

## ONLINE PORNOGRAPHY IN AUSTRALIA: LESSONS FROM THE FIRST AMENDMENT

TANIA VOON\*

Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.<sup>1</sup>

### I INTRODUCTION

Censorship of online pornography raises extremely complex and contentious issues of morality and the role of government – there is no definitive answer about the wisdom of such censorship. Nor is there any definitive ‘feminist’ perspective on online pornography, or pornography more generally. In fact, two feminist camps,<sup>2</sup> led by Nadine Strossen defending pornography on the one hand,<sup>3</sup> and Catharine MacKinnon and Andrea Dworkin vehemently opposing it on the other,<sup>4</sup> have forcefully disputed the impact of pornography and its censorship on women’s rights. The dearth of reliable evidence about the

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\* BSc (Melb), LLB (Hons) (Melb), LLM (Harv), AmusA; Solicitor, Mallesons Stephen Jaques, Melbourne. I submitted an earlier version of this article as part of a Graduate Diploma in International Law at the University of Melbourne. I would like to thank Gigi Sohn, Andrew Mitchell, the Journal’s Editors and the anonymous referees for their helpful comments in the preparation of this article. The views expressed herein, and any errors, are mine.

1 *American Civil Liberties Union v Janet Reno, Attorney General of the United States*, 929 FSupp 824, 883 (Ed Penn, 1996) (Dalzell J).

2 See generally Joan Kennedy Taylor, ‘Gender Symposium: Does Sexual Speech Harm Women? The Split Within Feminism’ (1994) 5 *Stanford Law and Policy Review* 49.

3 See, eg, Nadine Strossen, ‘Fighting Big Sister for Liberty and Equality’ (1993) 38 *New York Law School Law Review* 1; Nadine Strossen, ‘A Feminist Critique of “The” Feminist Critique of Pornography’ (1993) 79 *Virginia Law Review* 1099; Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women’s Rights* (1995); Nadine Strossen, ‘Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?’ (1996) 46 *Case Western Reserve Law Review* 449. See also Gillian Rodgers and Elizabeth Wilson (eds), *Pornography and Feminism: The Case Against Censorship* (1991).

4 See, eg, Catharine MacKinnon, ‘Not a Moral Issue’ (1984) 2 *Yale Law and Policy Review* 321; Andrea Dworkin, ‘Against the Male Flood: Censorship, Pornography, and Equality’ (1985) 8 *Harvard Women’s Law Journal* 1; Andrea Dworkin and Catharine MacKinnon, *Pornography and Civil Rights: A New Day for Women’s Equality* (1988); Catharine MacKinnon, *Only Words* (1993).

prevalence and effects of pornography exacerbates the difficulties in resolving this dispute.

In Australia, while the *Australian Constitution* affords limited rights of speech and communication,<sup>5</sup> it contains no express guarantee of free speech equivalent to the First Amendment to the *Constitution of the United States of America* ('*US Constitution*') to protect the chaos of the Internet. This may make it harder to define the values of Australian society and the interests to be balanced in dealing with online pornography.

The Federal Government has enacted restrictive legislation in an attempt to limit access to online pornography by Australians in the form of the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) ('*Online Services Act*'). Rather than focusing on the technical operation or workability of the legislation, this article examines the rationales for freedom of speech and censorship as a basis for assessing the Australian approach. At the outset (in Part II), I outline a workable definition of pornography. I then go on to consider freedom of speech in Part III and the underlying reasons for accepting this as an important value. Against this background, I then examine the specific conflict between pornography and freedom of speech, with particular emphasis on the potential harms associated with pornography (in Part IV), pornography on the Internet (in Part V), and the treatment of the conflict by US courts (in Part VI). In the concluding section I consider Australia's recognition of rights such as the freedom of speech and briefly evaluate the Australian legislation in the context of that recognition.

## II DEFINING PORNOGRAPHY

It is extremely difficult to define pornography with precision in the abstract. Many proposed definitions use ambiguous terms and rely on subjective determinations.<sup>6</sup> The Supreme Court of the United States of America ('US') has drawn a distinction between 'obscene' speech, which is unprotected by the First Amendment to the *US Constitution* (and can therefore be prohibited based on its content), and merely 'indecent' speech, which is protected. In *Miller v California* ('*Miller*'),<sup>7</sup> the Court held that obscene speech arises where a work:

- (a) taken as a whole, and judged by the average person, applying contemporary community standards,<sup>8</sup> appeals to the prurient interest in sex;
- (b) portrays sexual conduct in a patently offensive way; and
- (c) taken as a whole, does not have serious literary, artistic, political, or scientific value.

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5 See below Parts VII (A) and (B).

6 Edward Cleary, *Beyond the Burning Cross: The First Amendment and the Landmark RAV Case* (1994) 109.

7 413 US 15, 24 (1973).

8 *Roth v United States*, 354 US 476, 489 (1957).

In contrast to obscene speech, indecent speech 'merely refers to non-conformance with accepted standards of morality'.<sup>9</sup> Indecent speech may include patently offensive words dealing with sex or excretion, which may have serious literary, artistic, political, or scientific value.<sup>10</sup> Prurient appeal is not necessarily an element of indecent speech.<sup>11</sup>

Various people have challenged the distinction between obscene and indecent speech and proposed alternative definitions. Dworkin notes that 'prurient' means burning, sexually arousing, and (empirically) causing erection.<sup>12</sup> It is thus defined by a male physiological response. MacKinnon criticises the definition of obscenity on several levels. She queries why the work should be taken as a whole and why its value needs to be considered at all if a woman is being subordinated:<sup>13</sup>

Obscenity, in this light, is a moral idea; an idea about judgements of good and bad. Pornography, by contrast, is a political practice, a practice of power and powerlessness. Obscenity is ideational and abstract; pornography is concrete and substantive.<sup>14</sup>

In mid-1980, MacKinnon and Dworkin developed an ordinance intended to provide women with civil rights against producers of pornography where the women could show that they suffered harm because of it.<sup>15</sup> The ordinance recognised harms including assault due to pornography and subordination of women through trafficking in pornography.<sup>16</sup> Although the Minneapolis City Council passed the ordinance, the Mayor of Minneapolis twice vetoed the ordinance. It later passed into law in Indianapolis, but the US Federal Court of Appeal struck it down.<sup>17</sup>

The ordinance uses the term 'pornography', which is defined as 'the graphic sexually explicit subordination of women through pictures and/or words that also includes' one or more specified factors, such as women being presented as dehumanised sexual objects, enjoying pain or rape, cut up or mutilated, or in positions of sexual submission, servility, or display.<sup>18</sup> The definition extends to the use of men, children or transsexuals in the same way.<sup>19</sup>

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9 *Federal Communications Commission v Pacifica Foundation*, 438 US 726, 740 (1978).

10 *Ibid* 746.

11 *Ibid* 740.

12 Dworkin, 'Against the Male Flood', above n 4, 515, 520.

13 Catharine MacKinnon, 'Pornography, Civil Rights and Speech' in Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (1992) 456, 464. See below Part IV(D) for further discussion of MacKinnon's notion of pornography in and of itself subordinating women.

14 *Ibid* 465.

15 Dworkin and MacKinnon, above n 4, 138-42; Mary Heath, 'Catharine MacKinnon: Toward a Feminist Theory of the State?' (1997) 9 *Australian Feminist Law Journal* 55, 55-8; Andrew Jacobs, 'Rhetoric and the Creation of Rights: MacKinnon and the Civil Right to Freedom from Pornography' (1994) 42 *Kansas Law Review* 785, 785-92.

16 See the discussion in Strossen, *Defending Pornography*, above n 3, 75-7. See below Part IV for further examination of the various harms arising from pornography.

17 *American Booksellers Association v Hudnut*, 598 FSupp 1316 (D Ind, 1984); 771 F2d 323 (7th Cir, 1985); 475 US 1001 (1986).

18 MacKinnon, above n 13, 465.

19 *Ibid* 466.

Strossen, the President of the American Civil Liberties Union, suggests that the 'MacDworkinites' deliberately use the term 'pornography' because of its pejorative connotations.<sup>20</sup> She, too, criticises the Supreme Court's definition of 'obscenity' because of its ambiguity and subjectivity,<sup>21</sup> but prefers the terms 'sexually explicit' and 'sexually oriented' speech.<sup>22</sup>

In this article, I use the term 'pornography' not to capitalise on its negative connotations but because it is a term that most individuals understand. Although this term is difficult to define,<sup>23</sup> most people have their own views as to what it means. In judicial terms, this may not be a particularly helpful formulation, but for the purpose of understanding the arguments on both sides of the pornography/free speech debate, it serves well enough. Pornography is generally intended to sexually arouse and may in fact do so, depending on the audience. It often includes full or partial nudity, but nudity alone is neither necessary nor sufficient to create pornography. It also typically includes a depiction or suggestion of sexual activity, but interpretation of this differs depending on the audience. I have focused on this type of material precisely because it is hard to defend. There is a much easier case for defending sex education or nude sculptures. At the same time, my description is weighted towards neither the most innocent material (as Strossen's references to sexually explicit speech often are) nor the most violent and vile material (as the MacKinnon-Dworkin definition of pornography is). It is likely to encompass obscene speech as well as much indecent speech as defined by the US Supreme Court.

