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Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996

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OBSCENITY AND INDECENCY IN A DIGITAL AGE: THE LEGAL AND POLITICAL IMPLICATIONS OF CYBERSMUT, VIRTUAL PORNOGRAPHY, AND THE COMMUNICATIONS DECENCY ACT OF 1996*

Blake T. Bilstad†

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I. INTRODUCTION

> I know that this group attracts a broad church of interests, and that is fine but surely there must be some things we as a community regard as unacceptable .... [W]hen we use our freedom to wank over the rape, torture and death of small children we prove that we don't really deserve freedom. I'm not a puritan after all I subscribe to this group but this cannot be right and we should not [be] allowed to continue. How long will Governments allow the kind of access we have to the internet if things continue as they are going. [sic] How would your average congressman or M.P. react if they were sent a selection of some of the pedo stories, [sic] they would overeact [sic] and look for prohibitive legislation. What we have here is too important to be sabotaged.[1]

> ARE YOU OUT OF YOUR MIND??? Speech is speech, written words are speech, ALL speech is covered by the first amendment. I write some stories in this group, and I do not go out and rape, torture or murder people in real life. I write about women getting raped, but I would never rape a woman, I AM a woman.... When you censor one kind of story, the door is open for censorship for all stories, and soon, not [sic] even missionary m/f sex in the dark with your clothes on stories would be censored because they offend someone's ideals. Please, get real. We need to protect all written words.[2]

For many on-line computer users, the year 1996 provided a profound learning experience on the subjects of both free speech and the First Amendment. Since the above-listed comments were posted in May 1995, the topic of objectionable material on the Internet (and in various other digital media) has become a focus of intense public debate. Indeed, *Time* magazine ran a cover story in July 1995 detailing the shocking horrors of *Cyberporn*.[3] Senator James Exon (D-Neb.)

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1. Nick Forro, *We Must Stop These Pedo Stories*, alt.sex.stories posting, May 1995 (copy on file with the *Santa Clara Computer and High Technology Law Journal*).

2. ShadowMist, *Re: We Must Stop These Pedo Stories*, alt.sex.stories posting, May 18, 1995 (copy on file with the *Santa Clara Computer and High Technology Law Journal*). This and the previous comment were posted on a popular Internet discussion mechanism called the Usenet. *See infra* Part II.D.5. Nick Forro also received a battery of other disapproving postings. Accordingly, responses were strikingly unmindful of the legal and political issues Forro raised, perhaps characterized best by Kevin D. Lee: "Quit trying to repress people just because you don't agree. Get a life and leave people alone." Kevin D. Lee, *Re: We Must Stop These Pedo Stories*, alt.sex.stories posting, May 19, 1995 (copy on file with author).

3. Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38.

waged a widespread public relations campaign in support of his Communications Decency Act.[4] Finally, amid the subsequent public and media fallout, Congress held hearings and ultimately passed the "prohibitive" legislation[5] that Nick Forro (rather prophetically) predicted above. Moreover, despite the initial notions of Internet users such as "ShadowMist," many Americans were ultimately brought to the realization that not all speech is protected by the First Amendment of the Constitution.

Obscenity, for example, does not receive First Amendment protection.[6] In addition, the Constitution does not protect *indecent* speech when it can be readily accessed by children."[7] However, many of the obscenity laws were originally written to manage physical objects (e.g., books) and physical space (e.g., storefronts). Accordingly, these laws are now straining to handle many of the new technologies such as CD-ROMs, databases, and the global computer network known as the Internet.[8] Staking ground in these new uncharted applications of the law, two federal courts have held that bulletin board system ("BBS") operators on the Internet will be held criminally liable if the material available on their systems violates the obscenity statutes of a given state.[9] Although controversial, attaching liability to BBS operators ("Sysops") was perhaps a predictable move by the courts: especially given the fact that a Sysop is an identifiable

4. S. 652, 104th Cong. §§ 401-410 (1995). The Communications Decency Act of 1995 was originally sponsored by Sen. Jim Exon (D-Neb.), *see* S. 314, 104th Cong. (1995), but was later incorporated into Title IV of the Senate's Telecommunications Competition and Deregulation Act of 1995.

5. The CDA was enacted by the Congress on February 1, 1996, and signed into law by President Clinton on February 8, 1996. The CDA was part of a larger legislative overhaul of the Communications Act of 1934, 47 U.S.C. §§ 1-1021 (1988).

6. Roth v. United States, 354 U.S. 476, 484-85 (1957) ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance .... [We therefore] hold that obscenity is not within the area of constitutionally protected speech or press.").

7. *See* FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (holding that an afternoon broadcast of George Carlin's famous Filthy Words monologue was unprotected indecent speech because of the pervasive presence of radio broadcasts and the unique accessibility of afternoon broadcasts by children).

8. *See* Aaron Zitner, *A Byte in the Law; Copyright, Libel and Obscenity Statutes Stretch to Keep up on the Electronic Frontier*, B. GLOBE, Jan. 25, 1995, at 33.

9. *See* United States v. Thomas, No. CR-94-20019-G (W.D. Tenn. 1994), *aff'd*, 74 F.3d 701 (6th Cir. 1996). This case represents the first criminal prosecution, or at least the first prosecution to proceed to trial, involving the distribution of obscene materials using an electronic bulletin board system. *See* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 204 n.32 (1995).

person, often with a financial stake in the respective BBS.[10]

Nevertheless, Congress still saw the need for additional action and proceeded to enact the Communications Decency Act of 1996 (CDA) in February of 1996.[11] As a result, transmitting obscene or indecent materials viewable by minors is a federal offense, punishable by a fine of up to $250,000 and a jail term of up to two years.[12] However, the ACLU and other groups challenged the law in a Pennsylvania federal court and won. As a result, key portions of the CDA were struck down as unconstitutional.[13] Although the prohibition against obscene materials was not called into question, the plaintiffs in the *ACLU* case were most concerned by the CDA's apparent ban against indecent materials. Arguably, anything from four-letter words to discussions of homosexuality could fall under the definition of indecent.[14] Accordingly, a number of groups with an on-line presence became gravely concerned. These groups, ranging from AIDS awareness organizations to breast cancer discussion groups, worried that because their on-line forums might be accessible by minors (or in some cases are specifically directed at minors), they could be held criminally liable. Nonetheless, at this juncture, the final judicial outcome of the *ACLU* case is not entirely certain. Although the district court opinion resoundingly declared the CDA unconstitutional, the U.S. Supreme Court will review the case in the Spring of 1997.[15]

Why, however, is there an apparent onslaught of sexually-related materials on the Internet and other new digital media? Part II of this article will discuss the explosive growth of the Internet in recent years and some of the shifts in thought that are required with

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10. *See* Zitner, *supra* note 8.

11. The CDA was enacted by the Congress on February 1, 1996, and signed into law by President Clinton on February 8, 1996. The CDA was part of a larger legislative overhaul of the Communications Act of 1934, 47 U.S.C. §§ 1-1021 (1988).

12. *See* 47 U.S.C. §§ 223(a)(2), (d)(2) (1996).

13. ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa. 1996), *cert. granted*, 65 U.S.L.W. 3411 (1996) [hereinafter *ACLU Case*].

14. Even the word "breast" had at one time been deemed offensive by on-line provider America Online, resulting in the censorship of membership profiles that recounted bouts with breast cancer, for example. *See* Sen. Patrick Leahy, *Floor Statement on Repealing the Communications Decency Act* (Feb. 9, 1996) <http://www.epic.org/free_speech/censorship/leahy_repeal_statement.html>. Accordingly, many observers feared the ultimate prohibition of *any* mature themes being discussed on-line. *See, e.g.*, Ramon G. McLeod, *Telecom Bill Called Threat to Free Speech on the Net*, S.F. CHRON., Feb. 7, 1996, at A1.

15. Reno v. ACLU, 65 U.S.L.W. 3411 (1996). *See* John Schwartz, *Court Upholds Free Speech on Internet*, WASH. POST, June 13, 1996, at A1; Leslie Miller, *Cyberporn Law Isn't Censorship, Government Says*, USA TODAY, (May 12, 1996) <http://www.usatoday.com/news/nds12.htm>.

such a medium. In addition, Part II will discuss the links between pornography and new technologies in general, attempting to document the prevalence of sexually-related materials among the various new digital technologies (e.g., CD-ROM's and the Internet). Finally, Part II will discuss the occurrence of other digital "vices," such as gambling, prostitution, and hate group tactics — as well as the much-publicized problems of on-line crimes against children.

Next, Part III of this article will address the overall public nature of the Internet. Issues of media hype, anonymity, privacy, on-line liabilities, and international concerns have all played a role in the current discussions regarding objectionable material on the Internet. Further, given the increased use of the Internet in our daily lives, Part III will consider whether the Internet should be considered a "public forum" for purposes of the law.

Part IV of this article will discuss the constitutional standards of obscenity and indecency in the United States This Part will briefly review the history of obscenity case law in the United States, as well as examine the Supreme Court's treatment of indecent speech. Next, Part V will address the passage of the CDA and discuss its constitutional outlook in light of the *ACLU* case. In Part V, this article will conclude that the indecency portions of the CDA should be reaffirmed as unconstitutional by the Supreme Court under the rationale of its decisions in *Pacifica* and *Sable.*

Finally, in Part VI, this article will discuss the various alternatives to federal regulation. Market screening products, industry self-regulation, and forms of extra-legal regulation are just a few of the effective regulatory tools available to combat objectionable material on the Internet, and eliminating the need for excessive government interference. Moreover, a number of authorities have argued that current laws against obscenity and child pornography are sufficient to address many of the public's recent concerns with on-line material.[16]

Ultimately, it is not an overstatement to say that our nation is in the midst of a digital and informational revolution. According to Owen Fiss of Yale Law School, the implications of this new digital world are "nothing less than a revolution of the way we read and write, the way we talk to and correspond with one another, how we entertain and educate ourselves, how we resolve our conflicts — how we form friendships and communities, and how we perform our roles as citizens."[17] Indeed, sorting out the boundaries among these

16. *See infra* notes 149-152, 295, 323 and accompanying text.

17. Owen Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613, 1615 (1995).

new media of what is acceptable — speech, conduct, or otherwise — appears to be one of the fundamental and important tasks of the current generation. Although exciting and challenging, the path ahead in these new frontiers of law and culture appears to be anything but certain.

II. SEX, VICE, AND TECHNOLOGY: AN OVERVIEW

> Like a trojan horse, each new communication technology — the printing press, the camera, the moving picture, the tape recorder, the telephone, the television, the video recorder, the VCR, cable, and, now, the computer — has brought pornography with it. Pornography has proliferated with each new tool, democratizing what had been a more elite possession and obsession, spreading the sexual abuse required for its making and promoted through its use . . . .[18]

A. Digital Technologies and the Internet

In its year-end issue, *Newsweek* magazine boldly declared 1995 as "The Year of the Internet."[19] The Internet was embraced as the "medium that will change the way we communicate, shop, publish, and . . . be damned."[20] Indeed, it seemed that 1995 was the year that the United States first acquired public consciousness of the Internet.[21] Moreover, with the extraordinary success of both Netscape and Yahoo!'s initial public offerings, many figures in the business and economic communities were finally forced to take notice of the on-line arena as well.[22]

Nevertheless, beyond its status as a buzzword of consumer culture, not much gets reported about the historical and technological roots of the Internet. The Internet began during the late 1960s as a communication tool for the United States research and academic

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18. Catharine MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, 1959 (1995).

19. Steven Levy, *The Year of the Internet*, NEWSWEEK, Dec. 25, 1995/Jan. 1, 1996, at 21.

20. *Id.* Moreover, the Internet infiltrated the other biggest news stories of the year: "Newt was online, as were the gun nuts charged with the Oklahoma City bombing, the loudest anti-Bosnia cranks, and every opinion on the O.J. verdict . . . ." *Id.*

21. *See id.* at 26 ("I date the big transition as sometime this summer . . . . One day before, the Internet was a specialized thing. Then there was a day when it got into the public consciousness." (quoting Eric Schmidt, VP of Technology, Sun Microsystems).

22. *See* Richard P. Klau, *Lawyers Who Keep Up with the Internet Explosion Can Look Forward to a Lively Career*, STUDENT LAW., May 1996, at 13-14; *see also infra* note 56 (regarding the success of the Yahoo! IPO).

communities. At that time, the United States government connected four computers in California and Utah "for the purpose of sharing files between computer scientists and military personnel."[23] The original project was named ARPAnet, after its sponsor, the Advanced Research Projects Agency.[24] Shortly thereafter, other academic and scientific computer systems were joined onto the network — now commonly referred to as the Internet.[25]

In essence, the Internet is an interlinking of computer networks that have the ability to exchange information between one another: a "network of networks."[26] As more and more systems became interconnected, special programming tools were developed to facilitate inter-computer communication, e.g., the Telnet program and FTP (File Transfer Protocol).[27] The popular platform known as the World Wide Web (the "Web"), was simply another programming tool of the Internet. The Web, based on a protocol language called HTML, was developed by Swiss scientists in the late 1980s. Another less sophisticated element of the Internet (at least in terms of graphics) is the Usenet, where users can read or post information to public bulletin board discussion groups.

Recent growth on the Internet can only be described as "explosive."[28] It is estimated that approximately 40 million people currently use the Internet. [29] A recent study by Morgan Stanley & Co. estimated that revenues for the global Internet industry were $15.9 billion for 1995 — with the forecast soaring to $79.1 billion by the year 2000.[30] The fastest growing aspect of the Internet has been the World Wide Web, which, at recent rates of growth, doubled in size every 53 days.[31] As of January 1996, the Web boasted at least

23. Paul H. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, 416 PLI/PATS., COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. COURSE HANDBOOK SERIES 9 (PLI Order No. G4-3948, Sept. 1995).

24. *Id.*; *see also* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa 1996).

25. Arne, *supra* note 23, at 14.

26. EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 4 (1994).

27. *Id.* For an additional summary of these technologies and historical developments, please see the well-researched joint findings from ACLU v. Reno, 929 F. Supp. 824, 830-849 (E.D. Pa.1996).

28. Arne, *supra* note 23.

29. ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *cert. granted*, 65 U.S.L.W. 3411 (1996); *CompuServe Blocks 'Net Sex Groups*, USA TODAY, Dec. 29, 1995, at 1A.

30. Shailagh Murray & Richard L. Hudson, *Europe Seeks to Regulate Global Internet*, WALL ST. J., Mar. 18, 1996, at A7.

31. Levy, *supra* note 19, at 27 (quoting Kevin Kelly, executive editor of WIRED magazine).

100,000 web sites[32] and over 4 million hosts.[33] Besides being called everything from a "revolution" to having a year named after it in *Newsweek*, experts in the industry still insist that "[i]n the long run it's hard to exaggerate the importance of the Internet."[34] According to Paul Moritz, Vice President of Microsoft, "It really is about opening communications to the masses."[35]

However, the Internet is only one part of a larger technological revolution. Given that the Internet is mainly a networking application, the ability to convert a wide variety of information into digital form was a key prerequisite to the success of the medium. Without the ability to digitize images, music, video, and other multimedia applications into a readily-transferable form, the Internet would, indeed, be nothing more than glorified e-mail. Herein lies the technological appeal of voluminous yet portable storage units such as CD-ROMs and laser discs.[36] Capable of containing vast amounts of digitized information, these technologies permit the storage of an entire set of encyclopedias or a full-length movie or two onto a single disk. These disk-based stockpiles consist of long strings of digital code which can be readily converted into useable files by a processor employing laser-reading technology (e.g., the average CD-ROM drive). Moreover, recent technological advances have produced publicly-available CD-ROM drives that can also record information.

In essence, these digital technologies, along with the Internet, have ushered in the growing convergence of information, entertainment, and communication media in our present society. Given the interactive capabilities of many of these technologies, they are beginning to change the way we think and learn. Some have called this the dawning age of multimedia, or perhaps more cliché, the "information superhighway." Yet, this author is not convinced that we as a society are certain of what it is that we are defining.[37] To maintain a focus on

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32. Matthew Gray, *Measuring the Growth of the Web* (Jan. 1996) <http://www.mit.edu/people/mkgray/growth/>.

33. Arne, *supra* note 23.

34. Levy, *supra* note 19, at 27 (quoting Paul Moritz, VP Microsoft Corp.).

35. *Id.*

36. CD-ROM stands for Compact Disc - Read Only Memory. The use of these technologies has also proven extraordinarily useful in the courtroom. Indeed, one compact disc is capable of storing up to 15,000 pages of standard litigation information. Jonathan D. Kissane-Gaisford, Note, *The Case for Disc-Based Litigation: Technology and the Cyber Courtroom*, 8 HARV. J.L. & TECH. 471, 474 (1995).

37. John Hagel, III & Thomas R. Eisenmann, *Navigating the Multimedia Landscape*, MCKINSEY Q., June 22, 1994, § 3, at 39 ("Multimedia and the information superhighway are terms used so broadly that they have come to mean absolutely everything and, as a result, are

the technological roots of these multimedia-based and information-driven changes and convergences in our modern society, this article will simply refer to these phenomena as part of a larger revolution called the Digital Age.

B. Links Between Pornography[38] and New Technologies

There is an often-heard truism that a new medium is only headed for big success if it "becomes a major channel for distribution of adult materials shortly after its introduction."[39] This theory is clearly supported by early developments in such media as photography, home video, and "1-900" telephone numbers. *Financial Times* columnist Tim Jackson modified this theory into what he called Jackson's Laws of Media Futures.[40] "First law: if pornographers are among the early adopters of the new technology, then it has definite commercial possibilities. Second law: if there is a public backlash against pornographic use of the new technology, then its future is assured."[41]

Moreover, scholar Catherine MacKinnon described the relationship of new technologies and porn as that of a trojan horse and its cargo (see quote at the beginning of this Part). According to MacKinnon, the more that new technologies proliferate the spread of por-

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beginning to mean virtually nothing. This is unfortunate. Interactive multimedia technologies are leading to a fundamental shift in the economics and competitive dynamics of entire industries."); Andy Johnson-Laird, *Multimedia and the Law, in* MULTIMEDIA AND THE LAW, at 7, 10 (PLI PATS., COPYRIGHTS, TRADEMARKS, AND LITERARY PROP. COURSE HANDBOOK SERIES NO. G-383, 1994) ("Defining 'multimedia' is as easy as defining, say, 'substantial similarity' or a computer 'interface.' Everyone familiar with the term sorta, kinda knows what it means in general, but finds it very hard to define in specific.").

