The U.S. Supreme Court's First Amendment refusal to protect children regarding sexually explicit speech on the Internet

*Mark S. Kende**

1. Intoduction

21 years ago, the U.S. Supreme Court in *Reno v. American Civil Liberties Union* (ACLU)[1] ruled that the Communication Decency Act (CDA) violated the First Amendment. The law prohibited the transmission to minors over the Internet, or the display of material available to minors, that was sexually indecent. The Court used strict scrutiny, and found that the law was impermissibly content discriminatory, as well as overbroad and vague. Adults would be precluded from seeing huge amounts of protected speech. This was the Court's first Internet free speech case. What was striking about the majority opinion was the Court's admiration for this new technology. Traditionally, the Court treated new technologies skeptically in terms of First Amendment protection.

After a hiatus of cases in this area, the Court in *Packingham v. North Carolina*,[2] last term, struck down a state law that prohibited registered sex offenders from using commercial Internet services and related social media sites to interact with minors. Like the CDA, this law was poorly drafted so the First Amendment result was no surprise. But, unlike *Reno,* the majority employed intermediate scrutiny. The Court reasoned it did not want to impose a rigid standard, given the technology's evolving nature. Like *Reno*, however, this majority contained language celebrating the Internet as a new "revolutionary" public forum, which might mean that certain restrictions should receive strict scrutiny.

---

* James Madison Chair Professor of Constitutional Law, Director of the Drake Constitutional Law Center. Thank you to University of Wuerzburg Faculty of Law Professor Dr. Dr. Eric Hilgendorf for the opportunity to present on this topic at the University's May 2017 conference on "Digitization and the Law." And thanks to Jochen Feldle.

1 521 U.S. 844 (1997).

2 582 U.S. __ (2017).

This article addresses two issues. First, what level of scrutiny should the Court use when examining Internet free speech cases? Second, has the Court been correct to strike down most Internet speech restrictions, even though they are designed to protect children? To put it differently, has the Court adequately accounted for and balanced the interests of children in not being exposed to certain material as part of its First Amendment analysis.

Part 2 of the paper will demonstrate that the Court has generally questioned the First Amendment value of new technologies. It will also illustrate the Internet's special protection. Part 3 will examine the *Reno* case. Part 4 will examine why the Court incorrectly struck down a far better drafted law, the Child On-Line Protection Act (COPA), aimed at protecting children in *Ashcroft v. ACLU* II.[3] COPA was even closely modeled after the Supreme Court's accepted obscenity definition. Part 5 will show how the Court was also wrong in striking down a law that banned "virtual" indecent material from the Internet. Part 6 will then briefly discuss how the Internet has changed in the last 20 plus years, it will describe an Internet threats case, and it will analyze *Packingham*, which reached the right result, but still paid homage to the Internet. The conclusion will argue that the Internet does not deserve such status, despite its benefits. That's because it has many dangerous components that the Court has not appreciated, as shown by the concurring opinions in the North Carolina case. There is now even a "Dark Net"[4] that did not seem to exist at the time of *Reno.*

2. Background

Historically, the Supreme Court treated new technologies as not producing free speech. For example, in 1899, the Court decided *City of Richmond v. Southern Bell & Telegraph Co.*,[5] and ruled that a telephone company lacked the power to piggy back on the speech rights of telegraph operators

3 542 U.S. 656 (2004).

4 Brad Chacos, *Meet Darknet, the hidden anonymous underbelly of the searchable Web,* PC WORLD, Aug. 12, 2013, http://www.pcworld.com/article/2046227/meet-darknet-the-hidden-anonymous-underbelly-of-the-searchable-web.html As the Chacos article shows, it is sometimes called the "deep Web.".

5 174 U.S. 761 (1899).

because "[t]he science of telephony, as now understood, was little known as to practical utility in 1866…"

In *Mutual Film Corp. v. Industrial Commission of Ohio*,[6] from 1915, the Court ruled that films were not protected by the First Amendment because, "They are mere representations of events, of ideas, and sentiments published and known, vivid, useful, and entertaining, no doubt, but as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition." The Court did not officially grant First Amendment protection to films until 1952 in *Joseph Burstyn, Inc. v. Wilson*.[7] The Court's traditionalism is still evident by its refusal to televise its own proceedings live, no matter how important the case.