### III PURSUING FREEDOM OF SPEECH

#### A Formal Recognition of the Freedom

Freedom of speech has long been a cherished human value, and several different nations, regions and international conventions recognise it as an individual right that deserves and requires protection. Perhaps the most well known protection given to freedom of speech is in the First Amendment to the *US Constitution*, which states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The *Canadian Charter of Rights and Freedoms* also specifically protects freedom of speech. The relevant sections came into force in 1982. Section 2 provides that:

Everyone has the following fundamental freedoms: ...

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20 Strossen, *Defending Pornography*, above n 3, 13, 16.

21 Ibid 53-5.

22 See generally the language used in Strossen, *Defending Pornography*, above n 3.

23 See, eg, the criticisms of this term in Strossen, 'A Feminist Critique', above n 3, 1103-4.

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Unlike the First Amendment, which contains no express limitation on freedom of speech, the Canadian protection is subject to the overarching limitation in s 1:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

At an international level, art 19 of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>24</sup> protects freedom of speech in the following terms:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article [may] be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

In addition to the restrictions on the right of free speech contained in art 19(3) of the ICCPR, art 20 contains express prohibitions on certain types of speech: 'propaganda for war', and what would ordinarily be termed 'hate speech' (for example, advocacy of racial hatred that constitutes incitement to violence). Article 20 is somewhat ambiguous, and it is unclear whether it is intended to prohibit hate speech in the absence of violence.<sup>25</sup> It is also the subject of a reservation by the US, since it requires prohibition of at least some material that would otherwise be protected by the First Amendment.<sup>26</sup>

Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>27</sup> protects freedom of expression in a manner broadly similar to that of the ICCPR, although it specifically states that this is not to 'prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. The European protection is also subject to a greater number of conditions than is art 19 of the ICCPR. Under art 10, the exercise of freedom of expression may be subject to prohibitions 'as are prescribed by law and are necessary in a democratic society' in the interests of a range of factors, including for the prevention of disorder or crime, or for the protection of health or morals.

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24 Opened for signature 19 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976).

25 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 365.

26 See Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (1996) 767-71.

27 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952). See generally Anthony Strahan, 'An Overview of the Protection of Freedom of Expression under Article 10 of the European Convention on Human Rights' (Research Paper No 6, Centre for Media, Communications and Information Technology Law, University of Melbourne, 1998).

## B Foundations of the Freedom

The right to freedom of speech may be based on several different principles. The following is a non-exhaustive list of some of the most commonly cited goals or justifications of the right.<sup>28</sup>

### 1 *Advancement of Knowledge and Discovery of Truth*

This is John Stuart Mill's argument – that free speech is required to enable the ascertainment of truth and advancement of knowledge.<sup>29</sup> This is also known as the 'marketplace of ideas' rationale, since it suggests that in a free market the exchange of ideas will enable the truth to be established.<sup>30</sup> Thus the more viewpoints expressed, the better.<sup>31</sup> Baker suggests that this theory dominates US Supreme Court discussions of free speech.<sup>32</sup> However, free speech does not always produce truth, and protecting Nazi messages or pornography demands some justification other than truth discovery. Similarly, by itself, this justification does not explain why statements of mere opinion that are neither true nor false should be protected.<sup>33</sup>

### 2 *Effective Participation in Decision-making by All Members of Society*

This is the goal of democracy, typically aligned with Alexander Meiklejohn.<sup>34</sup> If democracy is to work properly, all members of society must have access to all relevant information. Information that concerns public affairs or the political process therefore deserves particular protection. The core of this goal is democratic rather than libertarian, and social rather than individualistic.<sup>35</sup> The link between democracy and freedom of speech is somewhat paradoxical. If the members of a society, acting democratically and with proper information, decide to prohibit or restrict particular kinds of speech, the goal of democracy alone cannot explain why this should not be allowed.<sup>36</sup> Few would suggest that pornography is political in the sense that denial of the right to make, distribute or view pornography will infringe one's ability to participate in the democratic process.<sup>37</sup> This principle therefore does little to show why pornography should be unregulated.

28 T Emerson, 'First Amendment Doctrine and the Burger Court' (1980) 68 *California Law Review* 422, 423.

29 John Stuart Mill, *On Liberty* (1972) ch 2; see also Kent Greenawalt, 'Free Speech Justifications' (1989) 89 *Columbia Law Review* 119, 131-41.

30 *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J, dissenting).

31 Adam Newey, 'Freedom of Expression: Censorship in Private Hands' in Liberty (ed), *Liberating Cyberspace: Civil Liberties, Human Rights and the Internet* (1999) 13, 27.

32 C Edwin Baker, *Human Liberty and Freedom of Speech* (1989) 7.

33 Wojciech Sadurski, *Freedom of Speech and Its Limits* (1999) 8-10.

34 Alexander Meiklejohn, 'The First Amendment is an Absolute' [1961] *Supreme Court Review* 245; see also Richard Fallon Jr, 'Post on Public Discourse under the First Amendment' (1990) 103 *Harvard Law Review* 1738.

35 Owen Fiss, *The Irony of Free Speech* (1996) 2-3.

36 Sadurski, above n 33, 22-7; Eric Barendt, *Freedom of Speech* (1985) 21.

37 Ronald Dworkin, 'Is there a Right to Pornography?' (1981) 1 *Oxford Journal of Legal Studies* 177, 177.

### 3 *Individual Autonomy and Self-fulfilment*

This goal points to the value of speech, not in bringing about particular results (eg, by advocating a certain change in the law which results in that change being implemented), but in the act of speech itself. Through speech, we communicate to others aspects of ourselves, define better who we are, and are better able to achieve self-fulfilment.<sup>38</sup> If our speech is suppressed, we are unable to exercise full autonomy. This goal also focuses on the autonomy of the *listener*. If we restrict the listener's access to certain viewpoints, on the ground that they may harm the listener, we infringe the listener's autonomy.<sup>39</sup> The principle of moral autonomy is probably the most relevant and convincing reason for freedom in the context of pornography. Although different types and examples of speech clearly have different values, the importance of individual autonomy lies in deciding or choosing the hierarchy of values to assign to speech, rather than having that hierarchy determined by the government.

### 4 *Balance Between Stability and Change*

If a society restricts speech, or particular kinds of speech, it is more likely to suppress ideas of a radical or progressive nature than conventional or conservative ideas, thereby hindering its own development. In the context of pornography, it is quite clear that a majority of people at one time may consider as deeply offensive or immoral material that is later widely regarded as perfectly innocent.<sup>40</sup> Similarly, the sensibilities of people of one country may be far more easily affected than those of another country. It is because of the progression of ideas that novels such as James Joyce's *Ulysses* were once highly controversial and liable to be banned in the American 'crusades' led by the likes of Anthony Comstock,<sup>41</sup> but are now mandatory texts in literature courses. Equally, while the Beatles singing 'I get *high* with a little help from my friends' causes little consternation today, censors have new targets in graphic songs about cop killing, non-consensual sex and anarchic violence.<sup>42</sup>

### 5 *Tolerance*

Moving away from the perspective of the speaker, freedom of speech is important because of its effect on the audience. If an audience is exposed to a range of different ideas expressed by different people, the community as a whole is more likely to develop a character of tolerance.<sup>43</sup> Again, it is difficult to explain this rationale in the context of Nazi hate speech. Protecting a neo-Nazi march in Skokie, Illinois could hardly be justified on the basis that it will

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38 Sadurski, above n 33, 17.

39 Ibid 19-20; Barendt, above n 36, 18.

40 Dworkin, above n 37, 185.

41 Margaret Blanchard, 'The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew' (1992) 33 *William & Mary Law Review* 741, 771, 774.

42 Ibid 803, 828-34.

43 See generally Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986).

promote tolerance among Jews.<sup>44</sup> On the other hand, tolerance is an important value when it comes to pornography. Much sexual conduct that would once have been deemed abnormal or deviant is now frequently accepted (although some communities have progressed further in this regard than others), demonstrating the need to think critically about the absolutism of what is right and good in any given time and place. Tolerance is therefore a relevant concern, but obviously not a sufficient justification on its own for allowing pornography to go unregulated.

## IV PORNOGRAPHY AND HARM

According to the 'harm principle', an individual's freedom of speech (or indeed any other individual freedom or right) may be restricted only to the extent that its exercise would harm others.<sup>45</sup> Put another way, 'the government should not interfere with communication that has no potential for harm'.<sup>46</sup> Pornography has the potential to harm various members of society in different ways, as discussed in the following section.

### A Harming Participants

A key argument for censorship of pornography relates to its effects on the participants. Pornography involves more than 'mere fantasy' or 'mere speech' – it is real.<sup>47</sup> For example, pornography is often said to involve acts of prostitution; if prostitution is simply the exchange of money for sex,<sup>48</sup> pornography should arguably be regulated in the same manner as prostitution. If this argument is accepted, this suggests that a society that prohibits prostitution, or imposes time, place or manner restrictions on prostitution, should similarly prohibit or restrict pornography. Moreover, various commentators report acts of rape, assault<sup>49</sup> and even murder occurring either in front of the camera or behind the scenes because of the typical environment in which pornography is produced.<sup>50</sup> The producers, directors and consumers of pornography are largely men, monopolising information and media, with a tendency to characterise women as objects in their pornographic material.<sup>51</sup> The harm suffered by children in pornography is of particular concern. Whereas a woman involved in pornography can consent to

44 Sadurski, above n 33, 33; see also Greenawalt, above n 29, 147.

45 Mill, above n 29, ch 1; Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (1990) 382.

46 Greenawalt, above n 29, 122.

47 Stella Rozanski, 'Obscenity: Common Law and the Abuse of Women' (1991) 13 *Adelaide Law Review* 163, 177, 181; Gail Dines, Robert Jensen and Ann Russo, *Pornography: The Production and Consumption of Inequality* (1998) 21-2; MacKinnon, above n 13, 462.

