



AGE-VERIFICATION LAWS IN THE ERA OF DIGITAL PRIVACY

Christine Marsden*

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* Christine Marsden is a Juris Doctor candidate at the George Mason University Antonin Scalia Law School. She would like to thank to her husband and parents for patiently listening to her talk about the statistics of child pornography exposure for five months straight, and to the National Security Law Journal for its support and contributions to this Comment.

I. INTRODUCTION

By the age of thirteen, it is likely that more than half of children in the United States have been exposed to pornography.¹ What is more jarring, the nature of this exposure has changed drastically in the past few decades.² At one point, the primary way children were exposed to pornography was by stumbling upon a friend or family member's "stash" of magazines or similar materials.³ Now, at least two in three children have smartphones by age twelve.⁴ Simply misspelling a search term or domain extension can land an unsuspecting tween or teen on an explicit website.⁵

The most notorious example of typosquatting—where an often malicious website imitates “the look and feel of your intended destination”—may be *whitehouse.com* (not to be confused with *whitehouse.gov*).⁶ In the 1990s, the White House bought the *whitehouse.gov* domain but failed to secure similar domains and other extensions.⁷ Sensing an opportunity, Dan Parisi bought

¹ A study has shown that this statistic applies to children in the UK. *What's the Average Age of a Child's First Exposure to Porn?*, FIGHT THE NEW DRUG, <https://fightthenewdrug.org/real-average-age-of-first-exposure/> (last visited Dec. 27, 2022); BRIT. BD. OF FILM CLASSIFICATION, YOUNG PEOPLE, PORNOGRAPHY & AGE-VERIFICATION 7 (2020), <https://www.revealingreality.co.uk/wp-content/uploads/2020/01/BBFC-Young-people-and-pornography-Final-report-2401.pdf>.

² See FIGHT THE NEW DRUG, *supra* note 1.

³ *Id.*

⁴ Victoria Rideout, Michael B. Robb, THE COMMON SENSE CENSUS: MEDIA USE BY TWEENS AND TEENS 5 (2019), <https://www.common sense media.org/sites/default/files/research/report/2019-census-8-to-18-full-report-updated.pdf>; see also FIGHT THE NEW DRUG, *supra* note 1.

⁵ FIGHT THE NEW DRUG, *supra* note 1; see also *What is Typosquatting?*, MCAFEE <https://www.mcafee.com/learn/what-is-typosquatting/> (last visited Jan. 8, 2023).

⁶ MCAFEE, *supra* note 5; Gregg Ott, *A History of WhiteHouse.com, A.K.A. The Biggest Internet Controversy of the 1990s* (Apr. 19, 2021), https://www.cracked.com/article_30052_a-history-of-whitehousecom-aka-the-biggest-internet-controversy-of-the-1990s.html.

⁷ Linda Rosencrance, *Porn Site WhiteHouse.com Domain Name Up for Sale*, COMPUTERWORLD (Feb. 10, 2004, 12:00 AM), <https://www.computerworld.com/article/2574385/porn-site-whitehouse-com-domain-name-up-for-sale.html>.

whitehouse.com, which quickly began hosting adult content.⁸ To an adult, this may seem like a funny joke to play on the government, but the real punchline is this: citing the fact that his son was about to start kindergarten, Parisi put the domain up for sale in 2004, refusing to sell it to anyone in the adult entertainment industry.⁹

The proliferation of online pornography poses a great threat to the nation's security. Thirty years ago, children's exposure to pornography happened when they found a family member's stash of magazines or tapes.¹⁰ Now, even the most innocent misspelling in a search bar can take a turn that many parents are ill-equipped or unable to prevent, and the explicit content is often more extreme or hardcore than the content in a decades-old *Playboy*.¹¹ Further, children today are digital natives. These children experience technology differently than their parents, who may not understand or be able to keep up with the vast changes in the digital landscape in recent years, especially with the pandemic putting additional stress on parents' technology practices and limits the frequency a child uses technology.¹² However, this does not mean that today's children are better equipped to deal with the harms of sexually explicit content. Childhood exposure to pornography can cause confusion around realistic behavior and lead to violent behavior, mental health issues, relationship difficulties, and substance abuse.¹³ Studies have shown that the majority of children are exposed to pornography before the age of thirteen, with more than

⁸ *Id.*

⁹ *Id.*

¹⁰ FIGHT THE NEW DRUG, *supra* note 1.

¹¹ *Id.*; see also *Frequently Asked Questions for Clients*, AGE VERIFICATION PROVIDERS ASS'N <https://avpassociation.com/av-clients/faqs-for-clients/> (last visited Mar. 29, 2023).

¹² See OFCOM, CHILDREN AND PARENTS: MEDIA USE AND ATTITUDES REPORT 2, 35 (Mar. 30, 2022)

https://www.ofcom.org.uk/__data/assets/pdf_file/0025/217825/children-and-parents-media-use-and-attitudes-report-2020-21.pdf.

¹³ Allison Baxter, *How Pornography Harms Children: The Advocate's Role*, Am. Bar Ass'n (May 1, 2014),

https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/may-2014/how-pornography-harms-children--the-advocate-s-role/.

80% of males and 57% of females exposed to pornography by the age of eighteen.¹⁴

Unfortunately, most pornography websites run their operations abroad.¹⁵ Almost since its inception, the internet has been one of the most difficult environments to regulate due to its constantly shifting nature and sheer scope, as well as jurisdictional issues and enforcement complications.¹⁶ Some of the regulatory solutions have become viable only in recent years as technology advances.¹⁷ Lawmakers around the world have begun to introduce legislation to address these harms and mitigate them for future generations.¹⁸ Age-verification laws are at the forefront of the discussion around childhood pornography exposure.¹⁹ Debate continues over whether privacy and data security can be effectively protected in such legislation, and there are concerns over giving personal information to overseas companies who may not be known for their transparency.²⁰ As bad as it may be to share a user's pornography habits with a foreign or malicious entity, sharing identifiable information is arguably much worse. This type of intrusion endangers individual and national security due to an increased risk of exposure of information through cyberattacks against databases full of information about pornography users. Legislation must emphasize security without sacrificing the protection of vulnerable children who may be harmed by pornography exposure. Although there are certainly a few hurdles to creating

¹⁴ FIGHT THE NEW DRUG, *supra* note 1.

¹⁵ *Frequently Asked Questions for Clients*, *supra* note 11.

¹⁶ Steve Lohr, *The Net, a Complex Medium, is Proving Hard to Regulate*, N.Y. TIMES (June 13, 1996),

<https://archive.nytimes.com/www.nytimes.com/library/cyber/week/0613net.html>.

¹⁷ See, e.g., *The Story Behind LA Wallet*, LA WALLET, <https://lawallet.com/origins/> (last accessed Apr. 13, 2023).

¹⁸ See, e.g., Children's Internet Protection Act, Pub. L. No. 106-554 § 1701, 114 Stat. 2763A-335; LA. STAT. ANN. § 2800:29 (2023); Online Safety Bill 2022-23, HL Bill [87] cl. 1 (UK).

¹⁹ See Shiona McCallum, *Can Age Verification Stop Children Seeing Pornography?*, BRIT. BROAD. CORP. (Nov. 29, 2022), <https://www.bbc.com/news/technology-63794796>.

²⁰ Patricia Nilsson & Martin Coulter, *Porn Age-Verification Could Be Monopoly, Warns Watchdog*, FIN. TIMES (June 27, 2019), <https://www.ft.com/content/9913ba8e-942b-11e9-b7ea-60e35ef678d2>.

successful age-verification legislation, age-verification legislation is likely the best, least restrictive solution to the rampant issue of childhood pornography exposure, in conjunction and delicately balanced with education, parental involvement, and strong information security provisions. This Comment proposes to replace the current “honor system,” which will prevent more minors from accidentally being exposed to adult material.

II. THE HARMS OF CHILDHOOD PORNOGRAPHY EXPOSURE

Often, young children who view pornography for the first time do so accidentally.²¹ Some common ways that children are first exposed to pornography include (a) Google searches of terms such as sex or pornography without knowledge of what these terms mean, (b) clicking on links from friends without knowing what content they include, (c) pop-up ads on illegal film streaming and gaming websites, and (d) being shown videos by a friend on a phone or other device.²² Children who experience this early exposure, particularly before the age of 10, often report being initially “grossed out” or confused.²³

The harms of early exposure to pornography, and pornography in general, are well-documented. Many children report believing that pornography is a realistic depiction of sex, and consumption of pornography is positively correlated with higher self-esteem issues and negative mental health outcomes.²⁴ In addition, due to the nature of pornographic material, the pornography industry as a whole lacks sufficient safeguards to ensure that posted images and videos are “legitimate.”²⁵ That is, “revenge” pornography and other non-consensual porn, including pornography captured during human

²¹ BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 16; *see also* ELENA MARTELLOZZO ET AL., I WASN'T SURE IT WAS NORMAL TO WATCH IT 23 (2017).

²² BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 16.

²³ *Id.* at 17.

²⁴ *See* MARTELLOZZO ET AL., *supra* note 21, at 40; BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 51. *See also* How Porn Can Distort Consumers' Understanding of Healthy Sex, FIGHT THE NEW DRUG, <https://fightthenewdrug.org/how-porn-can-distort-consumers-understanding-of-healthy-sex/> (last visited Jan. 8, 2023).

²⁵ Fiona Vera-Gray et al., *Sexual Violence as a Sexual Script in Mainstream Online Pornography*, 61 BRIT. J. CRIMINOLOGY 1243, 1251 (2021).

trafficking, often go undetected.²⁶ As a broad generalization, adults have the ability to be more discerning about what they consume. Children often do not have the knowledge or understanding to fully realize the consequences of their consumption.²⁷ Many of these children also report depending on pornography to learn about sex and determine what might be expected of them.²⁸

In this way, pornography consumption can influence actual sexual experiences, especially for minors who use pornography as an educational tool.²⁹ Given the often wildly misleading portrayal of sex in pornography, it comes as no surprise that children who use pornography to inform their sexual encounters are more likely to engage in the activities they see in these videos.³⁰ Young people, particularly young girls, also felt that pornography often portrays sex as being male-centric.³¹ Parents expressed concern that “their daughters would feel obligated to perform certain sexual acts.”³²

Indeed, it seems that pornography does tend to impact sexual experiences in young people. Experts conducted various studies in the United Kingdom (“UK”) around child exposure to pornography that provide valuable anecdotes in observing effects of this exposure on children, some as young as seven years old. A 2021 UK study found that “one in eight titles shown on the home pages of the United Kingdom’s most popular sites” describe some form of sexual violence.³³ Additional anecdotal evidence from a study performed in the UK also noted worrying trends around consent.³⁴ Multiple teens, mostly boys, described trying out sexual acts they had seen in porn, including choking or being rough with their girlfriends, not realizing

²⁶ *See id.*

²⁷ *See* MARTELLOZZO ET AL., *supra* note 21, at 16.

²⁸ *See id.* at 36-37.

²⁹ *See id.* at 41; BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 46, 47.

³⁰ *See* MARTELLOZZO ET AL., *supra* note 21, at 16, 30.

³¹ BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 45.

³² *Id.*

³³ Vera-Gray et al., *supra* note 25, at 1243.

³⁴ *See* BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 48; *see also* MARTELLOZZO ET AL., *supra* note 21, at 1.

it may hurt or upset them.³⁵ The study notes that only 18% of sexually active 16- and 17-year-olds reported that viewing pornography had affected their own sexual experiences and hypothesizes that “only 18% of children are aware enough of pornography’s pervasive influence . . . to state it unprompted in a survey . . . [I]f accurate, it is concerning that the influence of information from pornography on sexual experiences is so ingrained as to be unrecognizable.”³⁶

In other words, children who view pornography may not be aware of how it affects them.³⁷ The more pornography children consume, the more concerning their attitudes about sex become.³⁸ A small survey of young people in the UK produced startling results on issues like consent.³⁹ Of the subgroup of children who said they watched pornography intentionally, “29% of this group said that consent wasn’t needed if ‘you knew the person really fancies you.’ In comparison, among those whose interaction with pornography has mostly been by accident . . . only 5% believed the same.”⁴⁰

Lastly, pornography’s addictive properties can be harmful to children who consume it regularly. Whether pornography can be addictive has been a source of controversy, with some people claiming that true pornography addiction does not exist.⁴¹ However, while not everyone who uses pornography is addicted, experts agree that the neurological signs of addiction can appear in instances of

³⁵ See BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 47; see also Vera-Gray et al., *supra* note 25, at 1245 (“[W]hen violence is found to be present, it is almost always perpetrated by men against women”).

³⁶ BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 50.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ *Id.*

⁴¹ AASECT *Position on Sex Addiction*, AM. ASS’N OF SEXUALITY EDUCATORS, COUNSELORS AND THERAPISTS, <https://www.aasect.org/position-sex-addiction> (last visited Jan 8, 2023) (“AASECT [(1)] does not find sufficient empirical evidence to support the classification of sex addiction or porn addiction as a mental health disorder, and [(2)] does not find the sexual addiction training and treatment methods and educational pedagogies to be adequately informed by accurate human sexuality knowledge”).

pornography consumption.⁴² Addiction causes four major changes in the brain: “sensitization, desensitization, hypofrontality, and a malfunctioning stress system.”⁴³ These changes in brain function have all been observed in those suffering from a pornography addiction.⁴⁴ Dozens of studies have shown that pornography addiction is both real and harmful, with measurable changes in the brain contradicting the claim that pornography is non-addictive.⁴⁵ Ultimately, early exposure to pornography can cause a variety of mental health and developmental risks to the youth of America, risks that can be remedied by age-verification laws.

III. LEGISLATIVE RESPONSES TO PORNOGRAPHY

Legal approaches to curbing pornography exposure have had mixed results. In 2017, the UK became the first jurisdiction to pass a law containing a legal mandate on the provision of an Internet age-verification system.⁴⁶ Unfortunately, despite its passage, the mandate was never enforced.⁴⁷ Currently, the UK is seeking to pass a replacement bill called the Online Safety Act, which would reinstitute and reinvigorate a number of anti-obscenity laws.⁴⁸ Some parts of this

⁴² See *Why Porn Can Be Difficult to Quit*, FIGHT THE NEW DRUG, <https://fightthenewdrug.org/why-porn-can-be-difficult-to-quit/> (last visited Jan 8, 2023) (*hereinafter* FIGHT THE NEW DRUG II).

⁴³ *Id.*; see also Nora D. Volkow et al., *Neurobiologic Advances from the Brain Disease Model of Addiction*, N. ENGL. J. MED. 363, 364 (2016), <https://www.nejm.org/doi/full/10.1056/NEJMra1511480>.

⁴⁴ See, e.g., Todd Love et al., *Neuroscience of Internet Pornography Addiction*, 5 BEHAV. SCI. 388, 389 (2015) <https://doi.org/10.3390/bs5030388>.

⁴⁵ See FIGHT THE NEW DRUG II, *supra* note 42 (noting the distinction drawn by sensitization “between the large and powerful ‘wanting’ part of our brain, and the relatively small ‘liking’ portion”).

⁴⁶ See Press Release, Age-verification for online pornography to begin in July, UK DEPARTMENT FOR DIGITAL, CULTURE, MEDIA & SPORT (April 17, 2019), <https://www.gov.uk/government/news/age-verification-for-online-pornography-to-begin-in-july>.

⁴⁷ See Harriet Grant, *UK Government Faces Action Over Lack of Age Checks on Adult Sites*, THE GUARDIAN (May 5, 2021), <https://www.theguardian.com/society/2021/may/05/uk-government-faces-action-over-lack-of-age-checks-on-pornography-websites>.

⁴⁸ See Charlotte Trueman, *What you Need to Know About the UK’s Online Safety Bill*, COMPUTERWORLD (Dec. 6, 2022),

replacement bill have been harshly criticized, including the vague language prohibiting “harmful but legal” content, which has since been removed.⁴⁹ While not focused on pornography, China has placed harsh regulations on video game usage for children.⁵⁰ In China, children are banned from playing video games for more than one hour a day and are only permitted to play during a specific time on Friday, Saturday, and Sunday evenings.⁵¹ Major gaming companies have even enforced these restrictions using facial recognition to ensure players are old enough to play.⁵² Neither the UK nor China’s approaches would be successful in the United States. China’s model, which is focused on protecting minors from video game addiction, is far more aggressive than anything that could ever pass in the United States. However, they provide an interesting point of comparison.

To successfully reduce pornography exposure for minors in the United States, the responsive law must be narrowly tailored, non-draconian, unambiguous, and enforceable. This Comment proposes a few possible solutions for stronger and more effective legislation of age verification on pornographic websites, including replacing the “honor system” currently in place. By nature, people visiting pornography websites are more hesitant to share personally identifiable information (“PII”) that can be used to identify them, so age-verification laws often pose a hurdle from users.⁵³ This Comment

<https://www.computerworld.com/article/3681832/what-you-need-to-know-about-the-uks-online-safety-bill.html>.

