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Reno v. ACLU: Champion of Free Speech or Blueprint for Speech Regulation on the Internet?

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RENO v. ACLU:* CHAMPION OF FREE SPEECH OR BLUEPRINT FOR SPEECH REGULATION ON THE INTERNET?

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INTRODUCTION

The Internet,[1] in its currently unregulated state, is an electronic Wild West—the new cyberfrontier—where netizens should beware of the dangers encountered on their cybertravels. Some argue that the clearest danger in this electronic frontier is a child's access to hardcore pornography.[2] Websites with explicit pornographic

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* 117 S. Ct. 2329 (1997).

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[1] *See* Ian C. Ballon, *Intellectual Property Protection and Related Third Party Liability*, 482 PLI/PAT 559, 565 (1997) ("the Internet connects over four million individual 'servers,' or host computers, around the world. Each server is linked to and accessible from any other point on the Internet over a matrix of more than 40,000 interconnected networks."); Lisa O. Laky & Thomas H. Watkins, *Internet Issues For Lawyers*, 507 PLI/PAT 827, 830 (1998) (stating broadly that "[t]he Internet, also called the world wide web, is a collection of computers connected by telephone lines"). *See also infra* Part III.A, discussing the Supreme Court's version of the history of the Internet as gleaned from the district court's opinion in ACLU v. Reno, 929 F. Supp. 824, 830-849 (E.D. Pa. 1996).

[2] *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, 1853 (1995) (citing a 1994 study at Carnegie Mellon University, covering a period of four months during which all available pornographic material from five popular Electronic Bulletin Boards was downloaded and discovered to comprise over one million

material are therefore the high-tech equivalents of the brothels in frontier towns.

Congress is fully aware that the Internet is a medium ripe for content regulation,[3] and provisions of the Communications Decency Act[4] ("CDA") have sought specifically to target individuals who receive and disseminate cyberporn.[5] Moreover, the United States Supreme Court has designated the protection of children from pornography as a compelling governmental interest.[6] Nonetheless, the Supreme Court in *Reno v. ACLU*[7] struck down provisions of the CDA which sought to regulate pornographic

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files that had been downloaded over eight million times). Mr. Rimm points out that pornographers have always been the first to exploit the commercial potential of new technologies—from the advent of the printing press, to VCRs, and now on the Internet. *Id.* at 1909. *But see* Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1974 (1995) (advocating that the Internet is an ideal medium for young people to engage in a discourse on sexuality and pornography).

[3] *See* Daniel Pearl, *On-Line: Government Tackles a Surge of Smut on the Internet*, WALL ST. J., Feb. 8, 1995, at B1 (stating that the general response of both Congress and the White House to the ubiquitous nature of pornography on the Internet has been to call for regulation).

[4] 47 U.S.C. § 223(a), (d), (f) (1996).

[5] *See infra* Part II.B, analyzing the statutory language criminalizing the knowing dissemination of all indecent and obscene material over the Internet to individuals under eighteen years of age.

[6] Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (stating that "there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards."); *see also* New York v. Ferber, 458 U.S. 747, 756 (1982) (stating that "we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights"); FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (upholding an FCC regulation limiting the hours of broadcast of an indecent comic monologue because it advanced the government's interest in the "well-being of its youth"). Accordingly, the Supreme Court has held that the state can prohibit the distribution of sexually explicit material to children, even though the material could be distributed to adults. Ginsberg v. New York, 390 U.S. 629, 639 (1968) (noting that the "well-being of its children is of course a subject within the State's constitutional power to regulate, . . . [including] the availability of sex materials to minors").

[7] 117 S. Ct. 2329 (1997).

material on the Internet.[8] The day after the *Reno* decision, the *Wall Street Journal*, quoting a free speech advocate, proclaimed that "the Supreme Court has written the First Amendment for the 21st century."[9] This Comment argues that *Reno* is not the manifesto on Internet free speech that commentators have suggested. Instead, the *Reno* decision presents Congress with the framework to draft new legislation which, if upheld, will result in significant constraints on the freedom to disseminate material on the Internet. In fact, this new legislation may censor material currently protected by the First Amendment.[10]

The *Reno* decision is premised on two competing governmental interests: protecting children from the harmful effects of exposure to sexually explicit material,[11] and ensuring adult access to protected material under the First Amendment.[12] However, to

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[8] 47 U.S.C. § 223(a), (d), (f). Though the question of what content Congress intended to regulate was at issue in both the lower court opinion and in Justice Stevens' majority opinion in *Reno*, the government argued that the statute's scope was limited to content providers of commercial pornography. *See* ACLU v. Reno, 929 F. Supp. 824, 854 (E.D. Pa. 1996), *aff'd* 117 S. Ct. 2329 (1997); *see also Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action, Hearing on S. 892 Before the Senate Comm. on the Judiciary*, 104th Cong. 7-8 (1995).