48 Barbara Sullivan, *The Politics of Sex: Prostitution and Pornography in Australia Since 1945* (1997) 3.

49 Rozanski, above n 47, 178-9.

50 Dines, Jensen and Russo, above n 47, 23-8.

51 Anne Orford, 'Liberty, Equality, Pornography: The Bodies of Women and Human Rights Discourse' (1994) 3 *Australian Feminist Law Journal* 73, 91; Rozanski, above n 47, 164, 193; Dines, Jensen and Russo, above n 47, 23; Susanne Kappeler, 'Pornography: The Representation of Power' in Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (1992) 88, 91.

her involvement, a child, by definition, cannot. This means that '[e]very piece of child pornography ... is a record of the sexual use/abuse of the children involved'.<sup>52</sup> These children are typically poor, and often from third world countries.<sup>53</sup> Our revulsion at child sexual abuse relates to the powerlessness of children, and the notion of childhood as an innocent and peaceful time when we are protected from the worst of the world.<sup>54</sup>

The real-life experiences of women and children involved in pornography constitute both an important motivator for anti-pornography feminists, as well as a significant part of their arguments. These feminists often rely on presenting graphic details of scenarios contained in pornographic materials,<sup>55</sup> and of the experiences of women in those materials,<sup>56</sup> to get their message across. In contrast, free speech advocates typically steer away from such vivid descriptions. Indeed, Strossen has been criticised for not facing the reality of pornography:

She approaches the pornography issue theoretically, never delving into the realities of pornography or the real injuries it creates. Strossen comments that antipornography feminists often include in their works detailed accounts of pornographic pictures or films, insinuating that this is so because they like pornography and need a reason to view or talk about it. This ludicrous insinuation demonstrates Strossen's own discomfort with facing pornography.<sup>57</sup>

It is easy to channel the horror one feels at the experiences of women involved in pornography into a conviction that the state should prohibit pornography in its entirety. No one would dispute that women should not be subjected to physical or sexual abuse, whether from strangers, employers or family members. Yet these things really happen, and not only in the context of pornography or prostitution. Exposing these experiences to the public for the purpose of condemning pornography is akin to showing a jury, in a murder trial, photographs of the victim's bludgeoned body: the prosecution intends to focus the jury's minds on the bloody aftermath rather than on how the accused is actually linked to the crime. It is understandable, then, that Strossen chooses not to focus on the sordid details of pornography, while Dworkin constantly restates them, since the two advocates view the role of pornography in producing these outcomes very differently.

Putting to one side the question of child pornography, it is simplistic and paternalistic to suggest that adult women involved in making pornography are

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52 Liz Kelly, 'Pornography and Child Sexual Abuse' in Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (1992) 113, 116.

53 Ibid 116-7; Catherine Itzin, 'Pornography and the Social Construction of Sexual Inequality' in Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (1992) 57, 65.

54 Kelly, above n 52, 113, 115.

55 For example, in the video produced by The Education Resource Centre, Institute of Education, University of Melbourne, *Cutting Edge - Against Pornography: The Feminism of Andrea Dworkin* (30 June 1992), several horrifying accounts are given, including of a snake being inserted into a baby's anus and a young girl being raped by her father or grandfather.

56 For example, reports of a woman's labia being nailed to a table: Catherine Itzin, 'Pornography and Civil Liberties: Freedom, Harm and Human Rights' in Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (1992) 553, 569.

57 Jill Meyer, 'In Search of a Right to Escape From a Pornographic Society' (1996) 23 *Northern Kentucky University Law Review* 553, 568.

invariably forced into the industry (for example, through physical or financial coercion), or that no women enjoy making pornography. Depending on the woman's individual perspective, she will not necessarily be harmed simply by participation in pornography. Moreover, the more pressing question is not whether women are ever mistreated in society or in pornography (as they undoubtedly are), but whether restricting or prohibiting the production of pornography will prevent or minimise that mistreatment. This question will be further discussed below in Part IV(E) of this article.

## B Harming Viewers

Another argument for censorship of pornography is that it harms viewers by corrupting their morals. This argument assumes that there is a singular reference point for morality, and that that reference point condemns pornography now and will continue to do so in the future. Such an assumption ignores the very different values in different parts of society and in different generations, as well as the right of individuals to decide for themselves what is acceptable to them and what they wish to view. If the state censors pornography in order to prevent moral corruption of a *willing* viewer,<sup>58</sup> this departs from the principle that speech should be restricted only to the extent necessary to prevent harm to others.<sup>59</sup> Moreover, liberal theory has typically shied away from characterising 'offence' as harm,<sup>60</sup> positing instead that the law should not protect a person from accidentally viewing pornography to the extent that this would restrict others from deliberately viewing it.

Anti-pornography feminists are less likely today to rely on arguments about harm to 'voluntary consumers' and 'involuntary consumers' than on the other harms described in this article.<sup>61</sup> The only exception to this tendency is in relation to children. Children are seen as needing additional protection because they lack the capacity to make informed decisions about what they are viewing, and because extreme material may 'corrupt' them or damage their development. Liberalists may share this concern and agree that regulation is needed to protect children from pornography, provided that protecting children does not require simultaneously protecting adults. The notion of shielding adults from viewing pornography under the guise of protecting children is particularly relevant to the *Online Services Act*, discussed further below.<sup>62</sup>

## C Harm Through Viewers

Pornography may also cause indirect harm, because viewers may be more likely to commit crimes against women after watching it. This may be because they become obsessed with particular pornographic situations they have watched, or simply because they are exposed to a culture of misogyny and the

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58 H L A Hart, *Law, Liberty and Morality* (1963) 31-3.

59 Mill, above n 29, ch 1; Gaze and Jones, above n 45, 382.

60 D F B Tucker, *Law, Liberalism and Free Speech* (1985) 127-33; Hart, above n 58, 47.

61 Kappeler, above n 51, 91.

62 See below Part VII(C).

aggressive domination of women through pornography. There are few reliable statistics on the causative effects of pornography on crime. However, while it is difficult to prove a positive, causal relationship, anecdotal and experimental evidence suggests there may be some connection.<sup>63</sup>

In Dworkin's view, pornography socialises men to rape – it is the *cause* of the inequality between men and women.<sup>64</sup> Itzin agrees that pornography sexualises violence, legitimates the abuse of women, and educates men in the subordination of women.<sup>65</sup> However, she considers that this is only one of a number of factors, such as economic subordination, that contribute to the oppression of women in society.<sup>66</sup> MacKinnon similarly highlights the chain of causation between pornographic speech and sexual abuse.<sup>67</sup> She refers to pornography 'making' rapists unaware of the absence of consent, 'creating' a person who sees no difference between violence and sex, and 'producing' sex murderers.<sup>68</sup>

This reasoning tends towards seeing men as predisposed to commit violence and sexual abuse. 'To see men as naturally programmed for violence is to endorse the most conservative views on human nature, to see it as unchanging and essentially unchangeable.'<sup>69</sup> This raises the dangerous proposition that men cannot change their 'innate' behaviour towards women any more than they can change their 'innate' responses to pornography. This goes against the history of the feminist movement, which has consistently sought to dispel stereotypes about men and women. Furthermore, if coupled with an argument for the prohibition of pornography, this analysis is also somewhat contradictory. If men are predisposed to rape, it is difficult to see why the prohibition of pornography (even if it were completely effective in limiting production of pornography) would prevent rape from occurring. Instead of blaming pornography or pornographers, viewers of pornography should be expected to have both the *capacity* to analyse the material, and *responsibility* for their subsequent actions.

## D Harm Through Presentation – Acts of Subordination

In the preceding sections I have examined how pornography may impose harm in three ways: by allowing abuse of women involved in pornography; by corrupting viewers' morals; and by causing viewers to abuse women. These are all 'perlocutionary' effects of pornography – its causal consequences. Pornography may impose a fourth harm: the harm committed by the mere performance or presentation of the pornographic material, ie, the harm that results simply from the 'illocutionary' act of pornographic speech. For example,

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63 See Dines, Jensen and Russo, above n 47, 109-34; Deborah Cameron and Elizabeth Frazer, 'On the Question of Pornography and Sexual Violence: Moving Beyond Cause and Effect' in Catherine Itzin (ed), *Pornography: Women, Violence and Civil Liberties* (1992) 359, 361-7; MacKinnon, above n 13, 477-80.

