

Reel American Heroes Foundation Policy Paper

EFFORTS TO CORRAL PORNOGRAPHY INTO THE .XXX DOMAIN

by Ricky Schroder

Pornography and Our Children

In a world undergoing constant change, few aspects of human society have transformed as dramatically as access to pornography. Adult content was once available primarily through black-and-white images on postcards, then magazines kept behind the counter, and then grainy X-rated films. In the past half-century, such adult content has become more and more graphic, while at the same time becoming more easily accessible. Today, children can access pornography through virtually every medium. Tragically, pornography is also pushed on children by government schools and public libraries. However, it is through the internet's accessibility on cell phones and social media that pornography is now entering the lives of most children.

The .xxx Domain

While we do not hold out much hope for stemming the flow of all pornography, we do seek ways to protect our innocent children from its corrupting influence. As the harm of internet pornography accessibility grows, we may learn how to move ahead, cordoning off that content where access can be better controlled. Today, pornography is generally found in the .com domain. A debate that occurred during the earlier days of the Internet as to how pornography could be isolated could help us. In this paper, we revisit the proposal to confine pornographic websites in a discrete portion of the Internet — what is known as the .xxx domain — so access can be controlled.

RAHF Policy Papers on Pornography

Reel American Heroes Foundation (“RAHF”) is committed to fighting back to protect our children. Believing that the nation has gone off track, we are issuing a series of papers designed to identify the source of the problem and suggest solutions.

RAHF's first policy paper was written by two constitutional lawyers, explaining that the First Amendment of the U.S. Constitution was never intended to protect pornography. Rather, the U.S. Supreme Court has departed from the Constitution to create a Free Speech and Freedom of the Press right to pornography which was unknown either at Common Law or at the foundation of our nation.

This is the second in a series of RAHF policy papers. Future papers will trace U.S. Supreme Court jurisprudence, explaining how, with each decade, the High Court has opened the door further to pornography of all sorts. Another will assess “Age Verification” laws that, fortunately, are sweeping the nation.

All papers are available at:

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I. THE INVASION OF PORNOGRAPHY INTO AMERICAN CULTURE.

An astonishing 91.5 percent of men and 60.2 percent of women report consuming porn in the past month, according to a 2020 study.¹ A program which ranks all websites based on the number of website visits shows that many pornographic websites generate millions of visits per month: Pornhub (25.4 million); Chaturbate (19 million); Xvideos (18.5 million); xHamster (18.4 million); and the list goes on.² It has been estimated that 4 percent of all websites globally are porn sites.³ Particularly disturbing is that an analysis of over 130,000 porn titles, “teen” is the most common word used to attract viewership.⁴

Pornographic websites are increasingly being accessed using phones at the same time that more children are being entrusted with phones. Withholding smart phones from children until they reach eighth grade is considered so harsh by some that it requires parents to form support groups to resist the pressure from their own children.⁵

It may seem strange that pornography can be accessed without charge — it is given away free. In fact one analysis showed that 9 out of 10 online porn sites “are ‘free’ sites that host image or video galleries and make money by directing traffic to pay sites or even to one another.”⁶

Increasing supply of pornography, accessible at no charge, using phones in the hands of children: what could go wrong?

II. THE HISTORY OF THE “.XXX” DOMAIN.

Today, the web address of every site on the Internet (*i.e.*, the uniform resources locator or URL) specifies the “top-level domain” (“TLD”) in which the website is located.⁷ The most common TLD is .com, but there are also .org (for nonprofit organizations), .edu (for educational organizations), .gov (for government), .net, and others as well. These TLDs are regulated and assigned by a private, nonprofit, international organization known as “The Internet Corporation for Assigned Names and Numbers” (“ICANN”).

Today, pornography is primarily found in the .com domain. During the early days of the Internet, an attempt was made to separate pornographic websites from other content and put them into their own domain, called .xxx. Then, a private company, ICM Registry, proposed the creation of two TLDs:

1. .xxx only for pornographic material, and
2. .kids containing content of interest to children which would be kept free from any types of material harmful to children.⁸

As originally proposed, use of the “.xxx” TLD would be voluntary.⁹ However, others wanted it to be mandatory so that there would be ways for parents to completely block .xxx sites, thus keeping children from having access to all explicit porn.¹⁰ The inclusion of the .xxx proposal was highly controversial, turning a normally unnoticed TLD approval process into a major business and political controversy.

III. TWO VIEWS ON THE .XXX DOMAIN.

The .xxx proposal met with opposition from two strange bedfellows: the porn industry and some Christian groups.