⁴⁹ Press Release, New Protections for Children and Free Speech Added to Internet Laws, UK DEPARTMENT FOR DIGITAL, CULTURE, MEDIA & SPORT (Nov. 28, 2022), <https://www.gov.uk/government/news/new-protections-for-children-and-free-speech-added-to-internet-laws> [hereinafter New Protections].

⁵⁰ Tom Jowitt, *China Claims to Have Resolved Child Gaming Addiction*, SILICON (Nov. 24, 2022), <https://www.silicon.co.uk/mobility/mobile-apps/china-resolved-child-gaming-addiction-487453>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Jovi Umawing, *Online Safety Bill Will Legally Require Porn Sites to Verify Users’ Age*, MALEWAREBYTES LABS (Feb. 11, 2022), <https://www.malwarebytes.com/blog/news/2022/02/online-safety-bill-will-legally-require-porn-sites-to-verify-users-age>; see also Michael McGrady, *Age Verification Laws Threaten Online Anonymity and Data Privacy*, DC J. (Mar. 27, 2023),

argues that an honor system simply asking website visitors to “type in your birthday” or “check this box if you are over 18” is not sufficient prevention for minors exposed to pornography at an early age. In today’s internet environment, children no longer have to sneak through a parent or sibling’s “stash” to gain access to porn. It is right at their fingertips, only one tap—or misspelling—away.

A. *History of Age-Verification Laws in the United States*

In 1959, the United Nations issued the Declaration of the Rights of the Child.⁵⁴ Over the last five decades, children have been increasingly recognized as legal entities, separate from their parents.⁵⁵ Since Roman times and before, various kinds of, what is now considered, child abuse have been tolerated or unregulated.⁵⁶ From child sacrifice to physical and sexual abuse, children were subjected to numerous horrific acts without much legal recourse until the eighteenth or nineteenth century.⁵⁷ Laws regulating child labor and making education compulsory had a huge effect on children’s legal status.⁵⁸ Prior to 1875, very few protections for children existed outside the sphere of criminal prosecution.⁵⁹ In 1875, the New York Society for the Prevention of Cruelty to Children, the first organization in the world devoted entirely to child protection, was founded.⁶⁰ Despite this step forward, it was not until 1962 that child welfare found a national stage in the United States with the publication of “The Battered-Child Syndrome.”⁶¹ The 1962 amendments to the Social Security Act formally identified Child Protection Services as integral to the public welfare of children.⁶² Over the next several

<https://dcjournal.com/age-verification-laws-threaten-online-anonymity-and-data-privacy/>.

⁵⁴ G.A. Res. 1386 (XIV), ¶ 7, 10 (Nov. 20, 1959).

⁵⁵ D. Kelly Weisberg, *Evolution of the Concept of the Rights of the Child in the Western World*, 21 I.C.J. REV. 43, 49-50 (1978).

⁵⁶ *Id.* at 45.

⁵⁷ *Id.* at 44-45.

⁵⁸ *Id.* at 46.

⁵⁹ *Id.*

⁶⁰ John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449 (2008).

⁶¹ *Id.* at 455.

⁶² *Id.*

decades, protecting children—including on the internet—became a common theme for lawmakers to target in new legislation.⁶³

With the advent of the internet, protective measures for children exploring this new landscape became a necessity. Typically, legislation that restricts the content of expression must survive “strict judicial scrutiny” and serve a compelling government interest to avoid being overturned.⁶⁴ However, obscenity is one of a handful of limited exceptions to the protected categories of speech.⁶⁵ In 1973, the Supreme Court established a three-part test to determine obscenity in *Miller v. California*.⁶⁶ Materials are obscene if (a) “the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;” (b) “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law;” and (c) “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁶⁷ Further, obscene materials may be legislated differently for minors than for adults.⁶⁸ When obscene materials are regulated separately for minors and adults, they must be narrowly tailored so they do not restrict adults’ access to only materials appropriate for children.⁶⁹

Even before the advent of the internet, controls on content access for children have been implemented in the states.⁷⁰ In 1934, the Federal Communications Commission (“FCC”) prohibited “obscene,

⁶³ See Myers, *supra* note 60, at 462.

⁶⁴ See ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 2 (2022).

⁶⁵ *Id.* at 3.

⁶⁶ See *id.*; see *Miller v. California*, 413 U.S. 15, 24 (1973).

⁶⁷ *Miller*, 413 U.S. at 24.

⁶⁸ *Ginsberg v. New York*, 390 U.S. 629, 634-35 (1968) (holding that selling a magazine depicting nudity to adults would not be an issue, but selling that same magazine to a child fits under the definition of obscenity as applied to children).

⁶⁹ *Butler v. Michigan*, 352 U.S. 380, 383 (1957); see also ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 4 (2022).

⁷⁰ ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 4 (2022).

indecent, or profane language” from being broadcasted.⁷¹ The FCC later defined indecency as “patently offensive” speech broadcast at a time when children may reasonably be present in the audience.⁷² Blanket limitations on speech have largely been less successful than specific, narrowly tailored restrictions.⁷³ For example, limiting content to a broadcast only at certain times of the day or in public-facing presentations has been relatively successful against judicial challenges, but limitations on private communications such as those in the phone sex industry are not typically sustained.⁷⁴

The Communications Decency Act (“CDA”) was the first federal legislation to attempt to regulate minors’ access to internet materials.⁷⁵ In 1997, the Supreme Court objected to the CDA’s approach in *Reno v. American Civil Liberties Union*, holding that the restrictions on content-sharing impermissibly burdened the free expression rights of adults.⁷⁶ The Supreme Court overturned the CDA because it unacceptably burdened speech protected by the First Amendment, but the CDA laid the groundwork for legislating minors’ access to pornography.⁷⁷ Originally, Congress relied on criminalization to address concerns about internet pornography.⁷⁸ However, to avoid First Amendment concerns, revisions to the CDA’s language began to target “bad actors” rather than specific types of content.⁷⁹ At the time, the Court also found significant value in the fact that current technology could not prevent access to explicit materials for minors alone.⁸⁰

⁷¹ 18 U.S.C. § 1464.

⁷² ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 4-5 (2022).

⁷³ *Id.* at 6.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 867-68.

⁷⁷ *Id.* at 8; *Reno v. Am. C.L. Union*, 521 U.S. 844, 882 (1997).

⁷⁸ ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 7 (2022).

⁷⁹ *Reno*, 521 U.S. at 882.

⁸⁰ *Id.* at 891.

The year following the *Reno* decision, Congress again attempted to pass legislation that sought to protect minors from exposure to pornography and other “harmful materials” on the internet.⁸¹ The Child Online Protection Act (“COPA”) tried to avoid the constitutional issues brought up in the Court’s decisions regarding the CDA by removing burdens on adult communications.⁸² The resulting litigation spanned over a decade, but the Supreme Court ultimately took issue with COPA’s “community standards” language in 2004.⁸³ Before the internet, “community standards” generally referred to the prevailing determinations of a geographic area where content is published.⁸⁴ Internet content, however, is not limited to only one particular geographic region. As a result, reliance on a community standards test to determine whether internet materials are obscene would essentially permit the most sensitive part of the nation’s population to determine what is permissible for the entire nation.⁸⁵ The Supreme Court was deeply divided on whether the community standards outlined in COPA was sufficiently narrow to avoid the constitutional issues created by the CDA.⁸⁶ Without a clear decision on whether COPA’s community standards language is constitutional, the Court remanded the case for further review.⁸⁷ The Eastern District of Pennsylvania held that COPA was unconstitutionally vague and overbroad, and the Third Circuit affirmed.⁸⁸ The Supreme Court denied certiorari, effectively putting the final nail in COPA’s coffin.⁸⁹

⁸¹ ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 0 (2022).

⁸² *Id.*

⁸³ *Id.* at 10; see *Ashcroft v. Am C.L. Union*, 542 U.S. 656, 674 (2004).

⁸⁴ ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 10 (2022).

⁸⁵ See *id.* at 10-11.

⁸⁶ See *Ashcroft*, 542 U.S. at 661, 673-74.

⁸⁷ See *id.* at 661.

⁸⁸ *Am. C.L. Union v. Mukasey*, 534 F.3d 181, 184 (3d Cir. 2008); ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 12 (2022).

⁸⁹ ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 12 (2022).