64 Dworkin, 'Against the Male Flood', above n 4, 528; see also MacKinnon, above n 13, 477.

65 Itzin, above n 53, 67.

66 Ibid 68.

67 MacKinnon, above n 13, 461-3, 473-8; MacKinnon, *Only Words*, above n 4, 118-20.

68 MacKinnon, *Only Words*, above n 4, 95-7.

69 Rodgersson and Wilson, above n 3, 36; see also Strossen, *Defending Pornography*, above n 3, 113-14.

making a pornographic statement can be likened to other speech-acts such as saying 'I do' (an act of marriage),<sup>70</sup> ordering someone to 'drink this poison' (an act of murder)<sup>71</sup> or saying 'Hispanics need not apply' (an act of unequal treatment).<sup>72</sup> Where the person saying 'Hispanics need not apply' has authority to enforce that rule (ie, authority to exclude Hispanics from a particular job), Hispanics are subordinated. Advocates like MacKinnon argue that pornographic images subordinate women in a similar way in and of themselves.<sup>73</sup>

This argument assumes that pornographers have the requisite authority to direct, through their pornography, the way in which women should be treated or sex should occur in society. If they lack such authority, their pornography cannot, of itself, subordinate women. Sadurski identifies the two elements of authority as 'a *normative* ingredient of "legitimacy" and an *empirical* ingredient of "control"'.<sup>74</sup> Although pornographers may influence people's thinking on sex, they do not have this kind of authority. Even assuming that the relevant audience consists of men and boys who watch pornography for entertainment and to determine what is sexually legitimate,<sup>75</sup> it is difficult to imagine that such an audience considers that the producers of pornography have the right to determine what is right and wrong in matters of sex, or that they have the capacity to enforce any such determinations.<sup>76</sup> Accordingly, it is difficult to substantiate the harm of actual subordination through the presentation of pornography alone.

Even if pornographers possessed the requisite authority, the assumption that pornographic images encourage abuse of women ignores the fact that different people may interpret such images in different ways and from a number of different viewpoints.<sup>77</sup> Strossen emphasises that 'ambiguous and positive interpretations apply to the full range of sexual speech, including violent imagery and imagery that might well be labelled "subordinating" or "degrading", such as rape scenes and scenes dramatizing the so-called rape myth – namely, that women want to be raped'.<sup>78</sup> Women may fantasise about rape because this avoids any feelings of guilt that might otherwise be associated with the sex involved,<sup>79</sup> or to add change to their experience when real change in their life may be impossible or unwanted.<sup>80</sup> The key is that in the fantasy the fantasiser is in control. Actual rape – unwanted sex – plays no part.<sup>81</sup>

70 C Edwin Baker, 'Harm, Liberty, and Free Speech' (1997) 70 *Southern California Law Review* 979, 984.

71 Ibid 982.

72 Sadurski, above n 33, 121-2.

73 See, eg, MacKinnon, above n 13, 483-5; MacKinnon, *Only Words*, above n 4, 29.

74 Sadurski, above n 33, 123.

75 Rae Langton, 'Speech Acts and Unspeakable Acts' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (1994) 95, 110.

76 Sadurski, above n 33, 123-32.

77 Catharine Lumby, *Bad Girls* (1997) xxv; Strossen, 'A Feminist Critique', above n 3, 1131.

78 Strossen, 'Defending Pornography', above n 3, 146; see also Strossen, 'A Feminist Critique', above n 3, 1128-30.

79 Nancy Friday, *Women on Top* (1991) 4-5, cited in Strossen, *Defending Pornography*, above n 3, 173.

80 Jean MacKellar, in collaboration with Menacham Amir, *Rape: The Bait and the Trap: A Balanced, Humane, Up to Date Analysis of Its Causes and Control* (1975) 260, cited in Strossen, *Defending Pornography*, above n 3, 173.

81 Strossen, *Defending Pornography*, above n 3, 172-3; Nancy Friday, *Forbidden Flowers* (1994) 169-71.

## E Minimising the Harm

In May 2000, the General Assembly of the United Nations adopted two optional protocols to the *Convention on the Rights of the Child*, reflecting the universal desire to protect children.<sup>82</sup> These protocols requires states that are parties to criminalise, inter alia, the offering, delivering or accepting of a child for the purposes of sexual exploitation, prostitution or pornography. The particular status of children requires that they be protected from pornography, not necessarily through banning the production of pornography or the sale of pornographic materials, but certainly through criminal laws preventing the abuse of children. Pornographic material may often provide evidence of such abuse. However, Strossen argues that women are distinguishable from children in this context because they can give real consent to perform in or produce pornography, and in many cases they do.<sup>83</sup> Where other illegal activity (such as rape or murder) is associated with pornography, certainly that activity should be forcefully prosecuted under applicable laws. However, the mere existence of such activity in the pornography industry cannot justify the imposition of censorship in place of vigorous enforcement of existing criminal laws.

Ironically, a crucial argument against prohibition of pornography is that the best way to counter 'bad' speech is with more speech.<sup>84</sup> Thus, speaking out against pornography (as Dworkin does so powerfully) may be a more effective means of limiting its popularity and increasing consumer awareness than simply banning it.<sup>85</sup> It is true that many marginalised people may be unable to speak out,<sup>86</sup> for example because of poverty, race or poor education. For them, the freedom to speak holds little comfort. Restricting the speech of others may thus be justified on the basis that it will provide further opportunities for members of minorities or marginalised groups to speak.<sup>87</sup> Specifically, MacKinnon maintains that pornography silences women – not only those participating in pornography<sup>88</sup> but all women:<sup>89</sup> '[t]here is a connection between the silence enforced on women

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82 See General Assembly of the United Nations, *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*; *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, UN Doc A/RES/54/263 (2000).

83 Strossen, *Defending Pornography*, above n 3, 179-88; Nadine Strossen, 'Book Review: The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate' (1987) 62 *New York University Law Review* 201, 211-12; Strossen, 'A Feminist Critique', above n 3, 1137-9. Contra: Andrea Dworkin, *Woman Hating* (1984) 184; Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989) 113, 125; Andrea Dworkin, *Pornography: Men Possessing Women* (1979) 23.

84 See, eg, Strossen, *Defending Pornography*, above n 3, 41; Strossen, 'Hate Speech', above n 3, 454.

85 Cf Strossen, 'A Feminist Critique', above n 3, 1135.

86 Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Greg Craven (ed), *Australian Federation: Towards the Second Century* (1992) 151, 171; Fiss, above n 35, 16; MacKinnon, above n 13, 471; cf Alon Harel, 'Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech' (1992) 65 *Southern California Law Review* 1887, 1902.

87 Sadurski, above n 33, 99-101; MacKinnon, above n 13, 483-5; Dworkin, 'Against the Male Flood', above n 4, 515, 529.

88 MacKinnon, above n 13, 471.

89 Ibid 483-5.

... and the noise of pornography that surrounds us'.<sup>90</sup> She is particularly concerned about the silencing effect of pornography on speech against sexual abuse.<sup>91</sup> Yet it is arguable that victims of sexual abuse are more likely to be reluctant to speak out because their abusers have threatened them with retaliation or because of their feelings of shame and fear of being disbelieved than because of pornography. Their abusers might use or refer to pornography in abusing them, but pornography is more likely to play an incidental role rather than to constitute the root of the abuse or the aftermath of silence. This suggests that prohibiting pornography will not necessarily enable victims of sexual abuse to speak freely.

Prohibiting pornography is a protective measure which casts women in the role of victims in need of such protection and unable to fight back or protect themselves. In addition, a ban on pornography, far from preventing subordination of women throughout society, is likely to drive pornography underground in all its forms. Pornography will still exist, and any associated negative effects will continue. Moreover, the women involved may suffer even greater harms. Without pornographic films being legally available in public, officials will not easily witness or scrutinize what happens on the screen, whether for the purposes of classification or otherwise. The police will find it harder to locate and monitor producers of pornography, and the state will be unable to regulate the working conditions of women involved.<sup>92</sup> The demand for pornography will remain, and may even increase.<sup>93</sup> Dworkin herself, while condemning pornography, recognises the importance of pornography being exposed and dealt with in the open:

If pornography is hidden, it is still accessible to men as a male right of access to women; its injuries to the status of women are safe and secure in those hidden rooms, behind those opaque covers; the abuses of women are sustained as a private right supported by public policy.<sup>94</sup>

Strossen points out that a law prohibiting pornography is also likely to be disproportionately used against the expression of disempowered people with minority interests, such as homosexuals and feminists.<sup>95</sup> Thus, history shows that censorship has been used to prevent the spread of information about birth control,<sup>96</sup> safe sex<sup>97</sup> and abortion.<sup>98</sup> The First Amendment has allowed disabled people, homosexuals and women to learn about and celebrate their sexuality.<sup>99</sup>

90 MacKinnon, *Only Words*, above n 4, 9-10, see also 40-1.

91 Ibid 9.

92 Strossen, *Defending Pornography*, above n 3, 192; Strossen, 'Hate Speech', above n 3, 461-2.

93 Strossen, *Defending Pornography*, above n 3, 180, 254.

94 Dworkin, 'Against the Male Flood', above n 4, 515, 533.

95 Strossen, *Defending Pornography*, above n 3, 31-2, 62; Strossen, 'Hate Speech', above n 3, 462-8; Strossen, 'A Feminist Critique', above n 3, 1145; cf David Knoll, 'Anti-Vilification Laws: Some Recent Developments in the United States and their Implications for Proposed Legislation in the Commonwealth of Australia' (1994) 1 *Australian Journal of Human Rights* 211, 234.

96 Strossen, *Defending Pornography*, above n 3, 11; Meyer, above n 57, 566; Blanchard, above n 41, 766-7.

97 Strossen, *Defending Pornography*, above n 3, 20-1.

98 Ibid 228-9.

99 Ibid 164-70.

Not all pornography will consist of such 'good speech'. However, as suggested above, where pornography incorporates extremes of behaviour that seem to go beyond the value of freedom of speech, I believe the key to successful regulation lies not in restricting the pornography itself but in vigorously enforcing other criminal laws that may be broken in its production or sale.

