Child Pornography and the Slippery Slopes of *Ashcroft v. Free Speech Coalition*

*An Address Given by Hon. A. Raymond Randolph at the 2002 National Lawyers Convention**

There are many visions of the slippery slope. I have a personal favorite stemming from an incident in my early childhood, when I lived near a river. To me, the slippery slope is a structure where the law of gravity takes over from the rule of law, a steep incline on which you cannot stop until you come to rest with a splash. Slippery slopes in law and public policy are common. Unlike my vision, some have exit ramps, to be ignored at one's peril. Those who were around in the 1960's and early 1970's watched as "nondiscrimination became equal opportunity became affirmative action became goals became quotas became 'equality of outcomes'"[1] – splash!

Arguments based on the image are also common. When you start paying attention to slippery slope arguments you begin to spot them everywhere. I bagged a particularly fine specimen the other day. Professor Michael Bellesiles of Emory University gained acclaim with his book *Arming America*, revealing that – contrary to popular belief — gun ownership in colonial America was not widespread. Trouble is he fabricated his evidence and, a few weeks ago, was forced to resign. His resignation statement tried to erect a slippery slope. "I believe," he said, "that if we begin investigating every scholar who challenges received truth, it will not be long before no challenging scholarly books are published."[2] This is of course balderdash; the only scholars who have to worry are those who falsify their data; and that is for the good.

As this example shows, some slippery slope arguments are valid and some are not. There is nothing very fancy about this kind of argument. The central idea is simply that one thing leads to another. It is an argument from consequences, resting on a prediction of outcomes. Why one thing supposedly will lead to another will of course vary. The reason may be empirical; it may be causal; it may be because attitudes will change as a result of the initial steps; or because no non-arbitrary line can be drawn, or some combination of these. The argument is a negative one, used to show why an action should not be taken in view of the action's undesirable consequences.

Freedom of speech cases are particularly prone to slippery slope arguments. A cluster of doctrines and dogma comprise modern free speech analysis. Clear and present danger, content discrimination, strict scrutiny, narrow tailoring, chilling effect, and overbreadth – especially overbreadth – now move the Court into ever more abstract adjudications. Rather than cases having concrete facts, the Supreme Court often has before it little else than a statute fresh from the legislature, attacked before it has been enforced. In this abstract setting, the Court gives free reign to its creativity, thinking up hypothetical future applications of the statute to imagined parties in imagined settings. The lawyers pro and con, but mostly con, argue slippery slopes and so do the Justices, in their questions from the bench and in their opinions. The arguments take the form of "if this . . . then that." If you take this step, terrible consequences will ensue. The more undesirable the consequences, and the more likely they will follow from the first step, the more powerful the argument will seem. In free speech cases, the bottom of the slope will contain what Professor Van Alystne aptly calls the irresistible counterexample, a result no one is willing to defend.[3]

Which brings me to *Ashcroft v. Free Speech Coalition*,[4] decided last term. Most of the First Amendment doctrines I just mentioned came into play, as the Supreme Court held that child pornography was within "the freedom of speech" when real children were not used in the production. In other words, the Free Speech Clause of the First Amendment protects computer-generated images of children having sex (usually with adults) even though the images are indistinguishable from real children.

The Supreme Court's decision, as you might have guessed, did not purport to rest on the original intent of the Framers.

The government contended, among other things, that this sort of material was devoid of value, that pedophiles use child pornography to seduce children by making them think this activity is common and acceptable, and that pedophiles use the material to whet their appetites. At oral argument, a Justice asked government counsel the following question:

> it seems that this is a big step . . . from . . . injury to an actual child to the effect on the viewer and the same thing could be said for women with respect to pornography, portraying women in a degrading way. The same thing could be said for hate speech. So . . . where there is no actual child victim, where it's a picture and you're talking about the effect of that on the viewer, why is it the same for all these other things that can have a very bad effect on the viewer?
>
> The government attorney responded thus:
>
> Well, I think there are two principal reasons why you shouldn't be worried about that particular slippery slope.[5]

He then gave the two reasons – one, the Court had already embarked on the slope when it relied on the seduction rationale in an earlier child pornography case,[6] and two, the government could successfully prosecute only when the child pornography created with computers

was indistinguishable from the real thing.

