



As Cheryl B. Preston travels and speaks on the subject of Internet regulation, she sees many reasons for hope: “Do not assume that you are in the minority with your views. There are thousands of parents and concerned citizens, many of whom are not LDS, who also feel that pornography is a destructive force.” Needed is a strong core of citizens who are informed. “We can become better educated about technology and how it works, about the political and legal process, and about the economic forces behind the pornography production and delivery industries,” says Preston.

The Misunderstood First Amendment and Our Lives Online

Cheryl B. Preston

Do not be lulled into inaction by the pornographic profiteers who say that to remove obscenity is to deny people the rights of free choice. Do not let them masquerade licentiousness as liberty.

—President Spencer W. Kimball¹

I have often wondered what words the ancient prophets who were shown our day would have used to describe iPhones and portable video game systems. With a similar concern, after quoting Isaiah 5:26–29, Elder LeGrand Richards of the Quorum of the Twelve Apostles observed:

Since there were no such things as trains and airplanes in that day, Isaiah could hardly have mentioned them by name, but he seems to have described them in unmistakable words. How better could “their horses’ hoofs be counted like flint, and their wheel like a whirlwind” than in the modern train? How better could “Their roaring . . . be like a lion” than in the roar of the airplane? Trains and airplanes do not stop for night. Therefore, was not Isaiah justified in saying “none shall slumber nor sleep; neither shall the girdle of their loins be loosed, nor the latchet of their shoes be broken”? With this manner of transportation the Lord can really “hiss unto them from the end of the earth,” that “they shall come with speed swiftly.”²

1. Spencer W. Kimball, “A Report and a Challenge,” *Ensign* 6 (November 1976): 6.

2. LeGrand Richards, *A Marvelous Work and a Wonder* (Salt Lake City: Deseret Book, 1976), 230.

Many scriptures have multiple meanings and, as I do research on the law and Internet regulation, I have thought many times of the possible meanings of this scriptural warning: “I say unto you that the enemy in the secret chambers seeketh your lives” (D&C 38:28). As a youth I could

Cheryl B. Preston

BYU Studies: When did you first become involved in the field of Internet law?

Preston: I began nearly twenty years ago studying the relationship between visual depictions of women, latent sexism, and the law. My original emphasis was on “mainstream” advertising images; in my view, the use of pornography remained on the cultural fringes. In the last decade, however, pornographic images have moved from the fringes to the mainstream of society, primarily because of the Internet’s ubiquitous distribution system.

I now teach and write regularly about Internet law and regulation.

BYU Studies: You maintain that the problem is fixable, but some have likened the Internet to the lawless Wild West. For the sheriff to bring order, so to speak, what questions still need to be addressed?

Preston: The Internet poses particularly compelling questions about the role of law. We are in the midst of a “constitutional moment” as policy makers determine how the new frontier of cyberspace will be governed. Will we apply centuries of legal and political development and seek to craft, by analogy, regulation similar to that in the real world? Will we create a stewardship over public commons that those of all ages may safely use? Or will we allow cyberspace to be shaped and controlled by powerful financial interests? Will parents now be without the support of the state in the protection of children? Will we someday realize that early on we should have carefully incorporated a base of mutual rights and respect on which to build a new world, rather than mopping up the consequences?



not have comprehended the advent of the Internet, but I am confident that the prophets saw ahead to both the vast benefits and enormous risks that would come into our homes with a small electronic box, an always-available cheap and easy portal into “secret chambers.” The next verse reminds us that the biggest risks may not be from terrorists and nuclear threats. We may be underestimating the extent to which pornographers, most of whom publish from the United States,³ are stealing our souls. “You say that there will soon be great wars in far countries, but ye know not the hearts of men in your own land” (D&C 38:29).

Certainly, we have always been warned about the harms of pornography. Jesus said, “Ye have heard that it was said by them of old time, Thou shalt not commit adultery: But I say unto you, That whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart” (Matt. 5:27–28). But the prophets have become increasingly insistent in their warnings during the last several decades.⁴ This spike in prophetic warning corresponds to the development of technology.

3. In *ACLU v. Gonzales*, Judge Reed found that roughly 50 percent of pornographic websites belong to domain name owners with addresses outside of the United States. 478 F. Supp. 2d 775, 789, finding 63 (E.D.Pa. 2007). However, a high percentage of these still serve their content using servers in the United States to avoid the enforcement of tougher laws in their home country. On top of the 50 percent of websites, 68 percent of adult *membership* sites originate within the United States. See *ACLU v. Gonzales*, 789. In *ACLU v. Gonzales*, the expert witness for the government showed that roughly 88.4 percent of pornography pages (as opposed to websites) are domestic. *ACLU v. Gonzales*, 789. An average of 80 to 90 percent of sites identified as known pornography can be traced to IP addresses assigned to U.S. geographic locations. See Jerry Ropelato, “Internet Pornography Statistics,” Top Ten Reviews, <http://internet-filter-review.topten-reviews.com/internet-pornography-statistics.html> (accessed July 20, 2009). The Top Ten Reviews website states that it compiles Internet pornography statistics from several credible sources, including ABC, Associated Press, AsiaMedia, AVN, BBC, CATW, U.S. Census, Central Intelligence Agency, Comscore Media Metrix, Crimes Against Children, Forbes, Free Speech Coalition, Google, Harris Interactive, Hitwise, Kagan Research, ICMEC, MSN, Nielsen/NetRatings, The New York Times, Yahoo!, and XBIZ.

4. See, for example, Richard G. Scott, “The Sanctity of Womanhood,” *New Era* 38 (November 2008): 2–5; Thomas S. Monson, “Standards of Strength,” *New Era* 38 (October 2008): 2–5; Dallin H. Oaks, “He Heals the Heavy Laden,” *Ensign* 36 (November 2006): 6–9; Gordon B. Hinckley, “Rise Up, O Men of God,” *Ensign* 36 (November 2006): 59–61; Thomas S. Monson, “True to the Faith,” *Ensign* 36 (May 2006): 18–21; Dallin H. Oaks, “Pornography,” *Ensign* 35 (May 2005): 87–90; Gordon B. Hinckley, “A Tragic Evil among Us,” *Ensign* 34 (November 2004): 59–62; M. Russell Ballard, “Be Strong in the Lord,” *Ensign* 34 (July 2004): 8–15; Thomas S. Monson, “Pornography, the Deadly Carrier,” *Ensign* 31

Perhaps President Kimball was thinking of our time when, in 1974, he referred to “inventions of which we laymen have hardly had a glimpse.”⁵ He then referred back to a speech by President David O. McKay in the October 1966 conference in which he said, of the scientific discoveries that will make possible the preaching of the gospel to every kindred, tongue, and people, that they “stagger the imagination.”⁶ As wonderful as modern technological discoveries are, President McKay warned that they were “discoveries latent with such potent power, either for the blessing or the destruction of human beings, as to make men’s *responsibility in controlling them the most gigantic ever placed in human hands*. . . . This age is fraught with limitless perils, as well as untold possibilities.”⁷

One such peril is undoubtedly the easy availability of pornography on the Internet. Among the tools available to us in our “responsibility to control” these powers is the law. In this article, after briefly discussing the scope of the Internet pornography problem—the amount and the consequences—I will explain three aspects of the law as it relates to Internet pornography. First, I will review the often-misunderstood scope of the U.S. Constitution’s First Amendment protections on speech. Second, I will describe the history of attempts to fill the gap in the law as it relates

(July 2001): 2–5; Gordon B. Hinckley, “Great Shall Be the Peace of Thy Children,” *Ensign* 30 (November 2000): 50–53.

In addition, use of pornography has been mentioned and condemned in recent speeches on a variety of topics. See, for example, Boyd K. Packer, “Counsel to Young Men,” *Ensign* 39 (May 2009): 50; Robert D. Hales, “Becoming Provident Providers Temporally and Spiritually,” *Ensign* 39 (May 2009): 7; Dallin H. Oaks and Kristen M. Oaks, “Learning and Latter-day Saints,” *Ensign* 39 (April 2009): 24; D. Todd Christofferson, “Come to Zion,” *Ensign* 38 (November 2008): 39; Richard G. Scott, “Honor the Priesthood and Use It Well,” *Ensign* 38 (November 2008): 45; M. Russell Ballard, “Sharing the Gospel Using the Internet,” *Ensign* 38 (July 2008): 60; Russell M. Nelson, “You Are a Child of God,” *New Era* 38 (July 2008): 6; Dieter F. Uchtdorf, “A Matter of a Few Degrees,” *Ensign* 38 (May 2008): 59; Russell M. Nelson, “Salvation and Exaltation,” *Ensign* 38 (May 2008): 9; Henry B. Eyring, “God Helps the Faithful Priesthood Holder,” *Ensign* 37 (November 2007): 58; James E. Faust, “The Power to Change,” *Ensign* 37 (November 2007): 123; James E. Faust, “Put Light in Your Life,” *New Era* 37 (June 2007): 5; Russell M. Nelson, “Repentance and Conversion,” *Ensign* 37 (May 2007): 104; Russell M. Nelson, “Faith and Families,” *Ensign* 37 (March 2007): 39; Jeffrey R. Holland, “Broken Things to Mend,” *Ensign* 36 (May 2006): 70.

5. Spencer W. Kimball, “When the World Will Be Converted,” *Ensign* 4 (October 1974): 10.

6. David O. McKay, “A Divine Plan for Finding Security and Peace of Mind,” *Improvement Era* 69 (December 1966): 1091.

7. McKay, “Divine Plan for Finding Security,” 1091–92 (emphasis added).

to Internet pornography. Third, I will suggest some possibilities for how law and technology can be harnessed to provide at least some protections, and I will recommend some nonlaw efforts as well. At this point the battle is political more than legal. Constitutional parameters can be crafted, but Congress has not yet felt sufficient pressure to continue to explore them.