The government bears the burden of showing that content-based restrictions are constitutional.⁹⁰ Historically, Congress has struggled to narrow internet restrictions enough to satisfy constitutional requirements.⁹¹ Placing the burden on the government requires Congress to tailor content-based restrictions on speech as narrowly as possible, pursuant to a compelling government interest.⁹² Further, upon any legal challenge, they are reviewed with strict scrutiny.⁹³ The Supreme Court has repeatedly recognized that child welfare is a compelling government interest.⁹⁴ However, when child welfare is balanced against adults' First Amendment rights, courts often find that restrictions that suppress adults' free expression do not employ the least restrictive means for upholding child welfare.⁹⁵

More recently, senators introduced a bipartisan bill aimed at protecting children from harmful and explicit content, called the Kids' Online Safety Act.⁹⁶ The bill would direct the National Institute for Standards and Technology ("NIST") to conduct a study to evaluate options for implementing age verification based on existing technology.⁹⁷ The bill would require NIST, together with the Federal Trade Commission ("FTC") and the Secretary of Commerce, to perform a study identifying "the most technologically feasible options for developing systems to verify age at the device or operating system level."⁹⁸ In addition, this study must determine the following:

- (1) the benefits of creating a device or operating system level age verification system;
- (2) what information may need to be collected to create this type of age verification system;
- (3) the accuracy of such systems and their impact or steps to improve accessibility, including for individuals with disabilities;

⁹⁰ See *Reno*, 521 U.S. at 879.

⁹¹ See ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 10 (2022).

⁹² *Id.* at 12.

⁹³ *Id.*

⁹⁴ *Id.* at 13.

⁹⁵ See *Reno*, 521 U.S. at 874.

⁹⁶ Kids Online Safety Act, S. 3663, 117th Cong. (2022).

⁹⁷ *Id.*

⁹⁸ *Id.*

- (4) how such a system or systems could verify age while mitigating risks to user privacy and data security and safeguarding minors' personal data; and
- (5) the technical feasibility, including the need for potential hardware and software changes, including for devices currently in commerce and owned by consumers.⁹⁹

While the Kids' Online Safety Act has already faced some of the same criticisms as its predecessor, it avoids the community standards language that haunted COPA.¹⁰⁰ However, some of the goals of the Kids' Online Safety Act may be considered overly broad, meaning that websites may over-censor their content.¹⁰¹ In addition, the bill covers a huge variety of platforms, including not only websites, but also "commercial software application or electronic service that connects to the internet and that is used, or is reasonably likely to be used, by a minor."¹⁰²

The Supreme Court in *Miller* and *Reno* laid the groundwork for successful anti-pornography legislation.¹⁰³ In fact, Justices Rehnquist and O'Connor articulated no problem with the purpose of the CDA in their *Reno* concurrence.¹⁰⁴ The issue was that the legislation amounted to internet zoning laws, which restricted access by both minors and adults.¹⁰⁵ This opinion gave a clear path forward for future efforts to restrict minors' access to pornography.¹⁰⁶ So why have efforts since that time to implement age verification and the like been unsuccessful? The answer is likely that future attempts have not followed this path, with lawmakers trying to shoehorn in additional

⁹⁹ *Id.*

¹⁰⁰ See generally *id.* (stating that community standards language is not found within the bill).

¹⁰¹ See Jason Kelley, *The Kids Online Safety Act is a Heavy-Handed Plan to Force Platforms to Spy on Young People* (Mar. 24, 2022), <https://www.eff.org/deeplinks/2022/03/kids-online-safety-act-heavy-handed-plan-force-platforms-spy-young-people>.

¹⁰² *Id.*; see also Kids Online Safety Act, S. 3663, 117th Cong. (2022).

¹⁰³ See *Reno*, 521 U.S. at 882; *Miller*, 413 U.S. at 36-37.

¹⁰⁴ See *Reno*, 521 U.S. at 886 (O'Connor, J., concurring in part and dissenting in part).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

restrictions that place any new regulation outside of the scope of the *Miller* concurrence.¹⁰⁷

B. Age Verification and Child Protection Laws Internationally

Countries around the world have handled the onslaught of information made possible by the internet in vastly different ways, with varying degrees of success. In 2022, the United Kingdom introduced a law aimed at protecting children from pornography exposure by making social media companies legally responsible for the content accessible to minors on their websites, among other things.¹⁰⁸ However, some free speech advocates in the UK have taken issue with parts of the bill, including language restricting “legal but harmful” content.¹⁰⁹ As a result, the bill has been amended in a variety of ways since its introduction.¹¹⁰ The current UK Online Safety Bill, in many ways, mirrors previous American attempts in CDA and COPA at limiting childhood pornography exposure. Legal scholars and commentators have expressed varying levels of uncertainty about the effectiveness of the Online Safety Bill, which will likely be passed in the UK in 2023.¹¹¹

On the other end of the spectrum, China recently claimed that its ban on most video games and extensive regulation of minors’ online activities has curbed video game addiction in the country.¹¹² In August 2021, the Chinese government passed a law banning minors from playing video games outside of a single hour on “weekends and legal holidays.”¹¹³ These restrictions relied somewhat on parental

¹⁰⁷ See, e.g., ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 9-10 (2022).

¹⁰⁸ *A Guide to the Online Safety Bill*, DEP’T FOR DIGIT., CULTURE, MEDIA & SPORT (Dec. 16, 2022), <https://www.gov.uk/guidance/a-guide-to-the-online-safety-bill#a-guide-to-the-online-safety-bill>.

¹⁰⁹ See New Protections, *supra* note 49.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Jowitt, *supra* note 50.

¹¹³ Lauren Feiner & Arjun Kharpal, *China to Ban Kids from Playing Online Games for More than Three Hours Per Week*, CNBC (Aug. 30, 2021), <https://cnbc.com/2021/08/30/china-to-ban-kids-from-playing-online-games-for-more-than-three-hours-per-week.html>.

engagement to assist with enforcement, but Chinese video game companies also reportedly used facial recognition and other identification technology to keep minors from playing video games outside the one-hour window.¹¹⁴

The global nature of the internet makes it exceedingly difficult to regulate who can access content without relying on restrictive or invasive means of enforcement. On the other hand, free speech and privacy concerns in most developed countries often trump concerns for child welfare, especially when the restrictions burden the free expression rights of citizens without substantially harming child welfare on a consistently large scale.

IV. THE CHARACTERISTICS OF SUCCESSFUL AGE-VERIFICATION LAWS

Effective age-verification legislation will require three things: (1) preventing reliance on honor-system age-gates, (2) avoiding collection of excessive personal information, and (3) limiting adult access through only the least restrictive possible means. Honor-system age verification may prevent some pornography exposure by requiring self-attestation of age.¹¹⁵ However, the effect is minimal, since a minor can simply lie about their age to access explicit content.¹¹⁶ Many potential alternatives to the honor system involve collecting personal information, such as names, credit cards, and other sensitive information, often raising privacy concerns, even for adults using the websites legitimately.¹¹⁷ As a result, adults may be prevented from accessing explicit content due to hesitancy over sharing private information with websites or third party age-verification software.¹¹⁸ In addition, limiting the method of access to a single type of

¹¹⁴ See *id.*

¹¹⁵ *Age Gates are Becoming a Thing of the Past*, KONFIRMI, <https://konfirmi.com/blog/age-verification-websites-age-gates/> (last visited Apr. 2, 2023).

¹¹⁶ *Id.*

¹¹⁷ Jackie Snow, *Why Age Verification is so Difficult for Websites*, WALL ST. J. (Feb. 27, 2022), <https://www.wsj.com/articles/why-age-verification-is-difficult-for-websites-11645829728>.

¹¹⁸ See *id.*

identification creates additional issues for adults who may not have the documentation necessary to get past the age verification despite being technically old enough to legally access the materials.¹¹⁹

A. *Are You Over 21?*

The honor system of age verification is woefully ineffective at preventing even accidental exposure to pornography. Currently, the United States primarily verifies age on the internet through an easily-circumvented honor system.¹²⁰ Clicking on a pornography website, or a website that manages sports bets or sales of alcohol, cannabis, or firearms will generally open a pop-up asking users whether they are old enough to access the website.¹²¹ “Are you over 21?”¹²² Users must then click “yes” or enter a date of birth to access the content on the website.¹²³ The issue with these “age-gates” is that no verification actually occurs. Instead, users may input whatever date they want to “confirm” that they are old enough for website access.¹²⁴ This method does very little to prevent exposure by curious minors, even those who do not understand what content lies behind the age-gate. In fact, even adults often lie about their age to avoid giving any personal information to pornography websites.¹²⁵

Any legislation aiming to legitimately protect minors from pornography exposure must address the age-gate issue and require that a more effective system be put in place for websites hosting explicit content. The Kids’ Online Safety Act, Congress’s most recent attempt at regulating children’s harmful internet activity, includes an age-verification study.¹²⁶

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See, e.g., GUNS.COM, <https://www.guns.com/> (last visited Apr. 2, 2023); see also WHITEHOUSE.COM, <https://www.whitehouse.com/> (last visited Apr. 2, 2023); see also BUDWEISER, <https://us.budweiser.com/> (last visited Apr. 2, 2023).

