

A Constitutional Double Standard

Is it possible to guarantee a free marketplace of ideas and yet card people at the door?

By MIKE LIVINGSTON

*Saving Our Children
From the First Amendment*

By Kevin W. Saunders

(New York University Press, 305 pages, \$48)

Freedom of expression has always been a “be careful what you wish for” proposition. While other constitutional freedoms are tested by the innocent, the disenfranchised, the civil underdog, First Amendment freedoms are tested by Howard Stern, Larry Flynt, Joe Camel, and the Ku Klux Klan. You want free speech, you gotta put up with the worst of it.

Yet our society—and our jurisprudence—has decided not to let minors buy pornographic magazines, not to let tobacco companies aim advertising at minors, and not to let 976-LUST ads sponsor afternoon cartoons. This is tricky constitutional law, and reasonable people may disagree about the scope of the First Amendment as it applies to children. Actually, reasonable people must agonize: We cannot simultaneously claim to guarantee a free marketplace of ideas and yet card people at the door for proof of age, and we’re reluctant either to dilute that freedom or to welcome a climate in which children run a gantlet of porn and violence.

In *Saving Our Children From the First Amendment*, Kevin W. Saunders, of the Detroit College of Law at Michigan State University, calls for a codified double standard of freedom for adults and children. It is not only possible, he argues, but also constitutionally feasible—consistent with enduring case law—to deny adults’ unmoderated access to an audience of other people’s children without compromising the libertarian aims of the First Amendment as it applies to fully vested members of society.

The key to a two-tiered approach, Saunders maintains, is to devise filters or barriers that restrict only the direct flow of communication from adults to other people’s children; it must be recognized as lawful for minors to access any material their own parents choose to allow them. (Vulgar or hateful speech by minors is a peripheral issue, and Saunders pays brief attention to *Hazelwood School District v. Kuhlmeier* and other limits on expression in public schools.) In a series of cases from *Meyer v. Nebraska* (1976) to *Reno v. ACLU* (1997), the Supreme Court leaves no doubt that parents have the right to direct their children’s education. A libertarian corollary is

that it is parents’ responsibility, not government’s, to shelter children from unwelcome influences. But the recognition of parents’ rights, Saunders argues, “does not mean that society must leave children at the mercy of all others” whose messages might undermine parental choices.

“Children are different” from adults, Saunders explains. “Their abilities to analyze conflicting visions of society are not fully developed. While we may believe that through free and open exchange adults will eventually arrive at the truth, the argument is not as convincing for children.” And the state, therefore, has “the right and duty” to protect children from harmful messages—by holding communication received by children to a different standard than it may hold communication received by adults.

Much of Saunders’ argument rests on the 1968 case of *Ginsberg v. New York*, in which Justice William Brennan Jr. wrote for the Supreme Court majority that “the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.” The opinion quoted a *Yale Law Journal* article from 1963 arguing, more specifically, that “regulation of communications addressed to [children] need not conform to the requirements of the First Amendment in the same way as those applicable to adults.” On that basis, the Court upheld a state law prohibiting the sale of “obscene” magazines to minors.

Courts have not, however, applied the same double standard to graphic violence as to graphic sex; in 1992, the 8th Circuit pointedly declined an opportunity to recognize violence as a form of obscenity, or even as a parallel category of unprotected speech. In *Video Software Dealers Association v. Webster*, the court overturned a Missouri law prohibiting the sale of violent works to minors—works that, echoing established definitions of obscenity, “taken as a whole” lack “serious literary, artistic, political, or scientific value.”

The *Webster* decision did acknowledge the double standard established by *Ginsberg*, as well as a compelling public interest in restricting children’s exposure to violence. But the Missouri statute was held to be too vague and not narrowly tailored to the state’s interest. Seven years later—after the Columbine massacre—the case was re-enacted on the floor of the House of Representatives, when the Hyde Amendment to the Consequences for Juvenile Offenders Act sought to apply the classic language on obscenity to violent material. The amendment was defeated—“based, at least in major part, on the belief that its treatment of violent material was unconstitutional,” Saunders writes, adding, “Most scholarly commentary agreed.” Violence simply is not considered obscene and is therefore not subject to *Ginsberg*.

