

UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF JOURNALISM AND MASS COMMUNICATION

WHO'S YOUR DADDY?
COURT CONCEPTIONS OF THE PARENT-CHILD RELATIONSHIP
AS IT RELATES TO TECHNOLOGY

SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS
FOR THE COURSE
JOUR 806
SEMINAR IN MASS COMMUNICATIONS
LEGAL RESEARCH METHODS

BY BRYAN MURLEY

COLUMBIA, SOUTH CAROLINA
DECEMBER 9, 2003

Who's Your Daddy:

Court conceptions of the parent-child relationship as it relates to technology

The U.S. Supreme Court has rarely addressed issues related to the Internet as a medium. The one area where the court has seen fit to comment more than once is the distribution of indecent materials to minors. The court has addressed this issue in several high profile cases, including *Reno v. ACLU*, 521 U.S. 844 (1997), the first foray by the Court into Internet jurisprudence. While numerous legal scholars have revisited the Court decisions in these cases, nowhere in the current literature is there a discussion of the Court's understanding of the parent-child relationship in general, and specifically how that relationship relates to new technologies. As such, this research project seeks to discover the understanding of parent-child interactions used by the Supreme Court as it relates to technology. Do new mediums influence the court's image of parental involvement in the child's life? Understanding what ideal the court has formed regarding parent-child-technology relationships can provide better understanding about past court decisions, and assist legal scholars as they study future cases that involve juvenile interactions with the Internet.

Review of Literature

The Internet began life as a project of the U.S. Defense Department. It took almost 30 years for the 'Net to achieve its current prominence in American social and cultural life.¹ As the Internet became more available to the public, some elements of society became particularly aware of the promise of the Internet. Most troubling of these to legislators and parents groups has been the sites that choose to exhibit obscene

¹ Scott Winstead, Article, *The Application of the "Contemporary Community Standard" to Internet Pornography: Some Thoughts and Suggestions*, 3 LOY. INTELL. PROP. & HIGH TECH. J. 28, at 29-30.

and indecent materials.² All of the characteristics of the Internet that make it a promising arena for free expression: anonymity, instantaneous results, ease of entrance, and interactivity, have made it a haven for pornography and obscenity. Statistics are difficult to ascertain, but pornography is among the top commercial enterprises on the Internet.

A 2003 *USA Today* article pegged the money generated by all types of pornography, including Internet porn, as between \$8 and \$10 billion in 2002.³ Pornographic Web sites were visited by 24 percent of U.S. Internet users in the month of September 2003, according to Nielsen/NetRatings.⁴ Legislators have enacted laws because of the perceived threat that obscene or indecent speech on the Internet poses to minors. Again, society grapples with the promising features of the Internet when it struggles to limit access by children to obscene or indecent materials: the anonymous, instantaneous, easy to enter nature of the Internet. Minors can access obscene or indecent images with a few clicks of a computer mouse. Search engines will return pornographic Web sites for mundane search terms. Also, such access can be done from the privacy of the home, so that the minor can remain anonymous.⁵ A final factor

² Abbigale E. Bricker, Article, *You Can't Always Get What You Want: Government's Good Intentions v. The First Amendment's Prescribed Freedoms in Protecting Children From Sexually-Explicit Material on the Internet*, 6 RICH. J.L. & TECH. 17 at 17.

³ Bill Keveney, *Hollywood gets in bed with porn*, USA TODAY, Oct. 17, 2003, at 1E.

⁴ Kari L. Dean, *Sex and Tech in the Fleshbot*, Wired, Nov. 14, 2003, at <http://www.wired.com/news/culture/0,1284,61163,00.html>.

⁵ Tim Specht, *Untangling the World Wide Web: Restricting Children's Access to Adult Materials While Preserving the Freedoms of Adults*, 21 N. ILL. U. L. Rev. 411, at 420.

spurring legislative action is the very graphic, very hardcore nature of Internet pornography.

There is almost universal agreement that the idea of shielding minors from the most graphic, obscene or indecent parts of the Internet is a compelling state interest.⁶ Where the courts and legislative bodies have disagreed, however, is how much regulation is acceptable in achieving that valid state interest.⁷ The U.S. government has twice sought to criminalize distribution of indecent material to minors via the Internet – with the Communication Decency Act of 1996 (47 U.S.C. §223) and the Child Online Protection Act of 1998 (47 U.S.C. §231). The CDA was declared unconstitutional in *Reno v. ACLU* (521 U.S. 844). COPA is still awaiting Supreme Court review, although it has been ruled unconstitutional at every lower level.⁸ Legal scholars fall along a spectrum regarding how much regulation would be acceptable in regulating this material. Bricker⁹ and Werst¹⁰ argue forcefully that parents should be the ultimate authority over what material their children access on the Internet, and that government regulation is constitutionally hindered from providing effective methods of restricting such access. Winstead claims that government regulation of Internet indecency “could lull parents

⁶ Brian M. Werst, Comment, *Legal Doctrine and its Inapplicability to internet Regulation: A Guide for Protecting Children from Internet Indecency after Reno v. ACLU*, 33 GONZ. L. REV. 207, at 226.

