

# Washington University Law Review

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Volume 95 | Issue 4

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2018

## Shielding Children from Pornography by Incentivizing Private Choice

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### Recommended Citation

Karen Hinkley, *Shielding Children from Pornography by Incentivizing Private Choice*, 95 WASH. U. L. REV. 981 (2018).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol95/iss4/9](https://openscholarship.wustl.edu/law_lawreview/vol95/iss4/9)

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# SHIELDING CHILDREN FROM PORNOGRAPHY BY INCENTIVIZING PRIVATE CHOICE

## INTRODUCTION

In March of 2016, Playboy stopped publishing images of naked women in their magazines.<sup>1</sup> According to the company's chief executive, Scott Flanders, "[the] battle has been fought and won . . . . You're now one click away from every sex act imaginable for free. And so it's just passé at this juncture."<sup>2</sup> In stark contrast to the world of past generations, "[n]ow every teenage boy has an Internet-connected phone . . . . Pornographic magazines, even those as storied as Playboy, have lost their shock value, their commercial value and their cultural relevance."<sup>3</sup>

One consequence of modern technological advancements is that online pornography has become both prevalent and highly accessible to children.<sup>4</sup> Though some children access pornography intentionally, many are exposed to pornography unintentionally, often at very young ages.<sup>5</sup> Some adults are dismayed by this new normal, arguing that exposure to pornography and its inherent messages is harmful to children.<sup>6</sup> Others argue that there is evidence that pornography may not be harmful after all, at least when it comes to its consumption by teenagers.<sup>7</sup> Still others seem to approach the issue from a more neutral perspective, viewing the prevalence of online

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1. Ravi Somaiya, *Nudes Are Old News at Playboy*, N.Y. TIMES (Oct. 12, 2015), <http://www.nytimes.com/2015/10/13/business/media/nudes-are-old-news-at-playboy.html>.

2. *Id.*

3. *Id.* Ironically, Playboy changed its mind after a year and began publishing images of naked women again in March of 2017. Mike Snider, *'Playboy' Brings Nudity Back to Magazine*, USA TODAY (Feb. 13, 2017, 4:54 PM), <https://perma.cc/XZS2-F64M> ("Cooper Hefner, the son of magazine founder Hugh Hefner, announced the move . . . saying, 'I'll be the first to admit that the way in which the magazine portrayed nudity was dated, but removing it entirely was a mistake.'").

4. Nick Bilton, *Parenting in the Age of Online Pornography*, N.Y. TIMES (Jan. 7, 2015), <http://www.nytimes.com/2015/01/08/style/parenting-in-the-age-of-online-porn.html>; *see also infra* Part I.

5. Janis Wolak et al., *Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users*, 119 PEDIATRICS 247, 247 (2007). *See also infra* Part I.

6. *See, e.g.*, Jane Randel & Amy Sánchez, *Parenting in the Digital Age of Pornography*, HUFFINGTON POST: THE BLOG (Feb. 26, 2016, 3:24 PM), <https://perma.cc/RHE2-RTE8> ("It's naive to assume that uninformed viewers with little sexual experience will not be influenced by these messages . . . . Exposure to pornography creates unrealistic expectations for both women and men when engaging in sex, and that could very well be a driver of sexual assault among young people.").

7. *See, e.g.*, Bilton, *supra* note 4 (observing that some "experts who monitor teenagers and sexuality say that there is plenty of evidence" that indicates the pervasiveness of online pornography may not be as harmful to today's youth as some contend). "If you just look at the indicators of sexual responsibility, you don't see a generation of kids looking like they are off the rails," said David Finkelhor . . . a director of the Family Research Laboratory at the University of New Hampshire. But Dr. Finkelhor acknowledged that the long-term psychological effects of teenagers' access to online pornography was still being determined." *Id.*

pornography as an inevitable new reality we simply need to learn how to live with.<sup>8</sup> This difference in perspective raises the question of whether children's easy access to online pornography is a problem we should address.

Part I of this Note argues that children's easy access to online pornography is indeed a problem, and it is time for Congress to revisit this issue. Part II provides an overview of Congress's attempts to deal with the problem up to this point, most of which have been unsuccessful. Part III proposes that Congress pass legislation that awards financial incentives to Internet Service Providers (ISP) and Mobile Data Providers (MDP) who provide default filtering that adult customers can easily turn off. Part III also explains why passing this type of legislation is constitutionally permissible. Finally, Part IV argues that passing this type of legislation is normatively a good idea.

#### I. CHILDREN'S EASY ACCESS TO ONLINE PORNOGRAPHY IS A PROBLEM THAT CONGRESS SHOULD REVISIT

This Part first presents evidence that children's exposure to pornography on the Internet is both prevalent and harmful. It then argues that Congress can and should revisit this issue and take further action to shield children from exposure to online pornography.

##### *A. The Prevalence of Exposure to Online Pornography During Childhood and the Harm It Causes*

The great majority of America's youth—93 percent of boys and 62 percent of girls—are exposed to pornography online before their eighteenth birthdays.<sup>9</sup> On average, a child is first exposed to online pornography at the age of eleven,<sup>10</sup> and twelve to seventeen-year-olds consume more online pornography than any other age group.<sup>11</sup> Alarming percentages of children have seen dark, disturbing, and even illegal types of pornography online, including bondage, bestiality, depictions of rape or sexual violence, and child pornography.<sup>12</sup> In a 2005 study, 42 percent of all youth who used the

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8. See, e.g., *id.* ("Here's the new reality: Thanks to the Internet, children will see things that children probably shouldn't.")

9. WALT MUELLER, CTR. FOR PARENT/YOUTH UNDERSTANDING, A PARENTS' PRIMER ON INTERNET PORNOGRAPHY 4 (2016), <https://perma.cc/HWS3-WE8N>.

10. *Id.*

11. *Id.*; Robert A. Gomez, *Protecting Minors from Online Pornography Without Violating the First Amendment: Mandating an Affirmative Choice*, 11 SMU SCI. & TECH. L. REV. 1, 1 (2007).

12. Mueller, *supra* note 9, at 4 ("39% of boys and 23% of girls have seen online sex acts depicting bondage . . . 32% of boys and 18% of girls have viewed bestiality on the Internet . . . 18% of

Internet had been exposed to online pornography in the previous year, and 66 percent of those youth reported that all of their exposure had been unwanted.<sup>13</sup> Vulnerable populations of youth reported higher rates of exposure, including those showing indications of depression, a history of interpersonal victimization, or tendencies towards delinquency.<sup>14</sup>

Though more research is needed concerning the potential impact of exposure to pornography online,<sup>15</sup> continued exposure can be harmful to children in many ways.<sup>16</sup> “Exposure and/or easy access to adult pornography, X-rated media, or child pornography” is one of many risk factors that can make a child more vulnerable to sexual abuse.<sup>17</sup> In addition, pornography often normalizes sexual harm,<sup>18</sup> promotes aggression towards women,<sup>19</sup> shapes negative attitudes and behaviors towards women,<sup>20</sup> diminishes the capacity to establish and maintain healthy intimate relationships,<sup>21</sup> and can lead to addiction.<sup>22</sup> Consumption of pornography by

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boys and 10% of girls have seen depictions of rape and/or sexual violence on the Internet . . . 15% of boys and 9% of girls have seen child pornography”).