HOW MUCH?

Although pornography has been around in various forms for centuries,⁸ the nature and availability of this vice changed dramatically with the advent of the Internet. Although everyone seems to know that Internet pornography is rampant, very few comprehend the true scope of the problem, in terms both of increased amount and increased access.⁹ These images are now available in the privacy of one's home or office (or by Wi-Fi in a public park), at any time of the day or night, frequently for free, and in astonishingly intense digital displays. As recently as the mid-1990s, such access could be had only by those willing to take the time, effort, and risk of traveling to and being seen in suspicious neighborhoods, hiding hard copies, paying high prices, and either proving an appropriate age or violating the law. The natural barriers to use, especially impulsive or exploratory use, are gone.

While no one is sure how much porn is actually being published online, one expert has estimated 275 million to 700 million pages of sexually explicit material are available at any one time.¹⁰ Even if an Internet filter were 95 percent effective at blocking porn, this would still leave up to 35 million unblocked pages. The rate of growth is remarkable. In 1998, there were 14 million identified pages of pornography,¹¹ and by 2006, that

8. For a brief history of pornography, see Thomas P. Kalman, "Clinical Encounters with Internet Pornography," *Journal of the American Academy of Psychoanalysis and Dynamic Psychiatry* 36, no. 4 (2008): 594–95.

9. For further discussion of the changes over the last decade, see Cheryl B. Preston, "The Internet and Pornography: What If Congress and the Supreme Court Had Been Comprised of Techies in 1995–1997?" *Michigan State Law Review* 2008 (Spring): 61–102, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147142.

10. *ACLU v. Gonzales*, 788, finding 62 (accepting testimony of expert Matthew Zook concerning pornography statistics).

11. Covenant Eyes, "Internet Pornography Statistics," http://www.covenanteyes.com/help_and_support/article/internet_pornography_statistics/?c=80 (accessed August 11, 2009); see also New York State Division of Criminal Justice Services, "Pornography—Dangers: Access by Children to Pornography," http://criminaljustice.state.ny.us/missing/i_safety/porn_dangers.htm (accessed August 11, 2009).

number had increased by 3,000 percent to 420 million.¹² Additionally, the Internet has increased the volume of hard-core pornography available to the average viewer, and “the percentage of degrading, violent, misogynistic pornography continues to increase,” including child pornography.¹³

Experienced mental health professionals are seeing an increase in patients seeking help for pornography addiction.¹⁴ Researcher Dr. Thomas Kalman determined, after conducting a study of clinical cases involving pornography, that the fundamental content of pornography has not changed so much. Rather, Kalman concludes that the results seen in his and others’ studies “relate to the medium of delivery, and the particular technological attributes of the Internet. . . . Never before, in the history of pornography, has so much been so cheaply available to so many.”¹⁵

In 1998, Al Cooper coined the phrase “Triple-A Engine” to describe the three main factors that “combin[e] to make the Internet such a powerful force in the area of sexuality . . . Access, Affordability, and Anonymity.”¹⁶

The Triple-A Engine effect, in particular, is widely accepted as the primary reason why many pre-existing problems with other forms of pornography have been exacerbated in the last decade, and why many individuals who would not have been involved with this material prior to the advent of the Internet, have been drawn into problematic pornography consumption.¹⁷

12. Ropelato, “Internet Pornography Statistics.”

13. Donna M. Hughes, “The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children,” *Hastings Women’s Law Journal* 13 (Winter 2002): 137–38.

14. Kalman, “Clinical Encounters,” 598, writes: “Increasingly, however, psychotherapists are encountering anecdotal reports of problems related to Internet pornography use.” For a useful discussion of how pornography addiction occurs and the physiological aspects from the perspective of a physician, see Donald L. Hilton Jr., *He Restoreth My Soul: Understanding and Breaking the Chemical and Spiritual Chains of Pornography Addiction through the Atonement of Jesus Christ* (San Antonio, Tex.: Forward Press, 2009), 51–74. Dr. Hilton also offers solid suggestions for rehabilitation.

15. Kalman, “Clinical Encounters,” 609.

16. Al Cooper, “Sexuality and the Internet: Surfing into the New Millennium,” *CyberPsychology and Behavior* 1, no.2 (1998): 187; see also Dallin H. Oaks, “Focus and Priorities,” *Liahona* 25 (July 2001): 100. Elder Oaks says: “The Internet has made pornography accessible almost without effort and often without leaving the privacy of one’s home or room. The Internet has also facilitated the predatory activities of adults who use its anonymity and accessibility to stalk children for evil purposes.”

17. Jill C. Manning, “The Impact of Internet Pornography on Marriage and the Family: A Review of the Research,” *Sexual Addiction and Compulsivity* 13, no. 2/3 (2006): 134.

In addition, Pamela Paul adds “Acceptable” to the triple-A engine described above.¹⁸ Although the Church’s stance on pornography has not changed over the years, members no longer have the additional deterrent of the strong social stigma that once attached to pornography use in secular communities.¹⁹

Teens are not only viewing pornography; they are creating pornography of their own. “The practice of ‘sexting’—sending nude pictures via text message—is not unusual, especially for high schoolers around the country.”²⁰ The purveyors of this practice include minors in junior highs and high schools in Davis County, Utah,²¹ where the population is predominantly LDS.²²

Among the many incentives for proliferating the amount and reach of pornography is, of course, money. In 2006, U.S. pornography industry revenues were estimated to be \$13.3 billion, with about \$2.84 billion coming from Internet pornography alone.²³ The \$2.84 billion figure represents a

18. Pamela Paul, *Pornified: How Pornography Is Transforming Our Lives, Our Relationships, and Our Families* (New York: Times Books, 2005), 4.

19. In a study involving university students ages eighteen to twenty-six, “two thirds (66.5%) of emerging adult men reported that they agreed, at some level, that viewing pornography is acceptable,” and 48.7 percent of emerging adult women agreed that “viewing pornography [is] an acceptable way to express one’s sexuality.” Jason S. Carroll and others, “Generation XXX: Pornography Acceptance and Use Among Emerging Adults,” *Journal of Adolescent Research* 23 (January 2008): 16.

20. CBS News, “‘Sexting’ Shockingly Common Among Teens,” *CBS News.com*, January 15, 2009, <http://www.cbsnews.com/stories/2009/01/15/national/main4723161.shtml>. The CBS News article continues, “Roughly 20 percent of teens admit to participating in ‘sexting,’ according to a nationwide survey by the National Campaign to Support Teen and Unplanned Pregnancy.”

21. Ben Winslow, “Cases of Nude Photos by Teens Grows to 28 in Davis County,” *Deseret News*, April 1, 2008, B05, discusses the “trading of nude and sexually explicit pictures between teens over cell phones” in five junior highs and three high schools in Davis County, Utah.

22. Brandon Loomis and Matt Canham, “Utah’s Population Growth Slows, and LDS Percentages Dip, Too,” *Salt Lake Tribune*, November 20, 2008, available at www.sltrib.com.

23. Ropelato, “Internet Pornography Statistics.” Some estimate the share of the American economy closer to \$12 billion. Paul Sloan, “Getting in the Skin Game: An Entrepreneur Tries to Make it Easier for Everyone to Profit from One of the Economy’s Dirty Little Secrets,” *Business 2.0*, February 13, 2007, http://money.cnn.com/magazines/business2/business2_archive/2006/11/01/8392016/index.htm. This U.S. share “represents more revenue than the professional football, baseball, and basketball franchises combined or the combined revenues of ABC, CBS, and NBC.” Additionally, “every second of the day \$3,075 is spent on the adult industry and related products. The same second of each day commands

14 percent increase in a single year²⁴ and does not include the explosion of free pornography.²⁵ In 2008, the adult entertainment industry was estimated at \$57 billion globally.²⁶

Professionals in the lucrative adult entertainment industry are not the only ones making money off of Internet pornography. Amateur photographers and filmmakers now have the technology to easily upload pictures and videos of themselves and others to the Internet in order to turn a profit.²⁷ “Reputable” websites, such as eHow.com and ecommerce-journal.com, have articles on how to become an amateur porn star,²⁸ and sites such as Voyeurweb offer cash prizes in categories such as “newcomer of the month,” and “best lingerie shot.”²⁹ Other sites, such as SexBankRoll, provide services that set up websites with suggestive names and advertisers who will pay “per hit” to put ads and links on the page. All the purchaser or “affiliate” has to do is keep the site stocked with pornographic images of themselves, their friends, or anyone else willing to pose, to attract viewers to the site. The Web service and the purchaser then split the profits that come from the advertisers.³⁰

In addition to those who create the images and sell them, many others have significant economic stake in online pornography. Search engines,

an audience of 28,258 Internet users viewing adult performances.” “Adult Entertainment Capital Corporation Begins Trading Today Under A New Name and a New Symbol,” *Reuters News Service*, September 16, 2008, <http://www.reuters.com/article/pressRelease/idUS129147+16-Sep-2008+PRN20080916> (quoting Adult Entertainment Capital Corporation statistics).

24. Ropelato, “Internet Pornography Statistics.”

25. Claire Hoffman, “Obscene Losses,” *Portfolio.com*, October 15, 2007, <http://www.portfolio.com/culture-lifestyle/culture-inc/arts/2007/10/15/YouPorn-Vivid-Entertainment-Profile>.

26. “Adult Entertainment Capital Corporation Begins Trading.”

27. Preston, “Internet and Pornography,” 83–85.

28. eHow.com, “How to Become an Amateur Porn Model,” http://www.ehow.com/how_2050892_become-amateur-porn-model.html (accessed July 22, 2009); “How to Become a Porn Star on the Internet?” *Ecommerce Journal*, June 18, 2009, http://www.ecommerce-journal.com/articles/16276_how_to_become_a_porn_star.