## V PORNOGRAPHY ON THE INTERNET

### A Zoning Technology

Pornography raises essentially the same concerns and interests in any medium. However, the Internet has a number of unusual features that affect the regulation of online pornography. The technology of the Internet is constantly and rapidly developing, and well targeted regulation clearly has the potential to succeed in restricting access by particular classes of people to particular Internet sites. This could be done, for example, by requiring first time users to 'adult' sites to pay a fee by credit card to ensure that they are adults, and thereafter to access the sites using a password.<sup>100</sup> While such a system would contain some flaws (for example, where children learn their parents' passwords), on the whole it would be more accurate in differentially restricting children's access to Internet pornography than, say, channelling adult television broadcasts into late night timeslots is in restricting children's access to television pornography. In the latter case, the regulation may be at once too narrow and too broad. That is, some children will stay up to watch the broadcasts, while some adults will be unable or unwilling to do so such that their viewing choices are effectively restricted. The Internet offers the potential to overcome some of these problems.

Lawrence Lessig compares this kind of 'zoning' in cyberspace to that which occurs in real space. Like anything else, pornography is subject to zoning in real space by a combination of laws and regulations, contractual relationships, and social norms and rules. Thus, pornography is sold only in certain outlets and in certain areas, and typically only to people above a certain age.<sup>101</sup> If technologies are implemented to restrict children's access to pornography on the Internet, the zoning in real space will be imitated in cyberspace, only it will be even more precise.<sup>102</sup> Taken at face value, this form of transplanting real space zoning into cyberspace may seem innocent. As Lessig puts it, 'if zoning is a perfectly permissible activity in real space, what possible argument would there be that this zoning is impermissible in cyberspace?'.<sup>103</sup> Lessig recognizes that the answer may depend less on whether we are satisfied with the way zoning operates to restrict access to pornography in real space than on whether we are prepared to sacrifice the opportunities the Internet has to offer on a broader scale, without knowing the full extent of those opportunities, in order to replicate

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100 Lawrence Lessig, 'Reading the Constitution in Cyberspace' (1996) 45 *Emory Law Journal* 869, 892.

101 *Ibid* 885-6.

102 *Ibid* 888-9.

103 *Ibid* 894.

the zoning we have created in real space. If we are not prepared to sacrifice those opportunities, there is every reason to resist zoning in cyberspace.

## B Open Forum

While the Internet may enable near perfect regulation, it also potentially enables regulation-free communication and interaction. This is another feature that distinguishes it from real space. A person can relatively easily gain access to the Internet, whether to view material already there or establish a new site.<sup>104</sup> Once accessed, individual users and content providers have a significant degree of control over what they see and what they provide for others to see.<sup>105</sup> Originally at least, according to Lessig,

cyberspace was a place where this ideal of zoning was rejected. Here was one place where borders were not to be boundaries; access was to be open and free; people could enter and engage without revealing who they were; massive search engines would collect, in the most democratic way possible, everything that cyberspace had to offer.<sup>106</sup>

Lessig's reference to borders is interesting. If the Internet can be used to replicate zoning in real space by restricting access to pornography, arguably it could also be used to replicate national and geographic borders. Some commentators contend that regulation of the Internet in this manner is impossible because of its nature and technological limitations.<sup>107</sup> However, because we write the code that is the architecture of the Internet, the borderless world of the Internet could theoretically become a segregated one in which citizens of one country could only access sites hosted in their own country. The segregation could even extend to e-mail. From a censorship perspective, this is another example of a sweeping and (too) easy solution for regulators. In Australia, for example, an international effort to nationalise the Internet would eliminate the difficulties of restricting access to X-rated material when so much of it is hosted offshore.<sup>108</sup> It would minimise the difficulties of enforcing laws against persons outside the jurisdiction. However, at the same time, it would involve throwing away the benefits of unrestricted international e-commerce and electronic communication, and curbing the development of the Internet and related technologies.

Zoning, at least as created by social norms, may be inevitable to some extent even on the Internet. Thus, users that do not comply with 'netiquette' (for example, by sending unsolicited advertisements) may be sanctioned through

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104 Thomas Krattenmaker and L A Powe Jr, 'Converging First Amendment Principles for Converging Communications Media' (1995) 104 *Yale Law Journal* 1719, 1736; Adrienne Goldsmith, 'Sex, Cyberspace, and the Communications Decency Act: The Argument for an Uncensored Internet' [1997] *Utah Law Review* 843, 843.

105 David Lindsay, 'Censoring the Internet: the Australian Approach to Regulating Internet Content' (Research Paper No 9, Centre for Media, Communications and Information Technology Law, University of Melbourne, 1999) 34.

106 Lessig, above n 100, 887.

107 Lindsay, above n 105, 20, 22.

108 These difficulties have not been resolved by the *Online Services Act*, see below Part VII(C).

electronic letter bombs.<sup>109</sup> Nevertheless, the relatively low costs and ease of access, and the absence of bottlenecks or monopoly power on the Internet make it a unique forum for communicating with an enormous audience simultaneously. Further, even though limited zoning does exist on the Internet, this does not change the fact that it is much easier to look at pornography in the comfort and privacy of one's own home than to go to an X-rated cinema. The Internet pornography consumer avoids even the social anxiety that may arise when hiring a pornographic video or buying a pornographic magazine. Indeed, this is one of the fears of pro-censorship advocates. The freedom of the Internet means pornography is around every corner, 'just a click away'.

Just how much pornography is there on the Internet? Critics have widely discredited a major study into Internet usage,<sup>110</sup> and little other research is available to establish the degree to which pornography has proliferated on the Internet. Moreover, the Internet is constantly growing and changing, so that any such research is likely to become rapidly out of date. This makes it difficult to measure with precision the amount of pornography on the Internet at any given time, but common experience suggests that pornography is readily available online, whether you want to see it or not.

### C Non-assaultive Nature?

Some judges and commentators have suggested that the Internet is not as 'assaultive' as broadcast media. Since one has to navigate deliberately by clicking through the Internet and giving passwords as required, it has been suggested that it is very unlikely that an unwanted pornographic image or file would appear on screen unbidden.<sup>111</sup> In contrast, one might turn on the radio or television and be surprised by a graphic display of offensive words or pictures before having a chance to change the channel or decide not to watch or listen.<sup>112</sup>

This seems a rather dubious distinction. A cursory look at several websites demonstrates just how assaultive the Internet may be. First, not all pornographic sites require a password to enter, and those that do often include a 'free tour', accessible by anyone who clicks in the right place, accidentally or otherwise. Secondly, where an initial screen requests a password before entry, there will often be vivid pornographic images on the initial screen to entice the user to continue. Thirdly, it is not true that Internet users only reach pornographic sites intentionally. Users may come across pornographic sites unexpectedly when

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109 Dominic Andreano, 'Cyberspace: How Decent is the Decency Act?' (1996) 8 *St Thomas Law Review* 593, 597, 610; Newey, above n 31, 31.

110 Marty Rimm, 'Marketing Pornography on the Information Superhighway: A Survey of 917 410 Images, Descriptions, Short Stories and Animations Downloaded 8.5 Million Times by Consumers in Over 2 000 Cities in Forty Countries, Provinces and Territories' (1995) 83 *Georgetown Law Journal* 1849; see the discussion in Peter Johnson, 'Pornography Drives Technology: Why Not to Censor the Internet' (1996) 49 *Federal Communications Law Journal* 217, 224-5.

111 See, eg, *Janet Reno, Attorney General of the United States v American Civil Liberties Union*, 521 US 844, 854, 867-9 (1997); Andreano, above n 109, 600-1; Angus Hamilton, 'The Net Out of Control - A New Moral Panic: Censorship and Sexuality' in Liberty (ed), *Liberating Cyberspace: Civil Liberties, Human Rights and the Internet* (1999) 169, 170; Goldsmith, above n 104, 846-7, 857.

112 See below Part VI(A); Goldsmith, above n 104, 855-6.

doing Internet searches, or when typing seemingly innocent addresses. Finally, these sites have developed an alarming use of technology and strategy to obtain 'hits' (presumably to raise advertising revenue and sale value) and encourage new memberships. Often, clicking the 'Back' button on your browser will take you not to the last screen you were looking at, but to other pornographic sites, and closing the pornographic window will take you to still more such sites. Thus, the characterisation of the Internet as 'non-assaultive' may ultimately prove an inappropriate basis for regulating the Internet any more or less strictly than broadcast media.

## VI THE UNITED STATES' APPROACH TO PORNOGRAPHY

### A Regulating Indecent Speech Generally

In the US, the First Amendment protects indecent speech as described in *Federal Communications Commission v Pacifica Foundation* ('Pacifica').<sup>113</sup> However, according to the test set out in *Sable Communications of California, Inc v Federal Communications Commission* ('Sable'),<sup>114</sup> the state may nevertheless regulate indecent speech, based on its content, in order to promote a compelling state interest, provided that the regulation is 'narrowly tailored' to that interest.<sup>115</sup> In other words, the least restrictive means of regulation must be used. For example, the Supreme Court has held unconstitutional a statutory provision that effectively required certain cable television operators to 'channel' their material into the hours between 10pm and 6am.<sup>116</sup> The provision applied only to channels primarily dedicated to sexually-oriented programming, and was aimed at preventing children from viewing these channels, without the knowledge or permission of their parents, as a result of 'signal bleed'. Signal bleed occurs where images from unordered channels flash onto other channels – the images often appear only for a moment and are difficult to make out. According to the Court, a less restrictive means of protecting children from viewing such material would have been to require the cable operator to fully block any channel on request by a household that did not wish to receive that channel.