13. Wolak et al., *supra* note 5, at 247.

14. *Id.*

15. *Id.*

16. See Allison Baxter, *How Pornography Harms Children: The Advocate's Role*, 33 CHILD L. PRAC. 113, 113 (2014) (“Excessive media use . . . skews children’s world view, increases high-risk behaviors, and alters their capacity for successful and sustained human relationships . . . Pornography may have stronger effects among children and youth than other forms of media because it shows a much higher degree of sexual explicitness.”).

17. *Understanding What Makes Kids Vulnerable to Being Sexually Abused*, STOP IT NOW!, <https://perma.cc/8EKG-B6KF> (last visited Nov. 11, 2017).

18. Rachel B. Duke, ‘Epidemic’ Growth of Net Porn Cited, WASH. TIMES (June 15, 2010), <https://perma.cc/Y58B-7H25>; Baxter, *supra* note 16, at 113 (“[P]ornography normalizes sexual harm by portraying a lack of emotional relationship between consensual partners, unprotected sexual contact, and, in some instances, violence and rape.”).

19. Baxter, *supra* note 16, at 113 (“Pornography is arguably more sexist and hostile towards women than other sexual images in the media.”) (citing Michael Flood, *The Harms of Pornography Exposure Among Children and Young People*, 18 CHILD ABUSE REV. 384, 386–87 (2009)); see also Gert Martin Hald et al., *Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies*, 36 AGGRESSIVE BEHAV. 14, 14 (2010) (concluding that there is a “significant positive association between pornography use and attitudes supporting violence against women in nonexperimental studies”).

20. Baxter, *supra* note 16, at 118 (“A 2009 analysis of studies on pornography and violence towards women reveals a significant relationship between pornography consumption and attitudes supporting violence towards women.”) (citing Hald et al., *supra* note 19).

21. Baxter, *supra* note 16, at 118 (“Sexual socialization theory suggests frequent exposure to consistent themes about gender and sexual behavior can affect a young person’s developing sense of what is expected sexually for men and women and may also affect later behavior.”) (citing Jane D. Brown & Kelly L. L’Engle, *X-Rated: Sexual Attitudes & Behaviors Associated with U.S. Early Adolescents’ Exposure to Sexually Explicit Media*, 36 COMM. RES. 129, 132 (2009)).

22. Baxter, *supra* note 16, at 118. (“The medical field has recognized that pornography consumption can be problematic . . . Children and teens are capable of developing compulsive sexual behaviors, which can lead to sexual addiction.”) (citing Jill C. Manning, *The Impact of Internet Pornography on Marriage and the Family: A Review of the Research*, 13 SEXUAL ADDICTION & COMPULSIVITY 131, 155 (2006)).

children and teenagers has been associated with viewing society through an oversexualized lens, normalizing sexual promiscuity, believing sexual abstinence is abnormal and unhealthy, choosing to engage in sexual intercourse at a younger age, commodifying sex, objectifying others, and having unrealistic and harmful expectations about sex.<sup>23</sup> “While children and young people are sexual beings and deserve age-appropriate materials on sex and sexuality, pornography is a poor, and indeed dangerous, sex educator.”<sup>24</sup>

In light of the serious risks that exposure to online pornography poses to children, it is unsurprising that “[t]here has been extensive worry about the possible harms to youth . . . expressed by the medical establishment, psychologists, the public, Congress, and even the [U.S.] Supreme Court.”<sup>25</sup> Researchers have concluded that “[t]aken together, these expressions of concern suggest that there is a broad consensus that youth should be shielded from online pornography.”<sup>26</sup> But, as this Note discusses in more detail below, most legislation that Congress has passed in an attempt to protect children from online pornography has been struck down by the Supreme Court, and Congress has largely given up on addressing this issue.<sup>27</sup>

### *B. Congress Can and Should Do More to Protect Children from Exposure to Online Pornography*

This need not be the end of the story in the United States. Consider measures taken in the United Kingdom to protect British children from exposure to online pornography. On July 22, 2013, former Prime Minister David Cameron gave a speech “to talk about the [I]nternet, the impact it’s having on the innocence of our children, how online pornography is corroding childhood and how, in the darkest corners of the [I]nternet, there are things going on that are a direct danger to our children and that must be stamped out.”<sup>28</sup> He explained that the “growth of the [I]nternet as an unregulated space” posed two major challenges in protecting British

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23. MUELLER, *supra* note 9, at 5.

24. Flood, *supra* note 19, at 384.

25. Wolak et. al., *supra* note 5, at 248.

26. *Id.* See also Gomez, *supra* note 11, at 2 (“[T]here is a general consensus that pornography has a detrimental effect on impressionable youths.”).

27. See *infra* Part II. In addition to diminished Congressional efforts to legislate in this area in recent years, presidential candidates seem less likely than before to speak out against the proliferation of online pornography or in support of rigorous enforcement of federal obscenity laws. See Steven Nelson, *GOP Candidates Won’t Promise to End Porn*, U.S. NEWS & WORLD REP. (Feb. 4, 2016, 3:54 PM), <http://www.usnews.com/news/articles/2016-02-04/gop-candidates-wont-promise-to-end-porn>.

28. Prime Minister David Cameron, Speech to the National Society for the Prevention of Cruelty to Children (July 22, 2013), <https://perma.cc/2GR9-8P5P>.

children, one of which was “that many children are viewing online pornography and other damaging material at a very early age and . . . the nature of that pornography is so extreme it is distorting their view of sex and relationships.”<sup>29</sup> He announced that he had reached an agreement with British mobile phone providers, public Wi-Fi providers, and private ISPs to provide default filtering of adult content.<sup>30</sup> The mobile phone operators agreed to equip phones with automatic adult content filters that could only be deactivated by individuals who could prove they were over eighteen.<sup>31</sup> Public Wi-Fi providers agreed that “family friendly filters [would] be applied across public Wi-Fi networks wherever children are likely to be present.”<sup>32</sup> And private ISPs agreed to equip new accounts with automatically selected filters that “can only be changed by the account holder, who has to be an adult. So an adult has to be engaged in the decisions.”<sup>33</sup> The ISPs also agreed to contact all existing customers to present them “with an unavoidable decision about whether or not to install family friendly content filters.”<sup>34</sup>

The default filtering ultimately enacted in the United Kingdom arguably went too far, as the British government used the filters to block a wide variety of content that was not pornographic in nature.<sup>35</sup> But, as discussed below, U.S. lawmakers could avoid this pitfall by narrowly tailoring the type of content they incentivize ISPs and MDPs to filter by default.<sup>36</sup> With 92 percent of American teens using the Internet daily and 24 percent reporting that they go online “almost constantly,”<sup>37</sup> the landscape is dramatically different today than it was even a few years ago. Thus, it is time for Congress to take further action to protect children from exposure to online pornography.