Saunders is undaunted on the point: “It is important to note that the Su-

preme Court has never directly ruled that violent material cannot be obscene or at least regulable. In fact, *Winters v. New York* specifically left the possibility open,” in 1948, overturning a state restriction of violent material on the grounds that it was too vague—not that it was categorically unconstitutional. In an aside that might not carry much weight with his fellow legal scholars, Saunders explores the etymology of the word *obscene* and historical notions of obscenity, finding further openings for his contention that violent speech can be construed as obscene and unprotected.

The result is not a call for censorship; on the contrary, Saunders takes pains to avoid proposing remedies that would tend to “chill” communication addressed to, and received by, adult audiences. He leans toward the V-chip approach, contriving devices—warning labels, Internet filter tags—that enable distributors to identify material that should not be provided directly to children. Parents remain free to activate Internet filters or not.

HIGH-STAKES POLICY

These proposals and precedents could easily be mistaken for a moot academic foray into constitutional law, but in fact the subject is a timely matter of public policy and the stakes are high. The book was already on retail shelves when the vice president of the United States made a remark on the Senate floor that might not be deemed fit for underage ears; should the *Congressional Record* be removed from the open stacks of the school library, accessible only with a signed permission slip from a parent? But innocent ears and delicate sensibilities are not the proximate issue either. Saunders reviews a body of evidence—some scholarly, some anecdotal, but all reasonably compelling—that early and frequent exposure to violent imagery does affect child development.

Citing studies that find the average American child witnessing, on television, perhaps 8,000 murders and 100,000 other acts of violence, Saunders writes: “Does media violence lead to aggression and real-world violence? Forty years of study in the passive media—television and film—indicate a positive response,” and video games have not yet been subjected to a comparable body of research. The American Medical Association, the American Academy of Pediatrics, and four other associations representing the mental health profession issued a joint statement in 2000 finding, as quoted by

Saunders, “overwhelmingly . . . a causal connection between media violence and aggressive behavior.”

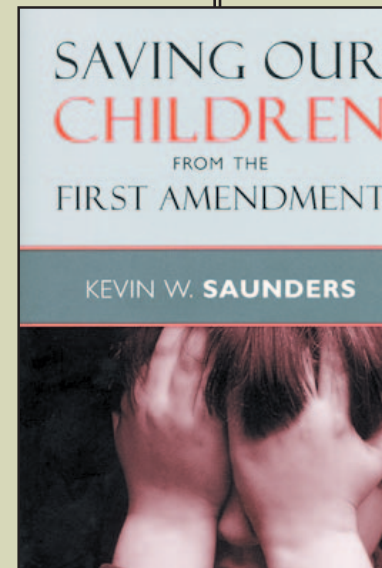
The anecdotal evidence is perhaps even more ominous than the studies. The video game *Doom* and the movie “The Basketball Diaries,” both of which feature first-person vantages of shooting sprees, figured in the experience of the perpetrators of the schoolhouse massacres in Littleton and Paducah. Games similar to *Doom* are used to train military snipers. And a record label affiliated with several neo-Nazi organizations, Resistance Records, publishes some 250 CDs of openly violent white-supremacist lyrics; the company’s founder describes the music as “highly

effective as a recruiting tool.” Resistance Records also sells a video game called *Ethnic Cleansing*, in which the player, in the guise of a skinhead or Klansman, picks off African-Americans and Latinos while searching for their hidden Jewish masters.

That is almost certainly not what the Founders meant to protect—but just as certainly, the Founders would hesitate to chill expression among adults in order to protect children, which in any case is primarily the parents’ job. “Free expression has its costs,” Saunders writes, and drawing that conclusion “is not the same thing as concluding that free expression rights are not worth retaining.” But children are different.