US courts have tended to draw a distinction between different types of media in determining indecency cases, so that the *Sable* test does not always apply. Radio and television broadcasting are typically regarded as less deserving of First Amendment protection than other media, such as newspapers, cable television and film.<sup>117</sup> Courts are therefore more likely to uphold regulations governing the time and manner in which indecent programming may be aired on broadcast radio or television, for example, by requiring channelling of indecent

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113 438 US 726, 740, 746 (1978). See also above Part II.

114 492 US 115 (1989).

115 Ibid 126.

116 *United States v Playboy Entertainment Group Inc*, 529 US 803 (2000).

117 But see Krattenmaker and Powe, above n 104.

programs into late hours of the night.<sup>118</sup> This distinction is largely attributable to the perceived ‘assaultive’ nature of broadcast radio and television. Broadcast media ‘have established a uniquely pervasive presence in the lives of all Americans’ and confront individuals not only in public but also at home.<sup>119</sup> In addition, as mentioned above, because one does not necessarily know what is on before turning on the television or radio, there is a risk that viewers or listeners will be unwillingly exposed to offensive material. It is no answer that the viewer can change the channel or turn the television off, as this does not help if the exposure has already occurred – the damage is done.<sup>120</sup> Nor are introductory warnings about the content of a program always effective, since one may turn on in the middle of the program without having heard or seen the warning.<sup>121</sup>

US courts typically view indecent material distributed via the broadcast media as particularly threatening to children, since even those too young to read can access such media. Thus, the Supreme Court has held that the *Miller* definition of obscenity is broader where children are involved, and the state has more leeway in regulating speech in this context.<sup>122</sup> In *Pacifica*, the complainant was in fact a father who was unhappy at having unwittingly exposed his young son to a radio broadcast of ‘Filthy Words’ while driving in his car.<sup>123</sup> In that case, the Supreme Court upheld the Federal Communications Commission’s declaratory order granting a complaint against the radio station.

### B The Communications Decency Act

In 1996, the US Congress created two criminal offences related to Internet content under the *Communications Decency Act* (‘CDA’).<sup>124</sup> The CDA provided that it was an offence to:

- (a) initiate the transmission of an obscene or indecent communication by means of a telecommunications device, knowing that the recipient is under 18 years of age;<sup>125</sup> or
- (b) use an interactive computer service to send or display to a person under 18 years of age a communication that describes sexual or excretory activities or organs in terms that are patently offensive as measured by contemporary community standards.<sup>126</sup>

The words ‘indecent’ and ‘patently offensive’ as used in the CDA were not defined. Two defences were available: taking reasonable, effective and appropriate action in good faith to restrict access by minors, and restricting access by means of an ‘adult verification mechanism’, such as requiring a credit

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118 *Action for Children’s Television v Federal Communications Commission (No 3)*, 58 F3d 654 (DC Cir, 1995).

119 *Pacifica*, 438 US 726, 748 (1978).

120 *Ibid* 748-9.

121 *Ibid* 748.

122 *New York v Ferber*, 458 US 747 (1982); see also *ibid* 749.

123 438 US 726, 719-30 (1978).

124 47 USC s 223 (1996).

125 *Communications Decency Act*, s 223(a)(1)(B), 47 USC s 223 (1996).

126 *Communications Decency Act*, s 223(d)(1), 47 USC s 223 (1996).

card before entering an Internet site.<sup>127</sup> In a 1997 case, *Janet Reno, Attorney General of the United States v American Civil Liberties Union* ('*Reno No 1*'),<sup>128</sup> the Supreme Court held that the CDA infringed the First Amendment right to free speech. The Court distinguished the Internet from broadcast media on three main bases:

- (1) The US has a history of extensive government regulation of broadcasting, which is not matched in relation to the Internet.<sup>129</sup> This reasoning seems strikingly circular, and rather irrelevant. There does not appear to be any meaningful or significant conclusion to be drawn from a comparison between the short history of the Internet and the much longer history of broadcasting.
- (2) The Internet is not as 'invasive' as broadcasting, and a user is unlikely to access sexually explicit material by accident.<sup>130</sup> For practical reasons described in Part V(C) above, this is not necessarily true, perhaps because of changes to the Internet since the case was decided. Therefore this also seems a rather weak basis for distinguishing between the treatment of broadcasting and the Internet.
- (3) Broadcasting frequencies are scarce (or were originally), whereas access to the Internet is relatively unlimited and cheap.<sup>131</sup> This third distinction provides the most persuasive reason for giving greater First Amendment protection to the Internet than broadcasting. As discussed in Part V(B) above, the Internet provides a unique open forum for discussion, which should not be so quickly or strictly regulated such that it becomes indistinguishable from other media.

Since the Court distinguished the Internet from broadcast media, it applied the narrow *Sable* test in evaluating the CDA,<sup>132</sup> and held that the provisions were not narrowly tailored enough to withstand the constitutional challenge. Although there was a compelling state interest in protecting minors, the provisions were simply too broad. Other, less restrictive, means of preventing indecent communications to minors could include requiring that indecent material be 'tagged' to enable better parental control of material accessed, and incorporating exceptions for material with artistic or educational value.<sup>133</sup> The Court also held that the terms 'patently offensive' and 'indecent' were unconstitutionally vague, even though the former was based in part on the description of indecency in *Pacifica*.<sup>134</sup> This vagueness threatened speech that fell outside the statute's scope,<sup>135</sup> for example, discussions about birth control practices, homosexuality,

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127 *Communications Decency Act*, s 223(e)(5), 47 USC s 223 (1996).

128 521 US 844 (1997).

129 *Ibid* 867, 868-9.

130 *Ibid* 854, 867-9.

131 *Ibid* 868-70.

132 See *Sable*, 492 US 115, 126 (1989).

133 *Reno No 1*, 521 US 844, 879 (1997).

134 See *Miller*, 413 US 15, 24 (1973).

135 *Reno No 1* 521 US 844, 874 (1997).

or the consequences of prison rape.<sup>136</sup> Finally, the Court found that the defences were inadequate to render the provisions valid. Implementing a credit card verification system would be too costly, especially for non-commercial sites, and in any case would mean adults without credit cards would be denied access.<sup>137</sup> The cost of implementing a password system as a method of age verification would also be prohibitive for non-commercial sites.<sup>138</sup>

Interestingly, the Court noted the difficulty in applying a 'community standards' test (as found in s 223(d)(1) of the *CDA*, as well as in the *Miller* definition of obscenity)<sup>139</sup> to the Internet. Numerous 'communities' can be identified on the Internet, but it is difficult to determine which community's standards to apply. This is because the person uploading material onto the Internet may belong to one real space community, while users in countless other real space communities may download the material, and another online community may discuss the material.<sup>140</sup> The Court stated that application of the community standards test would mean that 'any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message'.<sup>141</sup> This would restrict the type of material that an individual could access and limit that person's autonomy in choosing what material to view and what to ignore. It would also mean that the progression of ideas would be stunted by the views of the least open-minded members of society.

Congress' attempt to regulate online pornography in the *CDA* essentially failed because in attempting to limit access by minors to indecent material on the Internet, it effectively limited adult access to such material as well. The constitutional problem with the *CDA* was not that it attempted to limit such access by minors (although the Court did not determine whether a blanket prohibition on indecent or patently offensive communications to minors would be constitutional).<sup>142</sup> An alternative form of regulation relying more closely on the technological potential of the Internet would be for Congress to require Internet pornography providers to implement (and even develop) a device to discriminate between different kinds of Internet content, just as the V-chip discriminates between television content. If all Internet sites were rated according to their content, the so-called 'C-chip' could restrict access to sites with particular ratings. The user could even choose from a number of rating systems, which would then be automatically enforced by the C-chip. Lessig predicts, with some trepidation, that the Supreme Court would uphold such a statutorily mandated system as constitutional.<sup>143</sup>

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136 Ibid 871.

137 Ibid 856, 881-2.

138 Ibid 856-7.

139 *Miller*, 413 US 15, 24 (1973).

140 Anne Branscomb, 'Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace' (1995) 104 *Yale Law Journal* 1639, 1654; see also Goldsmith, above n 104, 860.

141 *Reno No 1*, 521 US 844, 877-8 (1997).

142 Ibid 878.

143 Lessig, above n 100, 893-5.

### C The Child Online Protection Act

Following *Reno No 1*, Congress passed the *Child Online Protection Act* ('COPA')<sup>144</sup> in a second attempt to regulate Internet content. The COPA made it an offence to knowingly, and for commercial purposes, make a communication to a minor by means of the Internet, where the communication contained material harmful to minors. It defined 'material harmful to minors' as obscene and expressly included a definition of obscenity based on *Miller*<sup>145</sup> (ie, with reference to 'community standards').<sup>146</sup> Affirmative defences applied to commercial content providers who restricted access to regulated material using an age verification mechanism, including requiring a credit card, personal identification, digital certificate, or 'any other reasonable measures that are feasible under available technology'.<sup>147</sup> On 22 June 2000, in *American Civil Liberties Union v Janet Reno, Attorney General of the United States* ('*Reno No 2*'),<sup>148</sup> the US Court of Appeals for the Third Circuit affirmed the grant of a preliminary injunction preventing the enforcement of the COPA. The main reason for the affirmation was, as highlighted in *Reno No 1*, the inclusion in the definition of obscenity of a test based on 'community standards'. Such a test

essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability [because of the] inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor.<sup>149</sup>

Obviously, it is impossible to identify a single community standard throughout the US, just as it is impossible to identify such a standard throughout Australia or the world as a whole. This raises a difficulty for Congress, which may have to develop some alternative standard for assessing indecency and obscenity on the Internet if it wishes to pursue the notion of Internet content regulation. Alternatively, it might find that technology races ahead in offering a means to target access to particular sites by people of particular ages or in particular regions. In either case, it will be up to the courts to determine whether the resulting legislation is constitutional, or whether the right to freedom of speech in the First Amendment requires Congress to take a more restrained approach.