38. The term "pornography" is used somewhat loosely throughout this article. Although there is a large debate over what distinguishes pornography, this article uses the term to describe what most people seem to interpret pornography to mean, i.e., graphic depictions of sexual activity or nudity. Given the charged nature of the term, this author believes that a true definition of pornography should not include mere nudity. And regarding sexual material, a definition of pornography should also incorporate some requirement of violence or harm. *See* Debra D. Burke, *Cybersmut and the First Amendment*, 9 HARV. J.L. & TECH. 87, 126-38, 145 (1996). These further definitions are highly debatable as well. Harm to whom? Violence by whom? Some commentators, such as scholar Catherine MacKinnon, claim that most sexual depictions of women inherently embody some level of violence. *See* MacKinnon, *supra* note 18, at 1959-61. To this extreme, though, this author does not agree. Moreover, the definition of these terms can become unwieldy and cause one to get bogged down in semantics. Thus, for present purposes, the terms pornography, erotica, and sexual shall remain loosely defined, and selected solely on the basis of popular and subjective criteria.

39. LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 247 (1995).

40. Tim Jackson, *The Porn Brokers: Based on the Current Uproar over Digital Obscenity, the Internet Is Set for Mainstream Success*, IRISH TIMES, June 19, 1995, at 8.

41. *Id.*

nography, the greater pornography's overall cultural currency becomes.[42] She explains: "In the process, pornography acquires the social and legal status of its latest technological vehicle, appearing not as pornography, but as books, photographs, films, videos, television programs, and images in cyberspace."[43]

Indeed, there are a wide variety of sexually-related products and materials to be found on-line and in digital form: obscene and indecent photos, pornographic films, sexually-oriented chat rooms, adult CD-ROM's, X-rated video games, erotic on-line stories, sex-oriented newsgroups on the Usenet, etc. In addition, per the Second Law of Jackson's Media Futures, there certainly has been a significant public backlash against these new pornographic media.[44] Recent studies have shown that a large percentage of the images available over the Internet are not just hard-core pornography, but images of pedophilia and paraphilia.[45] Moreover, children are supposedly accessing these images in record numbers. The moral fibre of our civilization, some have said, is in jeopardy.[46] However, Anne Wells Branscomb is quick to remind us that pornography "has been with us probably for as long as humans have inhabited the earth;" to say now that Internet porn somehow "endangers civilization" ignores the fact that "the same was true of the printing press, videotapes, laser disc, and

42. MacKinnon, *supra* note 18, at 1959.

43. *Id.*

44. *See* Jackson, *supra* note 40.

45. *See* Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849, 1913-15 (1995). "Pedophilia" means an adult's sexual attraction to children; "paraphilia" means an attraction to the sexually bizarre, unusual, or taboo. The Rimm Study has generated a tremendous amount of public controversy and attention for what was merely a law review article. *See, e.g.*, Philip Elmer-Dewitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38; Graeme Browning, *Psst! Wanna Read a Hot New Study?*, NAT'L J., July 22, 1995. In addition, shortly after publication of the study, Rimm's character and academic integrity were publicly called into question, and there has been a significant public backlash to his study's findings. *See* Brock N. Meeks, *The Story of How Time Was Duped on Cyberporn: Author of Study Used Same Info to Write 'Porn Handbook'*, SAN DIEGO UNION-TRIB., July 25, 1995, (ComputerLink), at 1; Philip Elmer-Dewitt, *Fire Storm on the Computer Nets: A New Study of Cyberporn, Reported in a TIME Cover Story, Sparks Controversy*, TIME, July 24, 1995, at 57; Howard Kurtz, *A Flaming Outrage: A Cyberporn' Critic Gets a Harsh Lesson in '90s Netiquette*, WASH. POST, July 16, 1995, at C1. Much of what was stated in the study, however, is still relatively valid. Georgetown has not yet backed down from its findings, and it is still the most extensive study of its kind, containing significant amounts of factual and primary source materials.

46. *See, e.g.*, Sen. James Exon, *Kid's Need Law's Protection*, USA TODAY, Dec. 7, 1995, at 10A; MacKinnon, *supra* note 18.

CD-ROMs."[47]

Perhaps the reason *why* there is this relationship between pornography and new forms of communication technologies is due to the fact that new media can develop in the United States and in many other western countries without prior, content-specific, restraints.[48] Thus, these new forms of technology are more attractive to pornographers because they, as a group, face more restraints on their speech than other more traditional communication entities. Moreover, pornography conversely acts as a catalyst in the propagation of these new technologies and communicative media. Richard Posner described the practice of erotic vase painting by the Ancient Greeks in the fifth century B.C. as one such example.[49] Likewise, in the late 1970's, many Americans bought their first videotape recorders in order to watch X-rated movies.[50] Finally, producers of digital erotica have offered evidence that their products are actually *selling* the new computers that they run on.[51] From a historical perspective, at least, we must say it "comes as little surprise that people have brought sex to the Internet" and the other new digital technologies.[52]

C. Sex and CD-ROMs

1. General Availability

Perhaps the most shocking aspect of the new infusion of pornography into computer technologies is in how mainstream the applications have become. This infiltration into mainstream popular culture is seen most strikingly in the marketing of adult CD-ROM's. In the last couple of years, for instance, stores such as Tower Records have added adult CD-ROM displays to their computer and video game

47. Anne Wells Branscomb, *Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information Superhighway Reveal a Threat to the Stability of Society?*, 83 GEO. L.J. 1935, 1935-36 (1995) (citations omitted).

48. *See id.* at 1937.

49. *See* RICHARD A. POSNER, SEX AND REASON 355 (1992). Indeed, certain Asian cultures, such as in India, have depicted various forms of erotica in their communicative media for thousands of years.

50. *See* Aaron Zitner, *How Sex Enters the Computer World*, B. GLOBE, Sept. 15, 1995, at 16.

51. "I would even go as far as to say that we're not just selling CD-ROMs, but we're selling computers also." Mark Brown, X-rated CD-ROM publisher, *quoted in* Michelle DeArmond, *Porn Peddlers Can Spice Up Your Cyberlife at Trade Show*, DENV. POST, Nov. 16, 1995, at C10.

52. Zitner, *supra* note 50, at 16.

sections.[53] Although "18 and over" warnings are usually placed on top of these adult displays, in the case of Tower Records, these adult racks were originally located next to video game sections — areas undoubtedly frequented by children.[54]

What is striking about this sort of mainstream availability is that most people in America probably view pornography as something that is relegated to shrink wrap covered magazines in convenience stores and newsstands. Pornographic videos and other hard core materials were something that one had to venture into the red-light district of town to obtain. However, one can now visit popular stores such as Tower Records to obtain interactive CD-ROM titles including: *Anal Rom*; *Bad Girls: Lockdown*; and *The Interactive Adventures of Seymour Butts*. Likewise, a number of full-length pornographic movies that have been converted into CD-ROM format, such as *Behind the Green Door* and *Bobbitt Uncut*, are also available for general purchase. Indeed, the covers for these titles are often in plain view, and although prohibited to children, appear relatively easy to access.

Heightening this availability of pornographic CD-ROM's is the increased prominence of X-rated mail-order catalogs. Many of these mail-order houses (e.g., Secret City Multimedia, Inc.) rely heavily on advertisements both in the back pages of many prominent computer magazines[55] and on the World Wide Web.[56] With catch phrases such

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53. Tower Records is one of the largest music-distribution chains in the country, primarily located in urban centers and popular with adolescents and young adults.

54. Most of these observations are based upon visits to the local Tower Records in Cambridge, MA, beginning in 1994 (when the sale of such adult merchandise began). In the past year, however, Tower has apparently begun the process of sectioning off its adult sections from its more traditional computer and video game sections. For example, other Tower Records around the country (*e.g.*, the Washington D.C. area) are currently using physical partitions to section off areas dedicated exclusively to adult materials. Given the prominent placement of these sections in the middle of many stores, one can assume that these sections are probably quite profitable.

55. *See, e.g.*, PC MAG., Oct. 24, 1995, at 364-66.

56. For a comprehensive listing of adult CD-ROM companies and distributors that maintain active Web sites, see Yahoo!, *Business and Economy: Companies: Sex: CD ROM* (1996) <http://www. yahoo.com/Business_and_Economy/Companies/Sex/CD_ROM/>. Yahoo! is the largest Web site that compiles and catalogs links to other Web sites. Through the use of searching software, a user can identify any number of Web sites of interest by typing in just a few key words into the search engine. Yahoo! is by no means a comprehensive list, but certainly one of the most thorough and authoritative resources on the Web, listing over 200,000 Web sites under 20,000 different categories. *See* Steve G. Steinberg, *Seek and Ye Shall Find (Maybe)*, WIRED, May 1996, at 109, 110. Run by recent grad students Jerry Yang and David Filo, Yahoo! is now a public corporation with $33.8 million in funds raised by its initial public offering (IPO). *See Yahoo! In with $33.8m IPO*, GOING PUBLIC: THE IPO REP., Apr. 15, 1996. Indeed, a recent profile compared Yahoo! to the opening of a lemonade stand in a hayfield that found itself a year later surrounded by skyscrapers. Steven Levy, *The Year of*

as, "Unleash Your Cyber Lust" and "Direct Your Ultimate Fantasy," a number of these companies (which also include virtual phone sex lines) are doing quite well at capitalizing on the new pornographic technologies.[57]

2. Interactive Nature of Games/Ethical Considerations

Another striking aspect of these adult CD-ROM products is the fact that many of them are billed as "interactive". In other words, in addition to full-motion video and sound, these CD-ROM's can be accessed by the user with point-and-click commands to reproduce a variety of pornographic scenarios. One researcher describes the experience as follows:

> I pop the silver sliver of the CD-ROM into the computer and up on the screen appears an image of a well-endowed cheerleader named Misty, bouncing up and down, waving her pom-poms. Cheerleading makes her "hot," she says, and so she invites me back to the locker room, where she strips off her clothes. There, in the inner sanctum of sport, Misty proposes that I play a game with *her*. At the top of the screen pops up a menu of six objects from which I am asked to choose one to masturbate her with, including a vibrator, a "throbber," a "tickler" and a cucumber. At the side of the screen is a gauge to chart the intensity of her arousal; the aim of the game is to make Misty reach orgasm as quickly as possible by inserting an icon of one of the menu objects between her open legs.[58]

Margaret Wertheim is describing the CD-ROM game, *MAC/PC Foxes*. One should note that many of these "games" do not employ mere cartoons of women, but rather, real women recorded in full-motion video. Wertheim goes on to describe another game, *Virtual Valerie 2*, in which a graphically-created woman is the game's subject, and the level of interactivity has been elevated to performing three-dimensional sexual acts on her with a computer-generated penis (supposedly, the user's) at the bottom of the screen. Wertheim expresses her alarm with the product as follows:

> Valerie represents a quantum leap in pornography because she is not just a more sophisticated blow-up doll; she is the quintessential realization of woman as sex object. Precisely because she is not a

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the Internet, NEWSWEEK, Dec. 25, 1995/Jan. 1, 1996, at 21, 26 ("They [Yahoo!] were positioned in exactly the right place during the Year of the Internet.").

57. These quotes are from representative advertisements that can be found in PC MAG., Oct. 24, 1995, at 364.

58. Margaret Wertheim, *The Electronic Orgasm*, GLAMOUR, Feb. 1995, at 243.

> real woman (no matter how much verisimilitude her makers achieve), ultimately anything one does to her is OK. At present, the fantasies available are rather tame, but the new version of the game is certainly more hard-core than its predecessor, with slightly more of an element of dominance. Can it be long before more sinister cyberporn fantasies are available? What is to stop anyone from making games in which virtual women are hurt, tortured or even killed as part of the erotic thrill? After all, they would only be collections of bits and bytes.[59]

A fair number of these products have sold quite well in stores. In fact, sexually-oriented CD-ROM programs are reported to be a significant "'hidden factor' that propel sales of computers and video game systems."[60] According to one adult CD-ROM designer: "I am frequently patted on the back by CEO's of companies privately because their hardware sales have gone through the roof since our title has been released."[61] Furthermore, the target for these markets is clearly men.[62] In fact, BodyCello, the nation's foremost distributor of adult computer games, reportedly does not carry "a single product for women in its catalog."[63]

Margaret Wertheim may be correct in fearing a not-too-distant future where all of the most deplorable sexual fantasies are available at the touch of a mouse. Indeed, the ethical considerations of such types of virtual pornography are conceivably quite complex.

How would you feel if you discovered that a male friend or partner engaged in violent sexual acts with a virtual woman? For those who doubt the need for concern here, imagine instead that the friend was engaging in sex with a virtual child. It is no more difficult to visually render a young girl (or for that matter, a young boy) than a

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59. *Id.*

60. David Landis, *Sex, Laws & Cyberspace*, USA TODAY, Aug. 9, 1994, at 1D; *see also* Michelle DeArmond, *Porn Peddlers Start Software Show*, COM. APPEAL (MEMPHIS), Nov. 16, 1995, at 8B.

61. *Id.* at 1D (quoting James Erlich, creator of the *Penthouse Interactive Virtual Photo Shoot*).

62. *Cf.* Elmer-Dewitt, *supra* note 3, at 40 (according to BBS operators, 98.9% of the consumers of on-line porn are men.).

63. Wertheim, *supra* note *58*, at 243. However, perhaps in response to Wertheim's article, a more recent advertisement for BodyCello seemed to list a gender-neutral interactive title called *Couples*. *See* PC MAG., Oct. 24, 1995, at 364. Also, it should be noted that not all erotic CD-ROMs are necessarily pornographic. Although such items are not typically available through mail order houses, they include titles such as *Interactive Sex Therapy*, (which is narrated by sex therapist Pauline Falstrom and attempts to offer couples a more explicit form of sex counseling). *See* Don Oldenburg, *Sex & the CD-ROM; Self-Help Via Computer: Therapy or Cheap Thrill?*, WASH. POST, Jan. 30, 1996, at D5.

grown woman — and in none of these cases would anyone *real* be hurt.[64]

As long as we continue to balance the right to free expression against our moral obligations as a society, there will be no easy answers to these questions. In the end, Wertheim urges us to remember one thing: "Bits and bytes are not flesh and blood, but neither are they always ethically neutral."[65]

D. Sex on the Internet

1. Publicity and Hype

What is most responsible for raising the ire of many citizens and members of Congress are not the adult CD-ROM's available at local music stores; rather, it is the pornographic material that lies only a few computer clicks away on the Internet. Tower Records and other merchandisers, at least, can be held accountable for sales of pornographic materials to children under eighteen. The Internet, though, is a realm that many parents find intimidating to learn, and one that many see as a threat to their roles as parents. As echoed by one parent in a Congressional hearing held last year: "[We] can't be present 100% of the time to monitor [our] children."[66] The prospect that huge stockpiles of the most vile pornography imaginable are lurking among the recesses of countless on-line databases is, indeed, a scary thought for many parents.

A good deal of this fear, though, is more or less the product of hype. "Cybersmut"[67] does exist in a number of on-line mediums. This fact is indisputable. Its accessability, however, is a far cry from the pornotopia that some commentators have made it out to be. Apparently, the hype potential of cybersmut in the media has, for many journalists and commentators, been irresistible.[68]

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64. Wertheim, *supra* note 58, at 243.

65. *Id.*

66. *Child Pornography on the Internet: Hearings on S. 892 Before the Senate Comm. on the Judiciary*, 104th Cong. (July 24, 1995) (statement of Dee Jepsen, President, Enough is Enough!), *available in* LEXIS, News Library, Curnws File.

67. Cybersmut has been defined as "sexually explicit speech in cyberspace which is not protected under the First Amendment." Burke, *supra* note 38, at 89 n.2. I am using the term also to describe indecent speech (which is protected under the Constitution) that is also found in the various computer media.

68. *See supra* notes 45-47 and accompanying text. *See also* Levy, *supra* note 19, at 26, 28; Leslie Miller, *The Internet's Seamy Side: On-Line Sex, Once Found, Can Be Raunchy*, USA TODAY, June 19, 1995, at 1A ("The proportion of raunchy material is small, but it exists. If you want to avoid sex on-line, that's fairly easy. But if you know where it is, you can get

The media response to a study published in the *Georgetown Law Journal* by a Carnegie Mellon undergraduate student named Marty Rimm (the Rimm Study) has been one of the largest contributors to this hype.[69] After the study was released, *Time* magazine published its controversial Cyberporn cover article and raised the concerns of a number of Americans.[70] Timed with the publicity blitz initiated by Sen. James Exon (D-Neb.) in support of his Communications Decency Act,[71] a poll of Americans conducted during that particular week in June stated that over 85% of those surveyed were "concerned about children seeing pornography on the Internet."[72]

Shortly thereafter, Marty Rimm's character and academic integrity were publicly called into question.[73] Not only were his study's methodology and conclusions attacked, it was later discovered that Rimm maintained some suspicious double-agent-like relationships with both the pornography industry and the religious right.[74] With the outcry and hype surrounding the Rimm Study, what seems to be forgotten in all of this is that many of Rimm's results are not necessarily untrue. Indeed, Georgetown has not backed down from his findings, and, as the most extensive work of its kind, the Rimm Study must still be recognized as containing significant amounts of important factual and primary source materials.[75]

The following subsections will attempt to outline a number of the areas on the Internet where sexually-oriented on-line activities occur. These areas, for the most part, consist of: BBSs, the World Wide Web, on-line chat groups, and the Usenet.