¹²² See, e.g., BUDWEISER, <https://us.budweiser.com/> (last visited Apr. 2, 2023); see also MEDMEN, <https://medmen.com/> (last visited Apr. 2, 2023).

¹²³ See Snow, *supra* note 118.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ Kids Online Safety Act, S. 3663 § 9, 117th Cong. (2022).

The Kids' Online Safety Act does not specifically cover pornographic websites, but makes a step in the right direction generally.¹²⁷ The Kids' Online Safety Act defines covered platforms to include "a social media service, social network, video game, messaging application, video streaming service, educational service, or an online platform that connects to the internet and that is used, or is reasonably likely to be used, by a minor."¹²⁸ This may be a step up from the original language of the bill, which included virtually any "commercial software" that might be used by minors.¹²⁹ However, this may still be overinclusive, as the bill seeks to protect children from harmful materials, and it does not limit its scope to pornographic materials or even categories such as sexual content and violence.¹³⁰ Instead, the bill seeks to prevent minors from experiencing mental health disorders, bullying, addiction, drugs, "financial harms," and more.¹³¹ A more effective way of framing the bill would be to limit its scope—not because preventing these harms is inherently bad, but because the broad purpose of the bill will make it a nightmare to enforce.

B. Collection of Personal Information

A common concern about age verification is its tendency to require personal information from users. In a time when massive data hacks and leaks make headlines on a semi-regular basis, even adults are understandably protective of their online habits, especially when it comes to search histories and pornography consumption.¹³² Privacy and security are some of the most important considerations for modern laws regarding technology.¹³³ With cyber warfare in the forefront of the American consciousness, no one wants to risk their personal information landing in the hands of a malicious hacker. Privacy concerns are a convenient target for opponents of age

¹²⁷ *See id.*

¹²⁸ *Id.* at § 2.

¹²⁹ *Id.*

¹³⁰ *Id.* at § 4.

¹³¹ *Id.* at § 3.

¹³² *See* McCallum, *supra* note 19; Snow, *supra* note 118.

¹³³ *See* Snow, *supra* note 118.

verification, so any legislative attempt to mandate age verification must take privacy and cybersecurity into consideration.¹³⁴

Additionally, collecting information from children poses another potential enforcement issue. The ideal age-verification solution would not be able to collect information from children who are not yet old enough to access it. The Children's Online Privacy Protection Act ("COPPA") regulates the collection of information for children under 13.¹³⁵ COPPA prohibits websites from collecting identifiable information from children.¹³⁶ In the same way that an age gate does not collect any information from minors, successful age verification should allow for confirmation of age without the retention of any identifying information. In any case, children, especially younger children, should not have any usable information to provide to pornography websites once age verification has been successfully implemented. For example, children under sixteen will not have a driver's license, so even if age verification required a driver's license to view pornography, COPPA is not implicated because no child under 13 has this information to give.

While some type of identification is required to verify age, technology (particularly technology that protects privacy) has improved since the days of COPPA. Privacy concerns over age-verification methods are legitimate, but the technology developed to prevent unauthorized or malicious parties from accessing private information has progressed significantly in the last several years.¹³⁷ This is an important change for legislators seeking to give age verification another try.¹³⁸

C. *Minimizing Access Difficulty for Adults*

The final consideration to address when crafting an age-verification mandate is the difficulty it may create for legitimate

¹³⁴ See *id.*

¹³⁵ Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-02.

¹³⁶ *Id.* at § 6502.

¹³⁷ See ERIC N. HOLMES, CONG. RSCH. SERV., R47049, CHILDREN AND THE INTERNET: LEGAL CONSIDERATIONS IN RESTRICTING ACCESS TO CONTENT 14-15 (2022).

¹³⁸ See *id.* at 14.

website users whose First Amendment rights allow them access to whatever information they wish to access, sexually explicit or otherwise. This is the concern most often cited by the Supreme Court and lower courts when determining whether content-based restrictions are valid under the Constitution.¹³⁹ The Supreme Court has repeatedly struck down content-based restrictions on the grounds that they do not rely on the least restrictive means to prevent the stated harms.¹⁴⁰ When the welfare of children conflicts with the rights of adults, the government must show both a compelling interest and that any other method would be less effective at accomplishing the stated goal.¹⁴¹ Because child welfare has been long-accepted as a compelling government interest, the burden of showing that child welfare will be achieved through the least restrictive means lies squarely on the government.¹⁴²

Despite disappointing results for proponents of age verification, recent improvements on age-verification technology make it both easier and more affordable to implement and use.¹⁴³ On the consumer side, using age verification should not be much more difficult than using two-factor authentication, which similarly provides extra security for internet users.¹⁴⁴ From the perspective of

¹³⁹ See *Miller*, 413 U.S. at 44 (Douglas, J., dissenting); *Ginsberg*, 390 U.S. at 650.

¹⁴⁰ See *Reno*, 521 U.S. at 869.

¹⁴¹ See *id.*

¹⁴² See *id.* at 869-70.

¹⁴³ See *Age Gates are Becoming a Thing of the Past*, *supra* note 116.

¹⁴⁴ See Jia Wertz, *How E-Commerce has Sparked Demand for Age Verification Software*, FORBES (Jun. 21, 2019), <https://www.forbes.com/sites/jiawertz/2019/06/21/how-e-commerce-has-sparked-demand-for-age-verification-software/?sh=7f1c62ab3962> (“[Online adult-only businesses] also need age verification software which is easy for consumers to use and doesn’t have clunky or slow processing times, which can kill conversion rate.”); see also Robyn Fizz, *Two Factors are Better than One: Sign up now for Duo authentication*, MIT NEWS (Jan. 30, 2015), <https://news.mit.edu/2015/two-factor-authentication-duo-security-0130> (“One way to strengthen security is to use two-factor authentication.”); see also Bia Pendelton, *Age Verification: The Pros, Cons, and Relevance of the Process*, CAL. BUS. J., <https://calbizjournal.com/age-verification-the-pros-cons-and-relevance-of-the-process/> (last visited Apr. 25, 2023) (“And verifying age is not the only pro of using [age verification], as the process will also help prevent fraud due to the government confirmed identification number request.”).

pornography website operators and others affected by age-verification legislation, it is not cost-prohibitive or overly difficult for pornography companies to add age verification to their websites.¹⁴⁵ For example, one age-verification software provider offers age verification for \$25 per month in addition to \$0.50 per successful verification.¹⁴⁶ The purpose of these laws is not to prevent extremely determined teenagers from intentionally accessing pornography, but to prevent accidental exposure and make it more difficult for pornography websites to get in front of children.

V. TECHNOLOGY AND AGE VERIFICATION

In the United States, the drinking age is 21 years old.¹⁴⁷ Citizens may vote when they turn 18 years old.¹⁴⁸ A Spotify Premium student subscription requires proof of enrollment, like a valid student ID.¹⁴⁹ Teenagers are generally eligible for a driver's license when they turn 16 years old.¹⁵⁰ What do all these examples have in common? To access any of these experiences, the individuals are required to present some form of identification. Bartenders may ask to see a driver's license. Many states require voters to show a legal identification document ("ID") to receive their ballot. Spotify asks for a student's ID and proof of enrollment, including screenshots of a class schedule or other proof that an applicant is, in fact, a college student.¹⁵¹ To get a driver's license, the Commonwealth of Virginia, like many other states, requires (1) proof of identity, (2) proof of Virginia residency, (3) proof of legal presence, and (4) proof of social security number.¹⁵²

¹⁴⁵ See, e.g., ID.ME, <https://www.id.me/business/progressive-identity-verification> (last visited Apr. 25, 2023); SHEERID.COM, <https://www.sheerid.com/business/> (last visited Apr. 25, 2023).

¹⁴⁶ See AGECHECKER.NET, <https://agechecker.net/pricing> (last visited Apr. 25, 2023).

