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CRIMINALIZING ONLINE SPEECH TO APROTECT THE YOUNG - WHAT ARE THE BENEFITS AND COSTS?

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Criminalizing online speech particularly about sexual subjects is frequently justified as necessary to protect minors from physical or psychological harm.

Certainly, this was the rationale underlying the two criminal laws passed in the last three years by the United States Congress to control sexual expression on the Internet. The first law, the 1996 Communications Decency Act, or CDA, banned any indecent online communications that were available to minors this covered essentially all Internet speech, certainly in newsgroups and Web sites, where speakers cannot readily determine the age of their listeners or screen the young ones out. Indecency was defined in the CDA basically as any words, ideas, or images depicting or describing sexual or excretory activities or organs, if deemed patently offensive according to contemporary community standards. Because it unconstitutionally reduced the adult population of the Internet to writing, publishing, and reading only what is fit for children, the CDA was invalidated as a violation of the First Amendment in *Reno v. ACLU*.

This first *Reno* decision, or *Reno I*, did not discourage Congress, harm to minors politics being what it is; and a second law, the Child Online Protection Act, or, COPA, was passed in 1998. COPA criminalized a narrower category of speech than the CDA: instead of indecent or patently offensive, the standard was now harmful to minors, or obscene as to minors. This was basically a variation watered down for minors -- of the three-part U.S. test for constitutionally unprotected obscenity -- that is, (1) whether, according to contemporary community standards, the communication is designed to pander to the prurient interest; (2) whether it depicts or describes sexual acts or nudity in a manner patently offensive with respect to minors; and (3) whether it lacks serious literary, artistic, political, or scientific value for minors. COPA was also narrower than the CDA in that it applied only to those communicating for commercial purposes on the World Wide Web. Yet it had the same basic legal flaw as the CDA: because of the economics and technology of the Web, it forced most speakers to self-censor their material to the level of a hypothetical minor -- whether child or teenager was not clear. The American Civil Liberties Union again went to court, and in February 1999, a federal judge in Philadelphia issued a preliminary injunction against COPA's enforcement.

The judge in this second case -- *Reno II* -- was clearly uncomfortable with his decision, and expressed personal regret that his preliminary injunction would

delay once again the careful protection of our children. Similarly, in *Reno I*, the U.S. Supreme Court had reiterated its often-repeated belief that the government has a compelling interest in protecting the physical and psychological well-being of minors,' which includes shielding them from indecent messages that are not obscene by adult standards. The Court in *Reno I* did not elaborate on what this physical and psychological harm might be; it simply repeated the mantra unexplained and unanalyzed that certainly there is some sexual material the mere access to which harms youngsters in physical and psychological ways.

But what is the harm to minors that is assumed to flow from sexual speech -- whether on computers, television, or elsewhere -- and why is this assumption so powerful that in the U.S., politicians continue, by large margins, to pass censorship laws purportedly designed to protect kids; while in England, the House of Lords urges industry self-regulation of undesirable Internet content to enable parents and schools to close off access to the red light districts; and on the Continent, the European Commission tries to figure out how to implement rating and blocking systems to protect youth from potentially harmful material? Conversely, what has happened to the idea that minors, like adults, have free-expression rights? Are there physical and psychological harms to youngsters when they are deprived of information, ideas, or just entertainment that a majority of adults think unsuitable?

I became intrigued by these questions as a result of my experiences as an ACLU lawyer specializing in censorship cases. Not only in the area of criminal laws, but in pressures for rating and blocking schemes, in the removal of school texts and library books, and in explicit lyrics labels on popular music, the harm-to-minors presumption, largely unexamined, drives a tremendous amount of censorship activity in the U.S. and, increasingly, in Europe. As a civil liberties litigator, I thought it obvious by the time of *Reno I* that an intelligent First Amendment challenge to the CDA should include not only arguments about the unconstitutional effect of the law in reducing the adult population of the Internet to reading and publishing only what is fit for children, but questioning of the longstanding assumption that indecency harms minors to begin with. This involved introducing evidence of the valuable, nonharmful nature of much potentially indecent speech for teenagers and children, in the hope of educating courts and persuading them to take a harder look at the issue. Thus, our clients in *Reno I* included the Planned Parenthood Federation, Human Rights Watch, Stop Prisoner Rape, Wildcat Press (an online magazine for gay and lesbian teens), and the ACLU itself, which, among other things, hosted a teen chatroom on masturbation in the wake of the firing of Surgeon General Jocelyn Elders for daring to make approving public mention of that still-taboo subject.