⁷ Id. at 226.

⁸ *High Court Asked to Reinstate Child Online Protection Act*, COMPUTER & INTERNET, Aug. 26, 2003, at 10.

⁹ Bricker, *supra* note 2, at 17.

¹⁰ Werst, *supra* note 7, at 228-229.

into a false sense of security regarding what their children can access on the Internet.”¹¹ At the other end are approaches, such as that advocated by Justice O’Connor in her partial dissent to *Reno v. ACLU*, which advocate “adult zoning” as a method of regulation that would pass constitutional muster.¹² In most cases, scholars note the inherent difficulties with regulating Internet content, whether because of constitutional concerns, economic barriers, or technological constraints.¹³ No analysis has yet sought to chart the court’s understanding of the parent-child relationship and the state’s role in this relationship through these cases. This study addresses this gap in the literature by examining the following research questions:

Research Questions

1. What underlying perception of parents and children and their interactions is apparent from a review of court decisions?
2. Given the interactive nature of the Internet, have courts adjusted their view of parental involvement and the role of government in shielding minors from access to indecent material?
3. How has the court’s perception of minors been applied in cases dealing with different media?

The Internet is defined as the global, interconnected network of computers through which data flows to and from participants in an instantaneous method. This

¹¹ Winstead *supra* note 1, at 41.

¹² *Reno v. American Civil Liberties Union*, 521 U.S. 844, 888 (1997).

¹³ David K. Djavaherian, *First Amendment: a) Indecency: Reno v. ACLU*. 13 BERKELEY TECH. L.J. 371, 387. See generally, William D. Araiza, *Captive Audiences, Children and the Internet*, 41 BRANDEIS L.J. 397.

definition should not be confused with the parts of the Internet which most often are at the center of court battles. They are:

- E-mail: Text or graphic files sent from computer to computer via the Internet to a specific e-mail “address” that is associated with an individual computer user. E-mail is sometimes used to send unsolicited indecent materials to minors.¹⁴
- World Wide Web: The portion of the Internet that is composed of “pages” of coded text that render text and graphic elements in a graphical format when viewed through a specific computer program commonly called a “browser.”¹⁵
- Bulletin Board: An early part of the Internet that allowed users to sign on to a host computer via telephone line and post messages that could be read by other computer users.¹⁶

Method of Analysis

This is a case study analysis of U.S. Supreme Court cases related to parent-child relationship and the government’s role in this relationship, with specific attention to the changes influenced by advances in technology.

This research project examines nine U.S. Supreme Court cases that bear upon the interplay of control relationships between parents, minors and the state. In order to establish the prevailing doctrine relating to these relationships, it will begin with an examination of three cases not related to technology or indecency: *Prince v.*

¹⁴ See generally Monique Redford, Comment, *The Indecency of Unsolicited Sexually Explicit Email: A Comment on the Protection of Free Speech v. The Protection of Children*. 26 SEATTLE UNIV. L. R. 125.

¹⁵ Winstead, *supra* note 1, at 32.

¹⁶ Alex C. McDonald. *Dissemination of Harmful Matter to Minors Over The Internet*. 12 SETON HALL CONST. L.J. 163, at 167.

Massachusetts, 321 U.S. 158 (1944), relating to child labor laws and religious practices; and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Meyer v. Nebraska*, 262 U.S. 390 (1923), both of which deal with the education of children. Next is the case that defined the crossroads of minors and obscenity, *Ginsburg v. New York*, 390 U.S. 629 (1968). *Ginsberg* is the first of these cases that dealt specifically with “technology,” in that it addressed printed material. *FCC v. Pacifica*, 438 U.S. 726 (1978) is the first case to tailor First Amendment protections to a specific medium on the basis of minor access to indecent materials. *Sable v. FCC*, 492 U.S. 115 (1989) adds to the study by examining government regulation of the dial-a-porn industry, again relating to minor access. Two cases deal specifically with cable television regulation and minor access: *Denver Area v. FCC*, 518 U.S. 727 (1996) and *U.S. v. Playboy*, 529 U.S. 803 (2000). Finally, *Reno* is addressed specifically to the Internet medium.

Each case was examined for references to parents, children, and the role of parents and government in regulating minors and their activities. More recent cases also included an examination for references to minor’s access to indecent materials. These references were compiled and examined to discern underlying themes of parent-child interaction and the role of the government in raising minors that appear through the manifest meaning of the texts. Where possible, the texts were examined to discern patterns of change in meaning and understanding as new technologies were addressed.