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29. *Id.* The other challenge Cameron identified was the “criminal . . . proliferation and accessibility of child abuse images on the internet.” *Id.* He acknowledged that the two challenges were “very distinct and very different.” *Id.* “In one we’re talking about illegal material, the other is legal material that is being viewed by those who are underage.” *Id.* But he observed that “both the challenges have something in common; they’re about how our collective lack of action on the internet has led to harmful and, in some cases, truly dreadful consequences for children.” *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See Laurie Penny, *David Cameron’s Internet Porn Filter is the Start of Censorship Creep*, THE GUARDIAN (Jan. 3, 2014, 1:00 AM), <https://perma.cc/DZE6-S666>.

36. See *infra* Part III.

37. Amanda Lenhart, *Teens, Social Media & Technology Overview 2015*, PEW RES. CTR. (Apr. 9, 2015), <https://perma.cc/Y5UU-HLJA>.

## II. THE HISTORY OF CONGRESS'S ATTEMPTS TO DEAL WITH THE PROBLEM<sup>38</sup>

This Part details the history of Congress's prior attempts to shield children from online pornography and the Supreme Court's responses to those attempts. Specifically, this Part will consider the Communications Decency Act of 1996, the Child Online Protection Act of 1998, and the Children's Internet Protection Act of 2000. Though the Court struck down the first two pieces of legislation as unconstitutional, it upheld the Children's Internet Protection Act.

### A. *The Communications Decency Act*

Concerned about the "amount of sexually explicit materials available for viewing and distribution over the Internet,"<sup>39</sup> Congress passed the Communications Decency Act (CDA) in 1996.<sup>40</sup> The CDA prohibited "knowingly" transmitting a "communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age."<sup>41</sup> It also prohibited "us[ing] an interactive computer service to send to a specific person or persons under 18 years of age" or "display in a manner available to a person under 18 years of age" any "communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."<sup>42</sup> The statute provided affirmative defenses for individuals who "ha[d] taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication" or "ha[d] restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."<sup>43</sup>

In 1997, the Supreme Court considered a constitutional challenge to the CDA in *Reno v. American Civil Liberties Union*.<sup>44</sup> The Court noted "the legitimacy and importance of the congressional goal of protecting children

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38. See generally GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 15.02 (2017); James F.X. Petrich, *Constitutionality of Sexually Oriented Speech: Obscenity, Indecency, and Child Pornography*, 16 GEO. J. GENDER & L. 81 (2015).

39. DELTA & MATSUURA, *supra* note 38, at 11.

40. Petrich, *supra* note 38, at 94.

41. 47 U.S.C. § 223(a)(1)(B)(ii) (Supp. III 1997), *invalidated by* *Reno v. ACLU*, 521 U.S. 844 (1997). Violating this portion of the statute carried a possible penalty of a fine, imprisonment for up to two years, or both. § 223(a)(2).

42. § 223(d)(1)(A), (B). Violating this portion of the statute also carried a possible penalty of a fine, imprisonment for up to two years, or both. § 223(d)(2).

43. § 223(e)(5)(A), (B).

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

from harmful materials.”<sup>45</sup> But it nevertheless affirmed the judgment of the district court,<sup>46</sup> striking down the “indecent transmission” and “patently offensive display” provisions<sup>47</sup> but “expressly preserv[ing] the Government’s right to investigate and prosecute the obscenity or child pornography activities prohibited therein.”<sup>48</sup>

In striking down the “patently offensive display” provision, the Court cited the three-part test it set forth for obscenity in *Miller v. California*:

“(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>49</sup>

The Court reasoned that because the CDA’s “patently offensive display” provision lacked requirements and limitations inherent in the *Miller* test, the provision presented “a greater threat of censoring speech that, in fact, falls outside the statute’s scope.”<sup>50</sup> The Court further reasoned that “[g]iven the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection,” a danger that “provides further reason for insisting that the statute not be overly broad.”<sup>51</sup>

In striking down the “indecent transmission” provision, the Court acknowledged that it has “repeatedly recognized the governmental interest in protecting children from harmful materials.”<sup>52</sup> But the Court also explained that “[i]n evaluating the free speech rights of adults, we have made it perfectly clear that ‘[s]exual expression which is indecent but not

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45. *Id.* at 849.

46. *Id.* at 885.

47. *Id.* at 859, 864.

48. *Id.* at 864.

49. *Reno*, 521 U.S. at 872 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

50. *Reno*, 521 U.S. at 873–74.

51. *Id.* at 874.

52. *Id.* at 875 (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978)). In *Ginsberg*, the Court held that “[m]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children,” explaining that “[b]ecause of the State’s exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.” *Ginsberg*, 390 U.S. at 636 (internal quotations and citation omitted). In *Pacifica*, the Court explained that the First Amendment does not prohibit all governmental regulation that depends on the content of speech in finding that the Federal Communications Commission has the power to regulate a radio broadcast that is indecent but not obscene. *Pacifica*, 438 U.S. at 744, 750–51.



obscene is protected by the First Amendment”<sup>53</sup> and asserted that the government’s interest in protecting children “does not justify an unnecessarily broad suppression of speech addressed to adults.”<sup>54</sup> The district court had found that: 1) “at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults,”<sup>55</sup> 2) there was “no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms,”<sup>56</sup> and 3) “it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults.”<sup>57</sup> Relying on those findings, the Court concluded that “[the CDA’s] limitations must inevitably curtail a significant amount of adult communication on the Internet.”<sup>58</sup>

Notably, in reaching its conclusions the Court relied in part on findings by the district court that led the Court to believe that “[t]hough [sexually explicit] material is widely available [on the Internet], users seldom encounter such content accidentally.”<sup>59</sup> That may have been true in 1997, but there is ample evidence that suggests it is not true today.<sup>60</sup>

The Court also expressed concern that the CDA prohibited “indecent” and “patently offensive” messages communicated to teenagers even if their parents approved of the communication.<sup>61</sup> As a possible alternative to the

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53. *Reno*, 521 U.S. at 874 (quoting *Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

54. *Reno*, 521 U.S. at 875.

55. *Id.* at 876.

56. *Id.*

57. *Id.* at 876–77.