Our strategy worked -- to a point. At the trial court level, the judges added their own examples to ours -- erotic Hindu sculptures; the word fuck used in an online anti-censorship chatroom (as in fuck the CDA), the text of Tony Kushner's Pulitzer Prize-winning play, *Angels in America*; and the Supreme Court in *Reno I* also took into account the many educational, nonharmful sorts of sexual information that might be suppressed by the CDA. These included visual art featuring human nudes, safer sex instructions, discussions about homosexuality, censorship, or prison rape; indeed, even a parent's sending birth-control information via e-mail to his or her teenage child. In *Reno II*, likewise, the plaintiffs include OB/GYN.net, Condomania, Artnet, RiotGrrl, and Powell's Bookstore, one of the country's leading still-extant independent booksellers. None of these plaintiffs are exactly pornographers, but the judge, although following *Reno I* and striking down the law, took scant notice of the value that their communications might have for minors, and credited Congress with simply wanting to protect kids from

commercial pornography, which it assumed would be harmful.

Ultimately, I decided that the presumption of harm to minors where it came from, what it means to different people, whether it makes sense -- merited full-scale, book-length examination. In July 1998, I left the ACLU and began full-time research and writing on this theme. It is endlessly fascinating, and I am not exhausted yet. I hope that ultimately I will be able to shed some light on this issue that carries such political and emotional weight and that continues to dominate political debates about sex and censorship.

Origins of the Concept of Harm From Sexual Speech

The concept of harm to minors is at the very root of modern obscenity law -- the 1868 English Queen's Bench decision, *Regina v. Hicklin*, which established the legal standard for restrictions on sexual speech in England and the United States for most of the next century. *Hicklin* set forth the famous deprave and corrupt test for criminally punishable obscenity: that is, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Those whose minds are open to such immoral influences primarily meant the young; as Lord Justice Alexander Cockburn explained in his *Hicklin* opinion, the danger of prurient literature was that it would suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of a most impure and libidinous character.

In case Lord Cockburn left any doubt as to the precise nature of the harm thought to result from impure and libidinous thoughts, the leading anti-sex crusader on the other side of the Atlantic, Anthony Comstock, made it explicit. As head of the New York Society for the Suppression of Vice and a specially deputized prosecutor under recently enacted U.S. obscenity laws, Comstock was probably the most formidable arbiter of what could or could not be published on sexual subjects in late 19th-century America. Comstock explained in his 1883 book, *Traps for the Young*, that the printed page is Satan's chief weapon in his effort to ruin the human family, ' by stimulating the secret entertainment. Obsessive fears about this secret entertainment, fueled by physicians, reached such heights by the mid- 19th century that youngsters were subjected to horrific restraints B chastity belts, penile rings, straitjackets, cauterization of the sexual organs -- in order, as historian Peter Gay has put it, to keep growing or adolescent sinners from getting at themselves. Censorship of erotic literature was but a small addition to this litany of restraints on youthful masturbation.

Obscenity laws' condemnation of impure and libidinous thoughts of course reflected not only 19th century myths about masturbation leading to hairy hands, feebleness, idiocy, and death, but, more broadly, a long Christian tradition that condemned genital commotion, as compounded and intensified by modern institutions of social-sexual control -- government, industry, education, the medical profession -- and by the unique moral strictures of the Victorian Age. The laughably hypocritical premise of *Hicklin* was that educated adult males reading sexual literature would not get aroused and thus fall into sin, while those whose minds are open to such immoral influences (that is, youngsters, women [by definition weak-minded], and members of the lower classes) would, and therefore needed protection. English determinations of obscenity to this day turn on the perceived vulnerability of the likely audience: in one case in the 1960s, a distributor was acquitted of an obscenity charge because the only proven purchaser of the material in question

was a police officer who testified he was unaffected by it; conversely, an obscenity prosecution against a store owner who sold bubble gum cards depicting battle scenes to schoolchildren was reinstated by appellate judges (after acquittal at trial), specifically so that the prosecution could offer expert evidence regarding the capacity of the cards to deprave and corrupt the youthful clientele. In the United States, similarly, the Supreme Court created the harmful to minors or variable obscenity standard (the one used in the 1998 Child Online Protection Act) in a 1968 case called *Ginsberg v. New York* precisely to criminalize distribution to presumably vulnerable youths of girlie magazines that would not be considered obscene, and were thus lawful reading, for adults.