Analysis 1: Early Doctrines of Parent-Child Relations

The Supreme Court first delineated a theory of parental rights and responsibilities in two cases in the 1920s, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. This doctrine changed somewhat when the court decided *Prince v. Minnesota*.

Meyer involved a Nebraska state regulation that children not be taught foreign languages before they completed the eighth grade. The opinion of the court did not

dwell on the issue of parental control, but hinted at a common understanding of parents' responsibilities in these passages (emphasis added):

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." **Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.**¹⁷

Also:

(Plaintiff's) right thus to teach and **the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.**¹⁸

And:

Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and **with the power of parents to control the education of their own.**¹⁹

Justice McReynolds further compares the parental rights of U.S. citizens to those envisioned by Plato in his *Commonwealth*:

Although such measures have been deliberately approved by men of great genius, **their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest;** and it hardly will be affirmed that any legislature could impose such

¹⁷ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

¹⁸ *Id.* at 400.

¹⁹ *Id.* at 401.

restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.²⁰

While the issue at hand was education and the attempt by the state to proscribe the learning of certain languages, the justices showed a disdain for such attempts at control by the state. Their understanding of the U.S. Constitution placed individual liberty (and by extension the liberty of parents) higher than the interests of the government in ensuring certain educational outcomes. Through the concept of a “right of control,” this judgment placed the parents of a child at the center of the decision-making process with regards to education.

The court reaffirmed and expanded on this understanding only two years later in *Pierce v. Society of Sisters*, another case involving government attempts to control education. This time, the state of Oregon sought to force children to attend *public* schools. The Society of Sisters operated a number of boarding schools in the state, and filed suit to block the law. Justice McReynolds again wrote the opinion, and again affirmed parental control over decisions related to education (emphasis added):

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that **the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control ...** The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. **The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.**²¹

This case introduced more forceful language limiting the ability of the government to generate forced compliance with its aims, while simultaneously placing

²⁰ *Id.* at 402.

²¹ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925)

great responsibility with the parent. The child is under the “control” of the parent, as the court explained. But with that control, the parent has responsibilities as the one who “nurtures” the child and “direct(s) his destiny.”²² Thus, the role of the parent is that of more than a caregiver, but a vital person in the life of the child, one who prepares the child for adulthood. This parental control was asserted *against* the right of the State to enforce its ideas of public education. Of central thematic importance for this analysis in both *Meyer* and *Pierce* is the understanding of children as very young, impressionable beings. The role of the parent is paramount in these decisions, and the State may not “unreasonably interfere” with the parent’s role.

In *Prince v. Massachusetts*, the court seemed to step back from this theory of parental guidance. *Prince* addressed a Massachusetts child labor law that prohibited children from laboring in certain places at certain times. The plaintiff argued that the law was an abridgment of her rights of religious exercise under the First Amendment, and also violated her rights as guardian of the 6-year-old girl at the center of the controversy. Relevant passages of the court’s opinion are excerpted here (emphasis added):

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.

Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.²³

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States*, 98 U.S. 145; *Davis v. Beason*, 133 U.S. 333. And neither rights of religion nor rights of parenthood are beyond limitation. **Acting to guard the general interest in**

²² *Id.* at 535.

²³ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways ... It is sufficient to show what indeed appellant hardly disputes, that **the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare**; and that this includes, to some extent, matters of conscience and religious conviction.²⁴

The state's authority over children's activities is broader than over like actions of adults.²⁵

The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations [*170] difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Massachusetts has determined that an absolute prohibition ... is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. **We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults**, as is true in the case of other freedoms, and the [***655] rightful boundary of its power has not been crossed in this case."²⁶

Justice Rutledge, in writing the opinion of the court, narrows the parental right of control in some instances. While the family unit is described as a "private realm of family life which the state cannot enter," the state also "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare..."²⁷

²⁴ Id. at 166-167.

²⁵ Id. at 168.

²⁶ Id. at 169-170.

²⁷ Id. at 167.

Significant in this decision is the use of social scientific language in justifying the state's rights superceding parental control. Rutledge expressed the state's concern over the "Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury."²⁸ Here, the parent was seen as a potential "martyr," not as the caregiver of *Meyer* and *Pierce*. The parent's relationship to the child weighed against the health and well-being of the child, which necessitated state intervention. This is indicated in the court's words: "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."²⁹ While the rights of control by the parent is altered subtly, the image of the child remains constant. Children in the context of *Prince* are still unable to make choices for themselves.

This acknowledgement of the state's rights to control minors marked a subtle change in the relationship between parental control and state control that would inform subsequent decisions in *Ginsberg* and *Pacifica*.

