Critique of AZ Human Trafficking Prevention Act of 2017
(Townsend Bill)

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1. Introduction

I think the Supreme Court got it wrong in *Ashcroft v. ACLU*[2] when it failed to uphold the Child Online Protection Act of 1998 (COPA), concluding that parental use of filtering technology was a "less restrictive means" to shield children from Internet pornography. COPA would have required websites that commercially distribute sex materials deemed "harmful to minors" to take reasonable steps to keep minors away from the materials.

The "less restrictive means" test makes sense of course when there are two means **to achieve a goal** – in this case, protecting children from Internet pornography – and one means is less restrictive of First Amendment rights than the other. With some social problems, however, **there is no one means to achieve a goal.** For example, to protect children from online sexual exploitation, *the following are **all** needed*:

- Enforcing federal and state sexual exploitation of children laws
- Requiring electronic communication service providers to report facts or circumstances regarding an apparent violation of child pornography laws
- Motivating parents and schools to teach children about the dangers
- Using filtering and other technology

Similarly, to protect children from Internet pornography, *the following are **all** needed*:

- Enforcing federal and state obscenity laws
- Requiring Internet content providers to take reasonable steps to verify the age of those who view pornographic materials
- Motivating parents and schools to teach children about the dangers
- Using filtering and other technology

Parental oversight of children's use of computers should of course be the "first line of defense" when it comes to protecting children from Internet pornography, and the AZ Human Trafficking Prevention Act of 2017 (HTPA) is an attempt to provide additional protection for children by requiring adults who want unfiltered access to the Internet to request it (opt out of filtered access). By requiring adults to opt out of filtered access – instead of requiring parents who want filtered access to the Internet to request it (opt in to filtered access) – as things stand today – the drafters of HTPA hope to decrease the number of computers children have access to that provide access to pornography.

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[2] 542 U.S. 656 (2004), on remand, *ACLU v. Gonzales*, 478 F.Supp.2d 775 (E.D. Pa. 2007), aff'd sub nom. *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008), cert. den., 129 S. Ct. 1032 (2009).

In my opinion, however, there are several problems with the HTPA.

2. Opt-out law would help but would not solve the problem by itself

A law requiring adults to opt out of filtered access is preferable to the status quo, which requires parents to opt-in to filtered access, for the reason that many parents do not take needed steps to filter the Internet for their children because the parents are:

- Naïve or too trusting
- Fearful of being too strict or of upsetting their children
- Opposed to "censorship" of any kind
- Concerned about or fed up with filters over-blocking
- Technologically challenged
- Illiterate or foreign born and unable to read English
- Physically or mentally disabled
- Abusive or neglectful of their children
- Addicted to pornography themselves

Setting the default position for Internet access to filtered access should decrease the number of computers children have access to that provide access to pornography. But as the British experience shows, an opt out of filtered access policy isn't the whole answer:

Mark Jackson, "UK Home Broadband ISP Users Shun Adult Internet Content Filters," *ISPreview*, 12/16/15, at http://www.ispreview.co.uk/index.php/2015/12/broadband-isp-subscribers-shun-adult-uk-internet-content-filters.html.

News & Events, "Preventing children from accessing online pornography," *Univ. of Oxford*, 2/16/16, at http://www.ox.ac.uk/news/2016-02-16-preventing-children-accessing-online-pornography

Katherine Sellgren, "Pornography 'desensitising young people'" *BBC News*, 6/15/16, http://www.bbc.com/news/education-36527681

Joanna Moorhead, "How porn is damaging our children's future sex lives," *Guardian* (UK), 9/10/16, at https://www.theguardian.com/lifeandstyle/2016/sep/10/how-porn-is-damaging-our-childrens-future-sex-lives

Damien Gayle, "Pornography sites face UK block under enhanced age controls," *Guardian* (UK), 11/19/16, at https://www.theguardian.com/culture/2016/nov/19/pornography-sites-face-uk-block-under-enhanced-age-controls

I hasten to add that in contrast to the British policy, which applies only to computers in the home, the HTPA would apply to all computers. I also hasten to add, however, that the British policy was retroactive in that it required adults who had computers in the home prior to adoption of the policy to choose unfiltered access to the Internet.

In contrast, HTPA applies on its face only to the sale of new products. Millions of computers that children now have access to would therefore be unaffected by HTPA. This is a major drawback to a "products" versus ISP approach to filtering.