58. *Id.* at 877.

59. *Id.* at 854.

“A document’s title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site’s content before he or she need to take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content.” For that reason, the “odds are slim” that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, “the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.”

*Id.* (quoting findings by the district court in 929 F. Supp. 824, 844–45 (E.D. Pa. 1996)).

60. *See, e.g., supra* text accompanying note 13.

61. *Reno*, 521 U.S. at 878.

Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material “indecent” or “patently offensive,” if the college town’s community thought otherwise.

*Id.* (citation omitted).

CDA provisions, the Court cited with approval a finding by the district court that “a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.”<sup>62</sup>

Today, the statute prohibits “knowingly” transmitting a “communication which is obscene or child pornography, knowing that the recipient of the communication is under 18 years of age”<sup>63</sup> and “us[ing] an interactive computer service” to “send to a specific person or persons under 18 years of age” or “display in a manner available to a person under 18 years of age” any “communication that is obscene or child pornography.”<sup>64</sup>

### B. *The Child Online Protection Act*

In 1998, Congress “attempted to limit the access of minors to harmful materials” by passing the Child Online Protection Act (COPA).<sup>65</sup> In passing COPA, Congress attempted “to remedy the constitutional defects of the CDA.”<sup>66</sup> The statute provided that “[w]hoever knowingly and with knowledge of the character of the material . . . makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.”<sup>67</sup> According to the statute, a person was engaged in “commercial purposes only if such person is engaged in the business of making such communications.”<sup>68</sup> Importantly, the statute defined the term “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

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62. *Id.* at 855.

63. 47 U.S.C. § 223(a)(1)(B)(ii) (2012).

64. § 223(d)(1)(A), (B).

65. DELTA & MATSUURA, *supra* note 38, § 15.02.

66. *Id.*

67. 47 U.S.C. § 231(a)(1) (1998), *invalidated by* ACLU v. Mukasey, 534 F.3d 181 (3rd Cir. 2008), *cert. denied*, Mukasey v. ACLU, 555 U.S. 1137 (2009).

68. § 231(e)(2)(A).

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.<sup>69</sup>

The term “minor” was defined as “any person under 17 years of age.”<sup>70</sup>

The statute exempted any person who was “a telecommunications carrier engaged in the provision of a telecommunications service,”<sup>71</sup> “engaged in the business of providing an Internet access service,”<sup>72</sup> “engaged in the business of providing an Internet information location tool,”<sup>73</sup> or similarly engaged in one of these activities.<sup>74</sup> It provided an affirmative defense for any defendant who:

in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) any other reasonable measures that are feasible under available technology.<sup>75</sup>

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69. § 231(e)(6). This mixes language from the *Miller* obscenity test with additional restrictive language. See *supra* note 49 and accompanying text.

70. § 231(e)(7).

71. § 231(b)(1).

72. § 231(b)(2).

73. § 231(b)(3).

74. § 231(b)(4). This subpart of the statute specified that individuals similarly engaged in the transmission, storage, retrieval, hosting formatting or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person’s deletion of a particular communication or material made by another person in a manner consistent with subsection (c) . . . or section 230 shall not constitute such selection or alteration of the content of the communication.

*Id.*

75. § 231(c)(1). Successful assertion of an affirmative defense also barred civil liability under the statute. § 231(c)(2).

In addition to the criminal penalty, it provided for a civil penalty for violations<sup>76</sup> and tacked on additional criminal penalties for anyone who “intentionally violate[d]” the statute.<sup>77</sup>

The constitutionality of COPA was litigated for ten years.<sup>78</sup> Finally, in 2009, the Supreme Court refused to grant certiorari in *American Civil Liberties Union v. Mukasey*,<sup>79</sup> a 2008 Third Circuit case that struck down COPA, effectively ensuring that COPA would never go into effect.<sup>80</sup> In *Mukasey*, the Third Circuit affirmed the district court’s conclusions that “COPA is not narrowly tailored to advance the Government’s compelling interest in protecting children from harmful material,” “there are less restrictive, equally effective alternatives to COPA,” and “COPA is impermissibly overbroad and vague.”<sup>81</sup> The court first observed that “COPA criminalizes a category of speech—‘harmful to minors’ material—that is constitutionally protected for adults,” explaining that “[b]ecause COPA is a content-based restriction on protected speech, it is presumptively invalid and the Government bears the burden of showing its constitutionality.”<sup>82</sup> The court further explained that “[t]o survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest.”<sup>83</sup> The court acknowledged Congress’s “compelling interest in protecting the physical and

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76. § 231(a)(3). “In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.” *Id.*

77. § 231(a)(2). “In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.” *Id.*

78. COPA would have taken effect on November 29, 1998, but in October of 1998, a group of plaintiffs challenged the constitutionality of COPA, and the district court granted a preliminary injunction. *Id.*; *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999). This decision was affirmed by the Third Circuit in 2000. *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000). The Supreme Court vacated the Third Circuit’s decision that same year, holding that “the Third Circuit erred in holding that COPA violated the First Amendment by relying on contemporary community standards to identify material that is harmful to minors.” *DELTA & MATSUURA*, *supra* note 38, § 15.02 (discussing *Ashcroft v. ACLU*, 535 U.S. 564 (2002)). On remand, the Third Circuit struck COPA down again on different grounds of overbreadth and vagueness. *ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003). On appeal, the Supreme Court held “that the District Court did not abuse its discretion in granting [a] preliminary injunction” preventing the enforcement of COPA. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). It allowed the injunction to “stand pending a full trial on the merits” of COPA. *Id.* at 671. On remand, the district court struck COPA down yet again and issued a permanent injunction to prevent the government from enforcing it. *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007). On appeal a year later, the Third Circuit struck down COPA itself, and, in 2009, the Supreme Court denied certiorari to the Third Circuit’s decision. *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

79. 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

80. *DELTA & MATSUURA*, *supra* note 38, § 15.02.

81. *Mukasey*, 534 F.3d at 184.

82. *Id.* at 187.

83. *Id.* at 190.

psychological well-being of minors,” as held by the Supreme Court, and noted that in this case, “the parties agree that the Government has a compelling interest to protect minors from exposure to harmful material on the Web.”<sup>84</sup> But after reviewing findings by the district court regarding “Internet content filters,”<sup>85</sup> the court agreed “that filters and the Government’s promotion of filters are more effective than COPA”<sup>86</sup> and “that filters are less restrictive than COPA.”<sup>87</sup> The court ultimately concluded that “the Government has not shown that COPA is a more effective and less restrictive alternative to the use of filters and the Government’s promotion of them in effectuating COPA’s purposes.”<sup>88</sup>

In striking down COPA the court quoted the Supreme Court’s assertion that “Congress undoubtedly may act to encourage the use of filters.”<sup>89</sup> The court further reasoned that “the circumstance that some parents choose not to use filters does not mean that filters are not an effective alternative to COPA”<sup>90</sup> and observed that “[u]nlike COPA, filters permit adults to determine if and when they want to use them and do not subject speakers to criminal or civil penalties.”<sup>91</sup>

### C. *The Children’s Internet Protection Act*

In 2000, though COPA’s ultimate fate in the courts had yet to be decided, Congress took further action to protect children from obscene and pornographic images by passing the Children’s Internet Protection Act

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84. *Id.*

85. *Id.* at 198.