By contrast, the Digital Millennium Copyright Act of 1998 (DMCA) contains provisions that protect U.S. Internet servers and intermediaries from being liable for what people post in many circumstances, as does another statute.[8] Germany has also had a law providing limited Internet server immunity, but the German legal system apparently still allows greater protection of children from the Internet.[9]

3. Reno v. ACLU

The Court's reaction to the early Internet in 1997 was enthusiastic. Justice Stevens authored the majority in *Reno v. ACLU*[10] and touted how "anyone with access to the Internet may take advantage of a wide variety of communication and information methods." After discussing sexually explicit email, chat rooms, the Web, etc. he wrote that "[t]aken together, these tools constitute a unique medium – known to its users as "cyberspace" – located in no particular geographical location but available to anyone, anywhere in the world."[11] His enthusiasm for the technology was so high that

6 236 U.S. 230 (1915).
7 343 U.S. 495 (1952).
8 17 U.S.C. Secs. 512. There is also an immunity provision in the Communication Decency Act. 47 U.S.C. Sec. 230 (c)(1).
9 Sec. 5, par. 2, German Teleservices Act (server immunity privilege). The Basic Law's Freedom of Expression provision expressly discusses the interests of children unlike its U.S. counterpart. Basic Law Article 5 (2) (the Basic Law is known as the Grundgesetz in German).
10 521 U.S. 844 (1997).
11 521 U.S. at 851.

he did not acknowledge that he had written judicial decisions over the years deriding sexually indecent speech as low value in non-Internet cases.[12]

Reno involved the constitutionality of the Communications Decency Act (CDA)[13] which prohibited the sending or display of sexually indecent, but not obscene, material on the Internet in a manner accessible to children. Indecency was defined as, material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." The CDA actually passed as a U.S. Senate floor amendment without committee hearings, after the conservative Senator Exon from Nebraska suddenly learned about the offensive material on the Internet.[14] There were some affirmative defenses, if a Web site used age or credit card verification to keep out children. And the CDA could not reach foreign-based indecent material.

U.S. constitutional law already treated obscenity as unprotected speech, along with fighting words, incitement, true threats, child pornography, and defamation. The U.S. Supreme Court has adopted tests for regulating each of these types of expression – creating the impression that the Court has a categorical approach.[15] A major issue in *Reno* was what level of scrutiny, or not of categorical approach should be applied to the Internet.

But the CDA actually created a conflict between the protection of children and the free speech rights of adults. Justice Stevens concluded that the law violated *Butler v. Michigan*,[16] a precedent which said that adults

---

12 Young v. American Mini Theatres, Inc, 427 U.S. 50, 70-71 (1976) (he writes there that few of us would send our sons and daughters off to war to defend "unspecified sexual activities").

13 47 U.S.C. Sec. 223 et. seq.

14 Robert Cannon, *The Legislative History of Senator Exon's Communication Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMMUNICATIONS L.J. 51 (1996), http://www.cybertelecom.org/cda/cannon2.html.

15 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 1036-1037 (5TH Ed. 2015).

16 352 U.S. 380 (1957) (A Michigan man was unconstitutionally found guilty of violating a law which prohibited the production, possession, or distribution of any literature, image, or recording "containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." Since some of this material was legal for adults to read, the Court wrote that upholding the law to protect children would be "to burn the house, to roast the pig.").

could not be forced to watch only material suitable for children. The plasticity of the technology made it fundamentally impossible to "zone off" parts of the Internet from children, so indecent sites would likely have to close otherwise. Adult free speech won.

Stevens also ranked technologies. The broadcast medium was the worst because it permeated everything. A child could turn on the wrong radio station in the car, and immediately hear George Carlin's famous indecent comedy monologue on the seven dirty "words you couldn't say on the public…airwaves."[17] But, Stevens said a child could not accidentally be exposed to indecent Internet sites due to the site warnings and age verification mechanisms. Stevens also criticized the CDA's severe criminal penalties, as well as its chilling effect, vagueness and overbreadth problems. Educational sites, e.g. for AIDS, could be banned.