3. Not clear if HTPA regulates only 'obscene' materials

HTPA Part II, Subsections 3(a) & (b), state in part:

> (a) Any business, manufacturer, wholesaler or individual in the state of Arizona that manufactures, distributes, or sells or sells any products that makes accessible any content on the internet shall not sell any such product unless the product contains an active and operating digital blocking capability that renders **obscenity, as defined under § 13-3501** inaccessible. (b) Any business or individual that manufactures, distributes or sells any product that makes accessible any content on the internet may not sell or otherwise distribute any product unless it contains an active and operating a digital blocking capability that renders **obscenity, as defined under § 13-3501** inaccessible. Such business must make reasonable and ongoing efforts to insure the proper functioning of the digital content blocking capability to make **obscenity as defined under § 13-3501 inaccessible as required by § 13-3507…3513…3558.**

One problem with the above is that while "obscene" is defined in Subsection 2 of Section 13-3501, Sections 13-3507, 13-3513, and 13-3558 apply to materials deemed "harmful to minors," which is defined in Subsection 1 of Section 13-3501. It is therefore unclear whether HTPA is intended to apply only to obscene materials. I would add that HTPA Subsection 7 provides for criminal penalties, and criminal laws require clarity.[3]

Apart from the vagueness problem, there is also an effectiveness problem. While a law requiring that only *obscene* material be filtered would presumably be more likely to be upheld by the Courts than a law requiring that *harmful to minors* materials be filtered,[4] a law limited to *obscene* materials will allow children to have access to a large amount of pornography that is *harmful to minors* but that is not *obscene* for adults.

Furthermore, if *obscene* is the legal standard, the State will be authorizing access to content prohibited under federal law. See 18 USC 1462(c) ("Whoever knowingly… receives, from such interactive computer service" obscene matter) and 47 USC 230(b)(5).

4. Whereas clauses should include evidence that making parents aware of the availability of filters[5] has failed to protect children from Internet pornography

Any law that requires adults to opt out of filtered access will likely be challenged on the grounds that there is a "less restrictive means" – namely, requiring those who don't want

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[3] See, e.g., "Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine," *Justia*, at http://law.justia.com/constitution/us/amendment-14/54-void-for-vagueness-doctrine.html.

[4] I say this because "obscene" materials are unprotected by the First Amendment for both adults and children, while "harmful to minors" materials are unprotected only for children.

[5] 47 U.S.C. 230(d).

to be exposed to pornography to opt in to filtered access. Supporters of an "opt-out" approach must then show is that the existing "opt-in" approach has failed miserably.

Unfortunately, after the Supreme Court invalidated COPA both the mainstream press and academia in the United States turned their backs to the Internet pornography problem. Prior to the invalidation of COPA, there were many news stories about children's exposure to Internet pornography and many studies showing the extent of the problem. New studies are needed to show that the problem is worse than ever.[6]

5. Supreme Court treats real space and cyberspace differently

The drafters of AZ HTPA believe that when it comes to protecting children from pornography, whatever holds true in real space must also hold true in cyberspace.[7] Related to this, the drafters also compare the impact of pornography on children to the type of "secondary effects" that justify regulation of "adult businesses" in real space.[8]

The Supreme Court, however, dwells in a world of its own where there is more concern about the burden that regulation of Internet pornography may have on pornography distributors (financial costs) and potential users (anonymity concerns) than there is about the devastating impact that pornography has on children. Until the composition of the Court changes, the standard to be applied when evaluating a law that would require adults who want unrestricted access to the Internet to request it, is presumably the standard set

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[6] See, Robert Peters, "Children, Young Adults & Pornography: A 'Smorgasbord of Harms,' (Morality in Media 2015), at http://pornharmsresearch.com/wp-content/uploads/Children-Young-Adults-Pornograph-A-%E2%80%98Smorgasbord%E2%80%99-of-Harms-.pdf.

[7] See, e.g., **HTPA Summary, 11th Whereas clause** ("compelling interest to not treat and regulate bricks and mortar pornography shops under a different standard than Wholesalers and Manufacturers of products that distribute the Internet"); **13th Whereas clause** ("products of Manufacturers and Wholesalers that distribute the internet are subject to existing display statute…just like newsstands**…**"); **HTPA Section 8** ("Products that distribute the Internet are pornographic vending machines"); **HTPA Talking Points, 1** ("Why is there a double standard when it comes to the Technology Enterprise? Why aren't they regulated like bricks and mortar sexual enterprises?"); **Talking Points, 5** ("Products that distribute the Internet amount to handheld retail stores.").