29. Hal Niedzviecki, “The Other Porn Addiction,” *The Walrus*, April 2009, <http://www.walrusmagazine.com/articles/2009.04-society-the-other-porn-addiction-niedzviecki/>.

30. Steve Javors, “SexBankRoll Affiliate Program Debuts,” *XBiz*, September 7, 2006, http://xbiz.com/news/news_piece.php?id=17026&mi=all&q=steve+javors. For information on other such “affiliate programs,” see (or, rather, *don’t* see) *XBiz*, <http://xbiz.com/directory/id=18&pid=1> (accessed August 10, 2009).

such as Yahoo!, have shopping sites through which they sell pornography.³¹ In addition, Google's AdWords allows online businesses to pay extra to assure that their sites and ads appear in response to keyword searches. Then, Google collects a fee each time someone clicks on the ad.³² Such links to pornography sites are highly profitable. Similarly, Yahoo! charges a flat fee for the privilege of being listed in its directory, as well as a percentage of each sale made through Yahoo! online shops.³³ Neither Google nor Yahoo! will release specific numbers for profits from pornography advertisements. One analyst estimated that "no more than 10 percent of [Google's] total revenue comes from adult material,"³⁴ but with revenues coming in "at the rate of more than \$2 million an hour,"³⁵ that is no small amount.

Investors are increasingly buying stock in companies that once would have been a hiss and a byword. The porn production industry is facing some downturn in profit caused by the recession that began in 2008 and by competition from pirated copies, free content, and materials on social network sites. Nonetheless, it may still be the "most reliable bull market in the

31. "Adult products have been available through Yahoo! Shopping for more than two years." P. J. Huffstutter, "Yahoo's Search for Profit Leads to Pornography," *Los Angeles Times*, home edition, April 11, 2001, A-1.

32. Cade Metz, "Google's Riches Rely on Ads, Algorithms, and Worldwide Confusion," *Register*, March 18, 2008, http://www.theregister.co.uk/2008/03/18/when_google_does_evil/. "Google is not above making money from promoting adult material—AdWords is crammed full of XXX advertisers." Reprise Media, "How Very Grown-Up? Google Video Adds 'Mature and Adult' Category," *searchviews*, August 14, 2006, <http://www.searchviews.com/index.php/archives/2006/08/how-very-grown-up-google-video-adds-mature-and-adult-category.php>.

33. See Huffstutter, "Yahoo's Search for Profit." Huffstader argues, "As it does with its other online stores, Yahoo will receive a percentage of each sale, according to merchants working with Yahoo. . . . Around the beginning of the year, Yahoo began charging online commerce sites a fee if they wanted to be listed in its directory."

34. Andrea Orr, "Wall Street Not Ready for Porn on the Internet," *Reuters News* (April 3, 2002), quoting Safa Rashtchy of U.S. Bancorp Piper Jaffray. See also Saul Hansell, "Is Yahoo Flying High with a Bull's-Eye on Its Back?" *New York Times*, late edition (East Coast) February 1, 1998, sec. 3, p. 4, which provides an earlier estimate that "20 percent of Yahoo's ad revenue comes from ads for pornographic Web sites."

35. Miguel Helft, "The Humans Behind the Google Money Machine," *New York Times*, late edition (East Coast) June 2, 2008, C1, available at <http://www.nytimes.com/2008/06/02/technology/02google.html>. See also Metz, "Google's Riches Rely on Ads," 6, reports that, "During the fourth quarter of 2007, Google-owned sites raked in \$3.12bn in revenue, and revenue from partner sites topped \$1.6bn."

world.”³⁶ According to Francis Koenig, who created AdultVest (now Adult Entertainment Capital Corporation) and woos “brokerages interested in syndicating deals to sell to their Main Street investors[,] ‘People just need to get less shy, . . . and they’ll realize that there’s silly money to be made’” in the adult industry.³⁷ And some “mainstream” businesses have indeed become less shy. For instance, the sale of commonplace devices that access porn is a thriving business. Nationwide, “parents are buying their children the tools necessary to access astonishingly degrading and violent sexually explicit materials. For instance, innocent looking gaming systems, *i.e.*, PlayStation Portable, X-Box 360, and Nintendo Wii, can access the Internet and are available everywhere from around \$130 to \$500.”³⁸ In addition to browser-enabled game players, one recent study reports that 72 percent of minors between ages thirteen and seventeen have a mobile phone,³⁹ and another study found that one in five of these teens access the Internet with their phone. Of these, one in five report that their parents are not aware that they go online via their phone.⁴⁰ These systems do not come with a built-in browsing content filter and cannot be modified by software to add any protections.⁴¹ While a parent can sign up the device with an Internet service provider that offers a filter,⁴² a child can find another unsecured WiFi server to use instead.

These tools, as well as laptop computers, can pick up wireless Internet signals in “hotspots” all over the country, including in cafes and restaurants. In Utah, for instance, many businesses and public entities provide free

36. Ki Mae Heussner, “Porn Production Losing Ground on Technology,” *ABC News*, January 9, 2009, <http://abcnews.go.com/print?id=6611954>.

37. Sloan, “Getting in the Skin Game.”

38. Cheryl B. Preston, “WiFi in Utah: Legal and Social Issues,” *Utah Bar Journal* 20 (September and October 2007): 29, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148446. For an in-depth discussion of WiFi risks, see the entire article.

39. See Federal Communications Commission (FCC), *Implementation of the Child Safe Viewing Act; Examination of Parental Control Technologies for Video or Audio Programming Report*, August 27, 2009, 45, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-69A1.pdf, citing Progress and Freedom Foundation Comments, 63.

40. FCC, *Implementation of the Child Safe Viewing Act*, 45, citing Cox Communications Teen Online & Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls, May 2009, 49.

41. Cheryl B. Preston, “Making Family-Friendly Internet a Reality: The Internet Community Ports Act,” *Brigham Young University Law Review*, 2007, no. 6: 1495 n. 100, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1146651.

42. FCC, *Implementation of the Child Safe Viewing Act*, 43–45.

unsecured wireless Internet access,⁴³ and proposals are in the works for more, including citywide access. In addition, thousands of homes in Utah are set up with unsecured wireless routers. These electromagnetic signals cannot be stopped at property lines, and when not secured with a password or otherwise, they can be used by anyone on the street or in the house next door. While free wireless access is an important economic development, unsecured community access to the Internet makes home computer filters and other barriers to accessing pornography ineffective.

Along with the increased availability of the Internet comes the increased availability of the full range of pornography. Simply putting the family computer in a visible area of the home is not a sufficient resolution to the problem. Wherever people work, play, and live, it is becoming easier and cheaper to be instantly online with various devices.

HOW SERIOUS?

The deluge of pornography over the Internet is a relatively new phenomenon. It is reaching a broader and younger audience than ever before. It will take some time for the long-range studies to be published. Although not every extant study provides unambiguous support for the harmful consequences of pornography use and addiction, modern prophets have been unequivocal. Pornography, as “compounded by the Internet,”⁴⁴ is “destructive,”⁴⁵ “corrosive,”⁴⁶ “corrupting,”⁴⁷ “overpoweringly addictive and severely damaging,”⁴⁸ an “avalanche of evil,”⁴⁹ “a great disease,”⁵⁰ “vicious . . . and habit-forming,”⁵¹ a “pernicious contemporary plague,”⁵² “as addictive as

43. See XMission, “Wireless,” <http://www.xmission.com/wireless/index.html> (accessed August 12, 2009); “The Wi-Fi-FreeSpot Directory,” <http://www.wifi-freespot.com/ut.html> (accessed August 12, 2009).

44. Hinckley, “Tragic Evil among Us,” 61. President Hinckley continues, “The Internet has made pornography more widely accessible, adding to what is available on DVDs and videos, on television and magazine stands.” See also Monson, “True to the Faith,” 18, who writes, “One of the most accessible sources of pornography today is the Internet, where one can turn on a computer and instantly have at his fingertips countless sites featuring pornography.”

45. Gordon B. Hinckley, “Living Worthy of the Girl You Will Someday Marry,” *Ensign* 28 (May 1998): 49.

46. James E. Faust, “Don’t Be Afraid,” *New Era* 28 (July 1998): 8.

47. Oaks, “Pornography,” 87.

48. Scott, “Sanctity of Womanhood,” 5.

49. Oaks, “Pornography,” 87.

50. “Recurring Themes of President Hinckley,” *Ensign* 30 (June 2000): 20.

51. Hinckley, “Great Shall Be the Peace of Thy Children,” 51.

52. Holland, “Broken Things to Mend,” 70.

cocaine,”⁵³ and “one of the most damning influences on earth, one that has caused uncountable grief, suffering, heartache, and destroyed marriages.”⁵⁴

Internet pornography poses dangers other than addiction.⁵⁵ Anyone familiar with the Internet now knows that it has become a marketing miracle for commercial pornographers and a tool for sexual predators.⁵⁶ The FBI claims that “pornography is often used in the sexual victimization of children.”⁵⁷ Pornography is an effective tool for seduction because it “is used to lower the natural, innate resistance of children to performing sexual acts, thus functioning as a primer for child sexual abuse.”⁵⁸ A study reported in the *New York Times* in 2007 suggested a direct link between the use of pornography and actual acts of sexual abuse against children. It showed that as many as 85 percent of those convicted for trafficking in child pornography admitted also to inappropriately touching or raping children.⁵⁹

Pornography attacks the very heart of the plan of salvation—the sanctity of the marriage relationship and our agency. By separating satisfaction from mutual giving and sex from intimacy, it feeds selfishness and erodes

53. James E. Faust, “The Enemy Within,” *Liahona* 25 (January 2001): 55; see also Oaks, “Pornography,” 89, who writes, “A man who had been addicted to pornography and to hard drugs wrote me this comparison: ‘In my eyes cocaine doesn’t hold a candle to this. I have done both. . . . Quitting even the hardest drugs was nothing compared to [trying to quit pornography]’”; see also Dan Gray, “Talking to Youth about Pornography,” *Liahona* 31 (July 2007): 40, who writes, “The addiction is established when a person becomes dependent on the ‘rush’ of chemicals the body creates when one views pornography. He or she learns to depend on this activity to escape from or cope with life’s challenges and emotional stressors like hurt, anger, boredom, loneliness, or fatigue.”

