CIVIL LIBERTIES *Harvey A. Silverglate*

Kid-porn law goes too far

THE SUPREME Court will review a case that raises the most fundamental question facing any society that deems itself free—whether the law protects the sanctity of one's innermost thoughts. In a series of landmark 20th century cases, the answer has been yes. Suddenly the issue has been placed in doubt by congressional legislation and a circuit court conflict as to how far the federal government may go to stamp out what is termed "the scourge of child pornography."

The court granted certiorari in January to review the opinion by the U.S. Court of Appeals for the 9th Circuit in *The Free Speech Coalition v. Reno*, No. 97-16536. In a 2-1 decision at odds with those of the 1st, 4th and 11th circuits, the 9th invalidated, on First Amendment grounds, a portion of the Child Pornography Prevention Act of 1996 (CPPA) that, it said, criminalizes "the generation of images of fictitious children engaged in imaginary but explicit sexual conduct."

Technological advances

This statute was Congress' response to technology that enables the creation of lifelike images of children engaged in pornographic poses where no human subject is used, or permits users to morph innocent images of children to make it appear as though they are engaged in sex.

The 9th Circuit majority noted that Congress had shifted the paradigm from criminalizing child pornography that involved real children, to forbidding a "'visual depiction' that 'is, or appears to be, of a minor engaging in sexually explicit conduct.'" The court noted that Congress shifted from focusing on the "harm inflicted upon real children" to "a determination that child pornography was evil in and of itself, whether it involved real children or not."

Congress, as well as Circuit Judge Warren J. Ferguson in dissent, maintained that even imaginary images of children engaged in sex should be eliminated to protect children from the secondary efforts of virtual pornography, such as the perverse excitement these images would generate in pedophiles.

The 9th Circuit majority, however, concluded that under the statute "images that are, or can be, entirely the product of the mind are criminalized" and this violated the First Amendment. If a suppression of the products of the human imagination were permitted merely because "speech plays a role in the process of conditioning" the mind, "that would be the end of *freedom of speech*."

A shift may have taken place in 1990 in the Supreme Court's decision in *Osborne v. Ohio*, 495 U.S. 103, in which the court upheld an Ohio law that criminalized possession of child pornography. At first blush, this seemed in conflict with the court's 1969 landmark decision in *Stanley v. Georgia*, 394 U.S. 557, which accorded First Amendment protection to the private possession of obscene material.

If one could possess (albeit not create nor distribute) obscene material, then, obviously, one could possess merely pornographic material. Yet in *Osborne*, the court asserted that while it agreed with *Stanley*'s conclusion that the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts," when it comes to child pornography the considerations are different.

Imaginary victims

"The State does not rely on a paternalistic interest in regulating Osborne's mind," the court held, but rather, by outlawing child pornography, "hopes to destroy a market for the exploitative use of children." In other words, those who buy and thus create a market for child pornography indirectly cause the exploitation of the child subjects.

However, production of virtual child pornography, outlawed by the CPPA, does not involve real children. Congress' and the dissent's theory that such material nonetheless encourages perverts and places children at risk comes close to saying that any intellectual material that may inflame certain disfavored passions may be outlawed.

This makes a mockery of *Stanley*'s ringing support for the Founders' efforts "to protect Americans in their beliefs, their thoughts, their emotions and their sensations."

"Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds," Justice Thurgood Marshall wrote for the *Stanley* majority. We'll see.

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LAW AND LAUGHTER

"I'm not sentimental, yet I feel for defense attorneys."

A judge is never off the record

By Leonard Orland SPECIAL TO THE NATIONAL LAW JOURNAL

AS A LAW school professor with a special interest in the federal courts, I followed the landmark Microsoft antitrust case with concern over what I viewed as Judge Thomas Penfield Jackson's casual approach to procedure during the trial.

My concern turned to real dismay when the judge abruptly cut short the proceedings, decreeing that the world's largest and indisputably most important software company be broken in two (as the government requested) without even holding hearings on the remedy.

And my dismay turned to outrage when it was revealed that Judge Jackson had been holding secret briefings for selected reporters during the trial—briefings that disclosed both his prejudices about the case and his lack of concern for legal due process.

The fact that an experienced federal judge chose to ignore principles of judicial conduct is reprehensible.

It was thus a considerable relief to find that the U.S. Court of Appeals for the District of Columbia, which this week held two days of oral argument in the Microsoft antitrust case, shared my concerns.

For while the bulk of the hearings before the seven-member panel of the D.C. Circuit was spent on the standard meat-and-potatoes issues of appellate proceedings, the court specifically set aside time to consider a question that was anything but standard fare: misconduct by the trial court judge.

Off the record?

At issue before the panel were the conversations Judge Jackson had with members of the press. Along with granting time to reporters from the *New York Times* and the *Wall Street Journal*, Judge Jackson also gave 10 hours of taped interviews to the writer Ken Auletta of the *New Yorker*.

In the interviews, the judge compared Microsoft to depraved felons, equating Microsoft's "obstinacy" to the proclamations of innocence of four members of the Newton Street Crew, who were convicted of racketeering, drug dealing, torture and murder during a trial in Judge Jackson's court five years before.

The D.C. Circuit panel hearing the appeal remained polite in pressing government attorneys for an explanation, but they nonetheless were straightforward in their criticism. One judge suggested that such conduct "violates the oath of office." Another noted: "We [as judges] do not have ex parte communications. I don't discuss cases with my best friends."

The chief judge of the D.C. Circuit, Harry T. Edwards, underscored the point: "There are lots of things we think and feel about advocates and parties during the course of a proceeding. It doesn't mean that we are entitled to run off our mouths in a pejorative way. The system would be in shambles if all judges went around doing this."

And another appellate judge declared that Judge Jackson's seeming discretion in embargoing his inflammatory comments until the trial was over only made his conduct more culpable: "If he had not placed that embargo, he would have been off the case in a minute."

Start from scratch?

It is always hazardous to predict the outcome of an appeal from the questions raised at oral argument. But here the well-earned condemnation of Judge Jackson voiced by the circuit judges makes it fair to surmise that the D.C. Circuit will find judicial misconduct and remove him from the case. And at least one appellate judge raised the issue of whether Judge Jackson's conduct would force the courts to start from scratch in drawing any conclusions about the legality of Microsoft's conduct: Why, he asked, should Judge Jackson's findings of fact and law be given any weight at all in light of what, at minimum, was the appearance of bias?

Legal due process should be precious to every American. But the fact that an experienced federal judge chose to ignore principles of judicial conduct is as reprehensible as it is shocking. Fortunately, the D.C. Circuit seems determined to correct the record in the case.

Mr. Orland is a professor at the University of Connecticut School of Law and was a consultant to the Federal Courts Study Committee.

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