[8] See, e.g., **HTPA Summary, 8th Whereas clause** ("Supreme Court has established that the secondary harmful effects of pornography consumption are undeniable"); **9th Whereas clause** ("compelling interest to impose a filter deactivation tax as a matter of general equity to tax imposed on strip clubs…offsetting the secondary harmful effects…"); **10th Whereas clause** ("harmful speech that can be regulated in the time, place and manner of it"); **HTPA Part II, Section 10** ("Filter Tax to Offset the Secondary Harmful Effects of Obscenity on Society"); **HTPA Talking Points, 3** ("Protecting Against Harm: The United States Supreme Court has long since recognized the secondary harmful effects of pornography…Filter legislation will offset the secondary harmful effects and it is backed by the Constitutional law…").

forth in *Ashcroft v. ACLU* (i.e., "strict scrutiny"),[9] not *Ginsberg v. New York* (i.e., "rational basis").[10] In this regard, see, *Reno v. ACLU*, 521 U.S. 844, 864-868 (1997); 886-897 (O'Connor, J., concurring); *Boos v. Barry*, 485 U.S. 312, 320-321 (1987).

6. AZ Criminal Code Sections 13-3507, 3513, & 3558 do not apply to cyberspace

HTPA Part II, Section 3(b), states, "*inaccessible as required by* Sections 13-3507, 13-3513, and 13-3558." **Part II, Section 7(a),** states, "*is guilty of a class 6 felony under"* Sections 13-3507, 13-3513 and 13-3558. **Part II, Section 13(d),** states, "*ensure continued compliance with* Sections 13-3507, 13-3513, and 13-3558…" [*Italics* added]

Sections 13-3507, 13-3558 and 13-3513, however, do not apply to the Internet. **Section 13-3507** applies only when a person has placed harmful to minors material on "public display" and when the material is displayed from property in the person's "possession or under his control." Computers sold to customers are not in the possession or control of manufacturers and wholesalers, and the definition of "public display" does not encompass private viewing pornography. **Section 13-3153** is limited to displays in "coin-operated or slug-operated vending machines" in public places. **Section 13-3558** is limited to businesses in which employees appear nude or partially nude.

7. Filter deactivation tax is problematic

HTPA Part II, Section 10, would impose a "filter tax" on those who "opt out" of filtered access. The **HTPA Summary, 36th Whereas clause**, states that the "Constitutionality of the $20 filter deactivation tax is the same as the legal basis for the $5 poll tax imposed on adult entertainment establishments upheld by the Texas Supreme Court in *Combs v. Texas Entertainment Association,* 347 S.W.3d 277 (Sup. Ct. Tex. 2011)." Unlike the Texas poll tax that is imposed on those who enter an "adult" business, however, the "filter tax" will be imposed not only on those who access pornography but also on those who do not want to deal with the problem of filter over-blocking and on those who rebel against any government imposition on their Internet viewing. This raises serious First Amendment concerns.

8. Compliance problems

HTPA, Part II, Section 3(c) requires that "all" child pornography be hidden. This, of course, will prove impossible.

HTPA, Part II, Section 3, 4, 5 & 6 all use the word "inaccessible." Unfortunately, all filters under-block, and no filtering technology is foolproof.

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[9] *Supra,* at 1, n. 2. For an argument that the standard of review should be "intermediate scrutiny," see, Robert Peters, "It Will Take More Than Parental Use of Filtering Software to Protect Children from Internet Pornography," 31 *N.Y.U. Rev. L. & Soc. Change* 829, 843-852 (2007).

[10] 390 U.S. 629, 639 (1968) ("…at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful.").

HTPA, Part II, Section 6(c), states in part:

> The Manufacturer and/or Wholesaler shall deactivate the digital content blocking capability if the consumer: … (2) Verifies in a face to face encounter either in person or through means that verify the person is over the age of 18;

There is a difference between a wholesaler and a retailer; and it is difficult to envision how a manufacturer or wholesaler can verify through a face to face encounter that the purchaser is not a minor. Many computer products are also purchased online, which would make it difficult for anyone to have a "face to face encounter" with the purchaser. It is also not clear from the 6(c)(2) by what other "means" age can be verified.