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144 47 USC s 231 (1998).

145 413 US 15, 24 (1973).

146 *Child Online Protection Act*, s 231(e)(6), 47 USC s 231 (1998).

147 *Child Online Protection Act*, s 231(c), 47 USC s 231 (1998).

148 217 F3d 162 (3<sup>rd</sup> Cir, 2000).

149 *Reno No 2*, 217 F3d 162, 166 (3<sup>rd</sup> Cir, 2000).

## VII AUSTRALIA'S SOLUTION TO ONLINE PORNOGRAPHY

### A Traditional Reluctance About Rights<sup>150</sup>

Rights in Australia are protected by democratic principles as well as the federal constitutional system of checks and balances, characterised by judicial review and bicameralism.<sup>151</sup> The *Australian Constitution* contains only limited guarantees of rights. Peter Bailey lists specific 'rights' provisions of the *Australian Constitution* under the headings 'Political Rights', 'Civil and Legal Process Rights', 'Economic and Equality Rights' and 'Social Rights'.<sup>152</sup> These are not all strictly 'guarantees', and in some cases the extent to which they involve the provision of rights is debatable.<sup>153</sup> Several provisions of the *Australian Constitution* are relevant to freedom of speech. For example, in a broad sense, individuals have a right to free speech through the requirement of direct election by the people of members of the House of Representatives,<sup>154</sup> and through the strict criteria for amending the *Australian Constitution* by referendum.<sup>155</sup>

Australia has generally been reluctant to recognise or enforce specific individual rights and freedoms. This reluctance is exemplified by the pattern of sporadic calls for a Bill of Rights in Australia,<sup>156</sup> and the failure of constitutional referenda for the entrenchment of greater guarantees of rights.<sup>157</sup> The Australian people rejected the proposed insertion of a guarantee of free speech and expression as part of a broader referendum proposal in 1944.<sup>158</sup> Hilary Charlesworth suggests that this reluctance may be due in part to an enduring faith in the system of responsible government in a democracy.<sup>159</sup> This is consistent with Brian Galligan's suggestion that equality 'is the most fundamental Australian value which pervades social and political life'.<sup>160</sup> While

150 See Hilary Charlesworth, 'The Australian Reluctance About Rights' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) 21, 25; see also Elizabeth Evatt AC, 'Meeting Universal Human Rights Standards: The Australian Experience' (Paper presented at the Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 22 May 1998).

151 Brian Galligan, 'Australia's Political Culture and Institutional Design' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) 55, 63; Goldsworthy, above n 86, 158.

152 Peter Bailey, *Human Rights: Australia in an International Context* (1990) 84-6. The provisions listed are ss 8, 16, 24, 30, 31, 34, 41, 51(ii), 51(xxiiiA), 51(xxxi), 75, 80, 84, 88, 90, 92, 99, 100, 102, 104, 109, 113, 116, 117, 119, 128.

153 See Goldsworthy, above n 86, 151-2.

154 *Australian Constitution* s 24.

155 *Australian Constitution* s 128.

156 On the question of whether Australia should introduce a Bill of Rights see generally Philip Alston (ed), *Towards an Australian Bill of Rights* (1994); Enid Campbell and Harry Whitmore, *Freedom in Australia* (2<sup>nd</sup> ed, 1973) 432-56; Frank Brennan, *Legislating Liberty? A Bill of Rights for Australia* (1998); Goldsworthy, above n 86, 160-76.

157 Charlesworth, above n 150, 28-33.

158 Constitutional Alteration (Post-War Reconstruction and Democratic Rights) Bill 1944 (Cth); see George Williams, *Human Rights under the Australian Constitution* (1999) 251-2.

159 Charlesworth, above n 150, 22-3, 53.

160 Galligan, above n 151, 59; see also Eugene Kamenka and Alice Erh-Soon Tay, 'Introduction: Human Rights and the Australian Tradition' in Alice Erh-Soon Tay (ed), *Teaching Human Rights* (1981) 1, 3.

equality and individual liberty are not necessarily mutually exclusive,<sup>161</sup> if a society focuses on justice in terms of giving everyone an equal say, this tends to discount the fact that, without additional protections, those in the minority risk consistently having their interests subordinated in favour of the majority view. In other words, recognition of minority rights may run counter to the utilitarian nature of Australian society,<sup>162</sup> and democracy alone will not necessarily protect those rights.<sup>163</sup>

Although the Australian common law includes a principle that freedom of expression cannot be legislatively curtailed except by clear and unambiguous language,<sup>164</sup> the right of freedom of speech has traditionally played only a small role in judicial decision-making.<sup>165</sup> For example, in 1951, the High Court of Australia declared the *Communist Party Dissolution Act 1950* (Cth) unconstitutional.<sup>166</sup> The Act purported to dissolve the Communist Party, confiscate its assets<sup>167</sup> and impose disabilities on its members and officers.<sup>168</sup> The Court's decision was based primarily, not on the rights of individuals to hold and express particular political opinions, but on the absence of a relevant head of legislative power under which Parliament could enact such legislation in accordance with s 51 of the *Australian Constitution*. Individual rights were only incidentally protected: 'The court did not regard the substance of the legislation as antithetical to the rule of law'.<sup>169</sup>

## B Growing Recognition of Rights

Over the last decade, the Australian approach to human rights principles and rights discourse in general has been changing. Rights are becoming a more important feature of the legal, social and political landscape. One reason for this is the informal influence of the US culture of civil liberties, for example, through film, television, magazines and newspapers.<sup>170</sup> Another reason is Australia's role as a party to several human rights conventions, including conventions guaranteeing freedom of speech.

161 Strossen, 'Hate Speech', above n 3, 458-77; Strossen, *Defending Pornography*, above n 3, 30-2; cf Fiss, above n 35, 12-13; MacKinnon, *Only Words*, above n 4, 71.

162 Goldsworthy, above n 86, 153; Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114 *Daedalus* 147; cf Galligan, above n 151, 61-2.

163 Cf Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 163; Goldsworthy, above n 86, 165; Dworkin, above n 37, 202-5.

164 *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283, cited in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, fn 62.

165 For example, in one case a group of Indigenous Australians challenged the validity of legislative restrictions on the use of certain words related to the Bicentenary. In its decision, the High Court made only passing reference to the importance of free expression: *Davis v Commonwealth* (1988) 166 CLR 79, 100, 116.

166 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

167 *Communist Party Dissolution Act 1950* (Cth) s 4.

168 *Communist Party Dissolution Act 1950* (Cth) ss 9, 10.

169 Charlesworth, above n 150, 26.

170 Orford, above n 51, 75.

Australia is a party to the *ICCPR*.<sup>171</sup> Yet the *ICCPR* has not been implemented in Australia through domestic legislation (as required under Australian law if it is to take effect domestically),<sup>172</sup> even though the *ICCPR* is annexed to the *Human Rights and Equal Opportunity Act 1986* (Cth).<sup>173</sup> However, in the case of ambiguity, Australian courts may interpret a domestic statute with regard to such conventions, and may prefer a construction that is consistent with Australia's international obligations.<sup>174</sup> Australia also has a theoretical incentive to comply with international obligations because it is now a party to the *Optional Protocol to the International Covenant on Civil and Political Rights* ('*Optional Protocol*').<sup>175</sup> This means that Australian citizens can report violations of the *ICCPR* to the Human Rights Committee of the United Nations. However, decisions of the Committee are not binding. In practice, the Australian Government's response is likely to depend on the degree of political will and pressure associated with the particular decision.<sup>176</sup>

The High Court has handed down several important decisions in recent years recognising individual or human rights.<sup>177</sup> For example, the High Court has recognised a specific freedom of political communication as being implicit within the system of representative government established by the *Australian Constitution*,<sup>178</sup> or at least within the text of ss 7 and 24.<sup>179</sup>

Once it is recognized that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains.<sup>180</sup>

The Court's recognition of the importance of free political communication is linked to the rationale of promoting democracy through freedom of speech generally.<sup>181</sup> Rather than extending to protect all or most speech, this implied freedom is restricted to political communication, including: critiques of or

171 See above Part III(A) for a discussion of art 19.

172 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 74.

173 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287; Ivan Shearer, 'The Relationship between International and Domestic Law' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 34, 94.

174 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38; *Polites v Commonwealth* (1945) 70 CLR 60, 69.

175 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Australia became a party on 25 December 1991.

176 See, eg, *Toonen v Australia* (1994) 1(3) IHRR 97 and the *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4, discussed in Hilary Charlesworth, 'International Human Rights Law and Australian Federalism' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997) 280, 297.

177 See, eg, *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Mabo v Queensland [No 2]* (1992) 175 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v State of Victoria* (1997) 189 CLR 579; *Kruger v Commonwealth* (1997) 190 CLR 1.

178 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 559.

179 *McGinty v Western Australia* (1996) 186 CLR 140.

180 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 48-9 (Brennan J).