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it.").

69. *See supra* note 45 and accompanying text.

70. *See id.*

71. *See, e.g.*, J. James Exon, *Nonsense About the Decency Act*, OMAHA WORLD HERALD, July 13, 1995, at 11.

72. *See Nightline* (ABC television broadcast, Transcript no. 3677, June 27, 1995) (quoting a Time/CNN poll), *available in* LEXIS, Curnws Library, Script File.

73. *See supra* note 45 and accompanying text.

74. *See* Meeks, *supra* note 45; Peter H. Lewis, *Porn Study Torn Apart on the Internet*, SAN DIEGO UNION-TRIB., July 25, 1995 (ComputerLink), at 12; *see also* John J. Keller & Jared Sandberg, *Decency Law for Computers Hits a Glitch*, WALL ST. J., Feb. 16, 1996, at A3.

75. However, in the recent *ACLU* case challenging the CDA, government attorneys made the mistake of citing the Rimm Study in a brief without providing the court with any disclaimers. Accordingly, one attorney for the plaintiffs accused the DOJ of using "a study which is known to be profoundly flawed and even fraudulent" and that the government's actions constituted "a deliberate attempt to mislead the judge." Mike Godwin, staff counsel for the Electronic Frontier Foundation, *quoted in* Mike Mills & John Schwartz, *Judge Blocks On-Line Smut Law Enforcement; Order Sparks Confusion over Definition*, WASH. POST, Feb. 16, 1996, at B1.

2. Bulletin Board Systems ("BBSs").

Many Americans became aware of the existence of sexual material available on BBSs due to the much-publicized case of *United States v. Thomas*.[76] This case became known as the first federal criminal conviction for transmitting obscene materials over a computer network.[77] Robert and Carleen Thomas, the couple convicted in the case, distributed their obscene materials through a BBS they owned and operated called Amateur Action.

Presently, many other Americans have learned about on-line smut available from BBSs through the Rimm Study and its subsequent coverage in magazines such as *Time* and *Newsweek*.[78] The much-maligned Rimm Study, as previously noted, did in fact contain an unmatched quantity of primary source materials. Sometimes quite lewd, the Rimm Study stated in explicit detail the captions to images that were downloaded from a number of adult-oriented BBS services. Among these captions were descriptions such as: "She holds the dog cock! Inserts it in her daughter's ass!";[79] "Super torture! Pierced clit! Pussy nailed to a table!";[80] and "Blonde opens wide! Her girlfriend shits in her mouth!"[81]

Two of the Rimm Study's findings, (7) and (10), which have not yet been called into question, were that:

> (7) Paraphilic, hebephilic, and pedophilic imagery accounted for approximately one-half of nearly six million downloads counted on private "adult" BBS[s . . . and]
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> . . . .
>
> (10) The market leader among "adult" BBS[s], Amateur Action BBS, relies on three methods to service its clientele: a) power imbalance and disproportionate representation of women in acts which may be considered degrading; b) deceptive marketing; and c) exploitation of children.[82]

Thus, it is not difficult to conclude that some of the BBS materi-

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76. United States v. Thomas, No. CR-94-20019-G (W.D. Tenn. 1994), *aff'd*, 74 F.3d 701 (6th Cir. 1996). For a fuller discussion of the jurisdictional implications of this case, see *infra*, Part III.C.2.

77. Zitner, *supra* note 8, at 33.

78. Rimm, *supra* note 45 and accompanying text.

79. *Id.* at 1901. Note that these descriptions are often puffed up to play up to pedophilic and incestuous themes, and that the images do not necessarily depict these themes in reality.

80. *Id.* at 1918.

81. *Id.* at 1920.

82. *Id.* at 1914-15.

als available on-line are barely within the bounds of the law (or are currently breaking it). It is also no secret why a mere shift of jurisdiction (as evidenced in the *Thomas* case — Tennessee instead of California) can substantially affect such prosecutions.[83]

The *Thomas* case and the Rimm Study are helpful in providing an understanding of the types of material available through BBSs, the details of which can often be quite shocking. However, one should note that BBSs are not areas of the Internet that one can just stumble onto. BBSs require active subscribers who usually must pay a fee by credit card and receive a password to access the relevant database. Then, the user must access the BBS by either calling a separate number with his or her modem and communications software, or, in some cases, access the BBS via an on-line provider or through the Internet and the Web. It is significant that the Rimm Study identified nearly 1,000 adult-oriented BBSs in its 1994 research.[84] However, according to the popular Yahoo! search engine, there are only 160 adult-oriented BBSs currently holding themselves out as such on the Web.[85]

3. The World Wide Web

a. Pornography on the Web

Much of the sexual imagery and pornography available on the Web is considerably less extreme than that found on private BBSs. Given that the Web is more public in nature and more freely accessible to millions of people than a fee-based BBS, particularly lurid sites on the Web usually do not last very long (especially if accessible for free). Such a site risks not only increased legal liability due to its exposure but also faces user overload to such a degree that its on-line provider would probably be forced to shut down the site's server access.

However, a modest number of freely accessible Web sites containing hard core pornography[86] still exist on the Web. Usually, un-

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83. *See infra* discussion Part III.C.2.a.

84. Rimm, *supra* note 45, at 1877.

85. *See* Yahoo!, *Computers and Internet: Communications and Networking: Bulletin Boards: Adult Oriented* (visited April 20, 1997), <http://www.yahoo.com/Computers_and_Internet/Communications_and_Networking/Bulletin_Boards/Adult_Oriented/>. Yahoo! is the largest Web site that compiles and catalogs links to other Web sites. *See* Yahoo!, *Business and Economy: Companies: Sex: CD_ROM, supra* note 56.

86. I am defining "hard core" pornography as images that depict graphic sexual acts which may typically include various forms of penetration, oral contact, and/or the emissions of

der the pre condition that all users must consent to being of legal age (by clicking an icon or two),[87] these sites will often offer free sample images in an attempt to lure users into subscribing for a further set of fee-based services. Given that these services are more like BBS-hybrids, they often have the financial backing to avoid the attrition normally suffered due to server overload (which is caused by excessive on-line hits to a technologically-inadequate server).

Figure 1 is a brief compilation of Web sites at the time of writing that offer hard-core materials in at least some portions of their sites without the requirement of a password or fee (i.e., freely accessible).

Name of Web Site	*URL Address*	*Updates*
HotSex	http://samples.hotsex.com/samples/	weekly
Rawsex	http://www.xxx-rawsex-xxx.com/entrance.htm	daily
Voyeur Online	http://sexia.com/~voyeur/samples	weekly
Club Eros	http://www.gumjo.se/club-eros/samples/	n/a
The Adult WebSite II	http://xxxpic.com/adult/21/start.htm	n/a
Babes-n-Action	http://Babes-n-Action/resources/public_index.html	n/a

Figure 1: Sexually-Explicit Web Sites (or portions thereof) Currently Available Without Charge or Registration

As shown in Figure 1, the free samples that are routinely offered by these hard core services are sometimes updated weekly, and even daily in one instance. Given that all of these sites arguably contain isolated depictions of obscene material, many or all of these sites can considered illegal under current laws (regardless of the CDA).[88]

The Web has undergone tremendous, explosive growth in recent years. Consisting of only 130 sites in June 1993, the Web exploded to 10,022 sites in December of 1994, and by June of 1995, had more than doubled again to reach 23,500 sites. By January 1996, this

bodily fluids.

87. For a sample consent page, see HotSex Productions, *Free Hot Pictures & Magazine: Sex and Fantasy* (visited May 8, 1996) <http://www.hotsex.com>. It is questionable whether these consent pages would really shield a Web site operator from liability, given that children can lie about their age by merely click an icon.

88. *See supra* note 86; ROSE, *supra* note 39, at 258 ("Isolated shots of highly charged sexual materials do not, by themselves, come off as part of any story, but are readily seen as a reduction of focus to the sex act itself—a much easier case for obscenity prosecutions."). *See infra* discussion Part IV.A.3 (for a fuller explanation of these kinds of obscenity violations).

number had reached over 100,000 sites and is continuing to increase exponentially.[89] According to the Yahoo! search engine, in May 1996, the total number of sexually-oriented Web sites was approximately 500.[90] Now that number is will over 4,000.[91]

b. *Pornographic Images of Celebrities*

Some of the more popular attractions on the Web include sites that offer nude pictures of celebrities and on-line magazines such as *Penthouse* and *Playboy*. In fact, some celebrity Web sites are causing a fair amount of controversy given that they often depict famous persons such as Demi Moore, Sharon Stone, and Brad Pitt in poses that even their publicists were not aware of originally.[92] With an army of millions scouring through old magazines, and a quick and easy distribution network in the Internet, a number of long-gone photos have somehow resurfaced in full force, much to their subjects' embarrassment. In addition, many of these photos are displayed illegally, without secured copyrights or consents.[93] A fair number of these photos have also been doctored to create a sexual content. Once an image receives distribution on the Web, through the advancements of digital technology, it can be instantly processed onto thousands of different locations for permanent storage and possible future reposting (without any loss of the original's quality). Indeed, this technology raises a number of contentious issues regarding a celebrity's publicity rights.

Since these celebrity photos are often not being distributed for profit, there is no commercial exploitation involved that could grant a traditional publicity action in court. However, it is not unreasonable to say that a celebrity's personal reputation is being harmed by such photos. In the case of high-quality doctored photos, the impression is sometimes given that such a celebrity has in fact posed in the nude (since it is interspersed among more legitimate and recognizable nude photographs of celebrities). In the case of real photographs that

89. Gray, *supra* note 32.

90. *See* Yahoo!, *Business and Economy: Companies: Sex* (visited May 11, 1996) <http://www.yahoo.com/Business_and_Economy/Companies/Sex/>.

91. *See id.* (visited April 20, 1997). The total number of sites counted was 4,316.

92. Erik A. Meers, *Cyberchat*, PEOPLE WKLY., Aug. 7, 1995, at 33. Both Moore and Pitt's publicity people were caught off-guard when *People Wkly.* informed them that fully nude photos were now available on the Internet. Moore's nude photos appeared in *Oui* magazine in 1982 when she was still an aspiring model. Pitt's photos recently appeared in the tabloids with his genitalia blacked out, but resurfaced uncensored on the Net.

93. CAVAZOS & MORIN, *supra* note 26, at 60.

were published long before the celebrity became famous (e.g., Demi Moore), the republication of these photos on the Internet can often be embarrassing, not to mention a possible circumvention of legal rights that the celebrity might have secured against the original publisher in order to restrict the photos from ever being published again.

The Internet raises a number of these contentious issues because it effectively allows everyone on-line to become a publisher. Since many persons on the Internet are not motivated by profit, traditional sanctions against publishers may not apply. However, it is not clear whether celebrities could win a libel suit, given that they are public figures and can always use public speech to counter the legitimacy of such photos. Moreover, given the possibilities for anonymity on the Usenet, for instance, celebrities might not be able to identify the culprit that has uploaded the original photo. Due to the digital nature of the medium, it only takes one public posting on the Usenet for the photo to be perfectly copied and distributed onto thousands of computers at once. After that, there is little chance of ever removing a photo from the Internet.[94]

c. *Interconnectability of the Web*

Finally, an irony that illustrates the vast interaccessibility of the Web is that, from any given Web site, one is only a finite (often small) number of mouse-clicks away from some form of sexually-oriented material. This fact was not lost on journalist Mike Christensen who reported that several Web pages of Congressmen, many of them supporters of recent legislation designed to prohibit indecent materials on the Internet, provide nearly direct links to sexual material themselves.[95] The Web site of House Majority Leader Dick Armey (R-Tex.) is only two mouse-clicks away from "Amigos International," a site designed to help "single men find love, romance and marriage with women from Latin America," Likewise, Rep. Jim Kolbe's (R-Ariz.) Web site is only one mouse-click away from a comprehensive listing of adult entertainment services, including the steamy "Electric Sex Shop."[96]

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94. For a good discussion of celebrity publicity rights, see generally PAUL WEILER, CASES, MATERIALS AND PROBLEMS ON ENTERTAINMENT LAW, ch. 3, part A (forthcoming 1997).

95. *See* Mike Christensen, *Unwary Lawmakers Find Web Links Risky*, ATLANTA J. & CONST., Dec. 5, 1995, at 11A.

96. *Id.* Furthermore, in the irreverent spirit of the Net, some web surfers have invented a game much like *Name that Tune* called *Web that Smut*, where the object of the game is to challenge one another to guess how many mouse-clicks they are away from indecent material and sites such as the Christian Coalition (i.e., 5 clicks). *See* Andy Ihnatko, *Web that Smut!*,

4. Chat Rooms

Another major avenue for sex-related entertainment on the Internet can be found in on-line chat rooms. Chat rooms are generally operated by on-line providers, such as CompuServe and America Online,[97] or by private BBSs. These rooms are specific on-line locations where computer users can log on to talk about particular subjects, ranging from the National Hockey League to friendship and dating. These on-line conversations often appear in the form of text scrolling across one's screen in real-time, or in a format whereby one has to click an icon to update the screen. The number of users in a particular room will determine how many participants there are in a given conversation.[98] Participants can generally opt to congregate in a private room if they wish to have more personal interactions. Given the options, many participants engage in on-line sexual banter and play, which can often be quite compelling.

> Those who have not yet ventured on-line may find it hard to believe that people really relate to each other in an on-line world. There is the conversion experience: a newbie wanders into some chat area of an on-line service, or perhaps a bulletin board discussion of his or her favorite old TV show, and the newcomer is hooked. A whole new social dimension opens up, a whole new way of relating to people emerges. There is a standard backlash, too: the claim that you do not find flesh and blood people on-line, just thin streams of misunderstood text and massive veils of private fantasy. Sssshhhh, don't burst the bubble—this dream is too much fun....[99]

Commenting on the psychological aspects of these forums, Dr. Ruth Westheimer recently said that it was acceptable for teens to flirt on-line; however, she also felt compelled to advise them not to engage in on-line sexual play.[100]

MACUSER, Jan. 1996, at 25.

97. The major on-line providers include companies such as America Online, CompuServe, Prodigy, Genie, Delphi, and the WELL. These companies essentially provide the on-line ramps or gateways to the Internet in exchange for a monthly charge. Once on the Internet, consumers can either access their on-line provider's entertainment services (which usually include items such as sports scores and chat forums) or they can click on a few icons to tour Web pages, Usenet discussion groups, or private bulletin board systems (BBSs).

98. Nevertheless, some chat rooms possess a feature whereby one user can toggle ("~") a comment to another user in the main discussion area, allowing that user to be the only recipient of the message. This feature is also called "whispering."

99. ROSE, *supra* note 39, at 27.

100. Dr. Westheimer was asked in her newspaper column if "on-line flirting and sexual play on the Internet helps interpersonal teen relationships." Dr. Ruth Westheimer, *Ask Dr. Ruth*, CHI. TRIB., Dec. 18, 1995, at 7. Westheimer's response was that there was "nothing

Another form of on-line chat can occur in discussion areas called MUDs (multi-user dungeons) and MOOs (MUD, object-oriented). MUDs and MOOs are sophisticated social forums that are part fantasy role play, part public street corner, and part complex social experimentation laboratory. These forums have even transfixed participants to the point where a simulated on-line rape by another participant has actually been documented as a psychologically traumatic experience.[101]

Finally, a widely-publicized problem with chat areas is the threat posed to children who make on-line contact with adults. A number of media reports tell of children being physically abducted by pedophiles who befriended them in chat rooms.[102] Although these incidents are devastatingly serious in nature, their occurrence is far from common, and have been highly exaggerated in the press. In the words of Stephen Lynch, there have only been enough on-line abductions of children "to stock a baseball team," and that "no mention of the thousands of kidnappings every year on street corners" is being made.[103] Nonetheless, the need for parents and their children to take certain precautions is evident. As a result, the National Center for Missing & Exploited Children has issued a rather well-balanced evaluation of the problem and the requisite precautions that children

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wrong with a little bit of on-line flirting." *Id.* However, she warned that: "When it becomes sexual play, then I would say hold it; it is better to go out and find yourself a partner than to sit in front of a computer for hours." *Id.* A counter-argument is raised by Lance Rose who says that on-line exchanges can be "enlightening" experiences, "especially for those who first encountered sex in their own communities and families as a subject of superstition and fear, rather than accurate information." Further, "[t]he anonymity available in the online medium lets people talk about their conditions and experiences, and ask the dumbest of questions about sexual matters, without being embarrassed." ROSE, *supra* note 39, at 252.

101. *See generally* Julian Dibbell, *A Rape in Cyberspace*, VILLAGE VOICE, Dec. 21, 1993, at 36. Similarly, on-line interactions can provoke strong emotional responses and also feelings of romance. Many on-line services have relationship areas where users can meet and perhaps foster longer-lasting interactions.

> I was surfing the rooms of AOL / When her name caught my eye / The name she used was LUV2CUDL / And I said . . . / So do I . . . / I fell in love / Sight unseen / With this beautiful woman / My computer queen . . . / My Kathy deserves Roses / Each day of her life / Especially in June when she becomes my wife.

John Gretchen, winner of 1-800-FLOWERS on-line poetry contest, *reprinted in* Leslie Miller, *Looking for Love in Cyberspace*, USA TODAY, Feb. 9, 1995, at 6D; *see also* Cathy Curtis, *On Internet, Meeting of Minds Is Just a Beginning*, L.A. TIMES, July 4, 1995, at F3.