Was there another response? I believe so. Slippery slope arguments often can be turned against themselves. Potentially, for each slippery slope there is an opposing slope.[7] "As in all arguments from consequences, drawing attention to the [supposed] bad outcomes of one course of action is not enough; one has to show that the alternative courses of action don't have just as bad or even worse consequences themselves."[8]

Implicit in the Justice's question was the proposition that government cannot base its regulation on the effect of "speech" on viewers and listeners. Here is the opposing slope. If laws cannot rest on the effect on viewers and listeners, then the entire law of defamation would collapse. And so would a good many others as the Court began the slide. Laws against inciting riots would be swept away. Laws against indecent exposure and public nudity would fall.[9] Prohibitions against obscenity[10] would be cast aside. Professors of philosophy are fond of placing slippery slopes in categories. This particular opposing slope could be of the line drawing variety; it asks "Where do you draw the line?" and the answer is that there is no non-arbitrary place to draw it.

The Court's opinion striking down the federal law contained a number of slippery slope arguments, although some were not fully developed. In response to the government's argument that pedophiles will show child pornography to children to break down their resistance, the Court answered with two slippery slopes of its own devising. Here is the first:[11]

> [The government] argues that [the statute] is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused.

This is what one noted philosopher describes as a "precedent slippery slope argument."[12] The Court has stated a rule – things innocent (innocuous?) in themselves may not be banned simply because they may be misused. And so if the Court made an exception for the ban on virtual kiddie porn, it would also have to permit the banning of candy and cartoons because these too can be misused to seduce children. The argument is fallacious. The Court has answered the government's contention by generalizing it. It is not just seduction, but seduction in a particular way – namely, by showing a child graphic depictions of other children "having fun" while engaged in sexual activity. (Congress made a specific finding to this effect.)[13] Candy cannot be used in the same way. Moreover, where does the Court get the idea that child pornography is "innocent in itself," as "innocent" and innocuous as candy and cartoons?

The Court's second answer to the seduction claim invoked "the important First Amendment principle that the State could not 'reduce the adult population . . . to reading only what is fit for children.'"[14] This too is a slippery slope argument, although the sequence is not fully spelled out. The Court has deployed it in many cases. I think the child pornography opinion abused the argument, for two reasons. An empirical slippery slope argument is not plausible unless the empirical premises on which it rests are plausible. The premises here are completely implausible. How likely was it that if the Court upheld the statute outlawing computer-generated depictions of children having sex, adults would eventually be forced to view only material suitable for minors? Statutes punishing producers, distributors and possessors of child pornography involving real children — statutes the Court has upheld — have not resulted in the adult population watching material fit only for children. Far from it. There is a second problem with the Court's point. It begs the question. It assumes that virtual child pornography is "fit" for adults – by which the Court means this material is protected by the First Amendment. That of course was the issue before the Court.

The *Free Speech Coalition* opinion contains other assertions that are, I believe, fairly refuted by slippery slope arguments. Child pornography, the Court announces, "might have significant value."[15] Of what does valuable child pornography consist? The Court gives several examples, again imagining parties and situations not before it. Thus, there could be a "picture appearing in a psychology manual" or a "movie depicting the horrors of sexual abuse" of children.[16] If I understand this passage correctly, the Court has stepped onto a very slimy slope. It is telling us that visual depictions of children having sex, say with adults, can have value because they show how horrible this activity is. But on that rationale, the bottom of the slope is a cesspool. Movies and photographs and computer images of bestiality and sadism and incest, and who knows what else, would — on the Court's theory — have redeeming social value because the public would be able to see for itself how awful this stuff is.

At another point the Court says the statute "proscribes the visual depiction of an idea . . . that is a fact of modern society . . .."[17] An "idea"? What about an "activity"? That aside, consider the proposition embodied in this passage. If visual depictions are within the freedom of speech because they show a "fact of modern society," then there is no stopping point. Everything is protected speech. Every other perversion you can imagine, and many you cannot imagine, are "facts of modern society."

There is, I believe, another slope looming in the child pornography case, one the Court did not acknowledge, and perhaps did not see. It involves the "Fallacy of the Altered Standpoint." This "is the belief that, because some action or attitude is universally considered abhorrent, it will always remain so; the fallacy lies in what happens when the standpoint from which that belief derives

is altered. The view changes; from the new standpoint it is possible to believe that what was once unthinkable can now be thought; all too often, what can be thought is thought, and shortly afterwards what is thought is put into practice."[18] In reading the Supreme Court's opinion, Mary Eberstadt's articles, one in 1996 entitled "Pedophilia Chic,"[19] and a followup article last year[20] immediately came to mind. Ms. Eberstadt described a growing trend of so-called "enlightened voices" being "raised in defense of giving pedophilia itself a second look." The "social consensus against the sexual exploitation of children and adolescents . . . is apparently eroding," she reported, and "the defense of adult-child sex — more accurately, man-boy sex — is now out in the open."