In sum, the Court found that the CDA was content discriminatory and deserving of strict scrutiny, which it could not pass as it lacked narrow tailoring. Stevens analogized to an earlier technology case, *Sable Communications Inc. v. FCC*,[18] where the Court struck down a ban on 1-800 phone sex lines because the calls required affirmative acts by the viewer, and credit cards, meaning that children were already safe. The Court even treated the Internet with the same deference, or more, than newspapers.

Despite the right result, Stevens essentially ignored the Internet's dangers. I was one of the first scholars who discussed these dangers in a *Constitutional Commentary* article at the time.[19] Prosecutors in many countries have successfully convicted adults for using digital technology as a method of creating child pornography, as a way to meet children for illegal purposes, and sometimes for injuring or killing the children. This problem is worsened by the Internet's interactivity and anonymity. U.S. Depart-

---

17 Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) (Court upholds mild penalty against radio station and suggests that the station broadcast such material at night or when children will likely not be available).

18 492 U.S. 199 (1989).

19 Mark S. Kende, *The Supreme Court's Approach to the First Amendment in Cyberspace: Free Speech as Technology's Handmaiden*, 14 CONSTITUTIONAL COMMENTARY 465 (1997). Most commentators approved the decision for keeping the Internet relatively unrestricted, without paying much attention to the Internet's uniquely dangerous qualities. See e.g. Scott Shail, Note, *Reno v. ACLU: The First Congressional Attempt to Regulate Pornography on the Internet Fails First Amendment Scrutiny*, 28 UNIV. OF BALTIMORE L. REV. 272 (1998), http://scholarworks.law.ubalt.edu/ublr/vol28/iss1/6.

ment of Justice Statistics reveal that 13% of youth online users received unwanted sexual solicitations, sometimes with promises of money or other favors. The DOJ also reports that "of respondents to a survey of juvenile victims of Internet-initiated sex crimes, the majority met the predator willingly face-to-face and 93% of those encounters had included sexual contact."[20] Murders have even occurred that started with on-line contacts.[21] And there is an infamous German case where the Internet was used by a "middle class" cannibal to recruit a willing victim.[22]

Further the assumption that adults accessing indecent material does not impact children is wrong.[23] It "normalizes" the material for one thing. And postings can destroy people's reputations, or cause violence or bullying. Then there's the apparently growing problem of revenge porn.[24] It's true that parents could place filters on their children's computers. Yet any determined teenager would likely have friends with unfiltered computers, or smart phones. Moreover, tech savvy teenagers could probably dismantle filters, and other kids could steal their parent's credit card numbers. Also the sexually explicit material on the Internet can be more graphic than broadcast or cable television, and the teaser age warnings would probably make teenagers only more eager to enter this forbidden cyberspace.

---

20 U.S. Department of Justice, NSOPW, RAISING AWARENESS ABOUT SEXUAL ABUSE, FACTS AND STATISTICS, https://www.nsopw.gov/en-us/Education/FactsStatistics?AspxAutoDetectCookieSupport=1 See e.g. NBCNEWS.com, *Massive on-line pedophile ring busted by cops*, http://www.nbcnews.com/id/42108748/ns/us_news-crime_and_courts/t/massive-online-pedophile-ring-busted-cops/#.WZ3lgPL0fR8 (ring had up to 70,000 multi-national members and hundreds of children were saved).

21 *Internet killer admits murdering women he met in on-line chat rooms,* LONDON TELEGRAPH, Jan. 15, 2009. The killer was apparently German. For a list of this and other on-line related acts of violence, one can examine the entry "Internet Homicide" on Wikipedia.

22 Kate Connolly, *Cannibal filmed himself killing and eating his 'willing victim,'* THE TELEGRAPH, Aug. 14, 2003, http://www.telegraph.co.uk/news/worldnews/europe/germany/1448497/Cannibal-filmed-himself-killing-and-eating-his-willing-victim.html.

23 These problems still exist of course, despite efforts by groups to caution people. Sandy Cohen, *Adults' bad online behavior impacts teens and children,* DES MOINES REGISTER, E1, July 17, 2017.

24 CYBER CIVIL RIGHTS INITIATIVE, https://www.cybercivilrights.org/ (addresses revenge porn problem and shows legislation enacted). Danielle Citron and Mary Franks are two of the leaders on this issue in the U.S.