102. *See, e.g.*, Steve Olafson, *Boys' Testimony in Assault Case May Tap into Cyberspace Porn*, HOUS. CHRON., Dec. 4, 1995, at A13; John McChesney, *All Things Considered: FBI Investigates Kid Porn on the Internet* (NPR radio broadcast, Sept. 17, 1995, Transcript No. 1973-6); Elizabeth Corcoran, *Get Porn Off-Line, Parents Say: Senate Opens Hearings on Cybersex and Kids*, WASH. POST, July 25, 1995, at E3.

103. Stephen Lynch, *On-Line Crime 'Trends' are Nothing but Media Hype*, SAN DIEGO UNION-TRIB., July 25, 1995, (Computerlink), at 3.

should take on-line. Ultimately, the pamphlet concludes: "The fact that crimes are being committed on-line, however, is *not* a reason to avoid using these services."[104]

Also, new technologies are currently emerging that may create even more modern forms of on-line chat. A recent program called "CU-C-ME" (See You See Me) is a video protocol used on the Internet that allows users to hook up a camcorder to their PC and transmit live video images back and forth over the Net. The benefits of this technology could have widespread applications. However, at least one commentator has added the lament: "The porn aspect of this will likely get all the attention from the press . . . ."[105]

5. The Usenet

a. Overview of the Usenet

The Usenet, one of the most unique and popular aspects of the Internet, is a system of public newsgroups which are "neither owned by anyone nor subject to any central authority."[106] It is helpful to conceive of the Usenet as a floating system of discussion groups administered by some relatively simple organizational software.[107] Invented sixteen years ago by students at Duke University and the University of North Carolina,[108] the Usenet remains one of the Internet's more popular activities, currently consisting of about 17,000 public newsgroups that are "created and maintained by users at sites throughout the United States and the world."[109] When someone posts a message to a newsgroup, the message is propagated from computer to computer until it reaches every system on the Usenet. This process was described by one source as "a million notes that classmates pass across schoolroom aisles."[110]

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104. NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, CHILD SAFETY ON THE INFORMATION HIGHWAY 3 (1994) (emphasis in original).

105. John Dvorak, *The Naked Computer*, PC MAG., Dec. 19, 1995, at 89.

106. Landis, *supra* note 60.

107. A more technical definition of the Usenet is "a distributed, network-scale computer conferencing system that manages multiple public conversations, organized hierarchically into specific topics." Byassee, *supra* note 9, at 201 n.16.

108. *Today's Newsgroups Trace Roots to Students Experimenting at Duke*, PLAIN DEALER, Apr. 16, 1995, at 4I [hereinafter *Today's Newsgroups*].

109. Rimm, *supra* note 45, at 1862; *see also* John Markoff, *On-Line Service Blocks Access to Topics Called Pornographic*, N.Y. TIMES, Dec. 29, 1995, at A1 (providing the 17,000 newsgroups figure). Note that the experts in *ACLU v. Reno*, 929 F. Supp. 824, only claimed that there was a total of 15,000 Usenet newsgroups. *Id.* at 37.

110. Byassee, *supra* note 9, at 201 n.16. Each system will communicate a post with two

Usenet newsgroups are divided into hierarchies (the leading portion of the newsgroup's name) such as alt.* (for alternative) or sci.* (for science), and then followed by the more descriptive names of each group, e.g., alt.sex.stories or rec.music.classical.guitar. The alt.* hierarchy is the least restrictive as far as establishing new newsgroups, so many of the sexually-oriented discussions (as with most Usenet newsgroups, for that matter) developed there and can be found within the context of the alt.* hierarchy.[111]

b. alt.sex.stories

At one time, the most popular discussion group on the Usenet was alt.sex.stories, logging a total of one-half million users per month.[112] However, according to the Rimm Study, alt.sex.stories ranked ninth worldwide in terms of popularity behind: (1) news.announce.newusers; (2) news.answers; (3) rec.humor.funny; (4) alt.sex; (5) rec.humor; (6) misc.forsale; (7) misc.jobs.offered; and (8) comp.unix.questions.[113]

Indeed, alt.sex.stories is dedicated to the reprinting of "[s]tories and poems that contain some form of erotica in them."[114] The newsgroup's unofficial guide, also known as the group's Frequently Asked Questions (FAQ), states, "There are NO other limitations on what the stories can or cannot contain, despite what others may complain they don't like to see."[115] Accordingly, a wide range of erotica can be found on alt.sex.stories, ranging from accounts of monogamous heterosexual encounters, to stories about animals, rape, and child mo-

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or three other computers, which then exchange all of their new posts. Each of these computers then talks to two or three other computers. Within two hours, one post will have spread to 50 countries worldwide. *See Today's Newsgroups*, *supra* note 108, at 41. Since no single global routing table is used for the distribution process, no single node has control of the Usenet network. Henry H. Perritt, Jr., *Tort Liability, the First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 137 (1992).

111. *See* Rimm, *supra* note 45, at 1863.

112. *See* Tim Blangger, *Debate on Decency Bill Heats up*, MORNING CALL, Apr. 18, 1995, at D1 (cited statistics were compiled by the Digital Equipment Corporation); J. M. Lawrence, *College Students Gaining Access to Cyberporn*, B. HERALD, Feb. 5, 1995, at 1 (citing statistics from WIRED magazine).

113. *See* Rimm, *supra* note 45, at 1872. Apparently, no source was credited for these statistics.

114. Josh Laff, *FAQ: A.S.S & A.S.S.D*, alt.sex.stories posting, Apr. 10, 1995, ¶ 2 (copy on file with author). Despite the intended purpose of the newsgroup, more than just stories and poems appear in alt.sex.stories. Commentaries, advertising, and pornographic binary images also appear in the newsgroup.

115. *Id.* For a good discussion of the purpose and use of FAQs on the Usenet, *see* George P. Long, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177, 1182 n.25 (1994).

lestation.

The alt.sex.stories newsgroup recently gained notoriety for being the site of Michigan student Jake Baker's snuff story that landed him in jail for twenty-nine days in February of 1995. Baker, a twenty-one year old sophomore, detailed a violent rape and murder fantasy of a young woman in his Japanese studies class.[116] Because he had identified his fellow student by name, Baker was charged with transmitting threatening communications across state lines in violation of 18 U.S.C. § 875(c).[117] The case was thrown out by a federal district court judge on First Amendment grounds, but was affirmed by the Sixth Circuit on other grounds without considering the First Amendment issues.[118]

Generally speaking, alt.sex.stories represents the portion of the Usenet that is comprised of written material. Written posts to the Usenet are much harder to prosecute under obscenity laws.[119] However, the Baker case illustrates how federal authorities will resort to other statutes to prosecute the most offensive written material online. Perhaps the irony of the Baker case is that Baker did not use an anonymous identification (ID). Indeed, regulating the Usenet would be problematic simply because users can readily forge messages, employ anonymous IDs, and utilize encryption technology to disguise their messages.[120] Only the unwitting are likely to be caught in law enforcement's snare when within the auspices of the Usenet.

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116. *See generally* Megan Garvey, *Crossing the Line on the Info Highway; He Put His Ugly Fantasy on the Internet. Then He Ran Smack into Reality*, WASH. POST, Mar. 11, 1995, at H1. For a more complete discussion of the Baker case, see *infra* Part III.A.2.

117. 18 U.S.C. § 875(c) (1988).

118. *See* United States v. Jake Baker, 890 F. Supp 1375, 1381 (E.D. Mich.) (district court dismissing on grounds that message did not constitute "true threats" and were thus protected under the First Amendment), *aff'd sub nom.*, United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) (construing § 875(c) as requiring as an element of the offense prohibited that a "reasonable person . . . would perceive such expressions as being communicated to effect some change or achieve some goal through intimidation" and dismissing because the challenged communications did not satisfy this element).

119. ROSE, *supra* note 39, at 246 ("The First Amendment's protection of freedom of the press is historically strongest for printed works, and adult bookstores are loaded with books that would never be found obscene in court.").

120. For a complete discussion of anonymity on the Internet, *see generally* Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639 (1995); Long, *supra* note 115, at 1186. The backbone of anonymous messages are anonymous servers, which are usually located in jurisdictions unreachable by U.S. police. The most famous of the anonymous servers is anon.penet.fi, run by a man named Julf Helsingius in Finland.

c. *Binary photos and multimedia files*

Jake Baker notwithstanding, what is most controversial about the Usenet is not the prevalence of pornographic *written* material, but the presence of graphic binary images and multimedia files that appear in newsgroups such as: alt.binaries.pictures.bestiality, alt.binaries.multimedia.erotica, and alt.sex.pictures. Given the possibilities for anonymity on the Usenet, binary newsgroups usually end up being the repositories for huge amounts of obscene, and often untraceable, pornographic images. In addition, it is reported that seventy-one percent of all pornographic images on the Usenet were originally downloaded from commercial BBSs.[121] In effect, the Usenet seems to provide the perfect cloak for those who wish to download and trade in illegal pornographic material. It appears to be no coincidence that the Rimm Study found such a high prevalence of pedophilia and paraphilia in the images it studied.[122] Consumers of these images have apparently flocked to the Usenet in droves.

Although obscenity standards will be discussed in Part IV of this article, it should be noted that digitized photos or isolated clips from a pornographic movie on the Internet carry much less constitutional protection than written materials.[123] However, given the problems of anonymity, there is not much that U.S. enforcement agencies can do against careful pornographic uploaders to the Usenet.[124] Nevertheless, the accessibility of these pornographic materials on the Usenet is much lower than one would suppose. Again, one cannot stumble onto these images accidentally. Binary files only appear on one's computer screen as long strings of computer code gibberish. A certain understanding of Unix programming is required to decode these files and to actually convert them into full-color images or movie clips that are viewable on one's computer screen. Children, in effect, will have to know where they are going and exactly what they are doing to ever be able to access these files.

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121. Rimm, *supra* note 45, at 1914.

122. *Id.* ("Paraphilic, hebephilic, and pedophilic imagery accounted for approximately one-half of nearly six million downloads counted on private 'adult' BBS[s].")

123. Rose, *supra* note 39, at 258 ("Isolated shots of highly charged sexual materials do not, by themselves, come off as part of any story, but are readily seen as a reduction of focus to the sex act itself—a much easier case for obscenity prosecutions.").

124. *See supra* discussion Part II.D.5.

E. Other Vices on the Internet

1. "Victimless" Digital Vices?

It should also be noted that there are a variety of other objectionable activities that are currently being conducted on-line. Most of these activities would probably not fall under the labels of obscenity or indecency, and are best classified as digital vices. These on-line vices generally have separate laws regulating their activity and include such activities as gambling, prostitution, and other mature-themed activities (e.g., cyber-bars). Although these activities are considered acceptable to adults in varying degrees (depending on one's jurisdiction), they are all universally regarded as unacceptable for children.

As mentioned, one of these digital vices is gambling. According to Lance Rose in his treatise on law on the Internet, "Online systems are a natural for gambling."[125] Especially with the advancement of digital currencies and encryption technologies with which to cloak illegal activities, one report estimates that on-line betting could become a $50 billion a year business.[126] Reportedly, there are companies based in Antigua and other Caribbean islands that are currently setting up cyber-casinos.[127] Even though such activities would be illegal in the United States, "[e]merging technologies will make gambling on the Internet all but undetectable by law enforcement."[128]

Another digital vice available on-line is prostitution. According to reports, women from Asia and Eastern Europe are now available for sale via the Internet.[129] Researcher Donna Hughes from the University of Bradford in England has been documenting such practices after stumbling upon the phenomenon while researching women's human rights abuses.[130] On-line prostitution rings work in at least two different ways: (1) they can provide female spouses to potential

125. ROSE, *supra* note 39, at 204.

126. *See* James K. Glassman, Editorial, *Cyber Liberation*, WASH. POST, Nov. 7, 1995, at A13; *see also* Cynthia R. Janower, *Gambling on the Internet*, J. COMPUTER-MEDIATED COMM., Sept. 1996 (Vol. 2, No. 2) <http://jcmc.mscc.huji.ac.il/vol2/isue2>.

127. Glassman, *supra* note 126; *see also* Janower, *supra* note 126.

128. Glassman, *supra* note 126 (quoting Evan Schwartz, WIRED). Besides various state prohibitions against gambling, the United States currently has federal criminal laws prohibiting the use of the interstate telephone system to conduct gambling activities. *See* ROSE, *supra* note 39, at 204.

129. *See Sale of Sex Made Easy on Internet*, SAN DIEGO UNION-TRIB., Nov. 27, 1995, at A15.

130. *See id.*

husbands that possess a credit card (either by supplying addresses or by offering pre-arranged agency packages that include accommodations and flights); or (2) they can offer sex tours for when one is planning a visit to a foreign locale.[131] Putting to rest any claims that such activities are merely victimless are reports from men who say that they have "abused girls as young as nine in Thailand" via these services.[132]

Finally, there are on-line Cyberbars whereby information and events regarding the glorification of alcohol are conducted on the Web. Although these activities might sound tame in light of on-line pornography and other more serious digital vices, some observers have expressed concern over the high frequency of youths participating in such activities.[133] In essence, these Web sites act as free advertising for the alcohol manufacturers that often sponsor these sites (who sometimes are otherwise prohibited from advertising on TV and radio). For underage users, these sites act to promote the consumption of alcohol through the use of interactive games and on-line activities. According to one concerned expert, "They're taking a serious health problem and making it into a game."[134]

2. Hate and Violence

The problem of hate and violence being promoted on-line became big news when it was discovered that the information needed to make the fertilizer bomb used in the Oklahoma City bombing was widely available on the Internet. However, in addition to militias, groups such as the neo-Nazi National Alliance, Tom Metzger's White Aryan Resistance, and Skinheads U.S.A. have established Internet presence.[135] Thus, some groups have called for the elimination of all hate group activities on-line and have pressured the Internet access providers (e.g., America Online and CompuServe) to refuse to carry any messages that "promote racism, anti-Semitism, mayhem and violence."[136]

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131. *See id.*

132. *Id.*

133. *See* Laura Sessions Stepp, *Teens & Cyberbars: Youth-Oriented Drinking Games and Advertising on the Internet*, WASH. POST, July 24, 1995, at B5.

134. *Id.* (quoting George Hacker, Director of Alcohol Policies, Center for Science in the Public Interest).

135. *See* Steve Barmazel, *#&?!!@^*%#! There Is No Stopping Hate Speech*, CAL. LAW., June 1995, at 41; Editorial, *Hate On the Net*, SACRAMENTO BEE, Jan. 18, 1996, at B6.

136. Joanne Jacobs, Editorial, *Unfortunately, It Won't Work; Congress Should Resist Temptation to Censor Smut, Hate on the Internet*, ATLANTA J. & CONST., Jan. 16, 1996 (quoting

In order to be considered illegal under U.S. law, hate speech needs to advocate that "imminent lawless action" is likely to occur.[137] Therefore, most of these on-line hate-based activities will probably be allowed to continue. However, in light of events such as the Oklahoma City bombing, these kinds of speech will continue to touch some sensitive nerves in the United States and might prompt Congress (or various state legislatures) to act sometime in the near future.

Finally, a word should be mentioned about violence in TV and video-games. Although this article will not be addressing issues of violence with regard to television broadcasts and the new V-chip established by President Clinton, it should be noted that violence in the United States has traditionally been considered quite separate from classifications such as obscenity. As discussed in Part IV, nowhere in the definition of obscenity does there appear any mention of violence or harm (only sexual themes). Therefore, interestingly enough, the United States will often proscribe depictions of sexuality much more stringently than it does those of violence. However, this is not the case in other countries, such as Germany, which has banned video games such as *Doom* on the basis of extreme violence.[138]

F. On-line Crimes Against Children

1. On-line Contacts and Abductions

As discussed in *supra* Part II.D.4, the problem of on-line contact with and abduction of children is one that has received a great amount of press.[139] Generally, however, the response has been typified by a negative backlash toward the Internet as a medium (rather than against the underlying problem). Indeed, much of this negative reaction has been hype. "There's nothing of black magic in the Net—nothing even very new. It is just a collection of wires and software that connects people to other people."[140]

Rabbi Abraham Cooper, Associate Dean, Simon Wiesenthal Center in Los Angeles, CA).

137. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

138. *See* Matthew Hamilton, *Graphic Violence in Computer and Video Games: Is Legislation the Answer?*, 100 DICK. L. REV. 181, 187 (1995). Hamilton's piece primarily discusses the Video Game Rating Act of 1994 and concludes that it was unconstitutionally used as "a bludgeon to prod the [video game] industry" into passing its recent video game ratings systems in the United States. *Id.* at 206. Nevertheless, the result has been two inconsistent ratings systems that have both been deemed ineffective. *Id.* at 208.

139. *See, e.g.*, Steve Olafson, *supra* note 102, at A13; John McChesney, *supra* note 102; Elizabeth Corcoran, *supra* note 102, at E3.

140. Gerard Van der Leun, *It's 4 a.m. in Cyberspace. Do You Know Where Your Children Are?*, PENTHOUSE, Feb. 1996 <http://www.penthousemag.com/magazine/p02feb/02feat1.html>.

The underlying truth about on-line crimes against children is that they are ultimately committed by people.[141] While parents in this country should rightfully be concerned with any new threat to the safety of children, the proper response is not necessarily one of censorship, government control, or simple avoidance of the new medium. In the words of the National Center for Missing & Exploited Children: "The fact that crimes are being committed on-line . . . is *not* a reason to avoid using these services."[142]

2. Child Pornography

Another serious problem on the Net is child pornography. With the ability to post files anonymously on the Usenet, pedophiles and child pornographers have been able to promote and distribute their illegal wares on a scale once previously unheard of—all with relative impunity.[143] These images, according to one-time federal investigator Bruce Selcraig, depict "just about every form of sexual abuse adults can perform with children: oral, anal, and vaginal penetration of kids under 12. Men ejaculating on kids who can't tie their shoes yet."[144] Selcraig continues his description: "In many of the photos the kids look high, confused, or just unspeakably sad. These pictures make autopsy photos look erotic."[145]

Given the recent public infusion of child pornography, one computer-crime expert has remarked that: "Computers . . . are the best thing since sliced bread for pedophiles."[146] Likewise, "Cops are amazed these days if they arrest a pedophile who doesn't have a computer."[147] However, arresting experienced child pornographers on-line is often problematic. As a result, state or federal investigators often have to resort to sting tactics in order to lure on-line offenders out from under their cloak of anonymity. These operations include

141. *See* Lynch, *supra* note 103, at 3.