54. Scott, “Sanctity of Womanhood,” 5.

55. On the dangers of addiction, see generally Hilton, *He Restoreth My Soul*, 75–103.

56. See Ropelato, “Internet Pornography Statistics”; see also New York State Division of Criminal Justice Services, “Online Safety,” http://criminaljustice.state.ny.us/missing/i_safety/i_intro.htm (accessed August 12, 2009).

57. Federal Bureau of Investigation, “A Parent’s Guide to Internet Safety,” available at <http://www.fbi.gov/publications/pguide/pguidee.htm> (accessed August 12, 2009).

58. Sharon Cooper and others, *Medical, Legal, and Social Science Aspects of Child Sexual Exploitation: A Comprehensive Review of Pornography, Prostitution, and Internet Crimes* (St. Louis, Mo.: G.W. Medical Publishing, 2005), 198, citing Diane H. Schetky and Arthur H. Green, *Child Sexual Abuse: A Handbook for Health Care and Legal Professionals* (New York: Brunner/Mazel, 1988).

59. Julian Sher and Benedict Carey, “Debate on Child Pornography’s Link to Molesting,” *New York Times*, late edition (East Coast) July 19, 2007, A20, available at <http://www.nytimes.com/2007/07/19/us/19sex.html>.

relationships. Some addictions, including “unworthy sexual behavior, and viewing pornography, . . . can control us to the point where they take away our God-given agency. One of Satan’s great tools is to find ways to control us.”⁶⁰

As the battle continues against the devastating consequences of pornography, we see how many attempt to “masquerade licentiousness as liberty.”⁶¹ Under the banner of free speech, pornographers seek the protection of the Constitution in continuing to make their products available on the Internet, even to children.

THE LAW AND FREEDOM OF SPEECH

Many advocates of unfettered license on the Internet claim that the First Amendment gives a blanket free expression right to publish what they will without any accountability or restrictions. But the First Amendment, although deeply cherished, has never been interpreted as permitting speech rights to trump every other constitutional value. The leading legal treatise on free speech provides this overview: “Although absolutism is attractive for its intense commitment to freedom of speech, it proves to be too brittle and simplistic a methodology, and is simply not viable as a general working approach to free speech problems.”⁶² The Supreme Court has regularly iterated this need for balance. For instance:

Although accommodations between the values protected by [the First, Fifth and Fourteenth] Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that . . . an uninvited guest may exercise general rights of free speech on property privately owned.⁶³

Although the Court does apply “heightened scrutiny” to enactments that impinge on the First Amendment,⁶⁴ “the complexity of modern First Amendment law comes from the fact that the Court does not always apply the same level of judicial scrutiny to all conflicts involving freedom of

60. Faust, “Power to Change,” 123–24.

61. Kimball, “Report and a Challenge,” 6.

62. Rodney A. Smolla, 1 Smolla & Nimmer on Freedom of Speech § 2:10 (2009). Smolla cites *District of Columbia v. Heller*, 128 S. Ct. 2783 (U.S. 2008) for the proposition that the right of free speech was never intended to be unlimited. “Indeed, Justice Black aside, the absolutist view has never been fully accepted by any member of the Supreme Court.” Smolla, 1 Smolla and Nimmer on Freedom of Speech § 2:53 (citing an extensive list of cases as examples).

63. *Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 567–68 (1971).

64. 1 Smolla and Nimmer on Freedom of Speech § 2.61.

speech.”⁶⁵ Moreover, “modern First Amendment law abounds in three-part and four-part tests of various kinds.”⁶⁶

Thus, while Congress must handle First Amendment issues very thoughtfully and the Court will subject statutes to one of the doctrinal levels of scrutiny,⁶⁷ it is simply untrue to assume that statutes cannot be drafted that will satisfy the demands of freedom of speech. Simply put, “Modern First Amendment jurisprudence permits speech to be penalized when it causes harm.”⁶⁸ The Supreme Court upholds regulations on (1) commercial speech, such as advertisements, solicitations, and labels;⁶⁹ (2) content-neutral time, place, and manner restrictions,⁷⁰ such as limitations on the location of sexually oriented businesses;⁷¹ (3) speech on private property and on government property that is not a public forum;⁷² (4) speech

65. 1 Smolla and Nimmer on Freedom of Speech § 2.12.

66. 1 Smolla and Nimmer on Freedom of Speech § 2.13.

67. Generally when reviewing a law, the courts employ a minimal scrutiny, meaning they defer to the judgment of the legislature if there is a rational basis for the law. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (defining rational basis standard). However, laws that have constitutional implications may be subject to “intermediate” scrutiny. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (defining intermediate scrutiny standard). Laws that directly affect constitutional rights may be subject to “strict” scrutiny. To survive strict scrutiny, a congressional enactment must be aimed at serving a compelling governmental interest and must be narrowly tailored—not over- or under-inclusive. In addition, under strict scrutiny, a statute may be unconstitutional if there is a less restrictive alternative that would be at least as effective in achieving the government’s legitimate objectives. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001).

68. 1 Smolla and Nimmer on Freedom of Speech § 4.15.

69. See, for example, *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (holding that commercial speech is only entitled to lesser protection); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002) (affirming that government can prohibit unlawful or misleading labels or advertisements).

70. See, for example, *United States v. O’Brien*, 391 U.S. 367 (1968); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding city noise control regulation).

71. See, for example, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (holding that laws regulating sexually oriented businesses are considered content neutral if the law’s predominant purpose is to control secondary effects in the neighborhood).

72. See, for example, *Frisby v. Schultz*, 487 U.S. 474, 484-85, 488 (1988) (emphasizing the sanctity of the home as a refuge from unwanted speech and upholding a speech restriction on that basis); *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 799-800 (1985) (holding that the government may restrict access to nonpublic forums).

that defames or libels another person;⁷³ (5) speech that invades the privacy of another person;⁷⁴ (6) speech that dilutes a trademark,⁷⁵ infringes on a copyright,⁷⁶ or reveals a trade secret;⁷⁷ and (7) speech that involves otherwise criminal or fraudulent activities.⁷⁸

Without much stir, we accept the Do-Not-Call-Registry Act⁷⁹ and the Pandering Mail Act,⁸⁰ which permit regulation on speech to give listeners the option to keep it out of their (electronic and real-world) mailboxes. Congress's stated objective for enacting the Pandering Mail Act "was to protect minors and the privacy of homes from [sexually explicit] material."⁸¹ The Court then recognized that, if the Pandering Mail Act did "impede the flow of even valid ideas" into a home, "no one has a right to press even 'good' ideas on an unwilling recipient."⁸² Under the rationale of

73. See, for example, *New York Times Company v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that the Constitution does not protect libelous publications); *Dun & Bradstreet v. Greenmoss Builders, Inc.* 472 U.S. 749, 763 (1985) (holding that the First Amendment does not protect defamatory statements that do not involve matters of public concern); see also 1 Smolla and Nimmer on Freedom of Speech § 12.8; Rodney A. Smolla, *Law of Defamation* § 1.06[1] (1986).

74. See, for example, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 248 (1974) (holding that a family can recover from a newspaper for publishing private information placing the family in a false light in the public eye); *Frisby v. Schultz* 484–85, 488 (emphasizing the sanctity of the home as a refuge from unwanted speech and upholding a speech restriction on that basis).

75. See, for example, *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522, 536 (1987) (upholding the protection of a trademark against a First Amendment challenge).

76. See, for example, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (holding that federal copyright law does not violate the First Amendment).

77. See, for example, *DVD Copy Control Association, Inc. v. Bunner*, 31 Cal. 4th 864, 881 (Cal. 2003) (holding that an injunction preventing disclosure of trade secret does not violate the First Amendment); *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984) (holding that a court may order that a trade secret not be disclosed).

78. See, for example, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (holding that freedom of speech does not extend to protesters advocating criminal conduct).

79. 15 U.S.C. § 6101 (2003); upheld by *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), cert. denied, 543 U.S. 812 (2004).

80. Postal Revenue and Federal Salary Act of 1967, 39 U.S.C. § 4009 (1964 ed. Supp. IV); upheld by *Rowan v. United States Post Office Department*, 397 U.S. 728, 730–40 (1970).

81. *Rowan v. United States Post Office Department*, 732.

82. *Rowan v. United States Post Office Department*, 738. Similarly, the Supreme Court found in a separate case that captive audiences driving or riding in streetcars should not be forced to view communications through "no 'choice or

the Pandering Mail Act, positioning a mailbox in our yard (or opening a browser) to receive what we desire (or what we want delivered in response to an innocent search request) does not mean it is our duty to take all solicitations and then sift through and throw out the material we find offensive. We have an option to block delivery.

Further, the Supreme Court has ruled that some forms of speech are not protected at all by the First Amendment and thus can be regulated by the government. This includes “obscenity,” which is a technical term for a very limited amount of hard-core material, and “child pornography,” which involves sexually explicit images produced using an actual child. In addition, only limited scrutiny is given to regulation of “indecent” material on broadcast media during prime time and to sales to minors of hard-copy sexual material, even if not obscene or harmful for adults.

Although the term “obscene,” sometimes gets used casually, for legal purposes it includes only a small category of extreme speech. In 1973, the Supreme Court established in *Miller v. California* that material is obscene, and thus without First Amendment protection, only if it meets all three of the following tests: (1) “whether ‘the average person, applying contemporary community standards,’ would find that the work, taken as a whole, appeals to the prurient interest”; (2) “whether the work depicts or describes, in a patently offensive way, sexual conduct”; and (3) “whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁸³ Although most speech escapes characterization as obscenity because of this last prong, it is also increasingly challenging to characterize speech as “patently offensive” now that “contemporary community standards” have become more lax.