The campaign is being waged not just by the organization known as the North American Man Boy Love Association. Newspapers have carried Calvin Klein underwear ads showing youngsters in suggestive poses. Front page articles have reported the so-called scientific evidence that consensual man-boy sex is not harmful. New euphemisms have been coined: we now have "ageism" and "intergenerational sexual relations." And just as the Supreme Court was issuing its *Free Speech Coalition* opinion, the University of Minnesota Press released a book entitled *Harmful to Minors: The Perils of Protecting Children from Sex*.

What the Court wrote in its opinion and the result it reached tends to legitimate such views, and by doing so pushes us further down the slope of cultural decline. The Court had little to say negatively about virtual child porn and a good deal to say in its favor. The opinion pointed out that *Romeo and Juliet* was about teenage lovers, one of whom was just 13 years old; no matter that Shakespeare did not visually depict sex; according to the Court (again using its imagination), a modern director might want to be more graphic, using computer images to mimic reality.[21] And, the Court noted, there are contemporary movies like *Traffic*, which was nominated for an Academy Award, as if that is a measure of constitutionality.[22] "The right to think," said the Court, "is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[23] This last statement is an eye-popper – "speech is the beginning of thought." I always believed it was the other way around. Besides, look at the context. Is child pornography "the beginning of thought"? And what is the thought that this so-called speech triggers?

In the end, the Court dismissed the evidence that child pornography whetted the appetites of pedophiles and was used by them to seduce children. The Court cited no contrary evidence. It simply pronounced that these effects were too "contingent and remote" to outweigh what it called the "significant value" of some child pornography.[24]

Perhaps I am wrong about the effect of *Free Speech Coalition*. Perhaps we are not being propelled down the slope. Perhaps the Court's opinion will not have any lasting impact on our society. But the point of the Fallacy of the Altered Standpoint is "that until the standpoint has been altered, no one can safely predict what the view from the new one will be."[25] Still, "there is a clue. So far as I know, there is not one example of a new standpoint being less disturbing than its predecessor; the alteration invariably goes further, in the matter of actions that had previously been ruled out, towards danger."[26] And I know one other thing. A person who wants the stuff the Supreme Court has now protected under the mantle of the First Amendment is, by definition, someone who is sexually interested in children.

I will end with verse:

You are not on the Road to Hell
You tell me with fanatic glee:
Vain boaster, what shall that avail
If Hell is on the road to thee?

* Hon. A. Raymond Randolph serves as a judge on the United States Court of Appeals for the District of Columbia Circuit.

[1] Martin Mayer, Today and Tomorrow in America 4 (1976).
[2] *The Washington Times*, Oct. 28, 2002, p. A14.
[3] William Van Alystne, *A Graphic View of the Free Speech Clause*, 70 Cal. L. Rev. 107, 113 (1982).
[4] Ashcroft v. Free Speech Coalition 198 F.3d (9th Cir. 2002) *affirmed*, 535 U.S. 234 (2002).
[5] One might say the Justice's question was not technically about a slippery slope, but I will treat it that way, as did government counsel. *See* Schauer, *supra*, 99 Harv. L. Rev. at 366, contending that an "argument against the excess breadth of a principle" differs from a slippery slope argument.
[6] *Osborne v. Ohio,* 495 U.S. 103 (1990).
[7] *See* Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361, 382 (1985).
[8] David Enoch, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope* 10-11 [Available at: http://www.nyu.edu/gsas/dept/philo/students/enoch/papers/slopes.pdf]
[9] See also the Court's "Seven Dirty Words" case, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
[10] *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).
[11] 122 S. Ct. at 1402.
[12] Douglas Walton, Slippery Slope Arguments 115-159 (1992).
[13] 18 U.S.C. § 2251 note (Supp. V 1999).
[14] 122 S. Ct. at 1402, quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957).
[15] 122 S. Ct. at 1402.
[16] *Id*. 1400.
[17] *Id*. 1400.
[18] Bernard Levin, *A Little Something in the Bank for Life Eternal*, The Times of London, April 19, 1990.
[19] The Weekly Standard Magazine, June 17, 1996.
[20] *"Pedophilia Chic" Reconsidered,* The Weekly Standard Magazine, Jan. 1, 2001.
[21] *Id.* 1400.
[22] *Id.*
[23] *Id.* 1403.
[24] *Id.* 1402. The Court said that in *Ferber* it "recognized" that "some works in this category" — child pornography — "might have significant value," citing page 761 of the *Ferber* opinion (458 U.S. at 761). I have read this page of the *Ferber* opinion several times and I cannot find anything that remotely supports that statement.
[25] Levin
[26] *Id*.