Testimony of

Mr. Rodney Smolla

Dean
University of Richmond School of Law
November 10, 2005

Written Testimony of Rodney A. Smolla
United States Senate Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Property Rights

I. Summary of Testimony

I wish to thank the Committee for this opportunity to testify. In my oral testimony I will outline in brief the First Amendment standards that operate as the constitutional framework within which Congress must consider any legislation regulating sexually explicit materials. In my remarks I will briefly set forth:

1. The governing constitutional standards for obscenity, as set forth in Miller v. California, 413 U.S. 15 (1973), Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), Stanley v. Georgia, 394 U.S. 557 (1969), and their progeny.
2. The special rules governing the intersection of the "adult obscenity" standard set forth in the Miller test with efforts to protect children. Among the important Supreme Court decisions are Osborne v. Ohio, 494 U.S. 103 (1990); Reno v. American Civil Liberties Union, 521 U.S. 844 (1997); Ashcroft v. American Civil Liberties Union, (Ashcroft II) 524 U.S. 656 (2004); United States v. American Library Association, Inc., 123 S.Ct.2297 (2003); and Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
3. The "bottom line" as to what First Amendment doctrines are well-settled and what First Amendment doctrines remain unsettled as Congress grapples with attempts to balance the competing public policy and constitutional interests germane to: (a) the protection of rights of adults to access protected speech; (b) special privacy interests implicated when attempts are made to criminalize mere possession of otherwise unprotected speech; (c) the unique societal concerns posed by the compelling need to protect children from exposure to harmful materials and the dangers of sexual predators, particularly in the on-line environment; (d) the stresses placed on law enforcement and on First Amendment doctrines by changes in technology that have altered the manner in which sexually explicit speech is marketed and distributed (through such media as the Internet, cable, and satellite television); and (e) the extent to which social science evidence dealing with harms to the marital stability, sexual attitudes and behaviors, and protection of the stability of families will or will not meet settled or developing First Amendment standards governing restrictions on sexually explicit expression.

II. Detailed Analysis of Recent Supreme Decisions

In this section of my written testimony I summarize in some detail several of the more important recent First Amendment decisions that I intend to discuss in my oral presentation.

Congress and the federal courts have been engaged in an "ongoing constitutional conversation" over the constitutionality of the Child Online Protection Act, or "COPA."1 In the aftermath of the Supreme Court's decision in Reno v. American Civil Liberties Union,2 Congress explored other avenues for restricting minors' access to pornographic material on the Internet. Congress passed COPA, which 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, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."3

Responding to Reno v. American Civil Liberties Union,4 Congress limited the scope of COPA's coverage in at least three ways. First, while the CDA applied to communications over the Internet as a whole, including, for example, e-mail messages, COPA applied only to material displayed on the World Wide Web. Second, unlike the CDA, COPA covers only communications made "for commercial purposes."5 Third, although the CDA prohibited "indecent" and "patently offensive" communications, COPA restricts only the narrower category of "material that is harmful to minors."6

Drawing on the three-part test for obscenity set forth in Miller v. California,7 COPA defined "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

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.8

The United States Court of Appeals for the Third Circuit held COPA unconstitutional.9 The Court of Appeals based its decision entirely on a ground that COPA's use of "contemporary community standards" to identify material that is harmful to minors rendered the statute substantially overbroad as applied in the context of the World Wide Web, because Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users. The Court of Appeals reasoned that COPA would require any material that might be deemed harmful by the most puritan of communities in any state to be placed behind an age or credit card verification system.10 Hypothesizing that this step would require Web publishers to shield vast amounts of material, the Court of Appeals was persuaded that this aspect of COPA, without reference to its other provisions, "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute."11

The United States Supreme Court in Ashcroft v. American Civil Liberties Union,12 (Ashcroft I) written by Justice Thomas, reversed the Third Circuit, holding that the Court of Appeals erred in its community standards analysis, holding instead that COPA's reference to contemporary community standards in defining what was harmful to minors did not alone render COPA unconstitutionally overbroad under the First Amendment. Unlike the CDA, the Court held,

COPA applied to significantly less material and defined the harmful-to-minors material restricted by the statute in a manner parallel to the Miller definition of obscenity.