New York v. Ferber (1982) held that states may prohibit child pornography, in addition to obscenity, even if it does not meet the *Miller* guidelines, because of the states’ compelling interest “in ‘safeguarding the physical and psychological well-being of a minor.’”⁸⁴ A statute prohibiting child pornography will not run afoul of the First Amendment as long as the statute suitably limits and describes the proscribed conduct and applies only to depictions of children below age eighteen.⁸⁵

The states’ ability to regulate child pornography does not extend, however, to what has become known as “simulated” child pornography.

volition” of their own. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974), quoting *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

83. *Miller v. California*, 413 U.S. 15, 24 (1973).

84. *New York v. Ferber*, 458 U.S. 747, 756–57 (1982).

85. *New York v. Ferber*, 764.

Simulated child pornography is produced using computer-generated images, youthful looking adult models, or other means of creating what appears to be a sexually explicit image of a child, without the involvement of a real child.⁸⁶ This type of child pornography is protected by the First Amendment and must meet the legal definition of “obscene” to be prohibited.⁸⁷ In 2002, the Court determined in *Ashcroft v. Free Speech Coalition* that possible harms were insufficient to warrant regulation of simulated child pornography, including feeding the market for real child porn, encouraging pedophiles, and using the images to acclimate child victims of sexual abuse.⁸⁸ Later, in 2008, the Court found that the pandering or solicitation (but not production or possession) of simulated child pornography can be regulated, but only when the material is promoted as authentic child pornography.⁸⁹

Sexually explicit speech is also regulated on broadcast television and radio. In 1978, the Supreme Court held in *FCC v. Pacifica Foundation* that the nature of these media allowed the government to regulate offensive and indecent material transmitted over the airwaves.⁹⁰ The Court stated, “Broadcast media have established a uniquely pervasive presence in the lives of all Americans.”⁹¹ Because of this pervasiveness, “patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”⁹² Second, “broadcasting is uniquely accessible to children, even those too young to read.”⁹³ Third, “because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.”⁹⁴ The government’s ability to prohibit explicit speech in broadcast media was reaffirmed in 2009 in *FCC v. Fox Television Stations, Inc.*⁹⁵ In *Fox*, the Court upheld the decision of the Federal Communications Commission to prohibit even

86. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239–40 (2002).

87. *Ashcroft v. Free Speech Coalition*, 246.

88. *Ashcroft v. Free Speech Coalition*, 253–54.

89. *United States v. Williams*, 128 S. Ct. 1830, 1844–45 (2008).

90. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748.

91. *FCC v. Pacifica Foundation*, 748.

92. *FCC v. Pacifica Foundation*, 748, citing *Rowan v. United States Post Office Department*.

93. *FCC v. Pacifica Foundation*, 749.

94. *FCC v. Pacifica Foundation*, 748.

95. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

isolated or fleeting sexual or excretory references. The Court, however, has expressly refused to extend the broadcast rules to the Internet.⁹⁶

Finally, the Supreme Court has recognized that some speech in the real world may be protected as used by adults but may be regulated with respect to exposure to minors, defined as anyone under age seventeen.⁹⁷ In 1957, the Court held in *Butler v. Michigan* that adults should not be reduced to reading “only what is fit for children,”⁹⁸ although the government can, under *Ginsberg v. New York* (1968), prohibit the sale in the real world of harmful sexual material to minors even if the material does not qualify as obscene.⁹⁹

Nonetheless, translating the rule of *Ginsberg* to the Internet has proved futile to date. The seller in a hard-copy sale can be held responsible to assess the age of the purchaser. The online seller does not see the purchaser.¹⁰⁰ Although some pornographic websites voluntarily require the input of a credit card number for the purpose of limiting the site to adults,¹⁰¹ this is unworkable because a minor may easily use an adult’s credit card, and many adults object to submitting credit card information online. Nonetheless, given that this seemed like the best approach at the time, Congress passed the Communications Decency Act (CDA) in 1996,¹⁰² a law that mandated that all sexually explicit websites require the input of a credit card or equivalent age-linked identification prior to viewing.

The CDA sought to protect minors from harmful material on the Internet by prohibiting “knowingly” sending or displaying to a minor any message “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”¹⁰³ These provisions were challenged under the First Amendment and the Supreme Court found that the CDA violated the First Amendment.¹⁰⁴ The statute was particularly poorly drafted, and the Court reasoned, correctly, that the terms of the CDA were overbroad, vague, and that “governmental interest in protecting children from harmful

96. *Reno v. ACLU*, 521 U.S. 844, 845 (1997).

97. *Ginsberg v. New York*, 390 U.S. 629 (1968).

98. *Butler v. State of Michigan*, 352 U.S. 380, 383 (1957).

99. *Ginsberg v. New York*, 634.

100. *ACLU v. Reno*, 217 F.3d 162, 176 (3rd Cir. 2000), noting that Web publishers have no control over who accesses their materials.

101. Congressional Internet Caucus Advisory Committee, *COPA Commission: Information and Resources About the Commission on Online Child Protection (COPA)*, “Age Verification Systems,” <http://www.copacommission.org/report/ageverification.shtml> (accessed August 5, 2009).

102. 47 U.S.C. § 223(e)(5)(b) (2000).

103. 47 U.S.C. § 223(d).

104. *Reno v. ACLU*, 521 U.S. 844 (1997).

materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.”¹⁰⁵

Congress took another stab at regulating indecent speech on the Internet with the Child Online Protection Act (COPA) in 1998. Trying to correct for the CDA’s failures, COPA prohibited Web publishers with “commercial purposes” from knowingly making available on the Web material “harmful to minors.”¹⁰⁶ Congress intended COPA to cover adult material that does not qualify as harmful for adults under the narrowly applied definition of “obscenity” from *Miller* but that would meet the *Miller* standards as applied to children. COPA had a long and sordid affair with the court system,¹⁰⁷ but after ten years and three trips to the Supreme Court, the Court denied *certiorari*¹⁰⁸ to reconsider the Third Circuit’s 2008 opinion finding COPA unconstitutional.¹⁰⁹

In its last opinion on the statute, the Supreme Court remanded the case to the trial court to make factual determinations relevant to the question of whether in-box filters were a less restrictive, effective alternative to legislation.¹¹⁰ The District Court for the Eastern District of Pennsylvania appointed experts and, based on their reports, issued factual findings, holding that, notwithstanding government’s “compelling interest of protecting minors,”¹¹¹ filters “are at least as effective, and in fact, are more effective than COPA” in protecting children from sexually explicit material on the Web.¹¹² The district court also held that COPA was “not narrowly

105. *Reno v. ACLU*, 875.

106. COPA, 47 U.S.C. § 231(a)(1) (2000).

107. For a detailed summary of COPA’s history in the court, see *ACLU v. Mukasey*, 534 F.3d 181, 184–86 (3rd Cir. 2008).

108. “Certiorari” means “[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review.” *Black’s Law Dictionary* (8th ed. 2004). The United States Supreme Court has almost complete discretion on whether to accept a case on appeal by granting a writ of *certiorari*. The Supreme Court has resources to review on appeal only a small fraction of cases and tends to limit its review to cases raising unsettled issues of serious importance, for example *Haywood v. Drown*, 129 S. Ct. 2108, 2113 (2009), or issues subject to inconsistent opinions among federal Courts of Appeal, for example, *Rhines v. Weber*, 544 U.S. 269, 273 (2005).

109. *Mukasey v. ACLU*, 129 S. Ct. 1032 (2009).

110. *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

111. *ACLU v. Gonzales*, 775, 776.

112. *ACLU v. Gonzales*, 815. The district court stated that “filters block sexually explicit foreign material on the Web, parents can customize filter settings depending on the ages of their children and what type of content they find objectionable, and filters are fairly easy to install and use.”

tailored,” was “unconstitutionally vague,” and was also “unconstitutionally overbroad” as written.¹¹³

On appeal in *ACLU v. Mukasey*, the Third Circuit affirmed. Again, the court relied on the claims that filtering technology can block foreign content immune from COPA, is more flexible than COPA, and is highly effective in preventing minors from accessing sexually explicit material on the Web.¹¹⁴ Additionally, the court found that filters are “less restrictive than COPA” because they “impose selective restrictions on speech at the receiving end, not universal restrictions at the source.”¹¹⁵ The Supreme Court’s denial of *certiorari* laid COPA to rest forever, although most experts have now concluded, with the advent of proxy sites, that in-box filters are not effective. For example, Internet Safety Technical Task Force, found in 2008:

Filtering and monitoring technologies are . . . subject to circumvention by minors—especially older minors—who are often more computer literate than their parents and who access the Internet increasingly from multiple devices and venues. . . . Increasingly, minors are also learning how to use proxies to circumvent filters or to reformat their computers to remove parental controls. Home filters also cannot protect at-risk minors who live in unsafe households or do not have parents who are actively involved in their lives.¹¹⁶

Notwithstanding the failure of CDA and COPA, the Supreme Court has consistently reinforced the principle that the protection of children is a compelling state interest.¹¹⁷ In some sectors, the arguments against regulating online porn center around the notion that any kid smart enough to circumvent a filter can make his or her own choices, and in any event minors are already surrounded by pornography.

But the right of the state (and parents) to limit minors’ choices is deeply embedded in constitutional law. The law holds that “infants do not have the mental capacity and discretion to protect themselves from the artful

113. *ACLU v. Gonzales*, 775, 810–13, 816–20.

114. *ACLU v. Mukasey*, 203.

115. *ACLU v. Mukasey*, 203–204, quoting *Ashcroft v. ACLU* (2004), 667.