¹⁴⁷ See National Minimum Drinking Age Act, 23 U.S.C. § 158(a).

¹⁴⁸ U.S. CONST. amend XXVI, § 1.

¹⁴⁹ *Premium Student*, SPOTIFY, <https://support.spotify.com/us/article/premium-student/> (last visited Apr. 4, 2023).

¹⁵⁰ See *Driver Licensing Restrictions and Requirements for Every State*, DRIVERS.ED.COM (Sept. 29, 2022), <https://driversed.com/trending/which-states-have-driver-licensing-restrictions-teens>.

¹⁵¹ See *Premium Student*, *supra* note 149.

¹⁵² *Apply for a Driver's License*, VA. DEPT. OF MOTOR VEHICLES, <https://www.dmv.virginia.gov/drivers/#applying.asp> (last visited Apr. 5, 2023).

While it may sometimes be frustrating to gather this documentation, most people understand that it is necessary to ensure that these systems function properly.

While in-person identification has existed within some of these systems for decades, online identity verification is a more recent issue given the evolution of the internet. In the early days of the internet, technology could not securely handle an age-verification requirement because the security of private and identifying information could not be guaranteed.¹⁵³ In previous years, pornography websites would need to implement costly technology themselves and pay a third party to handle age verification or risk legal action over age-verification requirements.¹⁵⁴ However, age-verification technologies have improved vastly over the last several years. New and emerging technology may now allow companies to securely verify age without putting identities and other PII at risk.¹⁵⁵ These advances have also made age verification more affordable,¹⁵⁶ putting this technology in the hands of large and smaller production companies alike.

VI. DOWNSIDES TO AGE VERIFICATION

Age verification is the most straightforward path to preventing childhood pornography exposure. However, age verification is not without hurdles. The most difficult part of implementing age-verification requirements for pornography websites is enforcement. On one end of the spectrum are draconian laws which are unlikely to find support in the American legislative system. On the other hand, ambiguous internet restrictions on poorly defined “harmful” content that prescribe less stringent methods of

¹⁵³ See Amit Asaravala, *Why Online Age Checks Don't Work*, WIRED (Oct. 10, 2022, 2:00 AM), <https://www.wired.com/2022/10/why-online-age-checks-dont-work/>.

¹⁵⁴ See *id.* (noting that, on the early Internet, such sites primarily relied on credit card information and other data processed by third parties out minor users).

¹⁵⁵ See David McCabe, *Anonymity No More? Age Checks Come to the Web*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/27/technology/internet-age-check-proof.html>.

¹⁵⁶ *Tech is Clever; It Can Usually do What You Need it to and that Includes Online Age Checks*, AGE VERIFICATION PROVIDERS ASS'N (Feb. 15, 2022), <https://avpassociation.com/thought-leadership/tech-is-clever/>.

enforcement are also full of holes and essentially ineffective in practice.¹⁵⁷ Preventing childhood exposure to explicit materials is a worthy goal, but the enforcement issue can stop even the most zealous advocate for child welfare in their tracks.

One issue with enforcing laws restricting access to content on the internet is the broad impact such a law has on those outside the scope of the regulations. For instance, it has been difficult in the past to accurately verify age over the internet through the minimally restrictive means required by the Constitution.¹⁵⁸ In *Ashcroft v. ACLU*, the Court reminded that the burden the government must overcome is “not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective.”¹⁵⁹ For legislation to be both constitutional and effective, it must narrowly tailor its language without giving the law the same effect as trying to nail Jell-O to a tree.¹⁶⁰ Any successful age-verification requirement must be limited in scope to avoid a litany of unintended consequences. It must prevent accidental childhood exposure to pornography, while not so limited that loopholes and workarounds create a cheesecloth law.

All legislation has unintended consequences, and age-verification legislation is no exception. One possible unintended consequence of additional regulation of websites housing adult content may be that larger websites with more resources already have the ability to implement new software, while smaller websites or new entrants into the market are unable to afford the technology needed to comply with new laws.¹⁶¹ For example, Mindgeek, Pornhub’s parent company, owns age-verification software.¹⁶² Large, established companies such as Facebook often advocate for more regulation, partly because smaller companies cannot afford to implement new

¹⁵⁷ *See id.*

¹⁵⁸ *Ashcroft*, 542 U.S. at 663.

¹⁵⁹ *Id.* at 669.

¹⁶⁰ *Id.* at 667.

¹⁶¹ Will Duffield, *About Those Facebook Ads Calling for More Internet Regulation*, CATO INST. (Feb. 7, 2022), <https://www.cato.org/commentary/about-those-facebook-ads-calling-more-internet-regulation>.

¹⁶² Nilsson & Coulter, *supra* note 20.

regulations, effectively eliminating the competition.¹⁶³ While this may often be seen as large corporations forcing smaller companies out in some contexts, it can also be argued that the pornography industry is a much riskier business. Thus, anyone who cannot afford to follow regulations probably should not be assigned legitimacy in the industry. Pornography production has many dangers¹⁶⁴ (such as widespread sexually transmitted infections, human trafficking, so-called “revenge porn,” etc.) that a company like Pornhub is better situated to combat, if they are, in fact, required to do so.

Pornography companies admit that age verification hurts their bottom line of earning profits, so it comes as no surprise that they generally resist regulations that will keep minors away from their content, despite knowing that minors are accessing this content with few safeguards in place.¹⁶⁵ However, the purpose of age verification is not to prevent adults from exercising free speech, but to prevent minors from accessing adult content. So long as legislation requiring age verification does not unduly limit adults’ access to content, the minimal effect age-verification requirements will have on adults who want to access pornography will likely not render the legislation unconstitutional.

VII. CURRENT STATE OF LAWS IN THE UNITED STATES

Around the world, countries have begun to experiment with age-verification legislation. Historically, the Supreme Court prevented attempts to limit access to pornography in the United States for being too broad in scope.¹⁶⁶ However, at the time of this writing, one state recently began testing the age-verification waters. Louisiana

¹⁶³ See Duffield, *supra* note 161.

¹⁶⁴ See *28 Good Reasons to Stop Watching Porn Forever*, FIGHT THE NEW DRUG, <https://fightthenewdrug.org/28-good-reasons-to-stop-watching-porn-forever/> (last visited Jan. 8, 2023); see also Adam Westbrook & Lindsay Van Dyke, *Why Do We Let Corporations Profit from Rape Videos?*, N.Y. TIMES, <https://www.nytimes.com/2021/04/16/opinion/sunday/companies-online-rape-videos.html> (last visited Jan. 8, 2023).

¹⁶⁵ See *Porn Sites Admit Age Verification Would Hurt Profits*, FIGHT THE NEW DRUG, <https://fightthenewdrug.org/porn-sites-admit-age-verification-would-hurt-profits/> (last visited Jan. 8, 2023).

¹⁶⁶ See *Reno*, 521 U.S. at 882; *Miller*, 413 U.S. at 27.

recently implemented a new law requiring age verification on all adult websites, which went into effect on January 1, 2023.¹⁶⁷ At the time of this writing, it is the first of its kind—though California and some other states inched toward stricter requirements for pornography websites in recent years.¹⁶⁸ Whether the new Louisiana law will pass muster in the inevitable legal challenges remains to be seen. The law regulates all websites comprised of at least 33.3% pornography, leaving open the potential issue of how 33.3% is defined because it is unclear from the text of the law how this will be calculated¹⁶⁹ or enforced. Could a pornography company circumvent this by adding a large proportion of non-explicit content to its website for the sole purpose of avoiding enforcement? Louisiana Representative Laurie Schlegel tweeted after its passage that the law was bipartisan, passing almost unanimously with nearly fifty co-authors from both sides of the aisle.¹⁷⁰ Now, any attempt to access Pornhub in Louisiana will result in a pop-up which reads, “Louisiana law now requires us to put in place a process for verifying the age of users who connect to our site from Louisiana. The privacy and security of the Pornhub community is our priority, and we thank you for your cooperation.”¹⁷¹

Another unique element of Louisiana’s law is that Louisiana became the first state to accept a state-issued digital driver’s license, called LA Wallet.¹⁷² Initially, only the police accepted this ID, but now

¹⁶⁷ See Lindsay McKenzie, *Digital Driver’s License Downloads Soar in Louisiana Amid Porn Restriction*, STATESCOOP (Jan. 3, 2023), <https://statescoop.com/louisiana-porn-restriction-digital-drivers-license-downloads/>; H.R. 142, Reg. Sess. (La. 2022).