More significantly, the Court in Ashcroft I appeared to reject the argument that, at least on its face, the application of local community standards in Internet obscenity cases offended the First Amendment. Drawing on both Hamling v. United States,13 and Sable Communications of California Inc. v. FCC,14 the Court held that the First Amendment permitted the community standards approach to be applied even in the context of the Internet, a medium that largely knows no geographic boundaries. In Hamling the Court had considered the constitutionality of applying community standards to the determination of whether material is obscene under the federal statute prohibiting the mailing of obscene material.15 Justice Brennan, dissenting in Hamling, argued that it was unconstitutional for a federal statute to rely on community standards to regulate speech. Justice Brennan maintained that national distributors choosing to send their products in interstate travels would be forced to cope with the community standards of every hamlet into which their goods might wander.16 As a result, Justice claimed that the inevitable result of this situation would be "debilitating self-censorship that abridges the First Amendment rights of the people."17 The Supreme Court in Hamling, however, rejected the Brennan view, holding instead that the "fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional."18

Fifteen years later after Hamling, the Supreme Court in Sable addressed the constitutionality of a federal statutory provision prohibiting the use of telephones to make obscene or indecent communications for commercial purposes.19 A dial-a-porn operator challenged that portion of the statute banning obscene phone messages, arguing that reliance on community standards to identify obscene material impermissibly compelled message senders to tailor all their messages to the least tolerant community. Relying on Hamling, however, the Court once again rebuffed this line of attack on the use of community standards in a federal statute of national scope, stating that there "is no constitutional barrier under Miller to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages."20

The Supreme Court in Ashcroft I21 held that there were no persuasive grounds for not applying Hamling and Sable to COPA. While those cases involved obscenity rather than material that was harmful to minors, the Court reasoned, there was reason to believe that the practical effect of varying community standards under COPA, given the statute's definition of "material that is harmful to minors," is significantly greater than the practical effect of varying community standards under federal obscenity statutes. The Court seemed especially troubled by the prospect that a holding that COPA was unconstitutional because of its use of community standards, federal obscenity statutes would likely also be unconstitutional as applied to the Web.22

The Court strongly emphasized the limited scope of its decision. The Court did not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute was unconstitutionally vague, or whether the District Court correctly concluded that the statute likely would not survive strict scrutiny analysis once adjudication of the case is completed.

The force of the holding in Ashcroft was blunted, however, by the alignment of dissenting and concurring opinions that, in combination, cast doubt on the firmness of the Court's rejection of the attack on community standards in the Internet context. Justice Stevens dissented, arguing that

while Congress can prohibit the display of materials that are harmful to minors in the physical world, this attempt can break down on the Internet if local standards are employed. By aggregating values at the community level, Justice Stevens argued, the Miller test eliminated the outliers at both ends of the spectrum and provided some predictability as to what constitutes obscene speech. Community standards also serve as a shield to protect audience members, by allowing people to self-sort based on their preferences. Those who abhor and those who tolerate sexually explicit speech can seek out like-minded people and settle in communities that share their views on what is acceptable for themselves and their children. This sorting mechanism, however, does not exist in cyberspace; the audience cannot self-segregate. As a result, Justice Stevens maintained, 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.