By 1968, of course, anti-masturbation hysteria had abated: the secret entertainment was not mentioned in Justice William Brennan's opinion for a majority of the U.S. Supreme Court in the *Ginsberg* case. Instead, *Ginsberg* relied on generalized standards of morality, explained with a touch of psychiatric lingo. The state legislature's justification for the harm to minors law in *Ginsberg* was that exposure to erotic material would impair youngsters' ethical and moral development, and the Supreme Court considered this vague rationale sufficient. Justice Brennan elaborated by quoting at length from a child psychiatrist, William Gaylin, who had written that it is during adolescence, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control, .. that legalized pornography may conceivably be damaging. Psychiatrists make a distinction, Gaylin explained,

between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved.

The justification, in other words, was symbolic -- the youngster must know that the messages and attitudes reflected in sexually arousing material are disapproved, even while admiring, enjoying, or lusting over the ideas and images presented.

Which brings us into present-day conceptions of harm. That is, youngsters, certainly, will have sexual thoughts; they will seek out information; they will masturbate nearly all adolescent boys and many girls do but we cannot publicly approve of it. Whether the messages of guilt, shame, and disapproval that society sends to youngsters by making such a big deal of forbidding their access to sexual explicitness and erotica are ultimately harmful or helpful to them is an open question.

Concepts of Harm Today

When asked today exactly what harm to minors they believe flows from sexual ideas, entertainment, or information, protectionists' answers range from the vaguely spiritual (they shouldn't be robbed of their innocence) to the specifically reductionist (if they see sexual acts described or depicted, they will imitate them). In between are a variety of arguments: Minors will pick up bad attitudes (about women, about sex roles, about sexual fidelity) from pornography, or indeed from any sexually suggestive books, TV shows, or movies. They will get the wrong ideas about the frequency of unconventional sexual practices, and may aim as a result for an unrealistic athleticism in their own sexual lives, or unrealistic expectations of their partners. Young children may be traumatized by depictions of what appear to be violent acts in which adults are strangely out of control -- much as Sigmund Freud once theorized

that they were traumatized by witnessing the primal scene of their parents copulating. Or, kids may get the idea that sex can be pleasurable among relative strangers, without trust or emotional commitment, that it is okay for its own sake, without procreation or marriage. Even safer sex information, it is often argued (in the face of repeated studies that demonstrate the contrary) implicitly approves and therefore encourages youthful sexual activity. And finally, in the words of the 1986 Report of the U.S. Attorney General's Commission on Pornography (the Meese Commission), harm to minors from exposure to erotica must be seen in moral terms:

Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm. ... For children to be taught by these materials that sex is public, that sex is commercial, and that sex can be divorced from any degree of affection, love, commitment, or marriage is for us the wrong message at the wrong time.

Of course, some cynics take the view that all of these harm-to-minors rationales are a smokescreen for the no-longer politically acceptable belief that adults should be barred from offensive or immoral information and ideas. On this theory, those who pose as child protectors are, whether consciously or not, simply expressing the common human impulse to suppress ideas or images that they find offensive or threatening. Nevertheless, harm-to-minors arguments are the currency of contemporary censorship, and must be addressed.