86. *Id.* at 202.

Given the vast quantity of speech that COPA does not cover but that filters do cover, it is apparent that filters are more effective in advancing Congress’s interest . . . . Moreover, filters are more flexible than COPA because parents can tailor them to their own values and needs and to the age and maturity of their children and thus use an appropriate flexible approach different from COPA’s “one size fits all” approach. Finally, the evidence makes clear that, although not flawless, with proper use filters are highly effective in preventing minors from accessing sexually explicit material on the Web.

*Id.* at 203.

87. *Id.* at 203–04.

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.

*Id.* at 203–04 (quoting *Ashcroft*, 542 U.S. at 667).

88. *Id.* at 204. The court also found that COPA was too vague and overbroad. *Id.* at 207.

89. *Id.* at 202 (quoting *Ashcroft*, 542 U.S. at 669).

90. *Id.* at 203.

91. *Id.* at 204.

(CIPA), a statute that required schools and libraries funded by the federal E-rate program<sup>92</sup> to enforce a “policy of Internet safety.”<sup>93</sup> The statute provides that a library may not use E-rate funds to purchase Internet service or computers used for Internet access unless the library 1) “operat[es] . . . a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are . . . ” “obscene,” “child pornography,” or “harmful to minors,” and 2) “is enforcing the operation of such technology protection measure during any use of such computers by minors.”<sup>94</sup> CIPA defines as “harmful to minors”:

any picture, image, graphic image file, or other visual depiction that—

- (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
- (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, and actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
- (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>95</sup>

The term “minor” is defined as “an individual who has not attained the age of 17.”<sup>96</sup> The statute permits “[a]n administrator, supervisor, or other authority [to] disable a technology protection measure . . . to enable access for bona fide research or other lawful purposes.”<sup>97</sup>

The American Library Association and the American Civil Liberties Union challenged the constitutionality of CIPA in 2001,<sup>98</sup> and the Supreme Court upheld the statute in 2003 in *United States v. American Library Association*,<sup>99</sup> reversing a district court that found CIPA “facially invalid on

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92. “[T]he E-rate program established by the Telecommunications Act of 1996 entitles qualifying libraries to buy Internet access at a discount.” *United States v. Am. Library Ass’n*, 539 U.S. 194, 198 (2003) (citing 47 U.S.C. § 254(h)(1)(B) (1996)).

93. 20 U.S.C. § 9134(f)(1)(A)(i) (2012).

94. § 9134(f)(1)(A)(i)–(ii). The statute also requires libraries to “enforce the operation of such technology protection measure during any use of [library] computers” with respect to “visual depictions” that are either “obscene” or “child pornography.” § 9134(f)(1)(B)(i)–(ii).

95. § 9134(f)(7)(B). This is similar, but not identical to, the test used in COPA. *See supra* note 69 and accompanying text.

96. § 9134(f)(7)(C).

97. § 9134(f)(3).

98. DELTA & MATSUURA, *supra* note 38, § 15.04.

99. 539 U.S. 194 (2003).

the ground that [it] induce[s] public libraries to violate patrons' First Amendment rights."<sup>100</sup>

Six justices voted to uphold CIPA.<sup>101</sup> Chief Justice Rehnquist, writing for a plurality, rejected the district court's holding that "the filtering software contemplated by CIPA was a content-based restriction on access to a public forum, and was therefore subject to strict scrutiny," holding instead that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum."<sup>102</sup> Considering the "tendency of filtering software to 'overblock'" and "[a]ssuming that such erroneous blocking presents constitutional difficulties," the plurality reasoned that "any such concerns are dispelled by the ease with which patrons may have the filtering software disabled."<sup>103</sup> The plurality ultimately concluded that "[b]ecause public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress'[s] spending power. Nor does CIPA impose an unconstitutional condition on public libraries."<sup>104</sup>

Concurring in the judgment, Justice Kennedy argued that "[i]f, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case."<sup>105</sup> He reasoned that "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case."<sup>106</sup> He emphasized that "[t]he interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, *as all Members of the Court appear to agree*," ultimately concluding that "[g]iven this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face."<sup>107</sup>

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100. *Id.* at 199.

101. *Id.* at 198, 214–15.

102. *Id.* at 202–03, 205.

First, this resource—which did not exist until quite recently—has not “immemorially been held in trust for the use of the public and . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions . . . . The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking. Nor does Internet access in a public library satisfy our definition of a “designated public forum.” To create such a forum, the government must make an affirmative choice to open up its property for use as a public forum.

*Id.* at 205–06 (citations omitted).

103. *Id.* at 208–09. “When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter.” *Id.* at 209.

104. *Id.* at 214.

105. *Id.* (Kennedy, J., concurring).

106. *Id.* at 215.

107. *Id.* (emphasis added).

Also concurring in the judgment, Justice Breyer advocated for a middle-ground approach, explaining that “[i]n ascertaining whether the statutory provisions are constitutional, [he] would apply a form of heightened scrutiny, examining the statutory requirements in question with special care.”<sup>108</sup> He argued that CIPA passes this test, reasoning that CIPA’s objectives are “‘legitimate’ and indeed often ‘compelling,’” that “no one has presented any clearly superior or better fitting alternatives” to filtering technology, and that CIPA “contains an important exception that limits the speech-related harm that ‘overblocking’ might cause” because it “allows libraries to permit any adult patron access to an ‘overblocked’ Web site.”<sup>109</sup> Breyer noted that CIPA “does impose upon the patron the burden of making [a] request,” but he reasoned that this burden was no greater than that imposed by other “traditional library practices associated with segregating library materials.”<sup>110</sup>

Justice Souter’s dissent—joined by Justice Ginsburg—asserted there was “no doubt about the legitimacy of governmental efforts to put a barrier between child patrons of public libraries and the raw offerings on the Internet otherwise available to them there.”<sup>111</sup> Souter’s concerns with CIPA were twofold, and he explained that he would uphold it “if the only First Amendment interests raised here were those of children” or if he agreed that “an adult library patron could, consistently with [CIPA], obtain an unblocked terminal simply for the asking.”<sup>112</sup> But he argued that “the unblocking provisions simply cannot be construed, even for constitutional avoidance purposes, to say that a library must unblock upon adult request, no conditions imposed and no questions asked.”<sup>113</sup> Thus, Souter argued, the Court has to “take the statute on the understanding that adults will be denied access to a substantial amount of nonobscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one.”<sup>114</sup> Therefore, though CIPA was upheld by a

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108. *Id.* at 216 (Breyer, J., concurring).