142. *See* NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, CHILD SAFETY ON THE INFORMATION HIGHWAY 3 (1994).

143. Several Usenet groups have become repositories for child pornography on-line. A few of these sites are: alt.sex.pedophilia, alt.binaries.pictures.nudism, and alt.binaries.pictures.erotica.teen.male.

144. Bruce Selcraig, *Chasing Computer Perverts*, PENTHOUSE, Feb. 1996 <http://www.penthousemag.com/magazine/p02feb/02feat1.html>. During the 1980s, Selcraig served as a U.S. Senate investigator for 16 months examining the pedophile and child-pornography underground.

145. *Id.*

146. Mike Geraghty, computer crime expert, New Jersey State Police, *quoted in* Selcraig, *supra* note 144.

147. Selcraig, *supra* note 144.

monitoring private on-line conversations, setting up phony BBSs, and posing as susceptible youths on-line. Nevertheless, according to Los Angeles Police Department detective Bill Dworin, "We just catch the stupid ones."[148]

Even with these difficulties, the Department of Justice has contended that the current framework of laws is still the most appropriate way to address the problem of on-line threats against children.[149] Currently, under Title 18 of the U.S. Code, a number of statutes already address the sexual exploitation and abuse of children. Section 2251 outlaws child pornography, and Section 2252 makes it illegal to: (1) receive child pornography; (2) distribute child pornography; and (3) knowingly possess more than three copies of any child pornography materials.[150] Moreover, these prohibitions have been clearly written to apply to activities which involve computers.

As a result, the FBI has instituted a number of arrest operations directed at child pornographers. These include Operation Innocent Images and Operation Cyberstrike, which have resulted in the service of over 160 warrants and the arrest of at least fifteen child pornographers over the past two and a half years.[151] In addition, Customs and Postal agents have accounted for hundreds more arrests during that time.[152]

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148. *Id.*

149. *See* Charles Levendosky, *Parental Guidance Suggested: Congressional Efforts to Legislate Cyberspace Will Create a Decency Monster—and It's Coming After You*, SUN-SENTINEL (Fort Lauderdale), Aug. 6, 1995, at 1G ("[New legislation] would significantly thwart enforcement of existing laws regarding obscenity and child pornography, create several ways for distributors and packagers of obscenity and child pornography to avoid criminal liability, and threaten important First Amendment and privacy rights."); Julian Dibbell, *Muzzling the Internet: Can This Congress Find a Way to Preserve Civil Liberties While Curbing Cyberporn? So Far, No*, TIME, Dec. 18, 1995, at 75 (reporting the DOJ has "made it clear it has all the laws it needs to police the Net.").

150. 18 U.S.C. §§ 2251, 2252 (1988).

151. *See* Selcraig, *supra* note 144; Glenn R. Simpson, *U.S. Arrests Three in Customs Probe of Computer Porn*, WALL ST. J., Jan. 12, 1996, at B7; Jared Sandberg & Glenn R. Simpson, *Porn Arrests Inflame Debate on New Laws*, SAN DIEGO UNION-TRIB., Sept. 19, 1995, at 3.

152. *See* Selcraig, *supra* note 144. The first major investigation of on-line child pornography dates back to March 1992 when Customs agents traced a package of child pornography through the mails to a man in Dade County, Florida. The resulting search warrant uncovered information regarding a private BBS in Denmark called B.A.M.S.E., which was providing sexually explicit photos of children (mostly aged 5 to 12) to subscribers who paid an $80 annual fee. Two other Danish BBSs were revealed and police found customer lists with about 6,000 names from around the world, 100 of them U.S. citizens. By March 1993, American agents had served 29 search warrants in 18 states—with 20 individuals later pleading guilty to various pornography charges. *See id.*

3. Problems with Virtual Child Pornography

However, amidst the technological advances of the Digital Age, even the definition of what constitutes child pornography has been called into question. New computer techniques (called morphing) have made it possible to completely or partially fabricate images of sexual situations involving children. In turn, real children may never be used in such depictions, or they may simply be photographed in innocent, non-exploitative activities that are then transformed into pornographic images. Under current readings of the child pornography laws, computer-generated forms of child pornography do not appear to be illegal in the United States, given that there is no apparent victim being exploited.[153]

As a result, a bill was proposed by Sen. Orrin Hatch (R-Utah) to outlaw *any* visual depictions — real, computer-generated, or otherwise (drawings even?) — which depict children engaged in sexually explicit conduct.[154] Although legislation of this variety has received some legitimate academic backing,[155] it has also been criticized by legal scholars such as Alan Dershowitz for attempting to "criminaliz[e] the imaginations and 'virtual realities' of our citizens."[156] Arguably, the production of computer-generated child pornography promotes and reinforces the abuse of children; however,

153. Possession of child pornography is considered presumptively illegal in the United States under the case of *New York v. Ferber*, 458 U.S. 747 (1982). However, the rationale of *Ferber* was primarily addressing the "sexual exploitation and abuse of children." *Id.* at 757. Consequently, more recent courts have said: "When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it." United States v. Villard, 885 F.2d 117, 125 (3d Cir. 1989). Likewise, in Britain, a man who was charged with possessing child pornography on his computer successfully defended himself on the claim that the pictures were, in fact, digitally altered pictures of an adult. *See* Charles Arthur, *How Porn Slipped the Net*, INDEPENDENT, July 31, 1995, at 13. As a result, Britain passed a provision in its Criminal Justice Act of 1994 making it an offense to knowingly store or distribute pseudo-pictures of children in pornographic poses on a computer or computer network. *See id.* At this time, the U.S. has yet to disallow such a defense.

154. Child Pornography Prevention Act, S. 1237, 104th Cong. § 3 (1995). However, this bill also attempts to amend the existing statutory definition of "sexually explicit conduct" to include the lascivious exhibition of the "buttocks of any minor" and the "breast of any female minor". *Id.*

155. A recent law review article makes strong argument for the elimination of virtual kiddie porn. *See* John C. Scheller, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 996-1001 (1994) ("[T]he state's interest in protecting children from the devastating effects of child pornography does not begin and end with the victim. Rather the state's interest in eliminating child pornography is the protection of all children.") (citations omitted).

156. Alan M. Dershowitz, *Federally Felonius Fantasizing*, PENTHOUSE, Feb. 1996 <http://www.penthousemag.com/magazine/p02feb/02feat1.html>.

are we ready yet as a nation to start down the path of regulating our ideas and imaginations?

These sorts of mental gyrations appear to have become rather commonplace among the new challenges of the Digital Age. This article continues to address these problems in Part III within the context of the unique public nature of the Internet.

III. THE PUBLIC NATURE OF THE INTERNET

> What is happening is nothing less than a redefinition of the way we read and write, the way we talk to and correspond with one another, how we entertain and educate ourselves, how we resolve our conflicts — how we form friendships and communities, and how we perform our roles as citizens. These changes take a multitude of different forms and are giving birth to an entirely new vocabulary — bulletin boards, e-mail, MUDs and MOOs, chat groups, fiber optics, cable television, CD-ROMs, satellite dishes, microwave transmitters, narrowcasting. These new technologies . . . help us think through the implications for the First Amendment of the technological revolution through which we are now living.[157]

A. Media Attention and Hype

1. Generally

A recurring theme throughout this article is the often-exaggerated attention that the Internet receives regarding objectionable activities. According to journalist Stephen Lynch: "[C]yberspace is making the ordinary extraordinary. Crimes that would not garner two paragraphs in the police blotter are the subject of exposés."[158] Ultimately, Lynch concludes that "[this] sensationalism reveals either severe boredom or a frightening lack of perspective."[159]

Nevertheless, one can argue that the public is merely attempting to assimilate the onslaught of changes that have been occurring in the way we communicate, learn, and entertain ourselves in the Digital Age. Granted, hype over the Internet is rampant. However, the challenge is to ensure that this hype is not just a fear of the unknown, used perhaps as an excuse to revamp our nation's laws for more personal agendas. It is important always to try and note what has

157. Owen Fiss, *In Search of a New Paradigm*, 104 Yale L.J. 1613, 1615 (1995).

158. Lynch, *supra* note 103.

159. *Id.*

changed, and what has not, in view of the new technological advances.

Gerard Van der Leun provides a somewhat debunking view of the Internet as "just a collection of wires and software that connects people to other people."[160]

> With all the hype removed, discussion groups and forums are like people talking on the telephone on a global party line. The difference is that you do not all have to be on at the same time to hear what is being said, since you type instead of talk.
>
> On-line chat rooms are much like the C.B.-radio craze of the 1970s and 1980s. You have handles, and you cannot all talk at once. There is even a version of the "over" signal to tell someone else they can go ahead.
>
> As for the much-ballyhooed World Wide Web, it is really a lot like very slow television (with about the same cultural promise), after you strip away the huffing and puffing from all the greedy folks who think they are going to make personal fortunes selling slow television in the cable age. There is nothing magic in the Net at all.[161]

The Net is just made up of people. On a metaphysical level, "what the Net mirrors most clearly is not our technology, but our souls."[162] Indeed, as in the real world, not all souls are benign.

2. Jake Baker Example

One highly-publicized incident involving objectionable on-line material was the case of University of Michigan student Jake Baker. Baker, a 20 year-old sophomore, wrote a story about a violent rape and murder fantasy of a young woman in his Japanese studies class and posted it to the Usenet discussion group alt.sex.stories.[163] However, Baker was not prosecuted under an obscenity statute, but rather, a statute preventing interstate communication of a threat to kidnap or injure.[164] Since Baker had made the mistake of including a real-life student in one of his stories, the authorities concluded that this was "a

160. Van der Leun, *supra* note 140.

161. *Id.*

162. *Id.*

163. *See generally* Garvey, *supra* note 116.

164. Baker was charged under 18 U.S.C. § 875(c) (1988), a federal statute that prohibits transmitting threatening communications across state lines. *See id.*; Philip Elmer-Dewitt, *Snuff Porn on the Net*, TIME, Feb. 20, 1995, at 69.

fairly classic threat case" under the law.[165]

The irony of this case is that Jake Baker did not think he needed to use an anonymous ID, and is characterized as meek and harmless by many people who know him.[166] However, the authorities have clearly treated him as a dangerous (virtual?) predator — or, in the words of U.S. District Court Magistrate Thomas A. Carlson, as "somebody who probably should not be walking the streets."[167] As a result, Baker served 29 days in jail for his posted story. The case was thrown out by a federal district court judge in June 1995, on First Amendment grounds.[168] The U.S. Attorney's Office in Detroit appealed the decision to the Sixth Circuit, where the district court's opinion was affirmed.[169]

Indeed, a few observations may be taken from the Baker case. One point is the global nature of the Internet. Under the facts of the case, a sixteen year-old girl in Moscow read Baker's story on the Usenet and reported it to her father, a Michigan alumnus. The father then alerted the university by e-mail, which then investigated the matter.[170] A second point, however, is the power of mere written words. Although prosecutors deemed Baker's additional e-mail correspondence to be his prime demonstration of a threat, much like the stories, these communications were arguably just written expressions of fantasy.[171] Granted, they were horrible expressions of fantasy, but fantasy nonetheless.

Ultimately, the sheer publicity that the case garnered only helped to demonstrate the over-hyped nature of cases involving objectionable material on the Net. Was Jake Baker really a classic threat or simply a computer-nerd with a vivid imagination? Again, are we to be concerned that our government was coming dangerously

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165. Garvey, *supra* note 116 (quoting U.S. Attorney Saul Green). The key to the case, though, was e-mail correspondence between Baker and an Ontario man detailing actual rape and murder scenarios that they could commit together, one of which involved a strategy for accosting women in the bathroom across from Baker's room.

166. *Id.*

167. *Id.*

168. United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995), *aff'd sub nom.*, United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997)

169. United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997). *See* Josar, *supra* note 118.

170. For a detailed timeline of the events in the Baker case, see P.J. Swan, *Timeline of Events in Baker Case* (1996) <http://krusty.eecs.umich.edu/people/pjswan/Baker/timeline.html>.

171. For a thoughtful and insightful account of both the horror of Jake Baker's writings and the inconsistencies of his prosecution, see CHARLES PLATT, ANARCHY ONLINE, Part 5 (forthcoming 1996) <http://anarchy-online.dementia.org/book/section.5.html>.

close to criminalizing mere thoughts in the Baker case? These are questions our courts and lawmakers will have to continue thinking about seriously in the next stage of the Baker case, and also in its future handling of cyber-related crimes.

B. Anonymity and Privacy

Apart from the media hype, however, perhaps what distinguishes the Internet the most from other forms of communication is the ease in which participants can communicate anonymously. Moreover, with the use of encryption technologies, participants can also communicate in complete privacy, a concept that raises the eyebrows of even the most liberal of governments. Although these various shields from public view — anonymity and encryption — may not have been established for criminal purposes, they can be used by those who have such intentions. Indeed, it is these concerns which drive the current debate over whether anonymous remailing and the use of encryption technologies are legitimate practices in the Digital Age.

1. Pros and Cons of Anonymity

The ability to send anonymous messages on the Internet primarily raises problems with issues of liability and accountability. By disguising the source of a message or a posting, an author may essentially evade the responsibility for any harm that may ensue. Thus, outrageous or even criminal behavior can be conducted without any opportunity for redress under the law. In terms of obscene or indecent materials, one can post an objectionable or illegal file to a Usenet newsgroup, for instance, and maintain almost total impunity.

To use an earlier-cited example, if the female college student in the Jake Baker case had not been able to identify the author of the rape and murder story that was written about her in alt.sex.stories, would it not have added a significant amount of fear and uncertainty to her life? Perhaps today, *she* would have been the student no longer attending the University of Michigan. Government officials who are confronted with graphic photos of child pornography on the Usenet and the outcry from an enraged citizenry (or perhaps from the distraught victims themselves) would clearly wish to be able to trace the sources of these criminal images. However, due to anonymous remailing technologies, authorities are often left powerless to trace the responsible persons.

The basis for much of the anonymity on the Internet is due to the

existence of "anonymous remailiers" on the Usenet. The most famous of these anonymous servers is anon.penet.fi, run by a man named Julf Helsingus in Finland.[172] These remailing services work on the principle that any message sent to an established account on the server will be stripped of any identifying information and then remailed to its desired final destination. As long as the operator of the anonymous server does not divulge the identities of its accounts, the message will remain completely anonymous.[173]

Indeed, one should note that there are a number of beneficial uses for anonymity on the Internet. Consider a victim of child abuse sharing his story with a support newsgroup; or of a Chinese dissident publishing one of his banned writings; or of an employee discussing the pros and cons of "blowing the whistle" on his employer.[174] All of these individuals have a vested stake in preserving anonymity. In addition, psychologists and sociologists have pointed out the benefits that people may attain from being able to assume various personae on-line.[175] Accordingly, an outright ban on such anonymity would seem to be an overly harsh measure by government, and one that would certainly chill a number of forms of valuable speech.

Ultimately, the consensus in the academic writing on the subject is that anonymity should not be outlawed as a "general principle."[176] However, most commentators seem open to the compromise of governments being able to access anonymous servers when a crime has been committed and when strict judicial procedures have been followed.[177] Although problems with jurisdiction will always play a

172. *See supra* note 120.

173. Julf Helsingus's anon.penet.fi service is by far the most popular anonymous remailer due to its relative security. Although stating in his public FAQ that anonymous posting is a "privilege," he also states: "I believe very firmly that it's not for me to dictate how other people behave." Julf Helsingus, *Anonymous Help* (automatic e-mail response, May 19, 1995) (copy available by sending an e-mail to help@anon.penet.fi). Indeed, only on one occasion has his facility been infiltrated by the Finnish authorities (regarding an accusation by the Church of Scientology). Reportedly, when the police found no illegal activity occurring at his facility, including no child (or any other) pornography to speak of, they took the particular account information they had a warrant for, and expressed resistance to ever having to go through such a procedure again. *See* Douglas Lavin, *Anonymous Service an Internet Loophole*, SAN DIEGO UNION-TRIB., July 25, 1995 (ComputerLink), at 7.

174. *See* Long, *supra* note 115, at 1178.

175. *See* Branscomb, *supra* note 120, at 1642. *But see* Clifford Stoll, author, *quoted in* Michael D'Antonio, *Our New Faceless Monsters*, L.A. TIMES, Aug. 27, 1995, 25, at 28 ("Unfortunately, what comes out of a lot of people is their absolute worst.... The more anonymous the communication, the nastier it is.").

176. Branscomb, *supra* note 120, at 1675; *see* Long, *supra* note 115, at 1200.

177. *See* Long, *supra* note 115, at 1205 (suggesting that a warrant procedure similar to a Title III wiretap standard should be adopted as a compromise); *see also* Branscomb, *supra* note

factor in such investigations, especially due to the international nature of the Internet (e.g., anon.penet.fi), a well-crafted form of compromise might be the only way to balance the significant competing interests involved over the troubling question of anonymity.