Ambitiously, Saunders suggests that a constitutional double standard could actually strengthen free speech guarantees for and among adults. Absent a weaker First Amendment applicable to children, the state will remain under pressure to regulate obscene, violent, hateful, and otherwise offensive material; if the law can accept that children (only) should be insulated from unchecked access to such material, then the adult marketplace of ideas can remain unrestricted. “Recognizing the differences between adults and children would go a long way,” he argues, “to relieving the strain on the First Amendment that, without such relief, could weaken the protection of free expression for adults.”

Mike Livingston is a freelance writer based in Takoma Park, Md. He is the lead author of The Newcomer’s Handbook for Washington, D.C., 3rd edition, published by First Books in 2002. His next book, The Newcomer’s Handbook for the USA, is forthcoming from First Books.



Paradigm Lost

How the law's reliance on a secrecy/invasion model is failing to protect privacy in a digital age.

By JAMES H. JOHNSTON

The Digital Person

By Daniel J. Solove

(New York University Press, 288 pages, \$29.95)

That privacy is important to voters is a fact not lost on Congress. In the last 30 years, it has passed some 20 privacy laws. Yet most people would say that there is less privacy in the information age than there was 30 years ago. Indeed, technology guru Scott McNealy, president of Sun Microsystems, once quipped: "You already have zero privacy. Get over it." Professor Daniel J. Solove of George Washington University Law School doesn't think you have to get over it. In his book *The Digital Person: Technology and Privacy in the Information Age*, he explains why the law fails to protect privacy and what can be done differently.

This book—the first in a series called "Ex Machina: Law, Technology and Society" edited by Jack Balkin of Yale Law School and Beth Noveck of New York Law School—pulls together the many disparate principles and laws on privacy into a relatively short and readable summary. It also takes umbrage with Scott McNealy's claim that privacy is dead and gone. Nonetheless, only time will tell whether McNealy or Solove is right.

Solove's thesis is that the law's essential failing has been its reliance on a secrecy/invasion paradigm for privacy that doesn't work in a digital age. The paradigm assumes that certain personal information about us should be secret and that the law's job is to protect these personal secrets from being invaded. Rather than having the law continue to wrestle with an illusive concept like personal secrets, Solove advocates a simpler strategy designed to prevent individuals from being victimized by improper use of personal information.

Since metaphors can be powerful aids to understanding complex issues, Solove reviews those that have been applied to privacy. The most common metaphor is that of Big Brother from George Orwell's novel *1984*. Big Brother was the name of the omnipresent surveillance that the government used to control the population. The trouble with the Big Brother metaphor, Solove says, is that the metaphor speaks only to the threat to privacy from government. He believes that private enterprise poses the greater threat to privacy in the United States today. He points out that even the government needed to dip into the information-rich, private databases in the fight against terrorism.

Solove prefers the metaphor of Franz Kafka's novel *The Trial*. In Kafka's book, the protagonist Joseph K. lives in fear of an investigation and trial, but he knows neither the charges against him nor the tribunal that will decide his fate.

Indeed, this is more akin to the situation Americans face today. Huge databases about us are assembled—"digital dossiers" Solove calls them—yet we do

not know what is in them, who has them, where the information comes from, or how it will be used. Every time we fill out a form for a merchant, bank, or lender, the information goes into a computer file. Other databases contain records of the checks we write, our credit card transactions, our birth, and every place we have lived. There may be digital records of the food, beverages, and toiletries we buy and of the prescription drugs we use.

If someone were able to assemble our complete digital dossier from all possible sources, that dossier would contain more information about us than we can remember about ourselves. In short, Americans should worry less about the kinds of personal information that is collected about them and instead, like Joseph K., worry more about who has the information, whether it is accurate, and how it will be used.

The Digital Person examines three approaches to privacy protection. It dismisses the effectiveness of the first, the existing secrecy/invasion paradigm, because it is overwhelmed by the vast amount of information in our digital dossiers. Since thousands of pieces of information about us work their way into computer databases, some of our information cats will always be out of the bag. We can't possibly put all of our secrets back. In fact, we need to give up personal information if we want mortgages, car loans, credit cards, and the like.