[W]e should not examine the statute’s constitutionality as if it raised no special First Amendment concern . . . [n]or should we accept the Government’s suggestion that a presumption in favor of the statute’s constitutionality applies. At the same time, in my view, the First Amendment does not here demand application of the most limiting constitutional approach—that of “strict scrutiny.”

*Id.* (citations omitted).

109. *Id.* at 218–19. “[T]he adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, ‘Please disable the entire filter.’” *Id.* at 219.

110. *Id.* at 219. As examples, Breyer mentioned “closed stacks” and “interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere . . .” *Id.*

111. *Id.* at 231–32 (Souter, J., dissenting).

112. *Id.* at 232.

113. *Id.* at 233.

114. *Id.* at 233–34.



majority of six justices, it is reasonable to assume that had CIPA more clearly articulated a requirement that the library's filtering be turned off at an adult patron's request, at least eight justices would have voted to uphold it.

Despite its CIPA victory in 2003, Congress has made little effort since to further protect children from exposure to online pornography.<sup>115</sup>

### III. INCENTIVIZING PRIVATE CHOICE AND WHY IT IS CONSTITUTIONALLY PERMISSIBLE

This Part proposes that Congress pass new legislation that awards financial incentives to ISPs and MDPs who provide default filtering that their adult customers can easily opt out of. It also explains why this proposal is constitutionally permissible.

Although modern filtering technology is capable of filtering numerous categories of unwanted content,<sup>116</sup> this new legislation should be narrowly tailored to address the specific problem of children's easy access to online pornography.<sup>117</sup> This could be achieved by using the same content categories as CIPA<sup>118</sup> to define the type of default filtering that ISPs and MDPs must provide to comply with the statute and receive its financial benefits. The filtering technology should notify the user any time a page or website is blocked,<sup>119</sup> and compliant ISPs and MDPs should be required, at minimum, to offer an obvious, easy, and instant method for adult customers to opt out of the filtering, either permanently or temporarily.<sup>120</sup> In addition,

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115. See Gomez, *supra* note 11, at 3. Congress passed the Truth in Domain Names Act (TDNA) in 2006, which makes it illegal to "knowingly use[] a misleading domain name on the Internet to deceive a person into viewing material constituting obscenity" or "to deceive a minor into viewing material that is harmful to minors." 18 U.S.C. § 2252B(a)–(b) (2006). While this law is a "step[] in the right direction" that "may keep children from accessing pornography accidentally by misspelling a domain name," it "does not keep them from stumbling upon links of inappropriate material while searching innocent terms" or "address the issue of minors who intentionally seek Internet pornography or children who access harmful material on sites with quite accurate domain names." Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417, 1425 (2007).

116. See, e.g., Renee Shipley, *The Best Internet Filter Software: Safeguard Your Child's Safety Online*, TOPTENREVIEWS (Feb. 28, 2017), <https://perma.cc/2448-7ZRG> ("With [Internet filtering] software, you can block certain websites, allow access to a select few or any combination thereof. You can also choose to block websites that have been flagged for certain content, such as drugs, alcohol, pornography or violence.").

117. See *supra* text accompanying notes 35–36.

118. See *supra* text accompanying notes 94–95.

119. See DELTA & MATSUURA, *supra* note 38, § 15.04 (arguing that "filtering software [that] blocks access to certain sites without informing you that this has been done . . . has the potential to become one of the most effective tools of global censorship" because "users cannot complain if they do not know that censorship is even occurring").

120. More ideally, the filtering technology could offer adult customers the option to choose different filtering settings for different devices or users. See Shipley, *supra* note 116 ("Internet filter software works by giving you the ability to create specific user IDs for every member of your family

ISPs and MDPs should establish a transparent process by which both individual customers and website owners can petition companies to “whitelist” specific pages or websites.<sup>121</sup>

In contrast to proposals involving the establishment of an Internet rating system<sup>122</sup> or port zoning,<sup>123</sup> this proposal calls for filtering technology that would automatically filter content regardless of where a website is hosted.<sup>124</sup> And in contrast to proposals involving device-level filtering software,<sup>125</sup> this proposal calls for filtering at the ISP or MDP level.<sup>126</sup> The legislation could award financial incentives to compliant ISPs and MDPs via tax breaks, tax credits, or even tax penalties assessed against non-compliant ISPs and MDPs.<sup>127</sup>

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who uses a computer. This enables you to set restrictions for certain individuals based on their age or maturity level.”).

121. See Shipley, *supra* note 116. A company can “whitelist” a page or website to ensure it is not blocked by the company’s filters. This remedy is intended to provide recourse to customers or website owners who feel that certain pages or websites have fallen victim to overblocking. Though beyond the scope of this Note, advocates for the LGBTQ community have argued that filtering technology often blocks teenagers’ access to valuable information. See generally Jacob Colling, *Approaching LGBTQ Students’ Ability to Access LGBTQ Websites in Public Schools from a First Amendment and Public Policy Perspective*, 28 WIS. J.L. GENDER & SOC’Y 347 (2013); Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888 (W.D. Mo. 2012).

122. See, e.g., DELTA & MATSUURA, *supra* note 38, § 15.04 (“A group of Internet industry leaders have agreed to write software that is compatible with the Platform for Internet Content Selection,” which “creates a common format for labeling Internet content. Thus, in the future, it may be possible to have content rated as it is in motion pictures and on broadcast television.”).

123. See, e.g., Preston, *supra* note 115, at 1426–34 (advocating for passage of the proposed Internet Ports Concept Act, which would have required online content to be “zoned into different ports,” allowing ISPs to offer customers “Internet service limited to those ports that are subject to regulation of pornographic content, or ‘Community Ports’”).

124. Constitutional issues aside, a weakness inherent in mandatory Internet rating systems or zoning requirements is that enforcement is only possible for websites hosted in areas subject to U.S. jurisdiction. See Preston, *supra* note 115, at 1457 (admitting that the proposed Internet Ports Concept Act “regulates pornography originating in the United States” and arguing, in 2007, that “most pornography available on the Internet is posted from locations subject to U.S. jurisdiction”). Filtering technology, however, filters content regardless of its origin—an important feature given the increasingly global nature of the modern Internet. See *Gonzales*, 478 F. Supp. 2d at 791–92 (“The geographic origin of a Web page is not a factor in how a filter works because the filter analyzes the content of the Web page, not the location from which it came.”).

125. See Gomez, *supra* note 11, at 19 (arguing that “Congress should pass a law requiring all new computers to come with pre-installed blocking and filtering software”).