2. Encryption Technologies

Another technology with a significant effect on anonymity and privacy is encryption. Although this article will only touch upon this issue briefly, encryption is essentially the process whereby "one person scrambles the information to be transmitted so that it is unreadable to any unintended readers."[178] Through the use of mathematical keys, encrypted messages can be decoded by their intended recipients only. Accordingly, a number of contentious issues have emerged with this technology. First, the U.S. government has imposed strict export controls on encryption since they are considered munitions under law. Second, the government is also trying to mandate a public key escrow system called Clipper, in which any encrypted messages can be decoded by the authorities when needed.[179] Finally, given the above government positions, some worry that the restrictions are Big Brother legislation which leaves little opportunity for private or secure communications.[180]

Indeed, the debate over encryption is very similar in some respects to the debate over anonymous servers on the Usenet. Summing up both sides of the encryption debate is Richard P. Klau, who wrote: "For those solely concerned with their privacy, encryption is a beneficial tool. However, for criminals and others with less than good intentions, encryption stymies law enforcement in its attempts to discover the content of scrambled communication."[181] Much like the debate over national ID cards, the ultimate question with encryption is whether we want government to have (or not have) that kind of power and access to information.

C. On-line Liabilities

Given the distinctly public nature of the Internet, there were a

120, at 1677 (observing that First Amendment protection is not absolute and urging lawyers and legislators to use caution).

178. Richard P. Klau, *Never Before Has One Technology Been Both So Enabling and So Threatening*, STUDENT LAW., Jan. 1996, at 15.

179. *See* Denise Caruso, *The Key Issue for the Net Is Not the Smut, It Is the Use of Encryption*, N.Y. TIMES, Mar. 25, 1996, at D5.

180. *See id.*

181. Klau, *supra* note 178, at 18.

number of conflicts that were bound to arise. The topic of on-line liability is perhaps the largest issue the courts are having to deal with today in the context of the Internet. Accordingly, this article will confine its comments to two subjects: the liability of on-line providers and the jurisdictional problems that arise with objectionable material on-line. However, one should note that there are also a number of problems concerning issues of intellectual property (e.g., rampant copyright violations, piracy of protected works, trademark concerns over Internet addresses.)[182] and concerning criminal violations (such as fraud and computer crime)[183] that occur on the Net.

1. On-line Providers as Responsible Agents

A major concern of the various on-line providers (e.g., America Online, CompuServe, public and private universities, and others) is whether they will be held responsible for the material that appears on their computer systems. Given the problems with anonymity discussed *supra* Part III.B, certain types of material are simply not traceable to their original sources. In the effort merely to have *someone* be accountable, governments may want to impose some sort of strict liability for on-line providers for any sort of objectionable or damaging material that happens to appear on their systems.

However, this policy would ultimately require providers to monitor every portion of material that is posted on-line, and in many cases, would result in speech being censored significantly or providers being put out of business. Given the variety of on-line areas — BBSs, the Web, the Usenet, and chat forums — on-line providers that decide to stay in business would most likely have to eliminate or seriously limit the less controllable of these activities. Even though programs could be used to scan for improper language, no program at current levels of technology would be able to tell whether a particular comment was defamatory or in violation of a copyright. Universities, given their limited resources for such services, would probably have to eliminate much of their on-line access altogether.[184]

182. *See generally* CAVAZOS & MORIN, *supra* note 26, at 47-65; Kenneth Sutherlin Dueker, Note, *Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses*, 9 HARV. J.L. & TECH 483 (1996).

183. CAVAZOS & MORIN, *supra* note 26, at 105-121; Michael P. Dierks, Note, *Computer Network Abuse*, 6 HARV. J.L. & TECH. 307 (1993).

184. For a good discussion of the regulatory issues faced by universities that provide Usenet access, for example, see Emel Aileen Gökyigit, Managing Usenet News Access at Harvard: An Analysis of the Legal, Institutional, and Technical Responsibilities of the University in Addressing Obscene and Indecent Material (April 9, 1996) (unpublished paper on file with

Fortunately, the U.S. government has *not* adopted such a strict liability standard. Indeed, under U.S. law, the proper test for on-line liability is whether the provider is acting as a "publisher" of on-line materials or simply acting as a "distributor." The key to this test is whether the on-line provider discriminates between the material by acting as some sort of editor of content.

Two cases involving on-line providers in the defamation context — one involving Prodigy, and one involving CompuServe — are instructive. Prodigy, which has traditionally censored its system to distinguish itself as a family-oriented on-line provider, faced the possibility of massive liability in the case of *Stratton-Oakmont, Inc. v. Prodigy Services Co.*[185] In *Stratton*, a New York state court ruled that Prodigy could be sued for libel because, in effect, it was acting as a publisher and was therefore liable for the content of subscribers' electronic messages.[186] However, CompuServe, which contracted with a third party for the management and editing of the on-line publication Rumorville U.S.A., avoided defamation liability in *Cubby v. CompuServe.*[187] This court reasoned that CompuServe was like a bookstore, and made no pretense of being a monitor of content.[188] Indeed, without any sort of specific knowledge, CompuServe could not be held liable for any libelous remarks.

2. Jurisdictional Concerns

a. The Problem of Community Standards: United States v. Thomas

As will be discussed in Part IV of this paper, part of the test for obscenity in the United States is the application of the community

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author).

185. Stratton Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 26, 1995). *See generally* Robert B. Charles, *Computer Libel Questions in* 'Stratton v. Prodigy', N.Y.L.J., Dec. 13, 1994, at 1, 4 (The original claim for damages in the suit was $200 million.).

186. *See* Constance Johnson, *On-Line: Courts Struggle with Definition of Cyberspace*, WALL ST. J., July 27, 1995, at B1. (Stratton-Oakmont and Prodigy eventually reached a settlement requiring only an apology by Prodigy. Even though the parties urged the New York court to vacate its earlier decision, the court refused to do so because it said such a move would "remove the only existing New York precedent in this area, leaving the law further behind the technology."); Susan Benkelman, *Judge Sticks to Decision on Computer Services*, NEWSDAY, Dec. 14, 1995, at A57.

187. 776 F. Supp. 135 (S.D.N.Y. 1991); *see also* Rex S. Heinke & Heather D. Rafter, *Rough Justice in Cyberspace: Liability on the Electronic Frontier*, COMPUTER LAW., July 1994, at 1-3.

188. Cubby v. Compuserve, 776 F. Supp. 135 (S.D.N.Y. 1991).

standard for the locale in which the suit is being brought. However, the community standard tests raises a distinct jurisdictional problem when looking at the context of liability on the Internet. Materials on the Net can be downloaded to just about any site in the United States. Does this mean that all on-line materials have to meet the standards of the most morally-restrictive community?

The 1994 case of *United States v. Thomas* set out to resolve this question.[189] Accordingly, this case resulted in the first federal criminal conviction for transmitting obscene materials over a computer network.[190] More specifically, the Thomases were charged under 18 U.S.C. § 1465 (1988), which prohibits the knowing transport in "interstate or foreign commerce" of any "obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print...."[191] However, the distinguishing feature of the case was that the couple was convicted under local community standard by a jury in Tennessee, and *not* in their home state of California (where their electronic bulletin board was located and operated).

Critics of the district court's handling of the case claim that it was improper for the court to apply Tennessee's community standards. Arguably, the use of these standards restricts all BBS operators to materials that are acceptable in only the most restrictive of communities. The Electronic Frontier Foundation (EFF) argued that the BBS was not the one traveling between jurisdictions in the *Thomas* case; rather, it was the user who downloaded the files.[192] "This case is operationally indistinguishable from one in which a Tennessee resident travels to California and purchases a computer file containing adult-oriented material that he brings back to his home."[193]

However, a three judge panel for the Sixth Circuit unanimously affirmed the Thomases' convictions.[194] In its decision, the court stated that "venue for federal obscenity prosecutions lies 'in any district *from*, *through*, or *into which*' the allegedly obscene material moves."[195] Moreover, in a significant move, the court held that

189. United States v. Thomas, No. CR-94-20019-G (W.D. Tenn. 1994), *aff'd*, 74 F.3d 701 (6th Cir. 1996).

190. Zitner, *supra* note 8.

191. 18 U.S.C. § 1465 (1988).

192. *See* Electronic Frontier Foundation, Amicus Curiae Brief at 6-7, United States v. Thomas, Nos. 94-6648, 94-6649 (6th Cir., Apr. 19, 1995).

193. United States v. Thomas, 74 F.3d 701 (6th Cir. 1996).

194. *Id.*

195. *Id.* at 709 (quoting United States v. Peraino, 645 F.2d 548, 551 (6th Cir. 1981)) (emphasis added).

"under the facts of this case, there is no need for this court to adopt a new definition of 'community' for use in obscenity prosecutions involving electronic bulletin boards."[196] The U.S. Supreme Court denied the Thomas's appeal.[197]

It seems that holding Sysops liable for the distribution of obscene materials (even to the most morally-restrictive jurisdictions) has a good chance of remaining law. According to one communications policy expert: "As long as money is changing hands . . . the courts are not going to be swayed by these arguments of the global community. They are going to say the business is responsible for these awful images popping up . . . ."[198] Of course, this probably seems unfair to Robert Thomas, who claimed that the alt.sex newsgroups can show the same obscene images, or worse, for free — and without the age restrictions that he enforced on Amateur Action.[199] However, these more diffuse Usenet newsgroups, without the presence of overseeing Sysops, are not so easily targetable by the authorities. In the end, these newsgroups are not likely to provide comparative excuses for BBS operators such as the Thomases who ultimately take in profits.

b. International Concerns

Another problem raised by the public nature of the Internet is the fact that no one nation can claim sole jurisdiction for the on-line world. Nevertheless, many nations are trying to regulate the Internet according to their own laws — irrespective of what other countries may be doing. As a result, a number of jurisdictional conflicts are now beginning to occur. In some cases, these conflicts abroad can have very real effects for domestic Internet services in this country.

For example, a German prosecutor in Munich recently ordered CompuServe to discontinue service of over 200 alt.sex and related newsgroups on charges that they contained illegal pornographic material.[200] Since CompuServe lacked the technical means in which to tailor Usenet content simply for German subscribers, the company blocked access to these newsgroups for all of its subscribers world-

196. *Id.* at 712.

197. Thomas v. United States, *cert. denied*, 117 S. Ct. 74 (1996).

198. Stephen Bates, Senior Fellow, Annenberg Washington Program in Communications Policy Studies, *quoted in* Zitner, *supra* note 8.,

199. *See* Zitner, *supra* note 8.

200. Nathaniel Nash, *Holding CompuServe Responsible*, N.Y. TIMES, Jan. 15, 1996, at D4.

wide.[201] Although CompuServe corrected its technical problem within a matter of weeks,[202] the incident received tremendous amounts of criticism domestically.[203] One source even characterized the event as "the most dramatic and far-reaching attempt to restrict the free flow of information on-line."[204]

Meanwhile, countries such as China and Singapore have also attempted to control the flow of information on the Internet. China, for instance, is (in the words of one commentator) determined to do what conventional wisdom suggests is impossible: join the information age while restricting access to information.[205] Indeed, China is attempting to implement a virtual "Intranet" that would possess the ability to screen out the two things its authoritarian government opposes most: political dissent and pornography.[206] Similarly, Singapore is also filtering its nation's access to the on-line world by holding on-line providers strictly liable for any pornographic and politically objectionable material that may appear.[207] In a somewhat realistic assessment of the task his country will face, one Singapore official explained: "what we can do is to keep our own backyard and frontyard clean by sweeping it every day."[208] However, the success of these two international systems, in light of the inherently decentralized nature of the Internet, remains to be seen.

D. Internet as Public Forum

Before addressing the specific constitutional standards that apply to obscene and indecent materials in cyberspace, it is necessary to first determine whether the Internet is a public forum for purposes of the First Amendment. Generally, the First Amendment only prohib-

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201. *Sex on the Internet*, ECONOMIST, Jan. 6, 1996, at 18.

202. Peter H. Lewis, *An On-Line Service Halts Restriction on Sex Material*, N.Y. TIMES, Feb. 14, 1996, at A1.

203. *See, e.g., id.*; Amy Cortese et al., *Alt.sex.bondage Is Closed. Should We Be Scared?*, BUS. WK., Jan. 15, 1996, at 39; Michael Meyer, *A Bad Dream Comes True in Cyberspace*, NEWSWEEK, Jan. 8, 1996, at 65; Jared Sandberg, *CompuServe Bans Its Internet Access to Sexual Material*, WALL ST. J., Dec. 29, 1995, at B2. Particularly controversial was the fact that the ban included newsgroups such as a sexuality support group for the handicapped and a bulletin board for homosexuals that served as a lifeline for thousands of gay youth.

204. *Pulling the Plug on Porn; Can German Laws Limit What We Say Online?*, TIME, Jan. 8, 1996, at 62.

205. Joseph Kahn et al., *Chinese Firewall: Beijing Seeks to Build Version of the Internet That Can Be Censored*, WALL ST. J., Jan. 31, 1996, at A1.

206. *Id.*

207. *See* Darren McDermott, *Singapore Unveils Sweeping Measures to Control Words, Images on Internet*, WALL ST. J., Mar. 6, 1996, at B6.

208. *Id.* (quoting George Yeo, Minister of Information and the Arts, Singapore).

its the government from restricting the expression of protected forms of speech. However, U.S. courts have ruled on occasion that some areas constitute public forums in which no one is allowed to restrict protected speech activities. Examples of such traditionally protected public forums are streets, sidewalks, and parks. Furthermore, in some very unique instances, privately owned locations, such as company towns and shopping centers, can also be considered public forums in order to protect individual speech.[209]

Given that an increasingly large amount of public activity and gathering is beginning to occur on the Internet, should cyberspace also be considered a public forum for purposes of the law? Would it actually be a violation of free speech rights if Prodigy, for instance, decided to censor out an individual's risque comments from an e-mail or a posting made to an on-line forum?

The answer, at this point, is no. First of all, the government at present does not run the Internet in this country. Given that there are a variety of private on-line providers to choose from, no one provider has captured a monopoly whereby the marketplace of ideas on the Internet could be distorted by the censorship by that provider. Consequently, one commentator has concluded that it would be premature to apply the public forum doctrine to the Internet.[210] Even so, if a completely public on-line network were to develop (i.e., one run by the government), or if the various on-line providers were to begin to resemble a public trust, then reconsideration of this status would probably be in order.[211]

IV. CONSTITUTIONAL STANDARDS OF OBSCENITY AND INDECENCY

> What is pornography to one man is the laughter of genius to another.[212]
>
> I know it when I see it . . . .[213]

209. *See* CAVAZOS & MORIN, *supra* note 26, at 71.

210. *See* Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO L.J. 409, 440-41 (1992).

211. *Id.* at 441.

212. D. H. Lawrence, *quoted in* JOSEPH F. KOBYLKA, THE POLITICS OF OBSCENITY: GROUP LITIGATION IN A TIME OF LEGAL CHANGE 1 (1991).

213. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)

A. Obscenity Doctrine

1. Historical Roots

In the Anglo-American tradition of law, perhaps no other crime has proven more difficult to define than obscenity.[214] It was not until 1868, when Lord Chief Justice Cockburn attempted to define what obscenity meant in *Regina v. Hicklin*,[215] that an established test for obscenity emerged.[216] Cockburn's definition, which appeared in dicta, is as follows: "I think the best test of obscenity is this; whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hand a publication of this sort may fall."[217]

Indeed, this test dominated the direction of English and American obscenity law for the next one hundred years.[218]

However, the American legal system made its first break from the *Hicklin* test in 1913 with an opinion by Judge Learned Hand in the case of *United States v. Kennerley*.[219] Criticizing the *Hicklin* test as too harsh, Judge Hand remarked that it "reduce[s] our treatment of sex to the standards of a child's library in the supposed interest of a salacious few."[220] According to at least one commentator, the final blow to the *Hicklin* test came in *United States v. One Book Called Ulysses*.[221] In this case, both the district and circuit court rejected the *Hicklin* test and suggested a standard based upon the pornographic intent and the effect of the work's dominant theme on the average reader.[222]

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214. RICHARD GEORGE LILLIE, OBSCENITY LAW: POLITICS, MORALITY, FREE SPEECH, AND THE STRUGGLE TO DEFINE OBSCENITY 2 (1990)

215. 3 L.R.-Q.B. 359 (Eng. 1868).

216. Readers should note that obscenity laws had been in place long before this time. The first obscenity law passed in the American colonies was a 1711 Massachusetts law entitled "An Act Against Intemperance, Immorality, and Profaneness, and for Reformation of Manners." *See* LILLIE, *supra* note 214, at 19. Furthermore, the first case in the United States suppressing a literary work solely on the basis of its sexually explicit content was *Commonwealth v. Holmes*, 17 Mass. 336 (1821). *See* Burke, *supra* note 38, at 98.

217. Regina v. Hicklin, 3 L.R.-Q.B. 359 at 371.

218. *See* LILLIE, *supra* note 214, at 15.

219. 209 F. 119 (S.D.N.Y. 1913).

220. *Id.* at 120-21.

221. 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom.*, United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934); *see* Eric Handelman, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 ALB. L. REV. 709, 719 (1995).

222. *See* Handelman, *supra* note 221, at 719.

Despite the movement away from *Hicklin* in the earlier part of the 20th century, obscenity doctrine in the United States lacked uniformity until 1957. In that year, the U.S. Supreme Court finally spoke on the issue of obscenity in *Roth v. United States*.[223] In *Roth*, the Court established for the record that "obscenity is not within the area of constitutionally protected speech or press."[224] Moreover, Justice Brennan rejected the *Hicklin* test outright and provided a new test: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[225]

After *Roth*, and up until the early 1970s, the Court had issued a number of other plurality decisions on obscenity that still left the doctrine rather unsettled.[226] In *Jacobellis v. Ohio*,[227] the Court seemed to be expressing some concern over the increasingly strident enforcement of obscenity laws in the United States. Consequently, Justice Brennan crafted an exception to the obscenity doctrine in *Jacobellis* for works with serious "literary, scientific, or artistic value."[228] Moreover, in *Stanley v. Georgia*,[229] the Court made a pronouncement that the private possession of obscene reading matter or films in one's home was also protected by the First Amendment.[230]

However, by 1973, several new conservative justices had been added to the Court, making it easier for the conservative wing to assemble a consistent majority regarding obscenity cases.[231] The Court sought to decide *Miller v. California*,[232] mainly to resolve the previous uncertainties regarding the obscenity doctrine. The Court developed a standard that is still in effect today and that has made *Miller* "unquestionably the most influential obscenity case in North Ameri-

223. 354 U.S. 476 (1957).