[9] Edward Felsenthal & Jared Sandberg, *High Court Strikes Down Internet Smut Law*, WALL ST. J., June 27, 1997, at B1 (quoting Jerry Berman, the executive director of the Center for Democracy and Technology). The *International Herald Tribune* added that "the line drawn by the court protecting adults' access to information would appear to make a new approach to Internet policing technically difficult." Brian Knowlton, *Justices Void Internet Indecency Law: Curb Violates Free Speech, Supreme Court Rules, 7-2*, INT'L HERALD TRIB., June 27, 1997, at 1. *See also* 143 CONG. REC. S6557-02 (1997) (statement of Sen. Feingold) (stating "Mr. President, this decision is a victory not only for Internet users, it is a victory for all Americans who hold the first amendment right to free speech among their most cherished rights").

[10] *See infra* Part IV, discussing the newly enacted Child Online Protection Act which prohibits the dissemination of material on the Internet on the basis that it is harmful to minors, whether or not adults may have a First Amendment right to access this material.

[11] *See supra* note 6 (noting the compelling state interest in preserving the emotional and psychological health of children).

[12] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). *See, e.g.*, Sable Communications v. FCC, 492 U.S. 115,

understand the Supreme Court's reasoning in *Reno*, it is necessary to distinguish between speech that currently enjoys First Amendment protection[13] and speech that is not afforded constitutional protection.[14] Part I illustrates this distinction with a survey of First Amendment law in the area of obscene and indecent speech. This survey discusses the regulation of speech that is not protected by the First Amendment by analyzing the legal standard of obscenity articulated in *Miller v. California*.[15] Additionally, Part I discusses Supreme Court decisions that have defined constitutionally protected indecent speech. This juxtaposition will demonstrate the absence of a bright line distinction between protected and unprotected speech, and thus the inherent difficulty of imposing these standards on the Internet. Finally, Part I examines the Supreme Court's attempt to balance the government's interest in regulating indecent speech with an adult's First Amendment right of unobstructed access to this speech.

Part II of this Comment reviews the legislative history of the CDA and analyzes those sections of the CDA that the Supreme Court found unconstitutional.[16] Part III discusses the Supreme Court's analysis in *Reno*, including a review of the procedural posture of the case from the district court to the Supreme Court. This discussion of the *Reno* opinion addresses the Supreme Court's characterization of the Internet,[17] the presentation of the

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125 (1989) (quoting Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976)) (stating that "[t]he government may serve this legitimate interest [of protecting children], but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms'"); Butler v. Michigan, 352 U.S. 380, 383-84 (1957) (striking down a city ordinance which banned the sale of pornographic material on the basis that, although the material was unsuitable for children [seventeen and under], an adult's access to it should not be restricted).

[13] *See infra* Part I.B, discussing indecent speech which, though unsuitable for minors, is lawfully accessible to adults.

[14] *See infra* Part I.A, discussing obscene speech that is not protected by the First Amendment.

[15] 413 U.S. 15 (1973) (providing a three-part test for defining obscenity).

[16] *Reno*, 117 S. Ct. at 2347 (striking down 47 U.S.C. § 223(a), (d) as unconstitutional).

[17] *See infra* Part III.A.

government's argument,[18] and the Supreme Court's reasoning for striking down the amendments to the CDA.[19]

Part IV argues that *Reno* effectively invites Congress to draft legislation more narrowly tailored to a state's interest in protecting children from exposure to pornography on the Internet. In support of this proposition, this Comment discusses two bills considered by Congress in the aftermath of *Reno* that led to the recent enactment of the Child Online Protection Act.[20] This new statute amends the Internet provisions of the CDA yet again, and serves as definitive proof that *Reno,* the presumed champion of free speech on the Internet, opens rather than closes the door to regulation on the Internet. Moreover, this Comment asserts that the Supreme Court's application of strict scrutiny, as articulated by Justice Stevens in *Reno*,[21] would not be fatal to a new and improved CDA.[22] Substantial regulation of the Internet is imminent and, in addition to censoring obscene speech that is not afforded constitutional protection, could arguably censor speech currently protected by the First Amendment.