126. The basic technology for this type of filtering already exists. See *Internet Filtering (Family Safety)*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://perma.cc/KC8T-ZVEG> (“Some [ISPs] will offer filtering as part of their service . . . there is usually nothing to configure—you simply turn this service on with your ISP, and it filters all content.”) (last visited Oct. 5, 2017). One marked advantage of ISP or MDP-level filtering over device-level filtering is that anyone (including a minor) can purchase a device, but ISPs and MDPs can require account holders to be adults. Thus, ISP or MDP-level filtering would enable compliant companies to make sure that an adult is involved in any decision to opt-out of default filtering. Cf. *supra* text accompanying note 33.

127. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 573 (2012) (upholding the individual mandate of the Affordable Care Act by characterizing the penalty imposed for failing to purchase health insurance as a tax).

This proposal is designed to promote a compelling government interest, as recognized in *Reno v. American Civil Liberties Union*,<sup>128</sup> *American Civil Liberties Union v. Mukasey*,<sup>129</sup> and by all nine justices in *United States v. American Library Association*.<sup>130</sup> In fact, the Supreme Court explicitly asserted that “Congress undoubtedly may act to encourage the use of filters,”<sup>131</sup> and when Congress did so by passing CIPA, the Court held that this action was constitutional.<sup>132</sup>

In promoting this compelling government interest, the proposed legislation avoids the constitutional pitfalls of the CDA and COPA and is a natural extension of CIPA. Because they were content-based restrictions,<sup>133</sup> the CDA and COPA were subject to strict scrutiny<sup>134</sup> and faced a difficult hurdle in passing constitutional muster.<sup>135</sup> In contrast, the proposed legislation is simply a financial incentive offered to voluntarily compliant ISPs and MDPs—similar to that offered to libraries and schools by CIPA.<sup>136</sup> And like CIPA’s provisions that allow filtering to be disabled upon request from an adult,<sup>137</sup> the proposed legislation would require compliant ISPs and MDPs to offer an obvious, easy, and instant method for adult customers to

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128. See *supra* note 52 and accompanying text.

129. See *supra* text accompanying note 84.

130. See *supra* text accompanying note 107. Justice Stevens, the ninth justice, also recognized the compelling government interest in his dissent, but he argued that because of the limits of the filtering technology available at the time, “local decisions tailored to local circumstances are more appropriate than a mandate from Congress” in protecting minor library patrons from exposure to obscenity, child pornography, and other harmful material. *United States v. Am. Library Ass’n*, 539 U.S. 194, 223 (2003) (Stevens, J., dissenting).

131. *Ashcroft v. ACLU*, 542 U.S. 656, 669 (2002).

132. See *supra* notes 98–100 and accompanying text.

133. *Gomez*, *supra* note 11, at 15 (“The CDA and COPA represent one school of thought on how to prevent children from accessing online pornography: content-based restrictions with criminal and civil sanctions for violators.”).

134. *Id.* (“As a result of their status as content-based restrictions, both statutes were subject to the highest standard of review, strict scrutiny.”).

135. *Id.* at 5 (“Congress has generally been incapable of persuading courts to uphold content-based restrictions.”); *Id.* at 15 (“The fate of [the CDA and COPA] demonstrates that strict scrutiny is a very difficult standard to satisfy.”).

136. See *supra* notes 92–94 and accompanying text. The voluntary nature of compliance with the proposed legislation is significant. This would be a valid exercise of Congress’s power under the Spending Clause, as CIPA was:

[U]nder our well-established Spending Clause precedent...we must ask whether the condition that Congress requires “would...be unconstitutional” if performed by the library itself. CIPA does not directly regulate private conduct; rather, Congress has exercised its Spending Power by specifying conditions on the receipt of federal funds. Therefore, *Dole* provides the appropriate framework for assessing CIPA’s constitutionality.

*United States v. Am. Library Ass’n*, 539 U.S. 194, 203 n.2 (2003) (citing *South Dakota v. Dole*, 483 U.S. 203, 210 (1987)). See also *id.* at 212 (“CIPA does not ‘penalize’ libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress’[s] decision not to subsidize their doing so.”).

137. See *supra* note 97 and accompanying text.

disable the filtering.<sup>138</sup> In fact, the proposed legislation would impose even less of a burden on adults who wish to disable filtering than CIPA does, because adults could autonomously disable the filtering in the privacy of their homes rather than having to ask a librarian to disable it for them. And the proposed legislation places discretion squarely in the hands of parents as to whether and when they choose to disable the filtering on behalf of their minor children.<sup>139</sup>

Like CIPA, the legislation this Note proposes is constitutionally permissible. The next Part will argue that it is normatively a good idea.

#### IV. INCENTIVIZING PRIVATE CHOICE IS NORMATIVELY A GOOD IDEA

As previously mentioned, researchers have observed that there is broad consensus among Americans that children's easy access to online pornography is a problem.<sup>140</sup> Passing legislation to protect children from this exposure is consistent with our societal values as expressed by our laws. We have federal laws against obscenity and child pornography.<sup>141</sup> The Supreme Court has held that obscene speech is not protected by the First Amendment,<sup>142</sup> that states may pass laws restricting minors' access to "indecent speech,"<sup>143</sup> and that Congress may exercise its power under the Spending Clause to encourage the use of filters that block obscenity, child pornography, and material that is harmful to minors.<sup>144</sup> Congress has passed legislation that promotes and protects private blocking and screening of offensive material:

Policy. It is the policy of the United States—

. . . to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

. . . to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict

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138. See *supra* note 120 and accompanying text. "[F]ilters that depend upon user involvement in private homes do not upset the First Amendment. Filters, unlike content-based restrictions, 'impose selective restrictions on speech at the receiving end, not universal restrictions at the source.'" Gomez, *supra* note 11, at 20 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2004)).

139. See *supra* text accompanying notes 61–62, 90–91.

140. See *supra* note 26 and accompanying text.

141. See, e.g., *supra* notes 63–64 and accompanying text.

142. *Roth v. United States*, 354 U.S. 476, 486 (1957).

143. See cases cited *supra* note 52. "Indecent speech" is speech that is considered harmful to minors but is protected for adults. *FCC v. Pacifica Found.*, 438 U.S. 726, 731–32 (1978).