¹⁶⁸ See Margaret Harding McGill, *California’s New Age Rules for Sites and Apps Raise a Ruckus*, AXIOS (Sept. 16, 2022), <https://www.axios.com/2022/09/16/california-law-websites-children-age>.

¹⁶⁹ See Jonathan Franklin, *Looking to Watch Porn in Louisiana? Expect to Hand Over Your ID*, NPR (Jan 5, 2023, 5:00 AM), <https://www.npr.org/2023/01/05/1146933317/louisiana-new-porn-law-government-id-restriction-privacy>.

¹⁷⁰ Laurie Schlegel (@RepSchlegel), TWITTER (Jan. 3, 2023, 11:08 PM).

¹⁷¹ Ekaterina Kachalova, *Big Privacy Turn-Off: Porn Sites Ask Americans for ID*, ADGUARD (Mar. 16, 2023), <https://adguard.com/en/blog/pornhub-identification-louisiana-privacy.html>.

¹⁷² See *LA Wallet is Leading the Nation in Digital Identification*, LA WALLETT (June 25, 2019), <https://lawallet.com/business/la-wallet-is-leading-the-nation-in-digital-identification/>.

retailers, bars, alcohol delivery services, polling places, and others may accept and use this as a legal ID as well.¹⁷³ Further, as of December 2020, most retailers in Louisiana were required to start accepting LA Wallet as a valid form of ID.¹⁷⁴ A scannable barcode provides an easy and secure way for businesses to check a person's identity.¹⁷⁵ Digital forms of legal identification provide a potential avenue for online forms of age verification. Unsurprisingly, Louisiana, one of the first states to implement a digital ID, is also pioneering mandated age verification for pornography websites.¹⁷⁶ Since Louisiana's implementation of LA Wallet, other states have begun to implement similar options, with Apple announcing a new ability to add driver's licenses to Apple Wallet.¹⁷⁷ States have just begun to normalize the use of age verification software in the digital age. Louisiana is the first, and, hopefully, not the last to use age verification software as the digital age continues to evolve, and privacy and security measures expand to quell consumer fears.

In December 2022, a senator from Utah introduced the Shielding Children's Retinas from Egregious Exposure on the Net ("SCREEN") Act.¹⁷⁸ The SCREEN Act would direct the FCC to require age verification on any commercial pornography website.¹⁷⁹ Historically, the Supreme Court overturned laws that strictly regulate adult materials on First Amendment grounds. For example, in *Butler*, the Supreme Court held that regulations must not restrict adults to

¹⁷³ See *LA Wallet Timeline*, LA WALLETT, <https://lawallet.com/timeline/> (last visited Apr. 25, 2023).

¹⁷⁴ See *HB 54 Makes LA Wallet Equivalent to Physical Credential*, LA WALLETT, <https://lawallet.com/legal/>.

¹⁷⁵ See *Commercial Verification Services for Identity, Age, and Covid-19 Vaccination Status*, LA WALLETT, <https://lawallet.com/commercial-verification/> (last visited Apr. 25, 2023).

¹⁷⁶ See Franklin, *supra* note 169.

¹⁷⁷ See Press Release, Apple, Apple Announces First States Signed up to Adopt Driver's Licenses and State IDs in Apple Wallet (Sept. 1, 2021), <https://www.apple.com/newsroom/> (search "Announces First States to Adopt Driver's License").

¹⁷⁸ See Press Release, Sen. Mike Lee, Sen. Lee Introduces Bill to Protect Children Online (Dec. 14, 2022).

¹⁷⁹ *Id.*

only what is appropriate for children.¹⁸⁰ However, the proliferation of internet-based pornography has increased drastically since the *Butler* decision.¹⁸¹ Access to pornography is easier than ever, and the safeguards against children's access have not adjusted to match this reality.¹⁸² An argument could be made that since circumstances have changed between the *Butler* decision and introduction of the SCREEN Act the holding in *Butler* might not apply if it were enacted and challenged judicially.

VIII. COUNTERARGUMENTS

Practically everyone, from internet service providers to pornography companies to the companies that make our devices, would like to place the burden of protecting children from pornography on *anyone* but themselves.¹⁸³ Often, that includes placing the blame on parents. “If your kids are looking at pornography, that’s your own fault. Turn on search filters!”¹⁸⁴ This view is a vast oversimplification of the exposure issue. Children are often exposed to pornography in places and ways that even the most prepared parents may be unable to predict, like a mistyped search term, pop-up ad, or on a friend’s device.¹⁸⁵ Most parents of young children likely do not spend their days wondering, “[w]hat’s new with

¹⁸⁰ *Butler*, 352 U.S. at 384.

¹⁸¹ *Id.*

¹⁸² See FIGHT THE NEW DRUG, *supra* note 1.

¹⁸³ BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 61.

¹⁸⁴ See Frank Young, Parents Need to Do More to Stop Their Kids Watching Porn, THE SPECTATOR (Nov. 30 2022), <https://www.spectator.co.uk/article/parents-need-to-do-more-to-stop-their-kids-watching-porn/>. *But see* BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 27-28 (survey results show parents are often unaware of their children’s exposure and often do not believe their children know how to get around safeguards they have implemented).

¹⁸⁵ *Isn’t Preventing Children from Accessing Pornography Their Parents’ Responsibility? Surely They Should Implement Parental Controls or Supervise Their Children Better?*, AGE VERIFICATION PROVIDERS ASS’N (Feb. 10, 2022), <https://avpassociation.com/question/isnt-preventing-children-from-accessing-pornography-their-parents-responsibility-surely-they-should-implement-parental-controls-or-supervise-their-children-better/> (“[W]e do not expect a parent to accompany a child every time they enter a newsagent . . . to make sure they don’t buy an adult magazine Parents are often unaware of parental controls, or lack the ability to set them up [T]hey are not on their own a sufficient solution.”).

typosquatting?” Yet children are still regularly exposed to pornography they never meant to seek out.¹⁸⁶ While filters can work to prevent kids from accidental Google searches or clicking on unassuming links, there is little for parents to do when a child’s friend has different filters or when the child is on other devices outside of the parents’ control.¹⁸⁷ For these reasons, parents should not be the sole authority and line of defense tasked with preventing pornography exposure, especially because many kids experience exposure in scenarios their parents cannot control, such as at school and with friends.

A separate concern with age-verification legislation is whether adults without proper documentation will be able to access adult content. Similarly, will people without proper documentation, or those deeply concerned about privacy, find it easier to simply use a Virtual Private Network (“VPN”) to hide their network activity rather than comply with an age-verification law?¹⁸⁸ There are three possible responses to this question. First, age verification aims primarily to prevent children from being accidentally exposed to pornography. If a few tech-savvy minors or privacy-driven adults, determined to circumvent age-verification, use VPNs to access pornography, this does not mean that age verification as a policy has failed. Secondly, some laws, like the UK’s Online Safety Bill, address VPN use by making it illegal to allow minors on an explicit website, regardless of how they got there.¹⁸⁹ The Age Verification Providers Association explained how VPNs are not as concerning of a “loophole” as some believe:

[Under the Online Safety Bill,] adult sites must either apply age checks to all their users globally . . . or at least apply them for users . . . in the UK or who access via a VPN . . . Netflix and many other services already block VPNs successfully with the IP addresses of the most commonly used widely known and

¹⁸⁶ BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 16.

¹⁸⁷ FIGHT THE NEW DRUG, *supra* note 1; BRIT. BD. OF FILM CLASSIFICATION, *supra* note 1, at 16.

¹⁸⁸ See *What is a VPN?*, NORDVPN, <https://nordvpn.com/what-is-a-vpn/> (last visited Jan. 8, 2023).

¹⁸⁹ *Frequently Asked Questions for Clients*, *supra* note 11.

blacklisted More expensive VPN services do offer less traceable IP addresses, but these tend to be costly, so that acts as a barrier in its own right to children stumbling across pornography.¹⁹⁰

The ultimate response is that valid forms of ID are required for many day-to-day activities, including driving, purchasing alcohol, voting, and even going to the movies.¹⁹¹ Therefore, it is also reasonable to require those who access pornography to show that they are legally permitted to consume it.