Justice O'Connor, concurring in part, emphasized the that the case presented a facial challenge, and left open the possibility that the use of local community standards will cause problems for regulation of obscenity on the Internet, for adults as well as children, in future cases. In an as-applied challenge, Justice O'Connor noted, individual litigants may still dispute that the standards of a community more restrictive than theirs should apply to them. And in future facial challenges to regulation of obscenity on the Internet, litigants could make a more convincing case for substantial overbreadth. Where adult speech is concerned, for instance, there may in fact be a greater degree of disagreement about what is patently offensive or appeals to the prurient interest. Justice Breyer, also concurring, expressed the view that Congress intended. COPA to apply a national community standard. Justice Kennedy, joined by Justices Ginsberg and Souter, reasoned that COPA's incorporation of varying community standards could impose the most puritanical community standard on the entire country, and that the national variation in community standards constitutes a particular burden on Internet speech. Nevertheless, those three Justices were unwilling to take the step of holding COPA void on its face for this reason, absent additional factual development.

On remand, the District Court again issued a preliminary injunction against enforcement of COPA, and Third Circuit again affirmed. The Supreme Court in Ashcroft v. American Civil Liberties Union, (Ashcroft II)23 affirmed the decision of the lower courts. The critical passages of the Supreme Court's opinion, written by Justice Kennedy, stated:

The District Court, in deciding to grant the preliminary injunction, concentrated primarily on the argument that there are plausible, less restrictive alternatives to COPA. A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another ... is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." Reno, 521 U.S., at 874, 117 S.Ct. 2329. When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute.

* * *

In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to

ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is The primary alternative considered by the District Court was blocking and filtering software. Blocking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them. The District Court, in granting the preliminary injunction, did so primarily because the plaintiffs had proposed that filters are a less restrictive alternative to COPA and the Government had not shown it would be likely to disprove the plaintiffs' contention at trial.

* * *

Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.

Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. The District Court noted in its factfindings that one witness estimated that 40% of harmful-to-minors content comes from overseas. Id., at 484. COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress' goals. Effectiveness is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas. It is not an answer to say that COPA reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them than less restrictive alternatives. In *668 addition, the District Court found that verification systems may be subject to evasion and circumvention, for example by minors who have their own credit cards. See id., at 484, 496-497. Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web.

That filtering software may well be more effective than COPA is confirmed by the findings of the Commission on Child Online Protection, a blue-ribbon commission created by Congress in COPA itself. Congress directed the Commission to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet. Note following 47 U.S.C. § 231. It unambiguously found that filters are more effective than age-verification requirements. See Commission on Child Online Protection (COPA), Report to Congress, at 19-21, 23-25, 27 (Oct. 20, 2000) (assigning a score for "Effectiveness" of 7.4 for server-based filters and 6.5 for client-based filters, as compared to 5.9 for independent adult-id verification, and 5.5 for credit card verification). Thus, not only has the Government failed to carry its burden

of showing the District Court that the proposed alternative is less effective, but also a Government Commission appointed to consider the question has concluded just the opposite. That finding supports our conclusion that the District Court did not abuse its discretion in enjoining the statute.

Filtering software, of course, is not a perfect solution to the problem of children gaining access to harmful-to-minors materials. It may block some materials that are not harmful to minors and fail to catch some that are. See 31 F.Supp.2d, at 492. Whatever the deficiencies of filters, however, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA. The District Court made a specific factfinding that "[n]o evidence was presented to the Court as to the percentage of time that blocking and filtering technology is over- or underinclusive." Ibid. In the absence of a showing as to the relative effectiveness of COPA and the alternatives proposed by respondents, it was not an abuse of discretion for the District Court to grant the preliminary injunction. The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective. Reno, 521 U.S., at 874, 117 S.Ct. 2329. It is not enough for the Government to show that COPA has some effect. Nor do respondents bear a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective. The Government has the burden to show they are less so. The Government having failed to carry its burden, it was not an abuse of discretion for the District Court to grant the preliminary injunction.