I. SPEECH CURRENTLY PROTECTED UNDER THE FIRST AMENDMENT

The present legal standards of obscenity have evolved dramatically over the past few decades.[23] This area of First Amendment

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[18] *See infra* Part III.B.

[19] *See infra* Part III.C.

[20] The first bill, S1482, 105 Cong. (1997), was proposed by Senator Coates. The second bill, H.R. 3783, 105 Cong. (1998), was proposed by Senator Oxley, and was enacted into law as the Child Online Protection Act.

[21] *Reno*, 117 S. Ct. at 2346. Justice Stevens articulated the Court's strict scrutiny analysis by stating that "[the] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Id.*

[22] *See, e.g.*, Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balance*, 1997 SUP. CT. REV. 141, 142 (stating that "[t]he strict scrutiny framework that [*Reno*] applies ultimately underprotects speech").

[23] A number of scholars have documented the evolution of obscenity standards within First Amendment law in recent years. *See, e.g.*, FREDERICK SCHAUER, THE LAW OF OBSCENITY; Louis Henkin, *Morals and the Constitution:*

law has proven problematic and the Supreme Court has struggled to distinguish indecent speech which is afforded constitutional protection from obscene speech which receives no such protection.

A. Obscene Speech: Outside the First Amendment

In *Miller v. California*, the Supreme Court provided a three-part test to define obscene speech that remains a pivotal decision in the evolution of obscenity law.[24] The *Miller* three-part test considers

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The Sin of Obscenity, 63 COLUM. L. REV. 391 (1963); Harry Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1 (discussing, *inter alia,* the evils against which obscenity legislation historically has been directed). This Comment's discussion of the legal standard of obscenity is by no means exhaustive and is intended only to touch key doctrinal elements.

[24] 413 U.S. 15, 16 (1973) (affirming a conviction for mailing unsolicited sexually explicit material in violation of a California statute which made it a misdemeanor to knowingly distribute obscene material). Well into the twentieth century, the Supreme Court applied the obscenity standard of a nineteenth century English case, *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868). The standard used in *Hicklin* in defining obscene speech was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences." 3 L.R.-Q.B. at 361. The most glaring problem with this standard was its emphasis on the effect of the obscene material on a person susceptible to its influence rather than the effect on a reasonable person. *Id.* Furthermore, the material under scrutiny was not judged as a whole, only the part with a tendency to corrupt. *Id.* In *Roth v. United States*, the Supreme Court rejected the *Hicklin* test on the basis that if a work was to be judged simply on the effect of isolated passages on the most susceptible of individuals, certain works would be suppressed which, when viewed as a whole, should be given First Amendment protection. 354 U.S. 476, 489 (1957). In *Roth,* the defendant was convicted under a federal statute that prohibited the distribution of obscene material. *Id.* at 480. The defendant, quoting the famous words of Justice Holmes, argued that the First Amendment protected all speech except that which presented a "clear and present danger" to society. *Id.* at 486 (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)). The defendant contended that the clear and present danger test applied to political speech that incited violence, but that obscene speech elicited no such violent reaction. *Id.* at 485-86. Rather than address the issue of how obscenity might pose a danger to society, the Court held that obscenity was not within the scope of constitutionally protected speech. *Id.* at 485. The holding also conveniently allowed the Court to avoid applying a constitutional test designed for political speech in the area of obscenity law. *Id.* at 484. The Court found that the speech at issue in *Roth* was "of such slight

whether the dominant appeal of the obscene matter[25] as a whole is to the "prurient interest" based on a community standard; whether the work depicts sexual conduct in a "patently offensive" way; and whether the work, taken as a whole, lacks "serious literary, artistic, political, or scientific value."[26] Using this test, the Supreme Court, citing *United States v. Roth*,[27] reaffirmed the proposition that obscene speech is not afforded First Amendment protection.[28]

The *Miller* test is problematic, however, because the adoption of the community standard allows each state to create its own definition of obscenity consistent with the mores of that community. This approach creates the potential for inconsistent judicial outcomes as a result of varying community standards.[29] The danger of inconsistent outcomes is potentially more acute on the Internet because the individual sending information cannot control

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social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality." *Id.* at 484-85 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Further, the Court defined obscenity as material that dealt with sex in a way that appealed to "prurient interest." *Id.* at 487.