IX. POTENTIAL SOLUTIONS

There are multiple ways to curb childhood pornography exposure, keeping with the *Miller* blueprint for constitutional regulation of explicit content. Regulations may be directed at internet service providers (“ISPs”), requiring them to implement strong anti-pornography features by default. Legislation may also target pornography websites themselves by mandating specific top-level domains that can be more easily filtered from search results, and mandating age-verification systems to keep out minors. Other options include requiring all devices to have these filters applied by default.¹⁹² The current approach in Louisiana, which mirrors the UK’s efforts to implement age verification, simply requires websites to implement age verification if greater than 33.3% of the content on the website is explicit.¹⁹³

Regulating ISPs and devices may be a more complicated way to implement age verification. Default settings are a good start for preventing childhood pornography exposure. However, they are only useful if most people choose not to opt out. For one thing, higher-level regulations may be less effective if parents choose to disable filters

¹⁹⁰ *Id.*

¹⁹¹ *The 1984 National Minimum Drinking Age Act*, ALCOHOL POL’Y INF. SYS., <https://alcoholpolicy.niaaa.nih.gov/the-1984-national-minimum-drinking-age-act> (last visited Apr. 5, 2023); *Voter ID Laws*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/voter-id> (last updated Mar. 9, 2023).

¹⁹² *See, e.g.*, Children’s Internet Protection Act, 20 U.S.C. § 9134.

¹⁹³ LA. STAT. ANN. § 2800:29 (2023); Online Safety Bill 2022-23, HL Bill [87] (U.K.).

and settings required by default on family computers or other devices children may have access to. This default-setting method of preventing childhood exposure to pornography has been tested in the UK, to less-than-stellar results, as the government never enforced the requirement.¹⁹⁴ In a similar way, requiring strong default filters on devices is only useful if they are applied to all devices that children have access to.

A better legislative solution to childhood exposure would be requiring all pornography websites to have a specific top-level domain (“TLD”), making accidental exposure and things like typosquatting less common. This approach would attempt avoid any constitutional challenges based on the First Amendment right to free speech. TLDs are the suffixes affixed to the end of websites.¹⁹⁵ Common TLDs include .com, .org, .gov, and .net, among others.¹⁹⁶ In the early days of the internet, only nine TLDs existed.¹⁹⁷ As of June 2020, there were more than 1,500 TLDs.¹⁹⁸ Legislation could require adult websites to host their content using a TLD such as .porn or .xxx would allow these websites to be more easily categorized and filtered, while not preventing adults from accessing them whenever they wish. While the TLD “.xxx” is currently designated for pornography websites, this is a voluntary designation.¹⁹⁹ Requiring pornography websites to use a specific TLD would begin to lay the groundwork to regulate minors’ access to adult content more effectively. Legislators would likely need to rely heavily on obscenity law categorizations and the *Miller* test to give effect to this legislation, as free speech advocates may resist categorizing pornography websites in this way.²⁰⁰

¹⁹⁴ Grant, *supra* note 47.

¹⁹⁵ *What Is a TLD? Top-Level Domains Definition and Guide*, SHOPIFY (Apr. 13, 2022), <https://www.shopify.com/blog/what-is-tld>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Fahmida Y. Rashid, *ICANN Approves .XXX Domain for Adult Web Content*, EWEK (Mar. 21, 2011), <https://www.eweek.com/cloud/icann-approves-.xxx-domain-for-adult-web-content/>.

²⁰⁰ *See id.*; *Miller*, 413 U.S. at 24.

A third avenue for preventing childhood pornography exposure is age-verification laws. This is likely the most effective route because it is more difficult to circumvent age verification that requires some form of identification, as opposed to the honor system currently used by most pornography websites. The first age-verification law in the United States was recently passed in Louisiana, and its implementation may be a guide for the rest of the country.²⁰¹ It will be interesting to see whether Louisiana's watershed digital driver's license program would support implementation of the new age-verification laws.²⁰² The vendor who developed the LA Wallet app claimed that "[t]he number of daily downloads of LA Wallet . . . has jumped from between 1,200 and 1,500 to more than 5,000, since Dec. 31 [2022]."²⁰³ The law requiring age verification on pornography websites went into effect on January 1, 2023.²⁰⁴

In recent years, people have accepted two-factor authentication to access all kinds of accounts.²⁰⁵ Louisiana's introduction of digital driver's licenses opens the possibility of a state-run app with the sole purpose of proving age based on state records. Although Louisiana's new identification system has not yet become widespread, it has so far proved a useful tool for easy identification, including for online age verification.²⁰⁶ At this time, Louisiana's system seems to be a stable and secure way of verifying identity, which cannot be easily circumvented or hacked.²⁰⁷ Although it would take

²⁰¹ LA. STAT. ANN. § 2800:29 (2023); McKenzie, *supra* note 167.

²⁰² McKenzie, *supra* note 167.

²⁰³ *Id.*

²⁰⁴ LA. STAT. ANN. § 2800.29 (2023).

²⁰⁵ See BANKSTON ET AL., *Case Study #2: Offering Two-Factor Authentication*, NEW AMERICA, <https://www.newamerica.org/in-depth/getting-internet-companies-do-right-thing/case-study-2-offering-two-factor-authentication/> (last visited May 7, 2023).

²⁰⁶ McKenzie, *supra* note 167.

²⁰⁷ See generally *id.* ("LA Wallet is working with established age verification services to help websites come into compliance with the law and has a rich set of integration points to verify identities, both face-to-face and remotely. He also told StateScoop that no identity information used during the verification process is passed on to Louisiana authorities.").

time, digital age verification is certainly on the horizon as a possible method of preventing childhood access to pornography.

One way to simplify age verification may be for Congress to standardize the age at which older teens may access pornography. Because the age of consent currently varies from state to state,²⁰⁸ it would be more costly for pornography companies to account for differing state requirements in their verifications. However, the age of consent is a good baseline for allowing access to pornography. The average age of consent across the United States is around sixteen years old.²⁰⁹ Some states have set this age higher or lower, but setting a nationwide limit at sixteen would allow older minors access to pornography around the same time they are also legally allowed to consent to sex.

A common argument against regulating pornography websites is that if the websites are regulated, individuals intended to keep off the website will simply use a VPN instead of dealing with the new regulation.²¹⁰ That may be true, but there are two reasons age-verification laws still have value. First, the purpose of these laws is primarily to prevent accidental exposure to pornography by minors who are too young to consume adult content. Most 13- and 14-year-olds do not make it a habit of surfing the internet using a VPN, and it seems likely that those who do will not be stopped by age verification or any other regulation if pornography is what they are searching for.²¹¹ Second, just because some people will break or circumvent a law is not a sufficient reason to not pass it. Enforcement is one consideration when drafting effective laws, but in this instance, as long as the purpose—keeping pornography out of the reach of minors—is met, the law will be performing its intended function. In addition, this law should establish a uniform response to pornography websites who fail to meet the standards set out in regulation and create a remedy when websites refuse to comply.

²⁰⁸ ASAPH GLOSSER ET AL., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6 (2004).

²⁰⁹ *Id.*

²¹⁰ *Frequently Asked Questions for Clients, supra* note 11.

²¹¹ *Id.*

X. CONCLUSION

It is the era of digital privacy. From embarrassing WebMD searches, to Googling the cast of a new Netflix show, to watching pornography, internet surfers expect privacy in their online activities. Plenty of websites require verification of age, status, and other characteristics to grant access.²¹² A student must upload student identification and a class schedule to get student pricing on Spotify Premium.²¹³ Should websites not also require adults to show that they can legally consent before allowing them to access pornographic materials? For age-verification laws to be successful, they need to mandate effective, enforceable technology to replace the honor system method, which does very little to prevent accidental exposure to pornography by minors.

Most children in the United States are exposed to pornography by the time they turn 13 years old.²¹⁴ Age verification gets pushback because most consumers of pornography would prefer not to share identifying information with these websites.²¹⁵ But with more children online than ever before, it is our responsibility as a nation to provide a safer, more secure online landscape, where minors' accidental exposure to pornography occurs much less often than it has in the past.

There are many wrong ways to legislate age verification into being. Existing laws in the United States and worldwide struggle to find the appropriate scope for age-verification legislation. In the United States, if the net is cast too wide, First Amendment and privacy concerns may outweigh the government's interest in protecting kids from pornography exposure.²¹⁶ Enact an overly narrow law, and it will not have sufficient power to accomplish its goals. Given the vast technological advancements since the advent of the internet, there is

²¹² Snow, *supra* note 118, at 1-2.

²¹³ See *Premium Student*, *supra* note 149.

²¹⁴ FIGHT THE NEW DRUG, *supra* note 1.

²¹⁵ Snow, *supra* note 118, at 2.

²¹⁶ See *Butler*, 352 U.S. at 384.

no reason the Congress cannot legislate age verification to watch pornography on the internet.