The pornography industry feared that “the domain name, while billed as voluntary, would make it easier for governments to later mandate its use” and “ghettoize” online porn,¹¹ by sticking all indecent content in an “online red-light district.”¹²

Some well-meaning Christian leaders had a different reason for opposing the creation of the .xxx domain — that it would lead to the proliferation of pornography. Patrick Trueman, former chief of the U.S. Department of Justice Child Exploitation and Obscenity Section, Criminal Division, and now CEO of Morality in Media, argued that “[t]he establishment of a .xxx domain would increase, not decrease the spread of pornography on the Internet.”¹³

Trueman argued that, under porn-friendly precedents, the U.S. Supreme Court would deem any effort to force pornographers to leave the .com domain into the .xxx domain unconstitutional, and thus porn sites would simply have more available means of access — both .com and their own .xxx TLD. *Id.*

The Family Research Council, with which Trueman was affiliated, also spoke out in opposition to the .xxx domain.¹⁴ “[P]ornographers will be given even more opportunities to flood our homes, libraries, and society with pornography through the .xxx domain,” FRC argued.¹⁵ Many argued that the .xxx domain could only work to realistically limit access if pornographers were forced to

surrender their .com and .org domains and be consigned to .xxx.¹⁶

In 2005, Assistant Commerce Secretary Michael Gallagher noted that “[t]he volume of correspondence opposed to creation of a .xxx (domain) is unprecedented.”¹⁷ Under pressure from such groups, the George W. Bush administration asked ICANN not to create the .xxx domain. *Id.*

However, in 2006, Senators Max Baucus (D-MT) and Mark Pryor (D-AR) co-sponsored the “Cyber Safety for Kids Act of 2006,” which would require the Department of Commerce to work with ICANN to create a .xxx TLD. Congressman Fred Upton (R-MI) criticized ICANN for failing to approve .xxx “as a means of protecting our kids from the awful, awful filth, which is sometimes widespread on the Internet.”¹⁸

It took another five years, but eventually, in 2011, **ICANN approved the “.xxx” TLD on a voluntary basis.**¹⁹ Once it was launched, the ICM Registry had the authority to set the price of domain names under the .xxx TLD.²⁰ Initially, domain name costs were \$650 per year. *Id.* Now, a .xxx domain can be registered for about \$150 per year.²¹

This separate registration system raised concerns over another possible unintended consequence of the .xxx TLD. It created the risk that pornographers would snap up .xxx domains with names otherwise similar to well-known .com and .org sites, filling those sites with indecent material, and essentially enabling them to extort money from entities trying to protect their trademarks. The damage to brands that could be caused by porn sites with names such as ChristianityToday.xxx or FoxNews.xxx needs

little explanation. As Ralph Yarro, president and founder of the anti-pornography group CP80, put it, “Who gets to buy Mormon.xxx? You have to pay the ‘porn tax’ to avoid it.” *Id.* “Many [businesses] feel they’re being blackmailed to protect their brands,” said a trademark attorney.²²

The .xxx domain still exists — however, on an entirely voluntary basis. It is time to reassess whether that was a good or bad idea.

Twenty years after the initial efforts to create a .xxx TLD, Patrick Brown of the Institute for Family Studies at the Ethics and Public Policy Center argued that conservatives’ strategy in opposing in opposing the .xxx domain had been a mistake. “Opposing any regulation in the name of not wanting to be seen as blessing an unfavored behavior is a recipe for obsolescence, particularly with sweeping technological change on the horizon,” he argued.²³

Today, we have the .xxx TLD, but its use is voluntary. Should an effort be made to urge Congress or state legislatures to force porn sites to move to the .xxx side of the Internet?

IV. WOULD THE SUPREME COURT ALLOW SEGREGATION OF PORN SITES INTO THE .XXX DOMAIN?

People disagree as to whether the Supreme Court would allow the federal or state government to compel pornographers to move their sites to a .xxx domain. The pornographers who now have access to any TLD would oppose the proposal aggressively.

The Congressional Research Service (“CRS”) evaluated this legal question in a

2008 report. The CRS first noted that a mandatory .xxx domain would likely be considered to be a “content-based” regulation of speech which could violate the principle set out by the Supreme Court that “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.”²⁴

The CRS noted that in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court had upheld zoning laws restricting places of “adult entertainment” to certain business zones. CRS at 3. However, the Court reasoned that the zoning ordinance was “not aimed at the content of the films shown at ‘adult motion picture theaters,’ but rather at the secondary effects of such theaters on the surrounding community.” *Renton* at 47. The CRS believes that since any mandatory .xxx rule would be aimed directly at the speech, it would not likely survive at the Supreme Court.