One argument to the contrary is worth mentioning--the argument that filtering software is not an available alternative because Congress may not require it to be used. That argument carries little weight, because Congress undoubtedly may act to encourage the use of filters. We have held that Congress can give strong incentives to schools and libraries to use them. United States v. American Library Assn., Inc., 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003).24

The reference at the end of this passage to United States v. American Library Association, Inc.,25 is important. In American Library Association the Supreme Court sustained, against a facial challenge, the Children's Internet Protection Act ("CIPA").26 Under CIPA, a public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them. The District Court held these provisions facially invalid on the ground that they induce public libraries to violate patrons' First Amendment rights. 27 The Supreme Court, in a plurality decision, reversed.28

To help public libraries provide their patrons with Internet access, Congress created two forms of federal assistance. First, the E-rate program established by the Telecommunications Act of 1996 entitled qualifying libraries to buy Internet access at a discount.29 Second, pursuant to the Library Services and Technology Act ("LSTA"),30 the Institute of Museum and Library Services makes grants to state library administrative agencies to electronically link libraries with educational, social, or information services, assist libraries in accessing information through electronic networks, and pay costs for libraries to acquire or share computer systems and telecommunications technologies.31

The plurality opinion of Chief Justice Rehnquist noted that these programs have succeeded

greatly in bringing Internet access to public libraries; by 2000, 95% of the Nations libraries provided public Internet access.32 By connecting to the Internet, the plurality noted, public libraries provide patrons with a vast amount of valuable information. But there is also an enormous amount of pornography on the Internet, much of which is easily obtained.33 The accessibility of this material has created serious problems for libraries, the plurality claimed, problems that have found that patrons of all ages, including minors, regularly search for online pornography.34 Some patrons also expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers.35 In response to these perceived problems, Congress became concerned that the E- rate and LSTA programs were facilitating access to illegal and harmful pornography.36

Congress also determined that filtering software that blocks access to pornographic Web sites could provide a reasonably effective way to prevent such uses of library resources.37 Indeed, by the year 2000 (before Congress enacted CIPA) almost 17% of public libraries used such software on at least some of their Internet terminals, and 7% had filters on all of them.38 A library can set such software to block categories of material, such as "Pornography" or "Violence." When a patron tries to view a site that falls within such a category, a screen appears indicating that the site is blocked. But a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material, but that nevertheless trigger the filter. To minimize this problem, a library can set its software to prevent the blocking of material that falls into categories like "Education," "History," and "Medical."39 A library may also add or delete specific sites from a blocking category, and anyone can ask companies that furnish filtering software to unblock particular sites.40

CIPA provides that a library may not receive E-rate or LSTA assistance unless it has a policy of Internet safety for minors that includes the operation of a technology protection measure that protects against access by all persons to "visual depictions" that constitute obscenity or child pornography, and that protects against access by minors to visual depictions that are harmful to minors.41 The statute defines a "[t]echnology protection measure" as "a specific technology that blocks or filters Internet access to material covered by" CIPA.42 CIPA also permits the library to disable the filter "to enable access for bona fide research or other lawful purposes."43 Under the E- rate program, disabling is permitted during use by an adult.44 Under the LSTA program, disabling is permitted during use by any person.45

Various groups, including library associations, challenged the restrictions. A three-judge District Court ruled that CIPA was facially unconstitutional and enjoined the relevant agencies and officials from withholding federal assistance for failure to comply with CIPA.46

The Supreme Court reversed. Congress, the Court held, has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.47 But Congress may not induce the recipient to engage in activities that would themselves be unconstitutional. To determine whether libraries would violate the First Amendment by employing the filtering software that CIPA requires, the plurality reasoned, it was necessary to first "examine the role of libraries in our society."48 Public libraries, the plurality noted, pursue the worthy missions of facilitating learning and cultural enrichment. To fulfill their traditional missions, public libraries must have broad discretion to decide what material to provide to their patrons.49 Although they seek to provide a wide array of information, their goal has never been to provide universal coverage.50 Instead, public libraries seek to provide materials that would be of the greatest direct benefit or interest to the community.51 To this end, libraries collect only those materials deemed

