



MEMORANDUM

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Pornography on the Internet & in the Community

Individual communities have the right to regulate pornography and even prohibit it altogether. Many cities have ordinances dealing with pornography that restrict what is sold, where it is sold, and who is able to buy it. The ACLJ is committed to protecting the right of communities to eliminate pornography from the Internet and the community.

Introduction

Studies have shown that men who use pornography are disproportionately more likely to be involved in sexual aggression and date rape, because pornography has the effect of dehumanizing women.¹ This fact is illustrated by horrific stories like that of Tia Rigg, a twelve-year girl who was raped, tortured, and murdered by her uncle.² Her uncle's sexual perversion had started off as an addiction to pornography.³ Furthermore, it is a well-documented fact that sexually oriented businesses lead to an increase in crime in the surrounding communities.⁴

¹ Leslie L. Crossman, *Date Rape and Sexual Aggression in College Males, Incidence and Involvement of Impulsivity, Anger, Hostility, Psychopathology, Peer Influence and Pornography Use*, SOUTHWEST EDUCATION RESEARCH ASSOCIATION 7–9 (Jan. 1994), available at <http://www.eric.ed.gov/PDFS/ED363844.pdf> [hereinafter *Sexual Aggression*].

² Meena Hartensein, *Man Sentenced to Life in Prison for Brutal Pornography-Inspired Rape, Murder of 12-Year-Old Niece*, NEW YORK DAILY NEWS (Oct. 5, 2010, 4:40 PM), http://articles.nydailynews.com/2010-10-05/news/27077341_1_pornography-murder-abuse.

³ *Id.*

⁴ Richard McCleary, Ph.D., *Crime-Related Secondary Effects of Sexually-Oriented Businesses: Report to the City Attorney* 2 (May 6, 2007), <http://secondaryeffectsresearch.com/files/City%20of%20Los%20Angeles%20Report.pdf> [hereinafter *Crime-Related Effects*]. Richard McCleary, Ph.D., is an expert in criminology and statistics. *Id.* at 1.

Not only is pornography harmful, but it is running rampant in modern society. Among Internet users aged 10 to 17 years, 42% reported having been exposed to online pornography in the past year.⁵ Of those, 66% had been exposed unwillingly.⁶ According to the study, children can be “psychologically and developmentally unprepared for unwanted exposure.”⁷

Because of the tragic effects that pornography bears on society, the United States (which is ranked among the top producers and consumers of pornography globally) has a unique responsibility to take a lead in addressing this issue.⁸ It is the ACLJ’s position that governments at all levels should take steps to allow families to keep their homes free from the invasion of pornography through the Internet and television. Specifically, (1) courts should not interfere with regulations that prohibit pornography; (2) governments at all levels should separate pornography from the public sector (e.g., requiring pornographic websites to end with a “.xxx” domain⁹); and (3) local zoning ordinances should restrict pornographic businesses to prevent their harmful effects on communities.

Pornography and the First Amendment

Since 1973, the Supreme Court held (as a general rule) that the First Amendment protects pornography under the principle of freedom of speech. *Miller v. California*, 413 U.S. 15, 27 (1973). This article discusses four major exceptions to this general rule, together with the ACLJ’s position on each.

Adult Obscenity (“hard-core” pornography)

The Supreme Court has declared time and again that “obscenity” is not protected by the Constitution. *See, e.g., Roth v. United States*, 354 U.S. 476, 484–85 (1957), *Memoirs v.*

⁵ Janis Wolak, J.D., Kimberly Mitchell, Ph.D., & David Finkelhor, Ph.D., *Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users*, 119 PEDIATRICS no. 2, 247 (Feb. 5, 2007), available at <http://www.unh.edu/ccrc/pdf/CV153.pdf>.

⁶ *Id.* at 247–48.

⁷ *Id.* at 248.

⁸ Testimony of Jill C. Manning before the Subcommittee on the Constitution, Civil Rights and Property Rights Committee on Judiciary, United States Senate (Nov. 9, 2005), available at <http://www.heritage.org/Research/Testimony/Pornography-Impact-on-Marriage-and-The-Family?query=Pornography%27s+Impact+on+Marriage+and+The+Family>.

⁹ Such a proposal was introduced by Sens. Max Baucus (D-MT) and Mark Pryor (R-AR) in the Cyber Safety for Kids Act, S. 2426, 109th Cong. (2006). The bill failed; but on March 18, 2011, ICANN (the Internet Corporation for Assigned Numbers and Names) established a .xxx top-level domain on its own initiative. ICANN, *Adopted Board Resolutions* (Mar. 18, 2011), <http://www.icann.org/en/minutes/resolutions-18mar11-en.htm#5>. Currently, registration of a .xxx top-level domain is voluntary.