181 Lindsay, above n 105, 36.

comments on State<sup>182</sup> or federal governments, political leaders<sup>183</sup> or public agencies like the Industrial Relations Commission;<sup>184</sup> advertising by political parties on radio or television during federal election periods;<sup>185</sup> and other speech relevant to the development of public opinion or matters of public affairs.<sup>186</sup> Thus, although non-verbal, visual images or symbolic speech may be protected,<sup>187</sup> this implied freedom is unlikely to protect any form of sexually explicit material or pornography, because of the absence of any political content.

The freedom of political communication implied in the *Australian Constitution* is therefore relatively limited in scope. It is focused on facilitating representative government for the good of the community rather than on allowing individuals to develop personal autonomy or self-fulfilment through speech.<sup>188</sup> As such, it involves immunity from governmental action rather than regulation of matters arising solely between private parties,<sup>189</sup> ie, a freedom from laws curtailing political communication rather than a freedom to communicate.<sup>190</sup> It does not guarantee voter equality,<sup>191</sup> and has been held not to protect speech that encourages voters to fill in ballot papers other than in accordance with the prescribed method.<sup>192</sup> Finally, even if a particular kind of speech is protected, a law that burdens that speech by its terms may nevertheless be valid if it is 'reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government' and the referendum procedure established by s 128.<sup>193</sup>

### C The Online Services Act

The passage of the Internet censorship legislation in Australia, and the constitutional limits on the power of legislatures in the United States to regulate communications content, mean that Australia and the United States represent extreme examples of the legal responses of Western societies to the problem of Internet content.<sup>194</sup>

On 1 January 2000,<sup>195</sup> Australia's solution to online pornography came into effect, in the form of the *Online Services Act*. The main amendment effected by the *Online Services Act* was the insertion of a new Schedule 5 into the

182 *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232.

183 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 124 (Gaudron J). On the impact of this case on defamation law see generally Sally Walker, 'The Impact of the High Court's Free Speech Cases on Defamation Law' (1995) 17 *Sydney Law Review* 43.

184 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 53 (Brennan J).

185 *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106, 132 (Mason CJ).

186 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 124.

187 *Levy v State of Victoria* (1997) 189 CLR 579.

188 Williams, above n 158, 168.

189 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

190 Sally Walker, 'Lange v ABC: the High Court rethinks the "constitutionalisation" of defamation law' (1998) 6 *Torts Law Journal* 9, 14-15.

191 *McGinty v Western Australia* (1996) 186 CLR 140.

192 *Lange v Commonwealth* (1996) 186 CLR 302.

193 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8.

194 Lindsay, above n 105, 58.

195 *Broadcasting Services Act 1992* (Cth) sch 5, s 22(5).

*Broadcasting Services Act 1992* (Cth), which sets up a scheme for regulation of certain content on the Internet. Internet content hosts and Internet service providers ('ISPs') bear the primary burden of 'cleaning up' the Internet in Australia, and substantial monetary penalties apply for non-compliance.<sup>196</sup>

Under the *Online Services Act*, Internet content hosted in Australia may be the subject of a 'take down notice' by the Australian Broadcasting Authority ('ABA'). Such a notice directs the content host to cease hosting particular content and not to host it in the future. The classification of content for the purposes of the notice is based on the Australian classification scheme for films and television programs, which includes the categories of 'R' (restricted), 'X' (sexually explicit) and 'RC' (refused classification).<sup>197</sup> The ABA is required to issue take down notices in respect of content hosted in Australia that is prohibited or potentially prohibited, being content that has been or is substantially likely to be rated X or RC. Unless subject to a restricted access system approved by the ABA (for example, requiring a PIN to access), content rated R is also prohibited.<sup>198</sup>

The *Online Services Act* also regulates Internet content hosted outside Australia, and the ABA can similarly issue a notice to an Australian ISP to take reasonable steps to prevent access to prohibited or potentially prohibited content hosted offshore, in accordance with any applicable industry code registered by the ABA, or any other applicable ABA standard.<sup>199</sup> For offshore content, the prohibition applies only to X and RC rated material.<sup>200</sup> In late 1999, the ABA registered a code of practice (developed by the Internet Industry Association) allowing ISPs to provide end users with approved content filters rather than blocking content from overseas sites.

Various commentators have criticised the *Online Services Act* as being both ineffective in its goal of limiting access to pornography on the Internet,<sup>201</sup> and unduly onerous in imposing strict obligations on ISPs.<sup>202</sup> Peter Chen states that the *Online Services Act* exemplifies 'symbolic politics': 'the desire of the decision-maker to appear active on an issue when he or she is not'.<sup>203</sup> As such, the Internet industry in Australia is likely to respond by hosting content offshore if it is prohibited in Australia.<sup>204</sup> This is an illustration of the very nature of the Internet: 'The Net interprets censorship as damage and routes around it'.<sup>205</sup> The

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196 *Broadcasting Services Act 1992* (Cth), sch 5, s 82.

197 See generally *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

198 *Broadcasting Services Act 1992* (Cth) sch 5, ss 10-11.

199 *Broadcasting Services Act 1992* (Cth) sch 5, s 40.

200 *Broadcasting Services Act 1992* (Cth) sch 5, ss 10-11.

201 See Brendan Scott, 'Silver Bullets and Golden Egged Geese: A Cold Look at Internet Censorship' (2000) 23 *University of New South Wales Law Journal* 215, 220; Peter Chen, 'Pornography, Protection, Prevarication: The Politics of Internet Censorship' (2000) 23 *University of New South Wales Law Journal* 221, 221-3.

202 Scott, above n 201, 218-20.

203 Chen, above n 201, 222.

204 *Ibid*; Lindsay, above n 105, 122.

205 Cited in Lindsay, above n 105, 20.

principles underlying the *Online Services Act* and the manner in which it has been drafted are also confused and inconsistent.<sup>206</sup>

The implementation of the Internet Industry Association's code has also been criticised. While ostensibly reducing the extent of regulation, the unfortunate effect of this change is that the acceptability in Australia of content hosted overseas will depend on 'American beliefs and values',<sup>207</sup> since the majority of commercial filtering services are designed by Americans. At the same time, the usual difficulties with such services arise.<sup>208</sup> In particular, due to technological limitations, content filters tend to be both over-inclusive and under-inclusive, filtering out desired material, such as educational material about sex, while failing to filter out particularly offensive material.<sup>209</sup> Moreover, users can choose not to use the filters.<sup>210</sup> This may be a triumph for individual liberty, but it appears to represent an unwitting departure from the strict, conservative approach taken in the *Online Services Act* as a whole.

Aside from its poor drafting and unwanted practical effects, the *Online Services Act* represents an insidious form of regulation. It restricts access to material deemed offensive, even though such material is available in the form of books, magazines and videos.<sup>211</sup> Moreover, while it ostensibly derives from a concern about children's access to such material, it makes no attempt to limit itself to children's access and restricts adult choices as well.<sup>212</sup> This suggests an unwillingness on the part of the Parliament to accept adults' rights to take responsibility for their own viewing habits and to follow their own moral compass. The Federal Government responded in this extreme fashion to the problem of pornography on the Internet in the absence of real contemplation and public consideration of the competing arguments. The legislation was heavily influenced by the moral conservatism of the Senate Standing Committee on Information Technologies,<sup>213</sup> and stands in stark contrast to the US law on this issue.

## VIII CONCLUSION

The conflict between freedom of speech and pornography has produced some strange bedfellows. Dworkin and MacKinnon accuse the American Civil Liberties Union of having economic ties with pornographers.<sup>214</sup> Strossen cautions against the alignment of feminist anti-pornographers with right-wing conservative and fundamentalist Christian groups.<sup>215</sup> The current US approach to

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206 Ibid 119-22.

207 Chen, above n 201, 226.

208 Lindsay, above n 105, 123-49.

209 Ibid 150.

210 Ibid 121.

211 Ibid 69.

212 Ibid 71.

213 Ibid 49, 65; Chen, above n 201, 223-5.

214 Dworkin and MacKinnon, above n 4, 83-4.

215 Strossen, *Defending Pornography*, above n 3, 13, 82; Jacobs, above n 15, 801-2.

online pornography may be less than ideal, and should not necessarily be followed in Australia. However, it is clear that if Australia is to reach a defensible position on online pornography it must give further thought to issues of free speech and harm. The reasons for protecting speech – based on ideals of democracy, autonomy and equality – apply equally in Australia, despite the lack of an equivalent to the First Amendment. The importance of this freedom must be compared to the lack of evidence of a direct causal relationship between pornography and physical, emotional and social harm. More importantly, even if such a relationship could be established, banning pornography is unlikely to remove, and may well intensify, any harms it presently causes. Criminal conduct associated with pornography would be better dealt with under laws directed specifically at that conduct rather than by censorship.

The *Online Services Act* imposes a strict regime limiting access by adults and children alike to material considered offensive by a group of moral conservatives. This approach conflicts with the rights of individuals to determine what is appropriate for them and their children to see. Further, in the context of the Internet, there is even less reason to attempt to regulate pornography than in other media. The nature of the Internet means that, at least at present, it is extremely difficult to stop people accessing material they wish to see. The likely impact of the legislation is therefore to move pornographic material offshore without preventing it being accessed from Australia. While it may fail in its goal of ridding Australians of online pornography, it is still a step in the wrong direction. The Internet offers a uniquely open forum which should be embraced and nurtured rather than strangled, as the *Online Services Act* seeks to do.