to have requisite and appropriate quality.52
The plurality noted that in analogous contexts the Court had held that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public.53 Just as public forum analysis and heightened judicial scrutiny were incompatible with the role of public television stations,54 and the role of the National Endowment for the Arts, 55 the plurality reasoned, so are they incompatible with the broad discretion that public libraries must have to consider content in making collection decisions. The plurality thus rejected the importation of public forum principles as the guide to whether the restrictions were constitutional.56 Internet terminals are not acquired by a library in order to create a public forum for Web publishers to express themselves, the plurality reasoned.57 Rather, a library provides such access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.58 The fact that a library reviews and affirmatively chooses to acquire every book in its collection, but does not review every Web site that it makes available, is not a constitutionally relevant distinction. The decisions by most libraries to exclude pornography from their print collections are not subjected to heightened scrutiny, the plurality held.59 Similarly, it would make little sense to treat libraries judgments to block online pornography any differently.60 Because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not.61 While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review.62 Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything made available has requisite and appropriate quality.63 As to the "overblocking" problem, the plurality held that concerns over filtering software's tendency to erroneously overblock access to constitutionally protected speech that falls outside the categories software users intend to block were dispelled by the ease with which patrons may have the filtering software disabled.64
The plurality held that CIPA does not impose an unconstitutional condition on libraries that receive E--rate and LSTA subsidies by requiring them, as a condition on that receipt, to surrender their First Amendment right to provide the public with access to constitutionally protected speech.65 When the Government appropriates public funds to establish a program, the plurality held, it is entitled to broadly define that program's limits.66 The library filtering requirements do not deny a benefit to anyone, the plurality reasoned, but instead merely insist that public funds be spent for the purpose for which they are authorized: helping public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes.67 Especially because public libraries have traditionally excluded pornographic material from their other collections, the plurality held, Congress could reasonably impose a parallel limitation on its Internet assistance programs.68 As the use of filtering software helps to carry out these programs, it is a permissible condition.69 The plurality distinguished the Court's legal services decision, Legal Services Corporation v. Velazquez.70 In contrast to the lawyers who furnished legal aid to the indigent under the program at issue in Velazquez,71 the court reasoned, public libraries have no role that pits them against the Government, and there is no assumption, as there was in Valazquez, that they must be free of any conditions that their benefactors might attach to the use of donated funds.72
In his concurring opinion, Justice Kennedy concluded that if, as the Government represented, a

librarian will unblock filtered material or disable the Internet software filter without significant delay on an adult user's request, there was in the end very little to the entire case. There were substantial Government interests at stake here: The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appeared to agree. Given this interest, and the failure to show that adult library users' access to the material was burdened in any significant degree, Justice Kennedy reasoned, the statute was not unconstitutional on its face.73

Justice Breyer agreed with the plurality that the public forum doctrine was inapplicable and that the statute's filtering software provisions did not violate the First Amendment.74 Justice Breyer stated, however, that he would not require only a "rational basis" for the statute's restrictions. Rather, he would examine the constitutionality of the statute's restrictions as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not strict scrutiny--where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. The key question in such instances is one of proper fit, Justice Breyer argued.75 The Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives.76 It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that is out of proportion to that objective.77 Applying this standard, Justice Breyer found that the statute's restrictions satisfied constitutional demands.78 Its objectives--of restricting access to obscenity, child pornography, and material that is comparably harmful to minors--were legitimate, and indeed often compelling. No clearly superior or better fitting alternative to Internet software filters had been presented.79 Moreover, the statute contains an important exception that limits the speech-related harm: It allows libraries to permit any adult patron access to an overblocked Web site or to disable the software filter entirely upon request.80 Given the comparatively small burden imposed upon library patrons seeking legitimate Internet materials, Justice Breyer reasoned, it could not be said that any speech-related harm that the statute may cause is disproportionate when considered in relation to the statute's legitimate objectives.