Massachusetts, 383 U.S. 413, 418 (1966). Before 1973, obscenity and pornography were virtually synonymous. *Id.* In 1957, the Supreme Court said that the test for obscenity was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” *Roth v. United States*, 354 U.S. 476 at 489 (1957).

But in 1973, the Supreme Court retreated from previous case law, and limited the government’s regulatory abilities to so-called “hard core” pornography. *Miller*, 413 U.S. at 27. In doing so, the Court adopted a new three-part test for obscenity, limiting the regulation of obscenity to “works which depict or describe sexual *conduct*,” *Miller*, 413 U.S. at 24 (emphasis added). Before 1973, the definition of “obscenity” allowed government to freely regulate pornography dealing with “sexual matters” (such as nudity), *Memoirs*, 383 U.S. at 418, and not just “sexual conduct.”

The ACLJ’s position. The ACLJ firmly advocates a change in the definition of “obscenity,” which would allow lawmakers to freely address the threat that pornography poses to their communities. The Supreme Court adopted its 1973 definition, seemingly because it nobly desired an expansive interpretation of the First Amendment, while cutting out only the forms of pornography that harm society. *See Miller*, 413 U.S. at 27–28. However, empirical evidence since then has strongly proven that pornography in general leads to violence and to the degradation of communities.¹⁰ As a result, it cannot be doubted that the Supreme Court’s newer, relaxed definition of obscenity has harmed society.

Child Pornography

The ban on child pornography has been upheld by the Supreme Court, which defines child pornography as “sexually explicit visual portrayals that feature children.” *United States v. Williams*, 553 U.S. 285, 288 (2008). The Court has further said that proscription of child pornography does not violate the First Amendment, “even [if the] material ... does not qualify as obscenity.” *Id.*

¹⁰ See generally, *Crime-Related Effects*, *supra* note 4, and *Sexual Aggression*, *supra* note 1. In addition, libraries of peer-reviewed research on the societal effects of pornography are available at www.pornharms.com and www.secondaryeffectsresearch.com.

The ACLJ's position. Child pornography victimizes America's weakest citizens. The ACLJ fully supports the ban on child pornography.

Separating Pornography from Children

Although the Supreme Court has held that the First Amendment protects "non-obscene" pornography, it has allowed governments to make pornography inaccessible to children. In 1978, the Supreme Court noted that "the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household justified the regulation of otherwise protected expression." *FCC v. Pacifica*, 438 U.S. 726, 749–50 (1978) (internal quotations omitted). Furthermore, the government's compelling interest in protecting children from pornography holds firm, even if that material is not obscene for adults. *Ginsberg v. New York*, 390 U.S. 629, 634–35 (1968); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 755 (1996). Such restrictions are especially appropriate over the airwaves, because "[p]atently 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." *Pacifica*, 438 U.S. at 748. The Court also found it significant that radio is "uniquely accessible to children." *Id.* at 749.

The ACLJ's position. Even more so than radio broadcasts, Internet pornography is "uniquely accessible to children" and "confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748-49. As a result, Congress has the clear, Constitutional authority to regulate the Internet to ensure that parents can protect their children from its greatest dangers. The ACLJ further supports a plan requiring pornographic websites to end with a "dot xxx" domain, so that pornographic websites can be more easily identified and filtered before they are visited.

Pornography and Local Zoning Laws

The United States Supreme Court has upheld zoning ordinances that keep pornographic businesses from being concentrated in a specific area, or that keep them away from schools, parks, religious institutions, and residential areas. *Renton v. Playtime Theaters*, 475 U.S. 41, 44 (1986), *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002). Such ordinances are valid if they meet three criteria. First, the ordinance must not infringe on pornographic "speech," but must rather regulate the "time, place, and manner" of the business. *Id.* at 47.

Second, the ordinance must not be aimed at restricting the *content* of the pornographic “speech,” but rather the secondary, harmful effects that such businesses have on the surrounding community. *Id.*¹¹ Finally, the ordinance must be “designed to serve a substantial governmental interest,” and they must “not unreasonably limit alternative avenues of communication.” *Id.*

The ACLJ’s position. Because of pornography’s unique effects on neighborhoods and local crime, local communities have an important role to play in preventing its harmful effects. The ACLJ urges all municipalities to adopt zoning ordinances that curb the effects of pornographic businesses.

Conclusion

Pornography is more than just a private issue. Over the past few decades, it has become a cultural crisis, with severe effects on society that are grossly underestimated. Even if banning pornography altogether might be impracticable, the ACLJ believes that lawmakers and communities should not be restrained in their efforts to address this issue. The ACLJ urges lawmakers to take advantage of the various options still available to them in combating the effects of this industry.

¹¹ Municipalities do not need to prove the presence of these secondary effects. They only need to rely upon evidence that is “reasonably believed to be relevant” to the secondary effects that they seek to address. *Alameda Books*, 535 U.S. at 442