Of the various arguments, imitation and trauma are the only ones that focus on direct physical or psychological harm (rather than the squishy concepts of bad or immoral attitudes). Both imitation and trauma argument, however, are empirically unsupported, and rely at best either on anecdotes or on superficial appeals to common sense. Young children in general are not interested in explicit sexual material, and are more likely to consider it yukky or boring than intensely frightening. Older ones may be curious, amused, aroused, or disgusted, but not likely traumatized. As for imitation, the fears are based on a reductionist form of thinking that overly simplifies the effects of media and culture on human personality. Certainly, children's, as well as adults', attitudes (and ultimately behavior) are affected, cumulatively, by information and ideas found in books, visual art, music, films, television, and now the Internet. The difficult question, of course, is precisely what books, films, songs, or Internet sites affect what people, and how; and the answer varies with every individual, according to his or her particular genetic predisposition, family background, religious training, peer group, and general social and cultural environment. Most people, including minors, do not directly mimic antisocial or promiscuous acts that they read about in magazines or see on TV. If they did, we would have to close their eyes and ears not only to explicit or arousing sexual information but to massive chunks of our culture, from the sexual immorality in the Bible to the bloody denouements of Shakespeare's plays. The few who engage in so-called copy-cat behavior, do so because, although a particular movie or book may have triggered a particular deviant act, the underlying reasons for the behavior are found in their idiosyncratic personal backgrounds. Indeed, a number of studies have found that sexual offenders generally come from repressive environments in which they are less, not more, likely to have been exposed to erotic literature.

Thoughtful protectionists acknowledge that the media are at best a minor factor affecting human attitudes and behavior, and in ways that are impossible to specify or quantify; but they still maintain that we have to start somewhere. Since we can't transform all

parents into paragons of virtue or provide all youngsters with wholesome social environments, the least we can do is protect them from sexually suggestive soap operas, heavy metal music, lascivious condom ads, and porn on the Internet. In the last two decades, the ideological temperature of this argument has risen, as rhetorical emphasis has shifted from old-fashioned morality to, purportedly, feminism -- that is, to theories propagated by the U.S. activists Andrea Dworkin and Catharine MacKinnon, and their acolytes in England and elsewhere, that pornography degrades women and eroticizes male domination. Beyond the heated rhetoric, however, the justification for protecting the young remains fundamentally the same as that articulated by more traditional censors: otherwise they will pick up bad ideas about sexuality, promiscuity, or violence.

Which brings us to the Amorality or bad attitudes justification that I believe is at the root of pro-censorship protectionism, whether it is explicitly stated, as in the Meese Commission report and the fulminations of Dworkin-MacKinnonites, or not. Because we cannot know what specific works are likely to have bad behavioral effects on any particular individual or group, the conclusion is irresistible that protectionism is less about preventing real-world harm B long-term trauma or imitation of physically or psychologically dangerous behavior -- than about symbolism. Thus, despite their different phrasings (some in terms of conservative moral values; others pro-censorship feminist; still others wrapped in the language of psychology), almost all of the child-protection rationales are at bottom variations on the symbolic and ideological justifications for censorship approved by Justice Brennan in the 1968 U.S. Supreme Court decision in Ginsberg. That is, sexual speech conveying immoral or disapproved values B whether misogynist attitudes or acceptance of unconventional sex -- should not be available to youngsters until they are mature enough to evaluate and (presumably) reject them. A 1997 report to the European Parliament made this point explicitly when it explained that harmful (as opposed to illegal) Internet content concerns minors and appertains essentially to the domain of morals. Indeed, in numerous European Community documents relating to protection of minors from harmful speech, the term harmful (or possibly harmful) is used interchangeably with the perhaps more candid offensive or unsuitable.

Now, symbolism is not to be sneezed at, but one must be careful when using it as a basis for censorship. The potential for abuse, and for overbroad restrictions based upon censors' personal reactions to sexual, or offensive content, is immense. More fundamentally, the premise of a free society -- and of free-expression principles -- is that governments cannot impose their versions of morality through censorship of unconventional or bad ideas; citizens are entitled decide these matters for themselves. As a U.S. appeals court explained in striking down an anti-pornography law drafted by MacKinnon and Dworkin, any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us.

Assumptions about harm to minors are in large part premised on the notion that this free-expression principle does not apply to kids B that they have lesser free speech rights. In the U.S., the First Amendment rights of minors have been steadily eroding in the courts, and in Europe, neither Article 10 of the European Convention on Human Rights nor the child-specific free-expression guarantee in the 1989 UN Convention on the Rights of the Child has apparently been considered an impediment to legislation designed to restrict minor's access to online speech. Indeed, in 1976 and again in 1988, the European Court of Human Rights upheld obscenity judgments specifically justified by the need to shield minors, in the first case from a left-

leaning Danish sex education text called *The Little Red Schoolbook*, after it was published in the U.K., and in the second from a Swiss art exhibit that included explicit sexual scenes.