Analysis 2: *Ginsberg*, minors and indecent material

With *Ginsberg v. New York*, the Supreme Court tackled a state law that prohibited sales of indecent material to minors under the age of 17. The case itself does not deal directly with the parent-child relationship, but passages expand our understanding of the court's view of this relationship and the role of the state. Relevant passages are excerpted below (emphasis added):

²⁸ *Id.* at 170.

²⁹ *Id.* at 170.

First of all, **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.** "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." *Prince v. Massachusetts*, *supra*, at 166. **The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.** Indeed, subsection 1 (f) (ii) of 484-h expressly recognizes the parental role in assessing sex-related material harmful to minors according "to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." **Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.**³⁰

"While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults."³¹

To be sure, there is no lack of "studies" which purport to demonstrate that obscenity is or is not "a basic factor in impairing the ethical and moral development of . . . youth and a clear and present danger to the people of the state." But the growing consensus of commentators is that "while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either." 10 We do not demand of legislatures "scientifically certain criteria of legislation." *Noble State Bank v. Haskell*, 219 U.S. 104, 110 . We therefore cannot say that 484-h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.³²

Justice Brennan authored the court's opinion, and in the first excerpt, he began by hearkening back to *Meyer* and *Pierce*. But again, the language of control shifts

³⁰ *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)

³¹ *Id.* at 640.

³² *Id.* at 641-643.

slightly. Previously, the State interest in controlling minors was juxtaposed with the rights of parents to control their minor children. Here, the state is seen as a “helper,” which can supply “laws designed to aid discharge of that responsibility.”³³ The second excerpt illustrates why this “help” is needed. Brennan and the court recognized that “parental control or guidance cannot always be provided” and laws aimed at controlling sales of indecent materials to minors is “transcendent.”³⁴ So, on the one hand, the court reaffirms a commitment to previous doctrines of parental control over minors, while on the other hand lending new credence to the state’s welfare interests. To make matters more confusing, the court acknowledges that, although the statute prohibits sales of indecent material to children, it does not prevent parents from purchasing the material for their children.

The final excerpt from *Ginsberg* hinted that the court was aware of the social scientific debate over the harmful effects of indecent materials to minors. The court agreed with the government’s ability to limit access to indecent material while acknowledging that the ill effects of such materials were not well documented in social scientific research.

To this point, cases addressing the parent-child relationship did not involve technology. While printed matter may be considered “technology” in one sense, it is also qualitatively different from more modern technologies such as broadcasting, telephony and the Internet. The court would address those issues soon enough.

³³ Id. at 639.

³⁴ Id. at 640.

Analysis 3: Technology, indecency, parent and child

With its decision in *FCC v. Pacifica*, the Supreme Court signaled a recognition of the technological changes in media and how these relate to the parent-child-state relationship. *Pacifica* developed a “medium-specific” standard for limiting speech rights in the broadcast medium that had been earlier applied in *Red Lion*. *Red Lion* limited First Amendment protections for broadcast medium, but did not address the parent-child relationship directly. *Pacifica* dealt specifically with minor access to indecent material. Based upon a parental complaint, the FCC issued a citation against *Pacifica* for airing a profanity-laced monologue by comedian George Carlin. Significant portions of the decision deal with the parent-child-state relationship and technology. Relevant excerpts follow (emphasis added):

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629 , 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. [438 U.S. 726, 750] *Id.*, at 640 and 639. **28 The case with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.**³⁵

Justice Stevens, concurring:

The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. **The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F. C. C. 2d,**

³⁵ *FCC v. Pacifica*, 438 U.S. 726, 749-750 (1978).

at 98. In my view, this consideration provides strong support for the Commission's holding.

The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975); see also, e. g., *Miller v. California*, 413 U.S. 15, 36 n. 17 (1973); *Ginsberg v. New York*, 390 U.S. 629, 636 -641 (1968); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (opinion of BRENNAN, J.). **This recognition stems in large part from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg v. New York*, supra, at 649-650 (STEWART, J., concurring in result). Thus, children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling [438 U.S. 726, 758] through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat.**³⁶

In most instances, the dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access. See *id.*, at 634-635. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. **During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching [438 U.S. 726, 759] children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes.**³⁷

From Justice Brennan's dissent, one excerpt is worth further examination:

--In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL, ante, at 757-758, and my Brother STEVENS, ante, at 749-750, both stress the time-honored right of a parent to raise his child as he sees fit - a right this Court has consistently been vigilant to protect. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Yet this

³⁶ *Id.* at 757-758.