Conspicuously absent from Justice Brennan's analysis in *Roth* was a discussion of how obscenity effectively threatened the social order. *Id.* at 484 (stating that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" without articulating how obscenity effectively posed a threat to society). Justice Brennan may have been hinting that dissemination of pornographic material led to moral decay, or that a causal link existed between obscene material and anti-social behavior. There is little support in the *Roth* opinion, however, for the proposition that obscenity was socially harmful.

[25] The California statute at issue in *Miller*, Cal. Penal Code § 311 (b), defined matter as "any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation." 413 U.S. at 16.

[26] *Miller*, 413 U.S. at 24.

[27] 354 U.S. 476, 484 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press"). *See supra* note 24 (discussing the holding in *Roth*).

[28] *Miller*, 413 U.S. at 28.

[29] *See* United States v. Thomas, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996) (husband and wife residing in California convicted by a Tennessee jury of transporting obscene images via the Internet).

the jurisdiction in which the material will be received.[30] This situation may arise when an individual disseminating pornographic material on the Internet is not committing a criminal act in his state, provided that the community standards in that state are relatively liberal, yet is simultaneously committing a criminal act in a sister state with a more conservative obscenity standard, where the material was downloaded.[31]

A recent decision in the United States Court of Appeals for the Sixth Circuit, *United States v. Thomas*,[32] clearly illustrates the problem of inconsistent definitions of community standards of obscenity. In *Thomas*, a husband and wife residing in California operated the "Amateur Action Computer Bulletin Board," which contained sexually explicit photographs.[33] The couple was convicted by a Tennessee jury of transporting obscene computer generated material in interstate commerce, after a Tennessee resident downloaded these materials on his home computer.[34] The Thomases were each sentenced to over two and a half years in prison.[35] The convictions were affirmed by the Sixth Circuit on the grounds that the more conservative Tennessee community standard was applicable because a Tennessee citizen downloaded the material which led to the conviction.[36] The circuit court

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[30] *See, e.g.*, Erik G. Swenson, *Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of* United States v. Thomas, 82 MINN. L. REV. 855, 859 (1998). Swenson states:

> One of the fastest growing areas on the Internet involves newsgroups and bulletin boards specializing in pornography . . . . Internet users from around the world can post pornographic material to bulletin boards, while other users can view and selectively download this material instantaneously without the bulletin board operator knowing who is accessing the board or where the user is located. Indeed, even if they wanted to, bulletin board operators could not selectively block out users from accessing the bulletin boards.

Id. at 860 (footnotes omitted).

[31] *Id.* at 874-75.

[32] 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996).

[33] *Id.* at 705.

[34] *Id.* at 705-06.

[35] *Id.* at 706.

[36] *Id.* at 710-711.

reasoned that as a result of this single citizen's access, the entire Tennessee community was potentially affected by the pornographic material.[37] The Court affirmed the conviction, even though the Thomases arguably would not have been convicted under the more liberal community standard in California.[38]

B. Indecent Speech: Inside the First Amendment

In *United States v. Roth*, the Supreme Court made clear that obscene speech is afforded no constitutional protection.[39] However, although the *Miller* three-part test attempts to provide a narrower definition of obscenity,[40] there still exists a class of speech that is near obscene, yet is nonetheless given protection under the First Amendment.[41] This indecent speech, as defined by the Supreme Court, encompasses more speech than obscenity.[42] Indecent speech, unlike obscenity, has been characterized by Supreme Court as not totally devoid of "social, literary, artistic, political or scientific value."[43] The elusiveness of a precise

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[37] *Id.*

[38] *Id. See also* Swenson, *supra* note 30, at 873 (arguing that the *Thomas* court erred in concluding that the more strict Tennessee standard was applicable to the defendants who were California residents because the Thomases had "the means to limit access in jurisdictions where obscenity standards were lower than in California").

[39] Roth v. United States, 354 U.S. 476, 489 (1957) (holding that a federal obscenity statute "did not offend constitutional safeguards"). *See supra* note 24 (discussing the *Roth* holding).

[40] *Miller*, 413 U.S. at 24. *See supra* Part I.A, discussing the *Miller* three-part test for obscenity.

[41] *See supra* note 6 (noting that indecent material may be harmful to minors but appropriate for adults).