The second solution, the so-called market-based approach, also fails because it will never give adequate protection, according to Solove. Advocates of this approach want Congress to stay out of the picture and let the consumer bargain with the information-collectors about her privacy. Thus, the individual consumer, rather than the law, would determine how much or how little privacy she wants. Solove faults this view by pointing out that consumers are generally not in a position to bargain intelligently and on equal terms with the voracious information-collectors.

Solove prefers a third approach, which he calls an "architecture" for privacy. He would have the law impose controls on how institutions can use personal information and when they may share it with, or sell it to, others. Government would assume part of the responsibility for protecting privacy by forcing institutions to abide by the rules.

Solove advances what he says is the "radical proposal" of turning information-collectors into fiduciaries of the information they get from us. However, he seems to settle for a less radical set of principles, the Fair Information Practices that were recommended in a 1973 Department of Housing, Education, and Welfare report. These would be enforced both by the government and by private rights of action. The fair practices include a prohibition against secret information systems, the right of individuals to know what information is kept and how it is used, the right to prevent the sharing of information, the right to correct information, and a requirement that institutions take reasonable steps

to prevent the misuse of information.

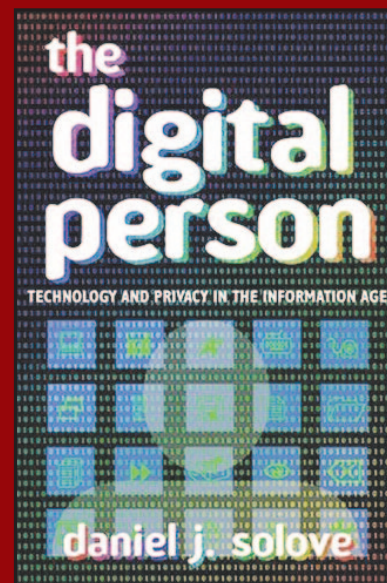
The Digital Person treats the right of privacy vis-à-vis the government as presenting a separate and distinct set of issues. With respect to government records, one problem is how to protect privacy and yet have open access. The Freedom of Information Act is one example. Although it attempts to protect personal information, the fact that most FOIA requests come from businesses shows how useful the law is to the information-collectors. Indeed, Judge Patricia Wald once lamented that FOIA had turned government agencies into "information brokers." The problem is even worse with respect to court records where, as the information industry knows, the most intimate personal information about litigants is readily available to the public.

Another problem, in Solove's eyes, is that current judicial interpretations of the Fourth Amendment are rooted in the obsolete privacy/invasion paradigm. This results in judges looking at the trees rather than the forest, puzzling over the narrow question of whether an individual had an "expectation of privacy" under the circumstances rather than whether the totality of the government's conduct stripped him of privacy.

The Digital Person is an excellent summary of the current law of privacy and the problems thereof. But it isn't a treatise. Rather, it is the kind of book a privacy lawyer might give to a new associate or to a senior corporate lawyer as a quick and easy way for them to get up to speed on the history and issues of privacy law.

The book is also a call for reform. It argues that the law needs to "reconceptualize" its approach to privacy. But it is short on details about what this would mean, leaving the reader hungry for elaboration on how Solove's architecture approach would enhance privacy. For example, he doesn't talk about whether new substantive privacy laws are needed. Does that mean the present laws just need to be enforced? What about enforcement of the privacy architecture? Who will do that? The implication is that there will have to be a federal agency, but which one? The already overburdened Federal Trade Commission, the Justice Department, or perhaps a new federal privacy protection administration? And would the individual still have a right to sue for invasion of privacy? Given the current wave of antipathy toward trial lawyers, Solove might win his privacy architecture but find its sole and exclusive overseer was a federal agency held captive by the information-collection industry. Would this improve privacy protection? Perhaps a book answering these questions will come later in the Ex Machina series.

Nonetheless, if you want to find out what a mess the law of privacy is, how it got that way, and whether there is hope for the future, then read this book. If you don't need the hope, then just read Kafka.



Daniel J. Solove believes that private enterprise, not government, poses the greatest threat to privacy.

D.C. lawyer James H. Johnston is a frequent contributor to Legal Times. He can be contacted at Jimjohn@erols.com.