Other nations and courts have recognized the Internet's dangers. For example, in *Editorial Board of Pravoye Delo and Shtekel v. Ukraina*,[25] the European Court of Human Rights in 2011 wrote that:

> The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.

According to a scholarly summary, this ECHR case decided that the Internet meant that "a new balance between freedom of expression and other human rights must be sought. In a nutshell, given that the Internet is bringing along unprecedented legal issues, restrictions to freedom of expression should be more broadly accepted."[26] This is certainly true regarding children.

4. Ashcroft v. ACLU II[27]

Congress then passed the Child On-Line Protection Act (COPA) which corrected the CDA's vague indecency criteria by adopting and modifying the Supreme Court's three part test for obscenity laws in *Miller v. California*.[28] Thus, COPA prohibited the knowing posting, for "commercial" purposes, of material harmful to minors e.g material 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 contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

---

25 App no 33014/05 (ECHR May 5, 2011).
26 Oreste Pollicin and Marco Bassini, *Free speech, defamation, and limits to freedom of expression in the EU: a comparative analysis,* RESEARCH HANDBOOK ON EU INTERNET LAW, Ch. 21.
27 542 U.S. 656 (2004).
28 413 U.S. 15 (1973).

c) taken as a whole lacks serious literary, artistic, political or scientific value for minors.

The requirement that the material serve commercial purposes avoided closing down many educational sites.

COPA defined a minor as under 17, and retained affirmative defenses so the sites would not be put out of business given adult speech rights. What is odd is that Justice Kennedy authored the majority opinion striking down the law, and said he was using strict scrutiny, while Justice Breyer dissented and also claimed to be using strict scrutiny. This is an example of how free speech issues on the Internet have made First Amendment doctrine even more confusing. Indeed one scholar has described the Court's First Amendment jurisprudence as being outmoded like Ptolemy's astronomy.[29]

Specifically, Kennedy's opinion found COPA was not the least restrictive alternative. Parents could install filters on the computers. Children would be unable to access the prohibited material, yet adults still could. Moreover, parents could control what types of this material would be suitable for their children. Filters also blocked foreign Web sites.

Justice Breyer, the Court's self-proclaimed "pragmatist", however, countered that filters are a private family-type remedy that government could at best, incentivize. Yet the First Amendment's definition of "a less restrictive approach" meant that there had to be an alternative statute or legal restriction that could do a better job, not reliance on parents acting responsibly. Many parents don't. In addition, Breyer makes the indisputable point that a criminal law (like COPA) plus filters is going to deter this material more than filters alone. And, as Kennedy even admits, filters are both over and under-inclusive in damaging ways. Filters also may be unaffordable for some.

Moreover, as mentioned before, children will have friends whose parents don't install filters, or the kids will work around the filters. Breyer correctly elaborates that COPA is the best that Congress can do, especially given the *Miller* pedigree. Thus, he is de facto balancing the interests of

29 Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 885 (1996).

children and adults, and finding that a well-crafted statute can constitutionally block child access. Breyer's dissent is actually using intermediate scrutiny to uphold the law.

The result of Kennedy's majority opinion is problematic. Adults will not die or even suffer serious psychiatric injury without access to indecent material. And most educators believe classic books can elevate a student's sensitivity and wisdom. Thus, it is no leap to assert that degrading pornography can diminish a child's moral compass. Certainly, the Supreme Court took that view in 1968 when it prosecuted the sale to minors of indecent materials at a store in *Ginsberg v. New York*,[30] even though the definition of "indecent" was less precise than *Ashcroft II.*

So here's one surprising conclusion. It appears that in the United States, no law can constitutionally protect children from indecent material on the Internet. This ignores the dignity and other interests that the state has in children's development, though there is admittedly some dispute about the precise impact of this material on kids. Breyer's de facto balancing. and deference to Congress, seems more pragmatic. He is not letting the perfect be the enemy of the good.