116. Internet Safety Technical Task Force, *Enhancing Child Safety and Online Technologies: Final Report of the Internet Safety Technical Task Force* (Cambridge, MA: Berkman Center for Internet and Society, Harvard University, 2008), 34, available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf.

117. “No one denies that such an interest [protecting minors from exposure to commercial pornography] is ‘compelling.’” *Ashcroft v. ACLU* (2004), 683, citing *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Ginsberg v. New York*, 639–40.

designs of adults.”¹¹⁸ For instance, minors do not have the Second Amendment right to bear arms, and a state may require adults to carry the burden of protecting children from guns.¹¹⁹ In Texas, a gun owner is criminally negligent “if a child gains access to a readily dischargeable firearm” and the gun owner “failed to secure the firearm.”¹²⁰ States also prohibit selling liquor to minors,¹²¹ alcohol consumption by minors,¹²² employing minors during school hours or in hazardous work,¹²³ providing tobacco products to minors,¹²⁴ permitting minors to use tobacco in a place of business,¹²⁵ providing certain weapons to minors,¹²⁶ body piercing or tattooing minors,¹²⁷ and entering into contracts with minors.¹²⁸ The Supreme Court reaffirmed that “‘there is a compelling interest in protecting the physical and psychological well-being of minors’ which extend[s] to shielding them from indecent messages that are not obscene by adult standards.”¹²⁹

118. *City of New York v. Stringfellow's of New York, Ltd.*, 253 A.D.2d 110, 684 N.Y.S.2d 544, 551 (App. Div. 1999).

119. Cal. Civ. Code § 1714.3 (West 1998); Fla. Stat. Ann. § 790.17 (West 2007); Utah Code Ann. 1953 § 76-10-509.6, 509.7 (2004).

120. Tex. Penal Code Ann. § 46.13 (Vernon 2003).

121. Cal. Bus. & Prof. Code §§ 25602.1, 25658(a) (West 2007); N.Y. Alco. Bev. Cont. Law § 65(a) (McKinney 2000); Utah Code Ann. 1953 § 32A-12-203 (West 2004).

122. Cal. Bus. & Prof. Code § 25658(d) (West 2007); Fla. Stat. Ann. § 768.125 (West 2005); Utah Code Ann. 1953 § 32A-12-217 (West 2004).

123. Cal. Lab. Code §§ 1294.1, 1391 (West 2003); Fla. Stat. Ann. §§ 450.061, .141 (West 2003); N.Y. Lab. Law § 143 (McKinney 2003); Utah Code Ann. 1953 §§ 34-23-201, -203, & -302 (West 2004).

124. Cal. Bus. & Prof. Code § 22951 (West 2007); Cal. Health & Safety Code §§ 118950, 104350 (West 2007); Cal. Penal Code § 308(a)(1) (West 2007); N.Y. Pub. Health Law § 1399-cc (McKinney 2007); Utah Code Ann. 1953 § 76-10-104 (West 2004).

125. Cal. Penal Code § 308(a)(2)(b) (West 2007); Utah Code Ann. 1953 § 76-10-103 (West 2004).

126. Cal. Penal Code § 12072(a)(3)(A) (West 2007); N.Y. Penal Law § 265.16 (McKinney 2007); Utah Code Ann. 1953 § 76-10-509.5 (West 2004).

127. Cal. Penal Code §§ 652(a), 653 (West 1999); Fla. Stat. Ann. §§ 381.0075(7), 877.04 (West 2000); N.Y. Penal Law § 260.21 (McKinney 2000); Utah Code Ann. 1953 § 76-10-2201 (West 2007).

128. Cal. Civ. Code § 1556 (West 1982); Utah Code Ann. 1953 § 15-2-2 (West 2004).

129. *Reno v. ACLU*, 869 (quoting *Sable Communications of California, Inc. v. FCC*, 126); see also *New York v. Ferber*, 756–57, which says, “It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’ . . . Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of

The Supreme Court has also articulated a compelling governmental interest in supporting parents' authority to raise their children in the manner they see fit.¹³⁰ The government acts on behalf of parents, not in place of them. "Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."¹³¹ In *Prince v. Massachusetts*, the Court further added that it "is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹³² The government will support parental choices that limit what may be characterized as free speech rights. For example, the state respects parents' decisions regarding placing their children in private sectarian schools rather than public schools,¹³³ placing them in schools that teach in languages other than English,¹³⁴ and, at times, taking them out of school altogether.¹³⁵ "Parents should be the ones to choose whether to expose their children to certain people or ideas."¹³⁶ Because the state respects parental authority, it must provide the "support of laws designed to aid [the] discharge of that responsibility."¹³⁷ Further, the state assists when "parental control or guidance cannot always be provided."¹³⁸ The government has a responsibility to act in a manner that does not impose its morality on children, but rather, that supports "the right of parents to deal with the morals of their children as they see fit."¹³⁹ Although some lower courts are suggesting limits on parental control over speech in some instances,¹⁴⁰

youth even when the laws have operated in the sensitive area of constitutionally protected rights."

130. *Ginsberg v. New York*, 639; *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944).

131. *Ginsberg v. New York*, 639.

132. *Prince v. Massachusetts*, 166.

133. *Pierce v. Society of the Sisters of the Holy Names*, 268 U.S. 510 (1925).

134. *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

135. See *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

136. *Troxel v. Granville*, 530 U.S. 57, 63 (2000), quoting *In re Custody of Smith*, 969 P.2d 21, 31 (Wash. 1998).

137. *Ginsberg v. New York*, 639.

138. *Ginsberg v. New York*, 640, quoting *People v. Kahan*, 206 N.E.2d 333, 334 (Fuld, J., concurring).

139. *Ginsberg v. New York*, 639–40 n. 7, quoting Louis Henkin, "Morals and the Constitution: The Sin of Obscenity," *Columbia Law Review* 63, no. 3 (1963): 413 n. 68.

140. See, for example, *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525 (1st Cir. 1995); *Interactive Digital Software v. St. Louis County*, 329 F.3d 954 (8th

the Supreme Court has held fast to parental rights, even in upholding a state statute requiring minors to have parental consent (or a judicial override in exceptional circumstances) for an abortion.¹⁴¹ In a 2007 case, the Court again said that the constitutional rights of children in schools differ from those of adults.¹⁴²

Of course, the First Amendment and the right of free expression must be given great respect by all Americans and by the courts. But it is possible to reach a solution that does not violate First Amendment principles and still provides better protection to children and supports the choice of adults who want to keep pornography out of their homes and businesses. The trail to that solution may be steeper now that both the CDA and COPA were held unconstitutional after a decade of litigation. Thus, Congress needs incentives to make further attempts in the near future to regulate pornography online. Not only has Congress been embarrassed, but much of the dicta and legal precedent set forth in the cases surrounding the CDA and COPA will make it even more difficult for a future statute to pass constitutional muster.¹⁴³

However, heavy political opposition to any regulation on the Internet is more likely the cause for congressional inaction than are insurmountable legal or constitutional hurdles. First, so many entities make money directly and indirectly from the online porn industry (and other aspects of an unregulated Internet), including a broad web of powerful “legitimate” companies. It is little wonder that those who fight against online protection and accountability are well funded. Second, because the workings of the Internet are still obtuse to most Americans, techies can easily stop discussion by dropping vague allegations about how the Internet (and the innovation of future technology) would be ruined by any regulation. These claims may not be accurate, but they easily intimidate opponents and make politicians reluctant to engage in a battle that (as with most political battles) is fought with sound bites, not complex explanations.

In 2004, President Hinckley observed:

Legal restraints against deviant moral behavior are eroding under legislative enactments and court opinions. This is done in the name of

Cir. 2003); but see *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1285 (11th Cir. 2008), which states, “The State’s interest in recognizing and protecting the rights of parents on some education issues is sufficient to justify the restriction of some students’ freedom of speech.”

141. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

142. *Morse v. Frederick*, 127 S.Ct. 2618 (2007); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

143. Preston, “Internet and Pornography,” 101.

freedom of speech, freedom of the press, freedom of choice in so-called personal matters. But the bitter fruit of these so-called freedoms has been enslavement to debauching habits and behavior that leads only to destruction. A prophet, speaking long ago, aptly described the process when he said, "And thus the devil cheateth their souls, and leadeth them away carefully down to hell" (2 Nephi 28:21).¹⁴⁴

The longer parents and families wait in seeking legal support, the harder it will be to reverse the inroads that pornography is making in this legal vacuum.

OTHER LEGAL ISSUES

In addition to the First Amendment concerns, crafting a regulation of Internet content is challenging for other reasons. One difficult problem is dealing with Internet content that originates in foreign countries, presumably outside the jurisdictional reach of U.S. law enforcement and courts.¹⁴⁵ This question came up early in the COPA litigation, and the Third Circuit court ultimately found that COPA could not be considered underinclusive simply because it did not address foreign websites.¹⁴⁶ In addition, much of the harmful content is published from servers in the United States.¹⁴⁷ If the deluge of pornography served from the United States were controllable, other countries may be willing to make and enforce Internet standards for material published within their borders as well.

Another practical problem is the need to draw a line between acceptable and unacceptable content. Statutory application lines are seldom perfect, but we have enforced speech regulations around such lines before. We have a solid basis in existing statutes for wording the concept of unduly harmful material. For instance, Congress has enacted, and the courts have upheld, the definition of "Sexually Explicit Conduct" in various federal statutes, such as 42 U.S.C. § 13031(c)(5), with minimal variations.¹⁴⁸ Even the trade organization for the pornography industry cites the § 13031(c)(5)

144. Gordon B. Hinckley, "In Opposition to Evil," *Ensign* 34 (September 2004): 3.

145. For further discussion of obtaining jurisdiction over international pornographers, see Cheryl B. Preston and Brent A. Little, "ICANN Can: Contracts and Porn Sites—Choosing 'to Play Internet Ball in American Cyberspace,'" *Pacific McGeorge Global Business and Development Law Journal* 21 (2008): 93–96, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1146646.