³⁷ *Id.* at 758-759.

principle supports a [438 U.S. 726, 770] result directly contrary to that reached by the Court. Yoder and Pierce hold that parents, not the government, have the right to make certain decisions regarding the upbringing of their children. **As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.**³⁸

Two things are of note in these excerpts. First, the government interest in controlling and limiting speech is strengthened by the nature of the technology involved. The court placed this squarely within the relationship of broadcasting to the child. Second, the court seemed to be informed by new parent-child relationships that were forming in society. Here was the first mention of “unsupervised” children who would be at home early in the afternoon.³⁹ And while the opinion expands the limits of speech in the broadcast medium, the court’s view of the state’s actions were seen through the state’s preferred reading: that of a “helper” to parents who are not available at all times to supervise their children.

Brennan’s dissent is noteworthy because it hinted at the tension in the court’s view of parent-child relationships and the government’s role in “aiding” those relationships. Rather than aiding parents in shielding their children from such indecent material, Brennan argued that the government was unnecessarily intruding on the parent’s right of control, hearkening back to the court’s ruling in *Pierce*.

While it is not obvious from the text, one assumes from the passive position of the child in *receiving* the message of broadcast media, that the court was operating with

³⁸ Id. at 769-770.

³⁹ Id. at 757.

an image of the minor consistent with *Meyer* and *Pierce*, an impressionable pre-teen operating under the parent's control.

Brennan's concerns would seem to have been assuaged in later years as new technology issues came before the court: telephony and cable television.

Analysis 4: Dial-A-Porn and Cable Porn

With two cases, the court signaled a significant shift in its "medium-specific" standards of scrutiny relating to free speech issues: *Sable v. FCC* and *Denver Area v. FCC*. *Reno v. ACLU* offered a further confusion of that standard, but will be addressed separately later in this examination.

In *Sable*, the court dealt for the first time with "dial-a-porn," a medium that was not as invasive as broadcasting. The government sought to ban dial-a-porn because of its potential harm to minors. And so the court struck down a government prohibition on the practice. Part of the opinion centered again on the state's interest in shielding minors from harmful material. In these excerpts, one can glimpse a new facet in the state's view of parent-child relationships.

Relevant excerpts follow (emphasis added):

The *Pacifica* opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." *Id.*, at 748-749. The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*.⁴⁰

The federal parties now insist that the rules would not be effective enough - **that enterprising youngsters could and would evade the rules and gain access to communications from which they should be shielded**. There is no evidence in the record before us to that effect, nor could there be since [492 U.S. 115, 129] the FCC's implementation of 223(b) prior to its 1988

⁴⁰ *Sable v. FCC*, 492 U.S. 115, 127 (1989).

amendment has never been tested over time. In this respect, the federal parties assert that in amending 223(b) in 1988, Congress expressed its view that there was not a sufficiently effective way to protect minors short of the total ban that it enacted. The federal parties claim that we must give deference to that judgment.⁴¹

For all we know from this record, **the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages.** 10 If this is the case, it seems to us that 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages. Under our precedents, 223(b), in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of "burn[ing] the house to roast the pig." *Butler v. Michigan*, 352 U.S., at 383 .⁴²

Here it is enough to note that the court distinguishes the telephone medium from broadcasting because it is not "invasive." And, the state advanced a view of minors that verged on the delinquent. Minors were not to be shielded because they might unwittingly dial the wrong number, but because they "could and *would* evade the rules and gain access to communications from which they should be shielded."⁴³ (emphasis added) In *Sable*, the government continued to assert its role as "helper" to parents who would not be able to monitor their minor children, but the court rejects the assertion.

Denver Area v. FCC allowed the court to revisit the "medium-specific" tailoring of *Red Lion* and *Pacifica* through the onset of cable television. The Cable Television Consumer Protection and Competition Act of 1992 sought to regulate sex-related

⁴¹ Id. at 128-129.

⁴² Id. at 130-131.

⁴³ Id. at 128.

content on cable television, specifically leased-access cable channels.⁴⁴ The court struck down two of the three provisions under review as unconstitutional.⁴⁵

Relevant excerpts are below (emphasis added):

Cable television broadcasting, including access channel broadcasting, is as "accessible to children" as over-the-air broadcasting, if not more so. See Heeter, Greenberg, Baldwin, Paugh, Srigley, & Atkin, Parental Influences on Viewing Style, in *Cableviewing* 140 (C. Heeter & B. Greenberg eds. 1988) (**children spend more time watching television and view more channels than do their parents, whether their household subscribes to cable or receives television over the air**). Cable television systems, including access channels, "have established a uniquely pervasive presence in the lives of all Americans." *Pacifica*, supra, at 748. See Jost, The Future of Television, 4 *The CQ Researcher* 1131, 1146 (Dec. 23, 1994) (63% of American homes subscribe to cable); Greenberg, Heeter, D'Alessio, & Sipes, Cable and Noncable Viewing Style Comparisons, in *Cableviewing*, at 207 (cable households spend more of their day, on average, watching television, and will watch more channels, than households without cable service). "Patently offensive" material from these stations can "confron[t] the citizen" in the "privacy of the home," *Pacifica*, supra, at 748, with little or no prior warning. *Cableviewing*, at 217-218 (while cable subscribers tend to use guides more than do broadcast viewers, there was no difference among these groups in the amount of viewing that was planned, and, in fact, cable subscribers tended to sample more channels before settling on a program, thereby making them more, not less, susceptible to random exposure to unwanted materials).⁴⁶