[42] FCC v. Pacifica Found., 438 U.S. 726, 747 (1978) (holding that indecent speech is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality") (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[43] *Miller*, 413 U.S. at 25 (stating that "[a]t a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection"). Moreover, Justice Powell in *Pacifica* stated that "I do not subscribe to the theory that Justices of this Court are free generally to decide . . . which speech protected

definition of indecent speech has hindered the resolution of the clash between the First Amendment right of an adult to access indecent material and the compelling governmental interest of shielding children from this material.[44]

Justice Stevens' opinion in *FCC v. Pacifica Foundation*[45] defined indecent speech as a category of speech that might, or might not, be protected by the First Amendment depending on its context.[46] The *Pacifica* Court accepted the FCC's definition of indecency as material "that describes, in terms patently offensive as measured by contemporary community standards . . . sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience."[47] Based on *Pacifica,* indecency is therefore inextricably linked to its context.[48] Material that would be considered indecent if it were broadcast over the radio in mid-afternoon, when children could easily gain access to it,[49] would not be indecent if broadcast late at night,

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by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." 438 U.S. at 761 (Powell, J., concurring).

[44] *See* Volokh, *supra* note 22, at 167. Professor Volokh articulates the conflict in the following way:

> In most free speech controversies the question is about trade-offs. How much free speech should we be willing to sacrifice in order to shield children, or to achieve any other government interest? Conversely, how much shielding of children—or how much of any other important value—must we sacrifice in order to protect free speech? Behind every framework for scrutiny of speech regulations lurks a judgment about the trade-offs that must be paid.

Id.

[45] 438 U.S. 726 (1978).

[46] *Id.* at 747-48.

[47] *Id.* at 732.

[48] *Id.* at 748. Justice Stevens illustrated this point when he stated the simple axiom that "[w]ords that are commonplace in one setting are shocking in another." *Id.* at 747.

[49] *Id.* The major concern for Justice Stevens in *Pacifica* was that the speech in question, a monologue by the comedian George Carlin, was broadcast in the middle of the day when any child could listen. *Id.* at 750. The relative ease with which a child could access the indecent material was central to Justice Stevens' willingness to allow the FCC regulation. *Id.*

when the likelihood of exposure to children is greatly diminished.[50] However, even with the contextual approach to indecency, as enunciated in *Pacifica*, the potential for regulatory encroachment of protected speech exists because the government must continually balance the competing interests of child protection and First Amendment protection.

C. *Suppression of Protected Speech and the Government's Regulatory Interest*

To justify regulation of indecent speech, federal and state governments have traditionally voiced the compelling interests of protecting children from the harmful effects of indecent material, and supporting parents in their efforts to protect children from exposure to this material.[51] The Supreme Court has generally rejected these interests if the result has been to prohibit adult access to indecent material.[52]

In *Butler v. Michigan*, for example, the Supreme Court struck down a Michigan ordinance banning the sale of pornographic material which was "found to have a potentially deleterious influence on youth."[53] The Supreme Court ruled that the effect of the ordinance was to "reduce the adult population of Michigan to reading only what is fit for children."[54] The *Butler* Court held that legislation effectively prohibiting access to adults was per se unconstitutional irrespective of the governmental interest asserted.[55]

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[50] *Id.*

[51] *See* Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (recognizing the "compelling interest in protecting the physical and psychological well-being of minors"); Ginsburg v. New York, 390 U.S. 629, 639 (1968) (stating that "parents . . . who have this primary responsibility for children's well-being are entitled to the support of the laws designed to aid discharge of that responsibility").

[52] *See, e.g.*, Butler v. Michigan, 352 U.S. 380, 383 (1957).

[53] *Id.*

[54] *Id.* (stating that the result of the ordinance "is to burn the house to roast the pig").

[55] *Id.* (holding that a law is unconstitutional if the "legislation [is] not reasonably restricted to the evil with which it is said to deal").

Though a complete ban on indecent speech is unconstitutional, the Supreme Court has on several occasions upheld laws regulating indecent material.[56] For example, in *Young v. American Mini Theatres, Inc.*,[57] the Supreme Court upheld an adult theater zoning ordinance on the grounds that the ordinance only regulated locations where adult films could be shown, and did not ban films entirely.[58] The Court reasoned that the ordinance was not content-based[59] and should not be subjected to strict scrutiny.[60] The government argued in *Reno* that the CDA was essentially a zoning regulation for the Internet and should be upheld just as in *Young*—an argument that the Supreme Court found unavailing.