In addition to infringements on minors' free expression rights, protectionists rarely consider other countervailing harms to minors from censorship. These can include feelings of powerlessness; training in authoritarianism; disrespect for the value of free inquiry; shame or confusion resulting from taboos on erotica; and the very tangible dangers of STDs and unplanned pregnancies where contraceptive and safer-sex information is forbidden. Protectionists also frequently merge all minors, from toddlers to teenagers, into one vast pool of purportedly vulnerable and impressionable youth. Regardless of whether one believes in childhood innocence, it is not a state that accurately characterizes the biological and psychological lives of adolescents, who are sexually charged, skeptical of authority, and hungry for experience and knowledge. Criminal laws, or elaborate rating and blocking schemes designed to protect them from nudity, sexual discussions, or other broad categories of material deemed potentially harmful is, frankly, an insult to them and to the democratic societies of which they are soon to become full citizens.

An Argument for Education Instead of Protectionism

The current protectionist approach, with its assumption of harm to minors from exposure to explicit sexual information and ideas, is not only intellectually and politically flawed; it is unfair to young people, particularly teenagers, and indeed, is ultimately counterproductive. Youngsters cannot be expected to mature into competent adults, capable of embracing good ideas and rejecting bad ones, unless they get some practice at it. Education is in any event likely to be more effective than censorship in developing sexually sane and healthy grown-ups. Particularly given the many different attitudes toward sexual morality prevailing in the world today, and the vagueness and subjectivity of concepts like indecent or harmful, attempts to criminalize online speech about sex pose grave risks for the ability of minors and adults alike to exchange ideas and information about a subject that is of great public importance, and vital to our physical and mental health.

At the very least, if harm-to-minors ideology continues to be politically irresistible, there ought to be more thoughtful and finely calibrated judgments about it. That is, as children grow older, protective censorship should diminish, and their free expression rights to receive controversial information and ideas should increase. Free expression rights obviously have little meaning for four year-olds, but open access to information and ideas -- and yes, even just entertainment -- is a very different matter for older minors and adolescents.

Europeans have sometimes paid closer attention to these age differences than pundits and advocates in the United States. The former Norwegian Ombudsman for Children, for example, has pointed out the importance of recognizing free-expression rights, and thereby countering feelings of worthlessness and powerlessness, among adolescents who in modern society live for ever longer periods in situations of dependence. She proposes a graduated framework of minors' rights and responsibilities in areas ranging from sexual consent to film attendance. Justices of England's high court, the Law Lords, observed in 1985 that as teenagers mature, their parents' (and the state's) right to control their decisions in such areas as sexuality dwindle: if the law should impose on the process of growing up fixed limits' where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to

human development and social change.

I would propose, then, that as youngsters approach majority arguably, by age 15 there ought to be a presumption against censorship (or protection). This would mean that judicial deference to vague moral pronouncements, as in the Ginsberg case, would not be acceptable: as with censorship of adults, the state would have to prove the need for restrictions. And social science generalizations would not likely suffice as proof, for, short of actual incitement, the propagation of ideas or attitudes that a majority of legislators consider reprehensible is precisely what free expression principles entrust citizens, even young ones (with help from parents and educators), to judge for themselves. Particularly given the efficacy of education in media literacy and resisting peer pressure as counters to pernicious ideas gleaned from television, video games, or real life models, there ought to be focused demonstrations of harm caused by specific works to overcome the presumption of free-speech protection for teenagers.

Even for pre-teens, consideration should be given to the notion of preparing them for adulthood through education and exposure to ideas, rather than creation of forbidden thought zones and closed circuit indoctrination. There is much to be said for letting youngsters make mistakes and learn from them (as adults do), rather than being spoon-fed only books, films, cartoons, or Internet sites that are considered kid-safe by a censoring authority. In a system of gradually appreciating free-expression rights, even grade-school students would have a presumption of freedom.

Finally, courts, pundits, and policymakers should reconsider the long-accepted but mistaken assumption that sexually explicit speech has little value and therefore merits little protection. Sexuality is now recognized as an important cultural and political subject; masturbation is no longer thought to produce idiocy and death; and teenagers are sexually active the world over. The same free-expression values that protect adults should protect minors; the same values that protect nonsexual ideas should protect sexual ones.