146. *ACLU v. Mukasey*, 194–95.

147. See note 3.

148. See, for example, 18 U.S.C. § 2256(2)(A) (2000); 15 U.S.C. § 7704(d) (2000); 18 U.S.C. § 3509(a)(9) (2000).

definition in describing what images it will not include in advertisements submitted for its newsletter.¹⁴⁹ We also have a solid Supreme Court track record of applying such definitions. The Court has consistently upheld the *Miller* definition despite the same kinds of objections about drawing a line on “obscenity.”¹⁵⁰

Of particular interest is the treatment of the definition in the COPA litigation. The COPA definition is the classic three-prong test adopted by the Supreme Court in *Miller v. California*,¹⁵¹ but it asks an adult juror to determine what is prurient, offensive, or of overriding worth with respect to a minor rather than an adult.¹⁵² It relies on a local “community standard.” A similar minor-targeted version of the *Miller* definition was upheld in *Ginsberg v. New York* with respect to sales of harmful material to minors in a non-Internet context.¹⁵³ Moreover, on the first appeal of COPA to the Supreme Court, the Court upheld COPA’s definition against a challenge that a community standard test was unworkable in the Internet context.¹⁵⁴

Also informative is that, on remand from a second Supreme Court appeal, the Eastern District of Pennsylvania easily recognized what content fits the COPA definition. In *ACLU v. Gonzales*, the court freely uses the term “sexually explicit,” as well as “adult” and sometimes “harmful to minors,” to describe the material covered by COPA’s definition.¹⁵⁵ The *Gonzales* Findings of Fact, Section E, is titled, “Sexually Explicit Materials Available on the Web.”¹⁵⁶ In that section alone, the opinion identifies, classifies, and categorizes “sexually explicit,” “material,” “Web pages,” and “sites” dozens of times.¹⁵⁷ The court summarizes the court-appointed experts’ reports filed in the case in terms of separately identifiable “sexually explicit” or “adult” material.¹⁵⁸

The Findings of Fact were used by the court as reliable evidence of the reach and applicability of COPA. Thus, this opinion, as well as the expert reports relied upon, stands or falls on the ability of the court and the experts to “know it when [they] see it” and wrap it up in the phrase “sexually

149. Xbiz, “Print Campaigns,” <http://mediakit.xbiz.com/print.htm> (accessed January 24, 2008).

150. *Miller v. California*, 15.

151. *Miller v. California*, 15.

152. 47 U.S.C. § 231(e)(6) (1998).

153. *Ginsberg v. New York*, 638.

154. *Ashcroft v. ACLU*, 535 U.S. 564, 582 (2002).

155. See, for example, *ACLU v. Gonzales*, 777, 785, 788 *et seq.*

156. *ACLU v. Gonzales*, 788.

157. *ACLU v. Gonzales*, 789.

158. See, for example, *ACLU v. Gonzales*, 797.

explicit,” a phrase repeatedly used in federal law.¹⁵⁹ The experts must have believed that the COPA definitions are easily identifiable and thus legitimately the basis for the precise numerical studies accepted by the court.

Although the *Gonzales* court was truly hostile to COPA, the opinion proves that even critics can understand and apply the COPA definition of “Harmful to Minors.” The *Gonzales* opinion also shows that jurors and Web publishers can be expected to understand what a definition of “Harmful to Minors” means.

WHAT WE CAN DO

At this point in the campaign, many feel like the armies of Israel—“dismayed, and greatly afraid” (1 Sam. 17:11). However, we are not defenseless in our battle against pornography. We are armed with a sling and various stones in our bag (1 Sam. 17:49–50). These stones include viable and constitutional legal solutions, consumer pressure, political and social involvement, education, and personal righteousness.

Constitutional Legislation

Although Congress’s previous attempts at legislating Internet pornography have been unsuccessful, that does not mean that any act seeking to regulate the Internet must necessarily fail. I discuss here two possible approaches—combining technology, industry, and law—that offer regulatory schemes that could withstand constitutional scrutiny.

Zoning

Internet zoning is one example of a constitutional way to regulate Internet content. The particular zoning scheme that I refer to is called the CP80 Internet Community Ports Concept, and the proposed accompanying legislation is referred to as the Internet Community Ports Act (ICPA).¹⁶⁰

To understand the concept of zoning, one needs at least a basic level of knowledge of how the Internet operates and, in particular, how users browse the Internet by looking at and requesting information from Web page publishers. I will attempt to give a concise technical explanation below, but for purposes of an overview explanation for those with little exposure

159. *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

160. For an in-depth discussion of this zoning concept and its constitutionality, see Cheryl B. Preston, “Zoning the Internet: A New Approach to Protecting Children Online,” *Brigham Young University Law Review*, 2007, no. 6: 1417 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147163.

to the mechanics of the Internet, perhaps the simplest (although technically flawed and imprecise) analogy is to cable television channels. If Internet content were organized into channels, a parent could choose to block access to Internet pornography just as easily as he or she blocks unwanted cable-television channels—by simply calling his or her cable provider and requesting that the unwanted channel be shut off from the digital feed to his or her receiver.

Over sixty-five thousand ports or channels for the transmission of information currently exist in cyberspace.¹⁶¹ Most traffic now travels over ten to twenty of these ports. The default, or primary, range includes port 80, over which the vast majority of current Web traffic passes, and port 25, over which most email traffic currently passes. The government and military use a range of secured ports, and technology experts can redirect their Internet access to another range of ports designated by numbers. However, the vast majority of these ports are unused.

The Ports Concept assumes that ranges of ports could be assigned to different purposes. One port group would be designated as the general commercial range—the Ports Concept calls this range the Community Ports. The decency standards for this range of ports would be similar to the standards now applicable in the real world for areas of public traffic, such as streets, buses, and malls. Another range of ports would be designated as Open Ports. Any legal content, including legal pornography, could be transmitted over Open Ports under the Ports Concept. Internet Service Providers (ISPs) can easily sort the two types of ports with free software.¹⁶²

This proposed zoning of content regulates the means of delivery of Internet pornography by separating it at the source rather than blocking it. Thus, with Internet content zoned into different Internet ports, consumers can easily and definitively choose which channels (in this case, ports) they want to access or block through their Internet service in their home or office, just as they do with cable television. If a consumer chooses Community Ports, access to content on Open Ports is impossible, rather than subject to imperfect computer-installed filters, which users can hack past, circumvent, or disable, and which must be regularly updated and monitored. Furthermore, this approach resolves potential First Amendment concerns by allowing Internet users to select content at the receiving end while not criminalizing speech at the source.¹⁶³

161. See CP80, "Solutions: Technology," www.cp80.org/solutions/technology (accessed August 1, 2009).

162. Preston, "Family Friendly Internet," 1476–77.

163. Preston, "Family Friendly Internet," 1476–77.

I discuss at length elsewhere the constitutional implications of an ICPA-based regulation.¹⁶⁴ In summary, ICPA provides a legally viable option because (1) the government has compelling interests in protecting children from harmful material, protecting parents' rights to decide what their children access, and protecting the privacy of those who own real property and wish to exclude some forms of speech; and (2) ICPA is narrowly tailored to achieve those compelling interests because there are no restraints made prior to the speech taking place, it is an opt-in choice for consumers, and ICPA leaves more than reasonable alternatives for publishing adult speech.

Electronic Labeling and Choice

Even without the enforcement power of an accompanying statute, zoning (or its equivalent) could still occur on a voluntary basis if Internet content publishers would label their sites according to the type of content contained on the Web pages.¹⁶⁵ Once sites rate their content, ISPs could provide packages to consumers based on consumer rating preferences. As with the zoning described above, this kind of content management is preferable to filters because users cannot simply circumnavigate the filter at a weak moment if the filtering is happening at the ISP level and the content is not coming into the home at all.

Industry self-regulation through labels has been suggested before. After the Senate passed the CDA, the House passed the Internet Freedom and Family Empowerment Act,¹⁶⁶ suggesting website labels as an alternative. Shortly thereafter, the World Wide Web Consortium, an international policy group,¹⁶⁷ announced the release of Platform for Internet Content Selection (PICS).¹⁶⁸ PICS provided an infrastructure for content labeling that was intended to permit self-regulation. With PICS, a simple software code was invisibly embedded in content served on the Web. The coded

164. Preston, "Zoning the Internet," 1436–58.

165. For a more in-depth discussion of the PICS labeling concept, see Preston, "Internet and Pornography," 77–82.

166. H.R. 1978, 104th Cong. (1995).

167. The World Wide Web Consortium, or W3C, was formed to coordinate work with various international organizations and to provide "a vendor-neutral forum for the creation of Web standards." World Wide Web Consortium, "Facts About W3C," <http://www.w3.org/Consortium/facts> (accessed August 1, 2009).

168. See Todd Copilevitz, "Software to Let Users Screen Internet: Consortium to Announce System for Parents, Others to Create Own Ratings," *Dallas Morning News*, home final edition, September 9, 1995, 1A.

“tags” would identify a range of characteristics of the content.¹⁶⁹ Internet users could then program individual browsers or filters to block certain categories of content.

Representative Anna Eshoo (D-Calif.) proposed improvements to the CDA in the form of the Online Parental Control Act shortly after the PICS technology was finished.¹⁷⁰ Her bill substituted “harmful to minors” for the “decency” language in the CDA and specifically mentioned PICS as a mechanism that would allow the enforcement of the “harmful to minors” standard.¹⁷¹ At the time of Eshoo’s bill, however, the original CDA was “on the fast track to a Supreme Court challenge.”¹⁷² Members of Congress had little interest in revisiting the issue.