In *Sable Communications v. FCC*,[61] the Court examined the potential conflict between the government's compelling interest in protecting children from harm due to exposure to indecent material and the First Amendment protection that is afforded this material.[62] The *Sable* Court struck down a predecessor of the CDA which banned indecent as well as obscene interstate commercial telephone messages.[63] Specifically in *Sable,* the effect of the

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[56] *See* FCC v. Pacifica Found., 438 U.S. 726, 747 (1978) (upholding an FCC regulation limiting the hours of broadcast of an indecent comic monologue); Ginsberg v. New York, 390 U.S. 629, 631 (1968) (upholding a New York statute prohibiting the sale to minors of "girlie" magazines).

[57] Young v. American Mini Theatres, 427 U.S. 50, 58 (1976) (upholding the constitutionality of a Detroit ordinance which sought to regulate in which areas of the city, and at what proximity to each other, adult theaters and adult bookstores could be situated).

[58] *Young*, 427 U.S. at 71.

[59] *Id.* Content-based legislation has the effect of regulating a class of speech that otherwise would be afforded First Amendment protection, based on the content of that speech. *Id.* Content-based regulation is subject to strict scrutiny and is presumed to be constitutionally suspect. *Id.* In Justice Stevens' opinion, the ordinance was not content based and thus not subject to strict scrutiny. *Id. Cf.* United States v. O'Brien, 391 U.S. 367, 377 (1969) (maintaining only an intermediate level of scrutiny when a regulation was "unrelated to the suppression of free expression").

[60] *Young*, 427 U.S. at 70.

[61] 492 U.S. 115, 126 (1989).

[62] *Id.* at 126.

[63] *Id.* at 115 (striking down 47 U.S.C. § 223(b), amending the Communications Act of 1934).

Federal statute was to ban sexually explicit "Dial-a-Porn"[64] messages that telephone callers could dial into and receive.[65] Though the Court recognized the compelling interest of shielding children from these messages,[66] it also recognized that exposure to children was greatly diminished by the active steps necessary to gain access to the pornographic messages.[67] The Court therefore determined that constitutionally protected speech could be regulated to promote a compelling governmental interest if no less restrictive means existed.[68] Unlike the scenario in *Pacifica,* where an innocent child need only turn on a radio to hear the indecent speech, "Dial-a-Porn" access required a willing audience to take active steps by dialing into the message service.[69] What appeared determinative in the *Sable* Court's decision to strike down the federal statute was the Government's inability to adequately demonstrate that children were actually harmed by "Dial-a-Porn" messages.[70] The Supreme Court concluded that "the Government may serve this legitimate interest [of protecting the psychological well being of children], but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.'"[71]

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[64] *Id.* at 117-118 (explaining that "Dial-a-Porn" is a commercial service that offers sexually oriented prerecorded telephone messages from special telephone lines that can accommodate high volume calls).

[65] *Id.*

[66] *Id.*

[67] *Sable*, 492 U.S. at 128.

[68] *Id.* (citing New York v. Ferber, 458 U.S. 747, 756-57 (1982); Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).

[69] *Id.*

[70] *Id.* at 129-30. The *Sable* Court noted:

> There is no doubt that Congress enacted a total ban on both obscene and indecent telephone communications. But aside from conclusory statements during the debates by proponents of the bill . . . the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be.

Id.

[71] *Id.* (citations omitted).

II. THE COMMUNICATIONS DECENCY ACT OF 1996

In *Sable*, the Supreme Court grappled with both the constitutional implications of banning indecent material over commercial telephone lines,[72] and the inherent conflict between protecting children from harmful material and protecting the First Amendment.[73] The conflict articulated in *Sable* reappeared when the Supreme Court was asked to rule on the constitutionality of provisions of the Communications Decency Act of 1996.[74]

A. Legislative Background

On February 8, 1996, President Clinton signed into law the Communications Decency Act of 1996,[75] comprising Title V of the Telecommunications Act of 1996,[76] and amending the Communications Act of 1934.[77] The provisions of the CDA that were specifically intended to regulate content on the Internet were approved by the Senate in the summer of 1995.[78] These provisions were referred to as the "Exon-White Amendments" or the "Exon

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[72] *Id.* at 115.

[73] *Id.* at 129-130.