By contrast to the First Amendment, Article 5(2) of the German Basic Law contains a freedom of expression section which specifies that, "These rights shall find their limits in the provision's general laws, *in provisions for the protection of younger persons*, and in the right of personal honor." Germany has also had a "Federal Department for Media Harmful to Young Persons." And there is a famous case involving the American company CompuServe, and its violation of these restrictions connected to Bavaria, which had important consequences for a German-based CompuServe executive, Felix Somm.[31]

5. Ashcroft v. Free Speech Coalition[32]

In 2002, the U.S. Supreme Court struck down a 1996 law aimed at "virtual child pornography" in *Ashcroft v. Free Speech Coalition*. The First

30 390 U.S. 629 (1968).

31 Cyber-Rights & Cyber-Liberties, (UK), *Update: CompuServe Ex-Official's Porn Case Conviction Reversed*, http://www.cyber-rights.org/isps/somm-dec.htm (1999).

32 535 U.S. 234 (2002).

Amendment protected this because no actual children were harmed in the making of virtual porn.

Yet Congress found that pedophiles use other children's explicit images to lure real children into thinking the interaction is ok, and Congress found that the images excite pedophiles.[33] Moreover, allowing such images would make the role of law enforcement harder, as police try to distinguish between the real and virtual.[34]

The Court then fell back on its rigid Internet approach by stating that, "While these categories may be prohibited without violating the First Amendment [defamation, incitement, obscenity, real child porn], none of them include the Child Pornography Protection Act of 1996."[35] In response to law enforcement concerns, the Court said "the causal link" between allowing these images and boosting pedophilia was only "contingent" and "indirect," and "depends upon some unquantified potential for subsequent criminal acts."[36] This also shows the Court's social science skepticism. The Court elaborated that, "The government may not prohibit speech because it increases the chance that an unlawful act will be committed at some indefinite future time."[37] But why not? This result undermines the protection of children and continues to protect the Internet unnecessarily.

So this decision is a mistake. Almost no social values are served by the category of virtual pornography. And the Court does not engage in real balancing, nor place this worthless virtual material in the child pornography category. The Court in zombie-like fashion simply adopts some inappropriate "marketplace of ideas" or "autonomy" based views of free speech, though children are involved.[38]

---

33 Id. at 241.

34 Id. at 254.

35 Id. at 246. The law was also found invalid because it banned adults from acting as minors in such films, but this was not the main problem.

36 Id. at 250.

37 Id. at 253.

38 But see United States v. Williams, 553 U.S. 285 (2008) (Supreme Court upheld a federal statutory provision criminalizing expression that encouraged the distribution and pandering of material as child pornography regardless of whether it actually showed children). Notice what was outlawed here was the language calling for illegal action, not the content of the material involved as in the *Free Speech Coalition* case. That's partly how the Supreme Court distinguished the cases, but

6. Recent Developments

Since these earlier Internet cases, "technological convergence" has exploded. One commentator has explained this in a very straightforward fashion:

> In general, convergence is a coming together of two or more distinct entities or phenomena. Technological convergence is increasingly prevalent in the information technology world; in this context, the term refers to the combination of two or more different technologies in a single device.Two of the most common examples of convergence are taking pictures with a cell phone -- which combines the functionality of a camera and a telephone -- and surfing the web on a television, which brings a task normally associated with a computer to a TV.[39]

Actually now it's more common to watch television shows or even movies on computers or smart phones. In the U.S., binge-watching an entire television series on a streaming broadband Internet site has become a strange rite of passage.[40] And Wi-Fi is used now rather than dial up or direct connect. This augments the mobility of these sites.

Another development is that millennials and other young people have decreasing concerns about privacy.[41] Concomitantly, social media and other vital sites have been established, such as Facebook, Google, Twitter, and YouTube that have brought many benefits, but contain shocking amounts of inappropriate porn, terrorist-type instructions or propaganda, and other sick material. Indeed, Google apps like Snapchat allow the images to disappear quickly.

Moreover, certain companies have almost monopolistic power reminiscent of the former "robber barons" such as Google, Amazon, Facebook,

---

the harms in the *Free Speech Coalition* case ought to have been recognized as serious enough to justify the prohibition as argued in the text.

39 Margaret Rouse, *technological convergence,* WHATIS.COM, Dec. 2016, http://searchconvergedinfrastructure.techtarget.com/definition/convergence.