This device-the "lockbox"-would help protect children by permitting their parents to "lock out" those programs or channels that they did not want their children to see. See FCC 85-179, Para(s) 132, 50 Fed. Reg. 18637, 18655 (1985) ("[T]he provision for lockboxes largely disposes of issues involving the Commission's standard for indecency"). **The FCC, in upholding the "segregate and block" provisions said that lockboxes protected children (including, say, children with inattentive parents) less effectively than those provisions.** See First Report and Order Para(s) 14-15, 8 FCC Rcd, at 1000. But it is important to understand why that is so.

The Government sets forth the reasons as follows:

⁴⁴ *Denver Area v. FCC*, 518 U.S. 727, 732 (1996).

⁴⁵ *Id.* at 733.

⁴⁶ *Id.* at 744-745.

"In the case of lockboxes, parents would have to discover that such devices exist; find out that their cable operators offer them for sale; spend the time and money to buy one; learn how to program the lockbox to block undesired programs; and, finally, exercise sufficient vigilance to ensure that they have, indeed, locked out whatever indecent programming they do not wish their children to view." Brief for Federal Respondents.⁴⁷

No provision, we concede, short of an absolute ban, can offer certain protection against assault by a determined child. We have not, however, generally allowed this fact alone to justify ""reduc[ing] the adult population . . . to . . . only what is fit for children." (internal citations omitted)⁴⁸

Denver Area is notable again for the use of social scientific data to provide the court with a context for its decision. The first excerpt provides a lengthy explanation of the cable television phenomenon, including the fact that "children spend more time watching television and view more channels than do their parents, whether their household subscribes to cable or receives television over the air."⁴⁹ Adding to the theme of unsupervised children found in *Pacifica* is the theme that children are more attuned to television as a medium. This did not, however, influence the court's decision in the case, as the court seemed to feel that a less restrictive, more narrowly tailored solution: lock-boxes, would serve the need for preventing minor access.

Denver Area again highlighted the government's view of parent-child relationships as somewhat deficient. The government brief suggested that parents would be either too "inattentive" or overwhelmed by the steps to get a "lock-box" to adequately shield their children from offensive material.⁵⁰

⁴⁷ Id. at 758-759.

⁴⁸ Id. at 759.

⁴⁹ Id. at 744-745.

⁵⁰ Id. at 759.

In one final case, the court revisited cable television: *U.S. v. Playboy*. In this case, the government sought to restrict sexually explicit programming to certain time periods because of “signal bleed” from cable providers. The decision in the case was similar to the decision in *Denver Area*: the regulation was ruled unconstitutional. But the comments regarding parent-child relationships and technology again expand our thematic understanding.

Relevant excerpts follow (emphasis added):

Here, of course, we consider images transmitted to some homes where they are not wanted and where parents often are not present to give immediate guidance.

What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. **Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.**⁵¹

In addition, market-based solutions such as programmable televisions, VCR's, and mapping systems (which display a blue screen when tuned to a scrambled signal) may eliminate signal bleed at the consumer end of the cable. 30 F. Supp. 2d, at 708. Playboy made the point at trial that the Government's estimate failed to account for these factors. *Id.*, at 708-709. **Without some sort of field survey, it is impossible to know how widespread the problem in fact is, and the only indicator in the record is a handful of complaints.** Cf. *Turner Broadcasting System, Inc. v. FCC*, 520 U. S. 180, 187 (1997) (reviewing “a record of tens of thousands of pages’ of evidence” developed through “three years of pre-enactment hearings, ... as well as additional expert submissions, sworn declarations and testimony, and industry documents” in support of complex must-carry provisions). If the number of children transfixed by even flickering pornographic television images in fact reached into the millions we, like the District Court, would have expected to be directed to more than a handful of complaints.⁵²

It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be

⁵¹ *U.S. v. Playboy*, 529 U.S. 803, 818 (2000).