144. See *supra* notes 101–04 and accompanying text; *supra* note 89 and accompanying text.

their children's access to objectionable or inappropriate online material;

. . . No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .<sup>145</sup>

And again, the Supreme Court has consistently recognized that the government has a compelling interest in shielding children from online pornography.<sup>146</sup>

Filtering technology has improved over time<sup>147</sup> and will continue to improve.<sup>148</sup> Some major, private U.S. companies, including Starbucks and McDonald's, have already agreed to use filtering technology on their WiFi networks to block pornography.<sup>149</sup> Incentivizing ISPs and MDPs to increase their participation in the market for filtering technology is likely to increase the demand for this technology and contribute to its continued improvement and innovation. In addition, the value of empowering parents to make parenting decisions is broadly recognized.<sup>150</sup> By putting the choice to opt out of default filtering in the hands of adult Internet service and mobile data customers, the proposed legislation does just that.<sup>151</sup> And building the cost of filtering technology into the cost of Internet or mobile data service would enable more parents to take advantage of it.<sup>152</sup>

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145. 47 U.S.C. § 230 (b)(3), (b)(4)–(c), (c)(2), (c)(2)(A) (2012).

146. See, e.g., *supra* note 52 and accompanying text; *supra* text accompanying note 84; *supra* text accompanying note 107.

147. See generally Shipley, *supra* note 116 (discussing features of modern filtering technology).

148. See, e.g., DELTA & MATSUURA, *supra* note 38, § 15.04 (“Undoubtedly, in the years to come, filtering software is bound to become more sophisticated, and in the future, one could legitimately expect filtering software to solve many of the problems presently posed by unwanted exposure to sexually offensive materials.”).

149. Tobias Salinger, *Starbucks and McDonald's to Block Pornography from Wi-Fi Networks*, N.Y. DAILY NEWS (July 15, 2016, 6:32 PM), <http://www.nydailynews.com/life-style/starbucks-mcdonald-block-pornography-wi-fi-networks-article-1.2713372>.

150. See, e.g., Ashutosh Bhagwat, *What if I Want my Kids to Watch Pornography?: Protecting Children from “Indecent” Speech*, 11 WM. & MARY BILL RTS. J. 671, 673 (2003) (observing that the government's “interest in supporting and facilitating parental supervision over their children's access to sexually explicit speech” is “quite uncontroversial”). See also *supra* text accompanying notes 61–62, 90–91.

151. See Gomez, *supra* note 11, at 19 (observing that “a significant number of parents are not aware or knowledgeable about the existence and benefits of filters”).

152. Net Nanny filtering software costs between \$39.99 and \$119.99 per year, depending on how many devices a customer needs filtering for. NET NANNY, <https://perma.cc/SYMN-9GGV> (last visited Oct. 5, 2017). Qustodio costs \$54.95 per year for up to five devices. Qustodio, <https://perma.cc/NQ7T-HWQQ> (last visited Oct. 5, 2017).

Finally, there is added value in allowing adult customers to easily opt *out* of default filtering rather than encouraging them to opt *in* to optional filtering. Despite the prevalence of online pornography and the harm it causes,<sup>153</sup> many children still have unfiltered Internet access at home.<sup>154</sup> Some parents make a conscious choice not to filter their children's Internet access,<sup>155</sup> and under the proposed legislation those parents could easily opt out of the default filtering. But some parents who do not want their children exposed to online pornography may simply have failed to obtain filtering technology for their homes, either out of ignorance or out of a failure to overcome the "inertia" of inaction.<sup>156</sup> These parents would likely embrace filtering technology made available to them by the proposed legislation, particularly because it would require no affirmative action to set the filtering up.<sup>157</sup> In the same vein, companies who have not yet begun to filter the WiFi they make available to their customers may be more likely to embrace default filtering than they are to take affirmative action to purchase and install filtering technology.<sup>158</sup> Thus, the proposed legislation is likely to provide at least some protection from exposure to pornography to many

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153. See discussion *supra* Part I.

154. See, e.g., Martin Daubney, *Experiment that Convinced Me Online Porn Is the Most Pernicious Threat Facing Children Today*, DAILY MAIL (Sept. 25, 2013, 6:24 PM), <http://www.dailymail.co.uk/femail/article-2432591/Porn-pernicious-threat-facing-children-today-By-ex-lads-mag-editor-MARTIN-DAUBNEY.html> ("When I asked the children if there were parental controls on the [I]nternet at home, they all said no, their parents trusted them. They all admitted their parents had no idea what they were watching, and would be shocked if they did know.").

155. Bhagwat, *supra* note 150, at 701–02.

156. *Id.* at 700.

157. *Cf. id.* (noting that "imposing regulatory requirements which make it easier and less costly for parents to control their children's access to sexual materials" could "help[] parents overcome their inertia by reducing the transactions costs of supervising their children").

158. These arguments are supported by behavioral law and economics principles:

Libertarian paternalism, a phrase coined by Cass Sunstein and Richard Thaler, refers to a central component of behavioral law and economics (BLE) – the idea that good government should make it easier to make good decisions. Rather than overriding free will, choice architecture and public policy should "nudge" individuals toward decisions they *would like* to make but are unlikely to choose because they act like fallible humans instead of rational "Econs." A nudge is "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives."

... Americans out to embrace BLE insights to reduce pornography consumption in the United States because such methods meet the required burden of "asymmetric paternalism."

Asymmetrically paternalistic regulations "create[] large benefits for those who make errors, while imposing little or no harm on those who are fully rational."

Alexandra Harrison, Note, *Nudge, Don't Thrust: The Application of Behavioral Law and Economics to America's Porn Addiction*, 19 TEX. REV. L. & POL. 337, 338–40 (2015) (citing RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 5–6 (Penguin Books 2009) (2008)); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"*, 151 U. PA. L. REV. 1211, 1211–14 (2003)).

children who would otherwise retain completely unfiltered access to an almost infinite supply of pornography online.<sup>159</sup>

#### CONCLUSION

Incentivizing private choice is not a perfect solution to the problem. If the proposed legislation is passed, some individuals and companies will opt out of the default filtering—giving the children who use their networks the same unfiltered access to online pornography that those children have today. And though filtering technology has improved over time and will likely continue to do so,<sup>160</sup> it will never achieve perfection. Protecting children from exposure to online pornography requires more from adults than any law can accomplish.<sup>161</sup> But given what is at stake, lawmakers can and should do something more than today's status quo. Passing the proposed legislation would be a good place to start.

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159. Though beyond the scope of this Note, many argue that pornography consumption is harmful for adults as well. *See, e.g.*, Harrison, *supra* note 158, at 348–61. Thus, a secondary benefit of the proposed legislation could be aiding adults who desire to stop using pornography but have found it difficult to do so. *See id.* at 341 (“[H]elping people who wish to avoid pornography do so results in net gains for the populace.”).

160. *See* discussion *supra* Part IV.

161. Parents who educate and maintain an open line of communication with their children can reduce the harms of pornography. *See, e.g.*, Steven Schlozman, *How to Talk to Your Kids About Internet Pornography*, CLAY CTR. OF YOUNG HEALTHY MINDS (Feb. 3, 2015), <https://perma.cc/8RPA-8H38>.

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