cal., Inc. v. FCC*, 1989)

Requiring schools, libraries and other public facilities to install filtering software is equally problematic. There is not a single filtering software program available today that filters out every single pornographic site, let alone sites that are not pornographic but may be unsuitable for children. Furthermore, filtering software producers will not reveal their lists of blocked sites, citing trade secret concerns. But without being accountable for the sites that are being blocked, filtering software producers can block out sites for no obvious purpose, such as the Quaker Home Page that was blocked in *Mainstream Loudoun v. Board of Trustees of the Loudoun County Public Library* [See the complaint at <http://Loudoun.net/mainstream/library/complaint.htm>]

Teach Your Children Well

The Internet is an amazing source of knowledge, and the wide variety of available information enables adults and children to broaden their horizons, increasing their understanding and cultural experiences. The Supreme Court found, when striking down the first CDA, that the Internet enables everyone to have a voice in ways no other medium has done before, and therefore deserves the highest level of protection. (*Reno v. ACLU*, 1997). The beauty of the Internet is that quality of giving everyone a voice. It is that same quality that leads to calls for censorship.

Absent protection for children from online predators, child pornographers, and access to hard-core obscenity, it seems to me that this debate really comes down to how we choose to teach our children and who we choose to make those decisions. It is true that there are materials on the Internet I would not want my young children to view. I would probably be more comfortable permitting my children access to those same materials when they reached high school age. But I want to empower my children from the beginning of their Internet usage, teaching them what to do when they encounter "bad" things online, just as I teach them what to do when they encounter "bad" things on the street. The responsibility for determining what materials are appropriate for children to view should rest with the parents of those children. Taking away parental rights in exchange for government censorship is not the right way to handle this "problem."

Government intervention, while a quick fix, comes at too high a cost. Freedom of speech is simply too valuable a sacrifice. Freedom of speech enables each member of society to express his or her thoughts and realize his or her full human potential. Freedom of speech is necessary to understand all sides of a debate and know the truth. Without freedom of speech, other fundamental rights, such as the right to participate in our democracy, are meaningless (*ACLU*, 1997). Freedom of speech is the foundation of our government. Yet freedom of speech seems to be the first forfeiture we are willing to make when we hear frivolous claims regarding the need to protect our children.

The best way we can ensure the safety of our children is by bequeathing them a world where they are encouraged to think and speak freely. Without the ability to expose our society for its wrongs, we diminish the very lives we seek to protect.

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