40 Ann Brenoff, *The 8 Shows Everyone Over Age 50 Should Binge Watch*, HUFFINGTON POST, March 20, 2015, http://www.huffingtonpost.com/entry/best-shows-to-binge-watch_n_6856430.html.

41 Emily Badger, *Millenial Attitudes About Privacy May Change How They Feel About Cars*, WASHINGTON POST, Oct. 21, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/10/21/millennials-attitudes-about-privacy-may-be-changing-how-they-feel-about-cars/?utm_term=.a3d03f826c2 c.

and Apple, which are collectively called "GAFA."[42] Microsoft is no slouch either. The companies are having a huge impact on U.S. democracy. So even though we access the Internet differently than in 1997, it still remains largely the Wild West. Another vital issue in the U.S. is that the DMCA generally gives service providers immunity for what others post. While this facilitates Internet freedom, it also precludes protecting children easily, though companies like Facebook and others have some censorship rules. But the rules apparently have problems.[43] And there is of course the Trump Administration's rejection of "Net Neutrality". The Trump Administration supports favoring or divaforing the content of certain companies, presumably based on financial and other considerations.[44]

Regarding recent case law, there has been an important Supreme Court threats case, and a North Carolina case that both protect the Internet.[45]

a. Elonis v. United States[46]

In 2015, the Court decided *Elonis*, which involved social media. Mr. Elonis was apparently an odd man whose wife had divorced him and who had also lost his job and friends as well.

---

42 Elizabeth Kolbert, *The Content of No Content,* THE NEW YORKER 42, Aug. 28, 2017. (reviewing two recent books highly criticial of the current media technology situation). Some have even argued that President Trump would never have been elected except for these technologies (think of the Wiki-Leaks dumping materials on the Internet related to Hillary Clinton).

43 For example, recent studies suggest that the rules are actually racially biased. Julia Angwin, Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech but not Black Children,* PRO PUBLICA, June 28, 2017, https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms.

44 Cecelia Kang, *Trump's FCC Pick Quickly Targets Net Neutrality,* N.Y. TIMES, Feb. 5, 2017, https://www.nytimes.com/2017/02/05/technology/trumps-fcc-quickly-targets-net-neutrality-rules.html?_r=0.

45 It's worth mentioning that the Supreme Court did uphold a law that withheld federal funds from libraries that did not have "filters" on their computer with Internet access. United States v. American Library Ass'n, 539 U.S. 194 (2003). But this case had many other factors present beyond speech such as the government's taxing and spending power. And libraries were not mandated to install filters, as long as they did not mind losing federal funds.

46 575 U.S. __ (2015).

So he took to the Internet, especially Facebook, and posted voluminous threatening statements towards his ex-wife, his former friends, and others that included references to killing and dismembering them. Eventually, his ex-wife obtained a protective order, though these can be pretty useless as shown by the tragic U.S. Supreme Court case of *Town of Castle Rock v. Gonzalez*.[47] But Elonis was not stupid and he often interspersed his rants with comments about the First Amendment, his free speech rights, the fact that he would not actually do these things, and the fact that celebrities like Eminem made money off of record albums in which they threatened to injure people.

For example, Count II of the indictment quoted this posting of Elonis:

> "Hi, I'm Tone Elonis.
> Did you know that it's illegal for me to say I want to kill my wife?...
> It's one of the only sentences that I'm not allowed to say....
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife....
> Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife...[48]

And this is mild compared to other material. He walked a fine line on threats. Though this was not really a part of the Court's analysis in the case, it is hard to see any social value in his "violent abusive venting" theory of free speech.

He was indicted under a law that "made it a federal crime to transmit in interstate commerce"… "any communication containing any threat…to injure the person of another."[49] His defense was that the government never proved an actual intent to threaten e.g. deliberately communicate a true threat. The jury instructions simply relied on a "reasonable person's" assessment of the postings.

The Supreme Court erroneously ruled in his favor, and again left the Internet unregulated. The Court said that some federal threat statutes had been interpreted to contain an intentional threat requirement (mens rea). Instead, the Elonis jury instructions had resembled a negligent tort violation instruction – a reasonableness standard and knowledge of the act. Chief Justice Roberts said that is not enough. The Court left open the issue of whether recklessness would have sufficed. The Court said it should

47 545 U.S. 748 (2005).
48 135 S.Ct. 2005 (2017).
49 18 U.S.C. Sec. 875(c).

show "prudence" in these criminal law matters. Yet it also showed unjustified acceptance of terrifying threats on the Internet.

