Smut in Cyberspace - The United States Supreme Court Strikes Down the Virtual Child Pornography Statute

"I shall not today attempt further to define the kinds of material I understand to be embraced . . . But I know it when I see it . . . " Justice Potter Stewart, concurring in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)

As the judge remarked the day that he acquitted my Aunt Hortense,
"To be smut
It must be ut-
Terly without redeeming social importance." Songwriter Tom Lehrer, "Smut" (1965)

The United States Supreme Court has once again embraced the issue of smut - or not - and free speech, this time in the virtual world. On April 16, 2002, the Court struck down the Child Pornography Prevention Act of 1996 (CPPA) as unconstitutional under the First Amendment. Ashcroft v. Free Speech Coalition, __ U.S. __ (Case No. 00-795)

The CPPA was enacted in 1996 to expand federal prohibitions on child pornography to include not only pornographic images made using actual children, but also to visual depictions, including photographs, film, videos, pictures, and computer and computer-generated images that are, or appear to be, of minors engaging in sexually explicit conduct. The statute attempted to ban, in certain circumstances, the advertising, promotion, possession, and distribution of such images, which may be created by using adults who look like minors or by using computer imaging.

Thus, the law banned a range of sexually explicit images, sometimes called virtual child pornography, that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist.

The plaintiffs were an adult-entertainment trade association and others who were concerned that the CPPA threatened their activities. They filed suit in San Francisco claiming that the law was overbroad and vague, chilling production of works protected by the First Amendment.

In the case,, Justice Anthony Kennedy wrote for the Court's 6-3 majority that the CPPA violates the free speech provisions of the First Amendment. Kennedy said that the law "prohibits speech that records no crime and creates no victims by its production" and thus

was unconstitutionally overbroad in its reach. The justice said that the statute prohibits speech having serious redeeming value, the visual depiction of an idea - that of teenagers engaging in sexual activity - that is a fact of modern society and has been a theme in art and literature for centuries. Thus, the law is so far-reaching that it has the potential to chill expression with clear artistic and literary merit. Under the law, modern productions of Shakespeare's "Romeo and Juliet" could theoretically be attacked, since Juliet is only 13 years old, along with such Academy Award-winning films as `"Traffic" and "American Beauty," which depict teenagers in explicit sexual situations.

According to Kennedy, by prohibiting child pornography that does not depict an actual child, the statute goes beyond New York v. Ferber, 458 U.S. 747 (1982), which distinguished child pornography from other sexually explicit speech because of the state's interest in protecting children exploited by the production process. As a general rule, pornography can be banned only if it is obscene, but under Ferber, pornography showing minors can be prohibited whether or not the images are obscene under the definition set forth in Miller v. California, 413 U.S. 15 (1973).

The Free Speech Coalition case is the latest in a long line of obscenity and pornography cases decided by the Supreme Court, the most recent of which have involved the attempted regulation of smut in the virtual world. In 1957, in Roth v. United States, Justice Brennan held that the First Amendment does not protect obscene materials, as it does many other forms of speech. He defined obscenity as speech which " . . . to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest" and which is "utterly without redeeming social importance". 354 U.S. 476, 477, 489. (see Tom Lehrer's comment, above).

In 1973, in Miller, Justice Burger formulated the current definition of obscenity, namely whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value." 413 U.S. 15, 24-25. In 1982, in Ferber, the Court held that states are entitled to greater leeway in the regulation of pornographic depictions of children because the state's interest in safeguarding the physical and psychological well-being of a minor is "compelling" and the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children. 458 U.S. 747, 757-766.

Moving on to the virtual world, in 1997, the Court overturned the Communications Decency Act (CDA), the government's first effort to shield children from access to pornography on the Internet. ACLU v. Reno, 521 U.S. 844. Congress then passed a narrower version of the law, the Child Online Protection Act (COPA), which is now before the Supreme Court in a case that was argued in November 2001, Ashcroft v. ACLU, Case No. 00-1293.

In the Free Speech Coalition case, Justice Kennedy's opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer. Justice Clarence Thomas - of Anita Hill and Long Dong Silver and pubic hair in the Coke - or not - fame, concurred separately, suggesting that a more narrowly drawn law might pass constitutional muster. Justice O'Connor concurred in part and dissented in part, and Justices Rehnquist and Scalia dissented.

When correctly viewed,
Everything is lewd.
(I could tell you things about Peter Pan,
And the Wizard of Oz, there's a dirty old man!) - Tom Lehrer, Smut

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