⁵² *Id.* at 821-822.

ineffective; and **a court should not presume parents, given full information, will fail to act.** If unresponsive operators are a concern, moreover, a notice statute could give cable operators ample incentive, through fines or other penalties for noncompliance, to respond to blocking requests in prompt and efficient fashion.⁵³

Having adduced no evidence in the District Court showing that an adequately advertised §504 would not be effective to aid desirous parents in keeping signal bleed out of their own households, the Government can now cite nothing in the record to support the point. **The Government instead takes quite a different approach. After only an offhand suggestion that the success of a well-communicated §504 is "highly unlikely," the Government sets the point aside, arguing instead that society's independent interests will be unserved if parents fail to act on that information.** Brief for United States et al. 32-33 ("[U]nder ... an enhanced version of Section 504, parents who had strong feelings about the matter could see to it that their children did not view signal bleed--at least in their own homes"); *id.*, at 33 ("**Even an enhanced version of Section 504 would succeed in blocking signal bleed only if, and after, parents affirmatively decided to avail themselves of the means offered them to do so. There would certainly be parents--perhaps a large number of parents--who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, even if fully informed of the problem and even if offered a relatively easy solution**"); Reply Brief for United States et al. 12 ([Society's] interest would of course be served in instances ... in which parents request blocking under an enhanced Section 504. But in cases in which parents fail to make use of an enhanced Section 504 procedure out of distraction, inertia, or indifference, Section 505 would be the only means to protect society's independent interest").⁵⁴

Even upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech. **The Government's argument stems from the idea that parents do not know their children are viewing the material on a scale or frequency to cause concern, or if so, that parents do not want to take affirmative steps to block it and their decisions are to be superseded.** The assumptions have not been established; and in any event the assumptions apply only in a regime where the option of blocking has not been explained. The whole point of a publicized §504 would be to advise parents that indecent material may be shown and to afford them an opportunity to block it at all times, even when they are not at home and even after 10 p.m. Time channeling does not offer this assistance. The regulatory alternative of a publicized §504, which has the real possibility of promoting more open

⁵³ *Id.* at 824.

⁵⁴ *Id.* at 824-825.

disclosure and the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The Government has not shown that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention.⁵⁵

Again, the themes that show up are technology, the government view of parental action and the court's view in contrast.

In *Playboy*, the government made plain that it believed its interests in shielding children from offensive material trumped the parental right of control. Justice Kennedy quotes from the government's brief thusly: "There would certainly be parents – perhaps a large number of parents – who out of inertia, indifference, or distraction, simply would take no action to block signal bleed, even if fully informed of the problem and even if offered a relatively easy solution."⁵⁶ It is instructive to our examination that the court did not concur with the government in this view, mainly because of a lack of evidence for such pessimism regarding the parental role. Rather, the court suggested that a properly promoted statute would provide parents with the opportunity to apply "active supervision," a term that resonated with the court's decision 80 years earlier in *Pierce*.⁵⁷ While the decision did not highlight much about the court's view of children, it did shed light on one quirk of the government's interest in children. By banishing sexually explicit programming to late night hours, the government relinquishes control over viewing habits of children who are up past 10 p.m. Eastern Time, which would be mostly teenagers. The court seemed to view "minors" in this case as young children, but that view had a different effect than likely anticipated by the government. Whereas

⁵⁵ Id. at 825-826.

⁵⁶ Id. at 825.

⁵⁷ Id. at 826.

the government made the case that “minors” should be protected, the court seemed to assume that access by young children to indecent signal bleed was not a widespread problem, perhaps assuming that young children would not be interested or capable of discerning the signal bleed from sexually explicit programs.

Relating to the theme of technology, Justice Kennedy addressed it directly with these words: “Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.”⁵⁸ Now, this was a decided shift from *Pacifica*, where the government stood between technology and an unwitting populace of children.

Justice Breyer’s dissent is informative in this excerpt:

This legislative objective is perfectly legitimate. Where over 28 million school age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week, and where children may spend afternoons and evenings watching television outside of the home with friends, §505 offers independent protection for a large number of families. See U. S. Dept. of Education, Office of Research and Improvement, *Bringing Education into the After-School Hours* 3 (summer 1999).⁵⁹

The highlighted portion reinforces the court’s awareness of cultural changes that affected the parent-child relationship, in this case the growing number of “latch-key” kids who are at home in the afternoon without adult supervision. Notably, this awareness did not persuade the majority to Justice Breyer’s view.

Analysis 5: The Internet

With *Reno v. ACLU*, the court first addressed the Internet, the newest “medium” for disseminating information. Again, the issue at hand was offensive material and minor access. Relevant excerpts are listed below (emphasis added):

⁵⁸ *Id.* at 818.

⁵⁹ *Id.* at 842.