The CRS also raised the issue of the “compelled speech doctrine.” The U.S. Supreme Court has held that, just as the government cannot constitutionally prevent speech generally, it cannot compel speech either. The Court has held, “There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”²⁵ The CRS suggests that compelling porn companies to denote themselves by the .xxx label might run afoul of the Court’s “compelled speech” precedents.²⁶

Assuming that the Court would find a mandatory .xxx domain to infringe on free

speech, the CRS considered whether the mandatory domain could realistically claim to be the “least restrictive means” to accomplish the government’s objective to limit access to porn by children, since previous legislation had been struck down by the Court as not being the least restrictive means.

V. THE SUPREME COURT HAS REJECTED OTHER CONGRESSIONAL EFFORTS AT PROTECTING CHILDREN.

Congress has made several legislative attempts to rein in the problem, particularly the viewing of porn by children, but in every case, it has been throttled by the courts. The courts seem far more concerned with the “free speech” rights of pornographers and seamy adult consumers than the injuries to children.

Congress’ first major effort was the **Communications Decency Act of 1996 (“CDA”)**. The CDA prohibited use of an “interactive computer service to send to a specific person or persons under 18 years of age” any “patently offensive” sexual content.

But the Supreme Court struck down the CDA, holding that any “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose” of limiting children’s access to harmful pornography. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

In 1998, Congress tried again, with the **Children’s Online Protection Act (“COPA”)**. But COPA found no more favor with the courts than the CDA. After a long saga through the courts, COPA was struck down by the Third Circuit Court of Appeals for the same reason as the CDA — the court

thought there were “less restrictive alternatives” for protecting children than a flat prohibition, such filtering software. *ACLU v. Mukasey*, 534 F.3d 181, 202 (3d Cir. 2008).

VI. STATE AGE VERIFICATION LAWS.

As of this writing, 18 states have enacted laws which require pornographic websites to verify the age of those accessing them before allowing them to access pornography. Most statutes have passed with overwhelming bipartisan support. Pornographers and others challenged the Texas statute, which was initially enjoined by a district court, but the Fifth Circuit allowed the law to go into effect, and the pornographers have asked the U.S. Supreme Court to intervene, thus far unsuccessfully. A challenge to the Utah statute is also pending in the Tenth Circuit.

It is impossible to know how the U.S. Supreme Court will rule on such Age Verification laws, but there is reason for hope. These laws can function without requiring pornography to be in a .xxx domain, and if they are effective, making the .xxx TLD mandatory may not be required. However, if the Supreme Court blocks state age verification laws, or if the age verification laws can be circumvented by use of a Virtual Private Network (“VPN”), the need to push pornography into the .xxx domain will be back on the table.

VII. THE HIGH COSTS OF NOT PROTECTING CHILDREN FROM PORNOGRAPHY.

Although many in an increasingly permissive society may deny it, it is now well-established that pornography has had several

destructive effects on young persons. Former Deputy Assistant Health and Human Services Secretary Patrick Fagan, Ph.D., concludes that pornography doubles the likelihood of teenage pregnancy, develops attitudes that normalize bestiality and child sexual abuse, and fosters sexual violence against women. Adolescent exposure to pornography has been linked to a vast array of adult criminal behaviors, particularly sexual crimes.²⁷

The magnitude of the problem is difficult to overstate. A 2023 survey of more than 1,300 teens ages 13 to 17 found that:

- The average age that kids first reported being exposed to online porn was 12.
- Fifteen percent first saw porn when they were 10 years old or younger.
- 73% of the teens said they saw online pornography by the time they were 17.
- More than half reported seeing the content accidentally. Sometimes that was through clicking a link they didn't realize was porn, coming across a pornographic advertisement or being shown by a friend or classmate. Of the teens who saw pornography accidentally, 18% reported that it was on social media.
- 52% of boys reported doing so on purpose while 36% of girls did so.
- 41% of the respondents reported seeing online pornography during the school day, including 31% who said they viewed it while attending school in person.²⁸

The demand for porn has fueled a massive sex trafficking industry globally.²⁹ Life Impact International reports that “there is a cyclical relationship between pornography and human trafficking that is creating an ever-increasing problem in the United States and around the world.... One in five

pornographic images online are of a child and half are of teenagers under the age of 18.”³⁰

CONCLUSION

How the U.S. Supreme Court will rule on state Age Verification statutes, and whether it could view the mandatory .xxx domain any more favorably than it did the CDA and the COPA, is anything but certain. But it may be that those seeking to protect children have little option but to press Congress to make the .xxx site mandatory for pornographers and bring the issue back to the Supreme Court.

ENDNOTES

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