9. 47 U.S.C. 230 may preempt a State from an enacting a law which *requires* "Manufacturers and Wholesalers" to filter content

The drafters of AZ HTPA have presumably researched the issue of whether the proposed statute is preempted by 47 U.S.C. 230 and are satisfied that it isn't. In particular, the drafters of HTPA state in paragraph 11 of the LEGAL NOTES that 47 U.S.C. 230 "does not extend to apply to protect physical products."

A case could still be made that Section 230 envisions voluntary use of filtering technology and that the HTPA, which mandates use, is inconsistent with this Section. In this regard, I would point out that while HTPA uses the terms Manufacturer(s) and Wholesaler(s)" throughout the body of the law, it nowhere defines them. Compare 47 USC 230(f). Here are examples of uses of the terms in the HTPA Summary:

> "products sold by Manufacturers and Wholesalers that distribute the Internet" **[Summary – 2nd Whereas clause]**
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> "the products that distribute the Internet and make its content accessible amount to a miniature Wholesaler/retailer that is an extension of the primary Wholesaler and Manufacturer" **[Summary – 12th Whereas clause]**
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> "products that distribute the Internet never fully leave the instrumentality and control of the Manufacturer and Wholesaler" **[Summary – 14th Whereas clause]**
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> "the products sold by Manufacturers and Wholesalers that distribute the web" **[Summary – 21st Whereas clause]**
>
> "Wholesalers and Manufacturers that distribute the Internet or make content on the Internet accessible" **[Summary – 32nd Whereas clause]**

HTPA, Part II, Section 8, also refers to "*Internet Service Providers' routers,* cell phones, laptops, computers, gaming devices and other products that distribute the Internet and/or make the content on the Internet available."

10. Concluding thoughts

It has been more than twenty years since Congress first enacted legislation to protect children from exposure to Internet pornography.[11] The Supreme Court invalidated this law in part because it thought parental use of filtering technology was a less restrictive means.[12] Two years later, Congress enacted a much narrower law that again placed the primary burden on porn purveyors,[13] The Court again turned its back on the wisdom found in *Ginsberg v. New York*[14] and failed to uphold this law because it was of the opinion that parental use of filtering technology was a less restrictive means.[15]

And today, if a child walked into an "adult bookstore," he or she would be told to leave because it is against the law to sell pornography to children in real space. But if that same child "clicked" to most commercial websites that distribute pornography (including "free porn" websites that earn income through advertising revenues), that child could view pornography free of charge and without restriction because the Supreme Court thinks that in cyberspace it is up to parents to keep children away from pornography.

Meanwhile, there remains the question of what to do about the HTPA. While I do support the notion of requiring adults who want unrestricted access to the Internet to request it – instead of requiring parents who don't want unfiltered access to request filtered access, I also think HTPA as drafted is problematic for the above reasons.

ADDENDUM

A word about the prostitution and sex trafficking provisions

My professional background is in the realm of laws that prohibit and regulate obscene and indecent materials and performances. I would, however, make the following comments about **HTPA, Part II, Sections 4 & 5.**

Section 4(a) uses the term "prostitution hub" but nowhere defines "hub." **Section 4(b)** refers to content on the Internet that is used to "advance prostitution." This phrase encompasses websites that promote legalization of prostitution.

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[11] Communications Decency Act of 1996 (CDA).
[12] *Reno v. ACLU*, 521 U.S. 844 (1997).
[13] Child Online Protection Act of 1998 (COPA).
[14] 390 U.S. 629, 639-640 (1968) ("The wellbeing of its children is…a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations…upon the availability of sex material to minors…First…The legislature could properly conclude that parents…, who have this primary responsibility for children's wellbeing are entitled to the support of laws designed to aid discharge of that responsibility... The State also has an independent interest in the wellbeing of its youth… '…[T]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…'"
[15] *Ashcroft v. ACLU*, *supra* note 2, at 1.

Section 5(a) uses the word "known to be facilitating" but nowhere defines "facilitating." I would add, "Known by whom – the business, prosecutor or public?"

It is also not clear if businesses covered by **Sections 4-5** have a responsibility to seek out offending content (e.g., by following up on citizen complaints/tips or using filtering technology if such exists) or must act only if informed by a law enforcement agency.