224. *Id.* at 484-85.

225. *Id.* at 489.

226. *See* Handelman, *supra* note 221, at 726.

227. 378 U.S. 184 (1964).

228. *Id.* at 191.

229. 394 U.S. 557 (1969).

230. However, *Stanley* has been seriously limited in recent years. Although not technically overruled, *Stanley* applies to a limited exception (mere possession within the home, but not the purchase, transport, importation, or even the decoded broadcast of obscene materials). *See generally* John V. Edwards, Note, *Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for* Stanley v. Georgia*(?), A National Obscenity Standard, and Other Miscellany*, 33 WM. & MARY L. REV. 949, 982 (1992).

231. *See* Handelman, *supra* note 221, at 726.

232. 413 U.S. 15 (1973).

can jurisprudence."[233]

2. The *Miller* Test

In *Miller*, the Court established a three-part test for determining whether materials in question can be considered obscene. All three parts of the test must be satisfied before someone can be convicted for handling such materials. Accordingly, the trier of fact must examine: (1) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[234]

The *Miller* test, in practice, is fairly flexible. There is no concrete standard for measuring the "value" of a work, much less its "serious value."[235] Indeed, Justice Stewart once perfunctorily defined obscenity as: "I know it when I see it."[236] Even so, under the *Miller* test, one should recognize that the application of community standards only relates to the first two prongs of the test. Law enforcement officers have the burden of proving that the material in question has no serious artistic value under a national, objective standard of worth.[237]

Under the current legal regime, state and federal laws against pornography primarily limit the *dissemination* of obscene materials or performances (as defined in *Miller*). Although the mere possession of obscene pornographic materials cannot be illegal (with the exception of child pornography),[238] the transport or sale of these materials is usually grounds for statutory regulation. Outright bans on pornography are not generally permissible.[239]

3. Obscene Materials Under *Miller*

As far as determining what materials are actually considered ob-

233. LILLIE, *supra* note 214, at 140.

234. Miller v. California, 413 U.S. 15, 24 (1973).

235. ROSE, *supra* note 39, at 250.

236. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

237. *See* Pope v. Illinois, 481 U.S. 497, 500 (1987).

238. *Compare* Stanley v. Georgia, 394 U.S. 557, 565 (1969) (holding that the mere private possession of obscenity cannot be made a crime) *with* Osborne v. Ohio, 495 U.S. 103 (1990) (upholding ban on child pornography due to the compelling state interest in protecting children).

239. *See* American Bookseller's Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

scene, a few rules can be used as starting points. First, printed works generally receive the most First Amendment protection.[240] Although purely written matter can be held obscene under *Kaplan v. California*,[241] books are almost never found obscene under the *Miller* test today. Similarly, pornographic movies are usually held *not* to be obscene because they also meet the artistic value prong of the *Miller* test. Even the smallest semblance of plot or character can grant the most pornographic film (or book) some form of "artistic value."[242] However, still photos of sexually explicit activities receive the least amount of protection because they often lack an additional redeeming context. "Isolated shots of highly charged sexual materials do not, by themselves, come off as part of any story, but are readily seen as a reduction of focus to the sex act itself — a much easier case for obscenity prosecutions."[243]

As far as applying these standards to materials on the Internet, one finds that many more materials might be considered illegal than may have previously been thought. Since the very nature of the medium limits depictions to either isolated shots or short video clips, the possibility of additional redeeming context can be lost. Certainly, in the case of hard — core photographs, such as those available through Web sites listed in Figure 1, these materials would be illegal. Likewise, video clips that are popular on the Net (such as "cumshots") also lose the protection of any redeeming context. Again, even though these materials may be from a larger, non — obscene work, the very nature of the *Miller* test requires works to be looked at as a whole, not necessarily in mere digital packets.

Nevertheless, despite the availability of obscene materials on the Net, one expert has recently remarked, "Obscenity prosecutions in general are quite rare in 1996."[244] Indeed, this is perhaps due to the difficulty in establishing materials as clearly obscene under *Miller*, or perhaps to the great discretion that is given to prosecutors in bringing cases under the obscenity laws. Accordingly, only a limited number of obscenity cases, generally easily provable or publicly symbolic cases, seem to be brought under the laws of the various states.

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240. ROSE, *supra* note 39, at 246.

241. 413 U.S. 115, 117 (1973).

242. ROSE, *supra* note 39, at 257-58 ("[It is] very difficult for any court to conclude that [a] video, taken as a whole, lacks serious artistic value.").

243. *Id.* at 258.

244. Prof. Frederick Schauer, Kennedy School of Government, Harvard University, *quoted in* Gökyigit, *supra* note 184, at 13 (unpublished paper, on file with the author).

B. *Indecency as Protected Speech*

In order to address the gray area category of materials not purely classifiable as obscene, the Court had to come up with a second category of indecent materials. Unlike obscene materials, distribution of indecent materials receives protection as free speech under the First Amendment.[245] However, in *FCC v. Pacifica*, the Court held that a radio station's afternoon broadcast of George Carlin's famous Filthy Words monologue was unprotected indecent speech because of the pervasive presence of radio broadcasts and the unique accessibility of afternoon broadcasts by children.[246]

Although the government can prohibit obscene activities from occurring in the confines of the Internet, under *Pacifica*, mere indecent activities are proscribable only if the Internet is viewed as sufficiently pervasive and easily accessible by children. However, the Court was careful to limit its holding in *Pacifica*. The majority wrote that "We have long recognized that each medium of expression presents special First Amendment problems."[247] Thus, the question of whether or not mere indecency on the Internet can be regulated is far from being settled.

C. *Regulating Obscenity and Indecency in New Technologies:* Sable v. FCC

In the wake of *Pacifica*, the most relevant Supreme Court case addressing the regulation of technologically-oriented content providers and the transmission of obscene and indecent speech was *Sable v. Federal Communications Commission*.[248] This case examined the constitutionality of § 223(b) of the Communications Act of 1934, as amended by Congress in 1988, which banned all obscene and indecent interstate telephone messages for commercial purposes.[249] Perhaps exemplifying this case's relevance, § 223(b) is one of the sections that Congress specifically amended in its recent passage of the CDA.

Under the facts of the case, Sable Communications of California was a dial-a-porn service that collected fees from callers paying to hear sexually explicit messages. A portion of these fees were shared directly with Pacific Bell, the local phone company. Sable sought an

245. ROSE, *supra* note 39, at 253.
246. 438 U.S. 726 (1978).
247. *Id.* at 748.
248. 492 U.S. 115 (1989).
249. *Id.* at 117.

injunction against the federal ban on obscene and indecent communications arguing that the statute established impermissible restrictions on the rights guaranteed in the First and Fourteenth Amendments.

Although the Court in *Sable* clearly states that "there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings,"[250] the Court unanimously decided that the total ban on commercialized indecent speech was unconstitutional. In its decision, the Court reiterated that, "Sexual expression which is indecent but not obscene is protected by the First Amendment."[251] The government can only regulate the content of indecent speech in order to promote a compelling interest, and must choose "the least restrictive means to further the articulate interest."[252] In the words of Justice White, "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."[253]

The FCC had argued that a total ban on indecent commercial telephone communications was justified because nothing less could prevent children from gaining access to such messages.[254] However, the Court, reiterating Justice Frankfurter's words from *Butler v. Michigan*,[255] said that "Surely this is to burn the house to roast the pig."[256] Justifying the ban on indecent materials merely because children might be able to see it was "unpersuasive."[257] Moreover, "the government may not 'reduce the adult population . . . to . . . only what is fit for children.'"[258]

Ironically, as will be seen in the next Part of this Article, Congress seemed to rely on the same arguments made by the FCC in *Sable* in its recent passage of the Communications Decency Act.

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250. *Id.* at 124.
251. *Id.* at 126.
252. *Id.*
253. *Id.*
254. *Id.* at 128.
255. 352 U.S. 380, 383 (1957) (unanimous decision).
256. 492 U.S. at 127.
257. *Id.* at 128.
258. *Id.* (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983) and Butler v. Michigan, 352 U.S. 380, 383 (1957)).

V. THE COMMUNICATIONS DECENCY ACT OF 1996

> Are not laws dangerous which inhibit the passions? Compare the centuries of anarchy with those of the strongest legalism in any country you like and you will see that it is only when the laws are silent that the greatest actions appear.[259]

> The framers of the Constitution never intended for the First Amendment to protect pornographers and pedophiles.[260]

A. Criminalizing Indecency on the Internet

On February 8, 1996, President Clinton signed into law the Communications Decency Act of 1996 (the CDA) as part of the Congressional amendments to the Communications Act of 1934, 47 U.S.C. § 1 *et seq.* (1988). Among other things, the CDA prohibited the use of a telecommunications device or an interactive computer service to knowingly transmit to, send to, or display in a manner available to a person under 18 any "obscene" or "indecent" communication.[261] Given that obscene materials are already considered illegal, the most striking element of the CDA was that it essentially criminalized indecency on the Internet. Furthermore, violations of the Act were punishable by $250,000 maximum fines and jail terms of up to two years.[262]

The specific *prohibitions* of the CDA were as follows:

> Using a "telecommunications device" to knowingly *initiate the transmission* of obscene or indecent material while knowing "that the recipient of the communications is under 18 years of age."[263]

> Using an "interactive computer service" to *send to a specific person* under 18 years of age any "comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or

259. MARQUIS DE SADE, CHIGI, in L'HISTORIE DE JULIETTE, OU LES PROSPÉRITÉS DU VICE, Part 4 (1797)

260. Sen. James Exon, *Should the Plug Be Pulled on Cyberporn?; Keep Internet Safe for Families*, DALLAS MORNING NEWS, Apr. 9, 1995, at 1J.

261. 47 U.S.C. §§ 223(a)(1)(B), (d)(1) (1996).

262. *See* 47 U.S.C. §§ 223(a)(2), (d)(2).

263. 47 U.S.C. § 223(a)(1)(B).

initiated the communication."[264]

> Using any "interactive computer service" to *display in a manner available* to a person under 18 years of age any "comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."[265]

Despite the strictness of these provisions,[266] a number of *defenses* were also provided by the CDA:

> [a] "good samaritan" defense (provided to on-line providers that do not assist in the creation of illegal content in a communication, but that merely provided "access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection");[267]
>
> a "good faith" defense (provided when "reasonable, effective, and appropriate" efforts have been made to restrict or prevent access to minors to prohibited communications using "any method which is feasible under available technology");[268] and
>
> an adult verification defense (for persons who restricted the access of minors to prohibited communications by requiring the use of a "verified credit card, debit account, adult access code, or adult personal identification number").[269]

1. The Path of the Original Exon Legislation

The history of the CDA was one that included a fair amount of uncertainty and controversy. The original sponsor of the CDA was Sen. James Exon (D-Neb.), who proposed the bill in the early part of

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264. 47 U.S.C. § 223(d)(1)(A).

265. 47 U.S.C. § 223(d)(1)(B).

266. Although not specifically addressed in this paper, another provision of the CDA would have made it illegal to use computer services to provide or receive information about abortion by extending the reach of the Comstock Act of 1873 to interactive computer services. *See* Leslie Miller, *Abortion and the Internet: Law May Make Information Illegal*, USA TODAY, Feb. 8, 1996, at 1D.

267. 47 U.S.C. § 223(e)(1).

268. 47 U.S.C. § 223(e)(5)(A).

269. 47 U.S.C. § 223(e)(5)(B).

1995.[270] Senator Exon stated his reasons for pursuing such legislation were "to make this exciting new [information] highway as safe as possible for kids and families to travel."[271] Senator Exon further justified the legislation based on the Supreme Court's decision in *Pacifica*, stating, "[The] Court has ruled that in areas accessible to children — radio programs for example — reasonable restrictions on indecent material are warranted."[272] However, in a far sterner statement, and one of questionable constitutional jurisprudence under *Sable*, Exon stated that "Indecent communications must simply be conducted in a place *inaccessible* to children."[273]

The key contention for the critics of the original Exon bill (and subsequently, the CDA) was that it prohibited the transmission of indecent materials on-line. At several points during the legislative process, it appeared that the provisions regulating indecency were going to be amended out of the final legislation. However, Sen. Exon and a coalition of right-wing and anti-pornography groups persevered in maintaining the original language of the bill.

Despite the rumblings of controversy, Exon's measure was attached to the Senate's telecommunications reform bill[274] by an 84 to 16 vote of the full Senate in June of 1995.[275] The House of Representatives, however, passed a measure in its version of the telecom legislation expressly prohibiting censorship by the government on the Internet (voting 420 to 4).[276] Thus, the conflict between the House

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270. *See* S. 314, 104th Cong. (1995).

271. Sen. Exon, *supra* note 260.

272. Sen. James Exon, *New Law Will Protect Kids*, USA TODAY, Mar. 13, 1995, at 14A; *see also* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

273. Sen. James Exon, *Nonsense About the Decency Act*, OMAHA WORLD HERALD, July 13, 1995, at 11; *see also* Exon, *supra* note 46, at 10A. However, it is worth comparing Exon's statements again to *Sable Communications v. FCC*, 492 U.S. 115 (1989), which stated:

> [T]he government may not "reduce the adult population . . . to . . . only what is fit for children." . . . The federal parties nevertheless argue that the total ban on indecent commercial communications is justified because nothing less could prevent children from gaining access to such messages. *We find the argument quite unpersuasive* . . . . It may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system . . . . Under our precedents, . . . [i]t is another case of 'burn[ing] up the house to roast the pig.' . . . [W]e hold that the ban does not survive constitutional scrutiny.

Id. at 128-31 (emphasis added) (citations omitted).

274. Exon, *supra* note 273.

275. Edmund L. Andrews, *Senate Supports Sever Penalties on Computer Smut*, N.Y. TIMES, June 15, 1995, at A1.

276. *See* John Schwartz, *House Logs Off Censor for Internet*, INT'L HERALD TRIB., Aug. 7, 1995. The language originally adopted by the House appears in its revisions to S. 652, 104th Cong. §§ 401-410 (1995), under § 104 was "Online Family Entertainment," *available in*

and Senate versions had to be resolved in the joint conference committee. When the joint bills went to conference committee talks in late 1995, the House participants failed to support their on-line measure and agreed to Exon's original proposal that outlawed indecent transmissions on the Internet.[277]

2. Rejection of the "Harmful to Minors" Compromise

Indeed, the biggest surprise of the conference committee debates over S. 652 was the rejection of compromise language proposed by Rep. Rick White (R-Wash.).[278] Under the White proposal, only on-line material that was deemed harmful to minors would be regulated by the government (instead of all indecent material).[279] The harmful to minors standard had been clearly drawn out by the courts in other contexts, and, according to Rep. White, was accepted in 48 states.[280]

Favorable reviews of Rep. White's compromise language were reported in the media from just about all of the political camps debating the issue, including Sen. Exon.[281] On December 6, 1995, the House-Senate conference committee actually accepted the White proposal by a 20 to 13 vote.[282] However, in a surprising move, the committee then effectively *rejected* the plan by adopting an amend-

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LEXIS, Legis library, Bills file, 1995 S. 652. The language that passed also prohibited any regulation of the Internet by the FCC, and included some rather heady free-market rhetoric, crediting the rise of the Internet to an absence of regulation by state or federal authorities. *Id.* ("It is the policy of the United States to: (1) promote the continued development of the Internet and other interactive computer services and other interactive media; (2) preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by state of federal regulation"). The original House measure also adopted protections for good Samaritan blocking of objectionable materials by on-line providers, without subjecting them to liability as seen in the recent case of *Stratton v. Prodigy* (whereby an on-line provider's public claim to edit on-line discussions opened it up to liability for torts such as libel, as with any other publisher).

277. *See infra* discussion Part IV.A.2. The conference committee vote was only 17 to 16, and usurped a compromise proposal by Rep. Rick White (R.-Wash.) approved only moments earlier by a 20 to 13 vote. *See* Albert R. Karr, *Conferees Pass Rule Covering On-Line Smut*, WALL ST. J., Dec. 7, 1995, at A16.

278. Harvey Berkman, *Medium Is Message*, NAT'L L.J., August 19, 1996, at A1.

279. *Id.*

280. *See* Leslie Miller, *On-Line Porn: Plan to Protect Minors Gains Wide Support*, USA TODAY, Dec. 5, 1995, at 1D.

281. *See, e.g., id.* ("It's a good sign.") (quoting Dee Jepsen of Enough is Enough!); Mike Mills, *Compromise Closer to Restricting Smut on Internet*, WASH. POST, Dec. 3, 1995, at A7 ("'This is a major breakthrough,' said Sen. James Exon . . . ."); Phillip Davis, *Morning Edition: Congress Proposing Restrictions on Internet Obscenity* (NPR radio broadcast, Dec. 5, 1995, Transcript No. 1752-4) ("Even civil libertarian groups, like the Washington-based Center for Democracy and Technology, are signing on to the proposal . . . .").