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."** n17

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images." n18 **Nevertheless, the evidence indicates 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 available."**⁶⁰

For the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all "indecent" and "patently offensive" messages communicated to a 17-year old--no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. **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. See 47 U.S.C. A. § 223(a)(2) (Supp. 1997). 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.**⁶¹

Again, the issue of technology is addressed through "affirmative action" to access materials as in *Sable, Denver Area* and *Playboy*. The third excerpt shows some level of sophistication in the understanding of the parent-child relationship. Here it is clear that the court viewed "minors" as older children or teenagers, who would have the technological know-how to operate on the Internet. This is evident in the two examples

⁶⁰ *Reno*, supra at 854-855.

⁶¹ *Id.* at 879.

cited by the court of problematic enforcement scenarios. In *Reno*, then, the court's decision is definitely based not only on the medium, but the technological skills required to access information, an expansion of the reasoning specifically found in *Sable*.

Interpretation of Results (& Limitations)

Given the limited technological savvy of the Supreme Court when it dealt with the CDA, this researcher hypothesized that the research would show that the Supreme Court has a relatively low view of parental technological abilities, as well as a limited ability of parents to control their children's access to indecent materials. The analysis at hand does not confirm those hypotheses. The Supreme Court has shown some amount of technological savvy in adjudicating issues addressing the parent-child relationship. Rather, the court has served to fend off repeated attempts by the state to take over the parental role in judging material for minor children. Beginning with *Pacifica*, the court showed more of an awareness of social scientific data, although there was a developing "language of social science" evident in *Prince*.

The Supreme Court appeared to take a very positive view of parent-child interactions beginning with *Meyer*. That view changed somewhat in *Prince*, but was reaffirmed beginning with *Ginsberg*. Notably, government sources seemed to have always held a lesser view of the parent-child relationship. This government view has grown more pessimistic in recent years. This would be a possible area for further study.

Beginning with *Ginsberg*, the court showed some adjustment of its understanding of parent-child relationships. In *Ginsberg*, the court accepted the premise that government regulation could be a "helper" to aid parents in raising their minor children. Earlier cases held parental rights of control and government goals in conflict. This change in understanding could be said to be affected by the technology of printed

material that was accessible when a minor was outside the view of the parent. In *Pacifica*, the court expanded this understanding of government as parent aide based on the pervasive nature of the broadcast signal. Children must be protected from the potential harmful speech carried on broadcast stations, and the government was in a unique position to do so. This shift did not last, however, as again technology forced the court to retreat from the limiting “medium-specific” standards of broadcasting when it dealt with telephony, cable television and, finally, the Internet.

As technology has forced the court to alter its standards of constitutional review, so too has the court altered its understanding of the term “minors.” At times, the court seemed to address issues related to “minors” as related to small children, less than 10 years old – notably *Meyer*, *Pierce*, and *Pacifica*. As technology changed to require more affirmative action to access, the court’s view of “minors” seemed to shift to older children, perhaps teenagers. In these cases, the “minor” is viewed as one who attempts to circumvent efforts at prohibiting access to indecent materials – notably *Sable and Playboy*. The court was not willing to grant the government’s desires to control access through regulation for these particular minors.

Finally, the court showed remarkable consistence in a belief in the parental right of control, despite variation in views on governmental involvement in *Pacifica*. While the government often held a low view of parental responsibility (notably in *Denver Area* and *Playboy*), the court disputed that cynicism without some basis in social scientific research. Instead, the court seemed to assert a belief that parents would take “active supervision” of their children if they were given the chance.

Recommendations

This research suggests that legislators will have a difficult time regulating modern technology to restrict minor access to indecent materials. The nature of such

technology – interactive, affirmative access – negates the one argument that the government has been able to use successfully to regulate content: the pervasive nature of the broadcast medium. Given the track record, there is little hope of the government being able to regulate access in this manner. Rather, the government should focus efforts on enabling parents to practice the “active supervision” requested in *Denver Area*. Efforts at regulation to mandate positive steps of parental control might have a better chance of passing constitutional muster. However, this will require a significant paradigm shift in the government’s understanding of parent-child relationships. In every case examined in this analysis, the government insisted on a negative view of the parent-child relationship. In some cases, the child was seeking out improper viewing materials. In others, the parent was inattentive or lazy. In the earliest cases, the parent was desiring things that conflicted with government interests (foreign language instruction and religious education and evangelism). To facilitate “active supervision,” the government will need to move away from a primarily negative view of parents and minor children to a more positive view.

The confines of this analysis necessarily leave off many areas of further study within these cases. For instance, little of this analysis has focused on latent meanings: things that are taken for granted in the court’s opinions. Rather, this paper has focused on manifest meaning. Certainly, there is ample room for additional analysis to unearth latent meanings that guide the court’s interpretations. One further area of study is related to the recommendation above. A case study and textual analysis could be undertaken to examine government arguments in each of these cases to discover manifest and latent understandings of parents and children *held by the state*.