The case is puzzling in that it barely mentions the Internet. This might suggest the Court is treating the case no differently than others. But there was huge publicity before the case about the Court rendering its first Internet ruling on threats. It's as if Chief Justice Roberts wanted not to acknowledge what makes the Internet particularly dangerous. This is consistent with the cases already discussed.

By contrast, in dissent, Justice Thomas showed that the technological difference should not matter:

> Had Elonis mailed obscene materials to his wife and a kindergarten class, he could have been prosecuted irrespective of whether he intended to offend those recipients or recklessly disregard the possibility. Yet when he threatened [via the Internet] to kill his wife and a kindergarten class, his intent to terrify those recipients (or reckless disregard of that risk) suddenly becomes highly relevant. That need not – and should not – be the case.[50]

Also, by not clarifying the recklessness issue, the Court created confusion. As Justice Alito said concurring and dissenting, "Attorney and judges are left to guess." Alito further protested the Court's intent requirement:

> True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself.[51]

Interestingly, federal law makes threats against the President (which were one of Elonis' subjects) illegal regardless of intent.

b. Packingham v. North Carolina[52]

Last term, the U.S. Supreme Court struck down a law that prohibited registered sex offenders from accessing "a commercial social networking Web site where the sex offender knows that the site permits minor children

50 Id. at 2025.
51 2016.
52 582 U.S. ___ (2017).

to become members or to maintain personal Web pages."[53] The Court said that not all sex offenders remain pedophiles, that these individuals had served their time, and that these sites do not just pertain to sex. Indeed, the Court pointed out these sites allow people to learn about current events, find employment ads, voice their opinions in the 21st Century public square etc. These sites might help ex-cons reintegrate into society. Unlike twenty years earlier in *Reno* where strict scrutiny was used, however, Justice Kennedy said the law was so broad and poorly drafted that it could not pass intermediate scrutiny.

Kennedy's reasons for apparently using intermediate rather than strict scrutiny are interesting. Known for his flowery writing style, Justice Kennedy did not disappoint:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious what they say today may be obsolete tomorrow.
> This case is one of the first the Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.[54]

The reference to the "modern" Internet appears to mean "Internet 2.0" with the Wi-Fi, ubiquitous social media, technological convergence and other recent developments mentioned previously. Then, Kennedy oddly wrote that the Court did not have to decide the "precise scope" of the law, though it clearly covered, for example, Amazon and the Washington Post.

Despite these statements, however, he also analogized cyberspace to public forums where speech rights are at their strongest. Thus, the concurring opinions agreed with his result, but said Kennedy's public forum language limited the ability of government to restrict speech even if the Internet evolves in dark directions. The public forum discussion hinted strict scrutiny. Justice Alito wrote:

> But if the entirety of the internet or even just social media sites are the 21st century equivalent of public streets and parks, then states may have little ability to restrict the sites that may be visited by even the most dangerous sex of-

53 N. C. Gen. Stat. Sec. 1 202.5.
54 Slip Op. at 6.

> fenders. May a state preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.[55]

As previously referenced, Alito points out that the Internet's anonymity, interactivity and ubiquity are problematic whereas parents can monitor children more readily in the physical world.

7. Conclusion

In conclusion, the Court's insistence on strict scrutiny in cases where it strikes down Internet laws designed to protect children is flawed. When children are involved, the Court should shift to a more intermediate type of scrutiny that will balance and treat children's interests as significant. This could resemble a European type proportionality analysis. The laws protecting minors and others in *Ashcroft II, Free Speech Coalition*, and *Elonis* for example, should have been upheld. To put it another way, Justice Breyer's pragmatic approach is best as even parts of Justice Kennedy's *Packinghham* opinion actually suggest when he used intermediate scrutiny. And the Court should stop treating the Internet as if it's harmless.

55 Slip Op. at 10. 137 S.Ct. 1730, 1743 (2017).