282. *See* Karr, *supra* note 277.

ment that same afternoon by Rep. Bob Goodlatte (R-Va.) which reinserted the word "indecent" into the provision, replacing "harmful to minors."[283] The Goodlatte proposal was approved by only a 17 to 16 vote of the committee and included some perplexing votes in favor by Rep. Pat Schroeder (D-Colo.) and John Conyers (D-Mich.).[284]

B. The Unconstitutionality of the CDA

Despite Sen. Exon's assurances, criminalizing the transmission of indecent materials under the CDA is, in this author's opinion, unconstitutional under *Pacifica* and *Sable*. Although this position was confirmed by the recent district court opinion in the *ACLU* case, the unconstitutionality of the CDA is also evident through a close reading of the relevant case law. First, in *Pacifica*, a case which upheld restrictions against indecent material on daytime radio, the Court was careful to state: "It is appropriate, in conclusion, to emphasize the narrowness of our holding."[285] Furthermore, the majority wrote that the Court has "long recognized that *each medium of expression* presents special First Amendment problems."[286] *Pacifica* clearly limited itself to radio broadcasts. Whether or not Internet transmissions fall under a similar category is highly debatable. Indeed, legislators, perhaps unfamiliar with the technology, were viewing the Internet as "an autonomous agent — a 'thing' that distributes porn . . . so 'it' must be regulated."[287]

Under *Sable*, though, the Supreme Court appeared to make a strong statement against total bans on indecent material within a given medium.[288] The CDA, despite its requirements for knowing transmissions and accessibility by children, did little to show that it was not a total ban on indecent material given the medium that it was trying to regulate. Indeed, the Internet is a free-flowing, interconnected, worldwide system that, as Senator Exon acknowledges, is a medium children are more likely to understand and be able to ma-

283. *See id.*

284. *See id.*

285. FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

286. *Id.* at 748 (emphasis added).

287. Mike Holderness, *Internet: Bringing in Big Brother*, GUARDIAN, Apr. 13, 1995, at 4; *see also* Editorial, *Hobbling the Internet*, WASH. POST, Feb. 26, 1995, at C6 ("[The Exon legislation] is just one example of the danger of pushing through a law based on a careless analogy from one technology to another, and choking off a robustly growing communications enterprise in pursuit of an ideal of 'decency' that is adults' own business.").

288. *See supra* notes 250-258 and accompanying text.

nipulate than their parents.[289] Thus, given the greater accessibility of this medium for children, the Exon legislation is essentially putting a choke-hold on *all* indecent communications on the Internet — a total ban. Given that we are dealing with a law that imposes strict *criminal* penalties, and also one that is regulating a clearly protected form of content-specific speech, we should be applying only the strictest degree of scrutiny. As *Sable* instructs us, we must have not just a reasonable or an important governmental interest, but a "compelling" one.[290] Moreover, we must be dealing with a law that does not just appropriately address the government's interest, but one that is "narrowly tailored."[291]

Finally, and perhaps most important of all, this narrowly tailored legislation must embody the "least restrictive means" possible to address the government's compelling interest.[292] Given that: (1) several computer software products can already screen out most of the objectionable material present on the Internet for parents and their kids;[293] (2) less restrictive, yet effective, legislation was proposed by Rep. White (R-Wash.) to protect against material "harmful to minors" and was rejected;[294] and (3) that the Department of Justice actually opposed passage of the CDA because it said it "has all the laws it needs to police the Net;"[295] it seems clear that the Communications Decency Act of 1996 is neither narrowly tailored, nor the least restrictive means available, and is not likely to pass constitutional scrutiny.[296]

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289. Sen. James Exon, *How Congress Can Help Protect Children from Computer Smut*, ROLL CALL, Oct. 23, 1995.

290. 492 U.S. at 126. "Compelling" is defined as: "1. Tending to compel [to force or drive, esp. to a course of action]; overpowering: *compelling reasons.* 2. Having a powerful and irresistible effect: *a compelling drama.*" RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 276 (1995).

291. 492 U.S. at 128.

292. *Id.*

293. *See infra* notes 317-318 and accompanying text. In addition, researchers at MIT have developed a system for stamping ratings onto Web sites which would restrict younger viewers from access. *See* Michelle V. Rafter, *MIT Group Proposes Community-Based Internet Ratings System*, REUTER BUS. REP., Sept. 20, 1995.

294. *See supra* Part V.A.2.

295. Julian Dibbell, *Muzzling the Internet: Can This Congress Find a Way to Preserve Civil Liberties While Curbing Cyberporn? So Far, No*, TIME, Dec. 18, 1995, at 75 (author is summarizing statements from the DOJ).

296. However, weighing in the CDA's favor are two provisions granting a defense for the restriction of minors by "available technology" that is "reasonable" and "effective," 47 U.S.C. § 223(e)(5)(A) (1996), or by requiring credit card numbers for adult passwords. 47 U.S.C. § 223(e)(5)(B) (1996). However, these defenses still do not correct the over broad category of materials that will have to meet these access restrictions when using the term inde-

Public outcry against the CDA over the past two years has been intense. Some accused the law as being "an outrage to all who abhor censorship and ineffective fuzzily defined morality legislation."[297] Another commentator stated: "The Exon Act would be the most sweeping imposition of governmental censorship in American history . . . deliberately and directly aimed at a new technology [going] far beyond any previous ways of communication."[298] Others noted that the law could lead "to the ridiculous situation in which newspapers would be allowed to use such words as 'breast' and 'penis' in their paper-and-ink editions but not on-line."[299] In sum, David S. Bennahum of the *N.Y. Times* assessed the situation as follows: "Cyberspace, with 20 million users worldwide, connecting 145 nations, is too rich and complex an environment for a law as general and misinformed as the Communications Decency Act."[300]

C. The Legal Challenge to the CDA: ACLU v. Reno

The same day that President Clinton signed the CDA into law, a group of twenty plaintiffs led by the ACLU filed a complaint in a U.S. federal court in Pennsylvania.[301] In the complaint, plaintiffs asserted that in its indecency-regulating portions, the CDA was: (1) "unconstitutional on its face and as applied because it criminalizes expression that is protected by the First Amendment"; (2) "impermissibly overbroad and vague"; and (3) "not the least restrictive means of accomplishing any compelling governmental purpose."[302] Other effects of the CDA were also attacked, including the prohibition against information on abortion (which will not been dis-

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cent.

297. *See* Howard Rheingold, *Beware of Tyranny in Guise of "Decency"*, S.F. EXAMINER, Feb. 15, 1995, at C3.

298. Nat Hentoff, *When Privacy Doesn't Compute: A Senate Vote to Censor Cyberspace Could Mean That Speech That Is Fully Protected in Books, Magazines and Newspapers Is Subject to Sanction if Made Available over the Internet*, SAN DIEGO UNION-TRIB., Sept. 3, 1995, at G-4.

299. Editorial, *An Internet Indecency*, B. GLOBE, Dec. 13, 1995, at 22.

300. David S. Bennahum, *Getting Cyber Smart*, N.Y. TIMES, May 22, 1995, at A15. In his on-line publication, controversial cyber-commentator Brock Meeks assessed the situation in a somewhat different fashion. "The move is akin to ramming a hot poker up the ass of the Internet. And under the 'indecency' language, that last sentence, if somehow viewed by a minor, could make *Dispatch* criminally liable for a $100,000 fine [now $250,000] and toss my ass in jail for two years." Brock Meeks, editor of *Dispatch*, *quoted in* Dan Kennedy, *Doing the 'Indecent' Thing in Cyberspace*, B. PHOENIX, Dec. 15, 1995, § 1, at 9.

301. ACLU v. Janet Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *cert. granted*, 65 U.S.L.W. 3411 (1996).

302. Complaint at ¶ 1, ACLU v. Janet Reno, No. 96-963 (E.D. Pa. filed Feb. 8, 1996).

cussed in this article).[303]

Plaintiffs sought a preliminary temporary restraining order (TRO) to stop enforcement of the CDA until the conclusion of the district court proceedings. This TRO was granted in part by Judge Buckwalter on February 15, 1996. In an accompanying memorandum, Buckwalter said he believed that the indecency portions of the CDA "raised serious, substantial, difficult and doubtful questions which are fair ground for this litigation."[304] The court, however, only applied the TRO to the indecency portions of the CDA, and not to the portions prohibiting "patently offensive" speech.[305] Although it is not entirely clear how patently offensive speech and indecent speech may be different, the Department of Justice had said that it would not be enforcing the CDA until judicial resolution of this issue had been attained.[306]

Nevertheless, on June 11, 1996, a full three-judge panel for the U.S. District Court for the Eastern District of Pennsylvania issued a stinging denouncement (in three separate opinions) on the constitutionality of the CDA.[307] Arguing that the CDA was "profoundly repugnant to First Amendment principles," Judge Dalzell said that the CDA's regulation of the Internet would "burn the global village to roast the pig."[308] Ultimately, the judges decided the case on strict First Amendment grounds. "As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."[309] Accordingly, the CDA appeared to fail miserably under such a strict level of scrutiny.

Throughout the trial, the government contended that the credit card number and age verification procedures of the CDA demon-

303. Complaint at ¶¶ 2-4, ACLU v. Janet Reno, No. 96-963 (E.D. Pa. filed Feb. 8, 1996).

304. Memorandum Opinion, ACLU v. Janet Reno, No. 96-963 (E.D. Pa. issued Feb. 15, 1996) <http://www.eff.org/pub/Legal/Cases/EFF_ACLU_v_DoJ/buckwalter_cda_021596.decision>. Buckwalter went on to say that, regarding the word "indecent": "[i]t is a substantial question because this word alone is the basis for a criminal felony prosecution." *Id.*

305. *Id.*

306. *See* Miller, *supra* note 15.

307. *See ACLU Case*, 929 F. Supp. at 824. Note that the original *ACLU* case (No. 96-963) was joined with another case (No. 96-1458) that was represented by a group of plaintiffs calling itself the Citizens Internet Empowerment Coalition. This second action was filed on February 26, 1996 and was joined shortly thereafter. *See CDA Challengers Educate Jurists on Unique Qualities of On-Line Medium*, 1 Elec. Info. Pol'y & L. Rep. (BNA) 6 (Apr. 12, 1996).

308. 929 F. Supp. at 882 (Dalzell, J., concurring); *cf.* Butler v. Michigan, 352 U.S. 380, 383 (1957).

309. 929 F. Supp. at 883 (Dalzell, J., concurring).

strated that the Act was "narrowly tailored."[310] Moreover, the government asserted that the CDA could be enforceable through a "tagging" scheme that would label all materials available on the Internet. However, Chief Judge Dolores Sloviter (sitting in from the Third Circuit) blasted the CDA as failing to be narrowly tailored for three major reasons: (1) the CDA used *criminal* penalties; (2) the good faith defenses offered under the CDA were not yet technologically feasible; and (3) the terms "indecent" and "patently offensive" were inherently vague.[311]

Moreover, Chief Judge Sloviter also stated that the Internet was not comparable to the radio broadcasts at issue in *Pacifica*. Rather, more like telephone dial-a-porn from the *Sable* case, "an Internet user must act affirmatively and deliberately to retrieve specific information online."[312] Accordingly, Judge Dalzell concluded that the "few clicks" of a mouse necessary to access sexually-explicit material were of "immense legal significance."[313]

Ultimately, though, the outcome of the *ACLU* case will rest in the hands of the U.S. Supreme Court.[314] Although the strong wording of the separate district court opinions seems to leave open little room for upholding the CDA, the Court still could easily conclude that the age access restrictions imposed by the CDA are sufficient to narrowly tailor the act, and not to create a total ban in violation of *Sable*. However, barring such a drastic reversal of judicial opinion, Congress will either have to redraft the CDA, or scrap its content-based regulation entirely. All things considered, the continued pursuit of alternatives to regulation is perhaps the most appropriate step at this point.

310. *ACLU*, 929 F. Supp. at 829-830. *See* Rose Aquilar, *It's Decision Time on Net Free Speech*, C|NET NEWS (May 10, 1996) <http://www.cnet.com/Content/News/Files/0,16,1303,00.html>.

311. *ACLU*, 929 F. Supp. at 855-857 (Sloviter, C.J.).

312. *Id.* at 851-852.

313. *Id.* at 876 (Dalzell, J., concurring).

314. *See* 47 U.S.C. § 561 (1996).

VI. ALTERNATIVES TO FEDERAL REGULATION

> Governments of the industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.[315]

A. Non-Governmental Efforts to Reduce Obscenity and Indecency on the Internet

Although the CDA may be unconstitutional in its regulation of on-line indecency, there is no denying that there are still large quantities of obscene and indecent material currently on the Internet. The solution to this problem, however, does not need to come in the form of additional government regulation.[316]

Indeed, it appears that the marketplace might offer the most promising solutions for American families to protect their children from objectionable material. Currently, there are several Internet screening products such as "SurfWatch" and "NetNanny" which attempt to block out areas of the Internet that contain objectionable material.[317] SurfWatch software, for example, costs around $50, with an additional $6 charge for monthly upgrades. In addition, Jostens Learning Corp. has marketed a similar product called Advantage Worldware available for use in schools.[318] Indeed, the future need for more and improved versions of such products has become readily apparent.

Industry groups have also taken the initiative to give Internet users choices for controlling on-line content. The World Wide Web Consortium (a cooperative effort between MIT, America Online, AT&T, CompuServe, IBM, Microsoft, Netscape, and Prodigy) has been developing technical standards to allow for the universal label-

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315. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, e-mail distribution (Feb. 8, 1996).

316. Indeed, according to FTC Commissioner Christine Varney, "You don't want to regulate this new frontier before giving it a chance to live and flourish." Christine Varney, *quoted in* Catherine Yang, *How Do You Police Cyberspace?*, BUS. WK., Feb. 5, 1996, at 97.

317. A handful of products that screen out unwanted words, files, and on-line locations were introduced last year including: *SurfWatch, Internet in a Box for Kids, Net Nanny, CYBERsitter*, and *Crossing Guard. See In the Porn Fight, Parents Are First, Best Defense*, USA TODAY, Dec. 7, 1995, at 10A; Leslie Miller, *Products Shield Kids from Adult Material On-Line*, USA TODAY, June 27, 1995, at D1.

318. *See* Reid Kanaley, *Internet Sex Due for Cold Shower?*, RECORD, Apr. 3, 1995, at A1.

ing and blocking of Net content. These standards called PICS (Platform for Internet Content Selection) were expected to go into widespread use sometime in 1996.[319]

Finally, given the decentralized and often anarchic nature of the Net, one should not discount the extralegal forms of regulation available to on-line users. For instance, there is now an on-line version of the Guardian Angels, called the *Cyber Angels*, whose mission is to patrol the Internet for any criminal or offensive behavior (and also to respond to requests for help).[320] If possible, these computer vigilantes pass on the identity of offenders to either an on-line provider or, in more serious cases, to the police.[321]

B. Strength of the Status Quo

A recurring theme of this article has been the strength of existing laws in controlling problems such as child pornography and obscenity regardless of their medium of distribution.[322] In fact, the Department of Justice was originally opposed to the CDA because it believed the legislation would "significantly thwart enforcement of existing laws regarding obscenity and child pornography [and] create several ways for distributors and packagers of obscenity and child pornography to avoid criminal liability."[323]

Indeed, with the success of recent FBI operations such as Operation Innocent Images and Operation Cyberstrike, it does not appear that the enforcement authorities are calling for more laws to assist them with Internet arrests. In fact, it appears that the CDA may have been more a product of political posturing than of genuine legislative need. Granted, in an election year, a bill that posited itself as a champion against child pornography was perhaps a political no-brainer for those congresspersons in office who were seeking reelection.[324]

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319. *See* Mike Snider, *Coding System to Label Content Almost Done*, USA TODAY, Feb. 14, 1996, at 7D.

320. *See* Rachel Sylvester, *Vigilantes Keep Cyberspace Safe from Criminals*, SUNDAY TELEGRAPH, Nov. 5, 1995, at 21.

321. *See id.*

322. *See supra* notes 149-152, 295 and accompanying text.

323. U.S. DEP'T OF JUSTICE, May 3, 1995 letter to Senator Patrick Leahy (D-Vt.), *quoted in* Charles Levendosky, *Parental Guidance Suggested: Congressional Efforts to Legislate Cyberspace Will Create a Decency Monster—and It's Coming After You*, SUN-SENTINEL (Fort Lauderdale), Aug. 6, 1995, at 1G.

324. *See* Nat Hentoff, *The Attempt to Censor a "Worldwide Conversation,"* WASH. POST, July 6, 1996, at A23 ("[Sen. Patrick Leahy (D-Vt.)] added that although some knew the act was unconstitutional, they had voted for it anyway, and 'a couple already have told me they were

At the very least, though, if additional federal regulation appears to be the only palatable option for the American public, proposals such as Rep. Rick White's prohibition against materials "harmful to minors"[325] would be far more workable, and constitutional, than the Communications Decency Act in the form that it was passed. Pending a final decision in the *ACLU* case, Congress may want to reconsider this *harmful to minors* option.

C. A Final Caution

Ultimately, the new digital technologies have spawned a host of complex ethical and legal considerations regarding the pornographic materials that have accompanied their emergence. The recent passage of the CDA was only an attempt to deal with the deployment of these materials in the on-line world. In this increasingly Digital Age, with its myriad of technological and entertainment — oriented applications, we must carefully work through the diverse ramifications of our regulatory actions on the wide — reaching technological landscape. Otherwise, we as a nation can expect the problems and legal issues that will naturally arise regarding these new technologies to be needlessly compounded in the decades to come. Indeed, with the promise of digital decades ahead of us, Congress should not take steps at this critical juncture to chill the ink and to bend the delicate machinery of what is rightfully conceded to be our next printing press.[326]

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relieved that the courts [did the right thing]."); Lucy Howard & Carla Koehl, *Netting a Victory*, NEWSWEEK, June 24, 1996, at 4 (terming the congressional voting phenomenon as a "moral bandwagon").

325. Berkman, *supra* note 278.

326. *See* Exon, *supra* note 71, at 11 ("We are in the infancy of an exciting new era. The information superhighway is certain to be the greatest boon to the dissemination of information since the printing press. We should thoughtfully and constitutionally reason together to address the well-documented, serious problems with this technology.").