In *Reno v. ACLU*, when the Supreme Court rejected the CDA, Justice Sandra Day O’Connor, joined by Justice William Rehnquist, seemed to encourage the further development and use of PICS in the United States. She described such a technology:

Gateway technology is not ubiquitous in cyberspace, and because without it “there is no means of age verification,” cyberspace still remains largely unzoned—and unzoneable. . . . User-based zoning is also in its infancy. For it to be effective, (i) an agreed-upon code (or “tag”) would have to exist; (ii) screening software or browsers with screening capabilities would have to be able to recognize the “tag”; and (iii) those programs would have to be widely available—and widely used—by Internet users.¹⁷³

But she regretted that “at present, none of these conditions is true.” Although acknowledging that the CDA and the Internet had to be evaluated as they were presented to the Court, she stated encouragingly that “the prospects for the eventual zoning of the Internet appear promising.”¹⁷⁴

In July 1997, President Bill Clinton brought executives from high-tech groups together to discuss new methods of resolving the issue of material that was harmful to minors.¹⁷⁵ Reportedly, Clinton, along with members

169. See Paul Resnick and James Miller, “PICS: Internet Access Controls Without Censorship,” *Communications of the ACM* 39, no. 10 (1996): 87, available at <http://www.w3.org/PICS/iacwcv2.htm>.

170. David Plotnikoff, “Eshoo Unveils Net Law,” *San Jose Mercury News*, March 15, 1996, 1C. See also Notebook, *Communications Daily* 16, no. 52 (March 15, 1996), 8 (regarding the introduction of legislation by “Rep. Eshoo (D-Cal) and 4 co-sponsors”).

171. Plotnikoff, “Eshoo Unveils Net Law,” 1C.

172. Plotnikoff, “Eshoo Unveils Net Law,” 1C.

173. *Reno v. ACLU*, 891.

174. *Reno v. ACLU*, 891.

175. Louise Kehoe, “Clinton Acts to Protect Cyber-Kids,” *Financial Times* (UK), USA edition, July 17, 1997, 6; see also Joel Kirkland, “Software Giants

of the industry, coalesced around the idea of a Web rating system based on PICS software similar to the United Kingdom's RSACi.¹⁷⁶ Those involved claimed agreement to a commitment to "mak[e] the Internet 'family-friendly' without government regulation" by "giving parents a 'virtual toolbox' filled with already existing filtering technology bolstered by law enforcement."¹⁷⁷ Many commercial interests, especially the major news agencies, were opposed to this type of regulation.¹⁷⁸

For a while, the ICRA/PICS approach generated some enthusiasm. But in 2006, operators of commercial sites with sexually explicit material attacked a proposed amendment to a telecom reform bill that required some form of mandatory labeling of adult websites.¹⁷⁹ While the Association of Sites Advocating Child Protection (ASACP), whose members include Playboy.com, Hustler.com, and other smaller adult websites, claimed to support voluntary self-regulation based on labeling, no serious effort to adopt labeling has surfaced.

I point out these approaches—zoning and labeling—to illustrate that legal solutions within constitutional mandates are possible. I do not suggest that either are perfect solutions or that they easily resolve all practical complexities. A workable solution may take some creativity and innovation, both in terms of technological application and legal structure. But dialogue about how to address the problem should not be abandoned because of any notion that it is not possible to satisfy the First Amendment. The current cause of inaction is not primarily legal, but political. American parents, foundations for the protection of children, and primary educators are not creating the political pressure necessary to motivate legislators to stand up to the well-funded lobbyists representing pornography suppliers

Seeking Way to Filter Web Smut," *Chicago Tribune*, north sports final edition, July 17, 1997, 8.

176. Kehoe, "Clinton Acts to Protect Cyber-Kids." The approach that the Clinton administration seemed to favor at the time was like that of the prevailing rating system for television programs.

177. Julie Hirschfeld, "Consensus Announced to Make Web Child-Safe," *Dallas Morning News*, home final edition, July 17, 1997, 2D.

178. Amy Harmon, "Some News Organizations Take Umbrage at Rating Their On-Line Sites," *New York Times*, late edition (East Coast), September 1, 1997, D3.

179. "Mandatory Web Labeling Called 'Recipe for Self-Censorship,'" *Washington Internet Daily*, July 3, 2006. During this same time others introduced similar legislation, such as one requiring members of the House and Congress label their websites consistently with ICRA. See "SRES184: CRS Bill Digest for SRES184," *CRS Bill Digest*, November 30, 2006, available at 2006 WLNR 20986652; "HRES430: CRS Bill Digest for HRES430," *CRS Bill Digest*, November 30, 2006, available at 2006 WLNR 20918793.

and investors, who aim to ensure future profits without serious obligations to conform or risk liability. Moreover, many child-focused groups, similar to most politicians, are still not well enough informed and tech savvy to challenge the claims of technological impossibility, no matter how poorly founded.

As we build up enough unified political pressure, other options for more quickly taking action are available. Of course, we need to examine our own relationship with Internet temptation and we need to support others in seeking and providing addiction recovery help. We must be vigilant in training and supervising our own children and grandchildren. In addition to these actions, public-minded individuals can help with the effort to reach a preventive solution.

BECOME INVOLVED

Do not let pornography's apparent stronghold on our society deter you. You may be surprised at what a big difference a few people can make in the political process or the commercial landscape. "Wherefore, be not weary in well-doing, for ye are laying the foundation of a great work. And out of small things proceedeth that which is great. Behold, the Lord requireth the heart and a willing mind" (D&C 64:33–34). Even in the 1970s, President Kimball encouraged the Saints to become involved: "Members of the Church everywhere are urged to not only resist the widespread plague of pornography, but as citizens to become actively and relentlessly engaged in the fight against this insidious enemy of humanity around the world."¹⁸⁰ Lawyers and nonlawyers alike have powerful tools to address this social problem, even without legislation. For instance, we as paying consumers can insist on more choices in how we use the Internet. We can send a clear message to service providers, Web businesses, advertisers, and other companies that we will, to the greatest extent possible, spend our consumer dollar to support only businesses that do not capitalize on pornography. We can become better educated about technology and how it works, about the political and legal process, and about the economic forces behind the pornography production and delivery industries. We can remind our elected representatives that we are still expecting efforts to reach legislative solutions to protect children and give adults effective options to keep offensive material out.

"Lawmaking bodies will listen to effectively organized citizens. However, too often the trend is tragically toward citizen apathy and a sense of

180. Kimball, "Report and a Challenge," 5.

futility.”¹⁸¹ Do not assume that you are in the minority with your views. There are thousands of parents and concerned citizens, many of whom are not LDS, who also feel that pornography is a destructive force. President Gordon B. Hinckley warned of the danger of giving in to a vocal minority:

I am not one to advocate shouting defiantly or shaking fists and issuing threats in the faces of legislators. But I am one who believes that we should earnestly and sincerely and positively express our convictions to those given the heavy responsibility of making and enforcing our laws. The sad fact is that the minority who call for greater liberalization, who peddle and devour pornography, who encourage and feed on licentious display make their voices heard until those in our legislatures may come to believe that what they say represents the will of the majority. We are not likely to get that which we do not speak up for.¹⁸²

As the amount of pornography is expanding exponentially, it is also becoming increasingly accessible, affordable, and acceptable. An industry that was once relegated to dark corners and shadowy streets now is a click away on the Internet. The battle to get recognition of its harmful effects and to insist on some legal protection is going on right now, and the Lord needs his Saints to fight it. “Discipleship is not a spectator sport.”¹⁸³

Purveyors of pornography seek to legitimize their trade as freedom of expression under the First Amendment. To a large extent they have been successful in their attempts, to the point that images of child sexual abuse, so long as it is produced without the involvement of a real child, is material that adults have a constitutional right to make and consume.¹⁸⁴ However, relevant legal precedent and compelling government interests may be harnessed, and a constitutional solution is not impossible. While Congress’s attempts at regulation have thus far been unsuccessful, there are promising legal avenues remaining, as well as important actions that can be taken by individuals. Strategies such as zoning the Internet or requiring publishers to label online content could produce effective results without running afoul of the First Amendment. Writing to and encouraging local legislators will facilitate the development of solutions. In the meantime, we must also educate ourselves and our children about the evils of pornography, learn how

181. David B. Haight, “Personal Morality,” *Ensign* 14 (November 1984): 71.

182. Hinckley, “In Opposition to Evil,” 5. See also Neal A. Maxwell, “Meeting the Challenges of Today,” in *1978 Devotional Speeches of the Year* (Provo, Utah: Brigham Young University Press, 1979), 151, who said, “We will know the joy, on occasion, of having awakened a slumbering majority of the decent people of all races and creeds—a majority which was, till then, unconscious of itself.”

183. Dieter F. Uchtdorf, “The Way of the Disciple,” *Ensign* 39 (May 2009): 77.

184. *Ashcroft v. Free Speech Coalition*, 251.

to keep pornography out of our homes and lives, and encourage others to do the same.

Fortunately, along with the warnings of the prophets come messages of encouragement and promises of success. Although “the moral footings of society continue to slip”¹⁸⁵ and those who safeguard those footings often suffer persecution, the Lord has commanded us, “Be of good cheer, and do not fear, for I the Lord am with you, and will stand by you” (D&C 68:6). We are assured that making “the gospel of Jesus Christ the center of [our] lives . . . will not remove our troubles from us but rather will enable us to face our challenges, to meet them head on, and to emerge victorious.”¹⁸⁶

185. Thomas S. Monson, “Be of Good Cheer,” *Ensign* 39 (May 2009): 89.

186. Monson, “Be of Good Cheer,” 89.

Cheryl B. Preston (who can be reached via email at byustudies@byu.edu) is the Edwin M. Thomas Professor of Law at Brigham Young University. Her research focuses on feminist theory, gender and advertising, and law and religion. She is past president of the Law and Religion Section for the American Association of Law Schools. Her recent publications include “All Knowledge Is Not Equal: Facilitating Children’s Access to Knowledge by Making the Internet Safer,” *International Journal of Communications Law and Policy*, 13 (2009): 115–132.