[74] *See infra* Part II.B, discussing the *Reno* Court's analysis of the CDA provisions under scrutiny.

[75] 47 U.S.C. § 223 (1996). *See* Tracy Moorefield, *Legal Update: Communications Decency Act of 1996*, 3 B.U. J. SCI. & TECH. L. 13 (1997) (discussing the CDA in light of various District Court cases which challenged the statute, including *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996)). *See also* Elaine M. Spiliopoulos, *Legislative Update: The Communications Decency Act of 1996*, 7 J. ART & ENT. L. 336, 347 (1997) (discussing the constitutional implications of the CDA).

[76] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified is scattered sections of 15 U.S.C., 18 U.S.C., and 47 U.S.C.).

[77] Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.).

[78] 47 U.S.C. § 223(a), (d), (e). Spiliopoulos, *supra* note 75, at 347 (stating that the general scope of the CDA "restricts certain communications over computer networks by subjecting violators to criminal penalties and fines"). The provisions at issue in *Reno* were passed by a vote of 84 to 16. Spiliopoulos, *supra* note 75, at 346.

Decency Act," named after the authors of the amendments.[79] Senator Exon's statement to the House of Representatives in June of 1995 expressed the general tenor of the proposed amendments: "we should properly address . . . the matter of trying to clean up the Internet—or the information superhighway, as it is frequently called—to make the superhighway a safe place for our children and our families to travel on."[80] From the perspective of Senator Exon, who drafted some of the language of the statute, the CDA was intended to cleanse the Internet of speech that arguably had no First Amendment protection.[81]

Senator Patrick Leahy[82] strongly opposed the Exon amendments and proposed the Child Protection, User Empowerment and Free Expression in Interactive Media Study Act as a rival amendment to the CDA.[83] Senator Leahy's fear was that, rather than

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[79] 142 CONG. REC. S3146-02 (daily ed. March 28, 1996) (statement of Sen. Exon) (stating "[i]n my nearly 18 years in the Senate, I have won passage of many pieces of legislation dealing with the most important issues of the day including bills affecting national security, law enforcement, transportation, safety and deficit reduction. No bill that I have worked on has had as much attention, discussion or debate as the Communications Decency Act"). Senator James Exon, at the time the CDA was voted into law, was the Democratic Senator from Nebraska. Senator White is the Republican Senator from Washington State. *See generally, Thomas: Legislative Information on the Internet* (visited Nov. 29, 1998) <http://thomas.loc.gov/home/thomas2.html>.

[80] 141 CONG. REC. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon).

[81] *Id.* at S8090. Senator Exon insisted that commercial pornography was the target of his amendments:

> Let me emphasize once again what I am trying to do, Mr. President, is to stop these [pornographers] over here essentially from using teasers, not unlike coming attractions that we see when we go to the movies . . . . What they do is take the best and most enticing pictures of whatever they want to sell . . . and they enter it over here on the Internet . . . those are the pictures, those are the articles that are freely, without charge, accessible to the very young children and to anyone else who wants to see them.

Id.

[82] Senator Leahy is a Democrat from Vermont. *See generally Thomas: Legislative Information on the Internet* (visited Nov. 29, 1998) <http://thomas.loc.gov/home/thomas2.html>.

[83] 141 CONG. REC. S-8395-96 (daily ed. June 14, 1995) (statement of Sen. Leahy). Vikas Arora, Note, *The Communications Decency Act: Congressional*

deter commercial pornographers and private purveyors of indecent content, the CDA would "chill free speech and the free flow of information over the Internet and computer networks."[84] Senator Leahy's concern about the chilling effect of the CDA would become a theme of the Supreme Court's analysis in *Reno*.

B. The CDA Provisions Under Scrutiny

The Supreme Court in *Reno* focused on three sections of the CDA.[85] These sections were characterized respectively as the provision to regulate indecent or obscene material on the Internet, the provision to regulate patently offensive material on the Internet, and the affirmative defenses that are available to avoid liability.[86]

The first provision, 47 U.S.C. § 223(a), imposed criminal sanctions on a person who:

> (1) in interstate or foreign communications . . . (A) by means of a communications device knowingly . . . (i) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communications which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age . . . (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity . . . .[87]

The second provision, 47 U.S.C. § 223(d), further imposed criminal sanctions on a person who:

Repudiation of the "Right Stuff," 34 HARV. J. ON LEGIS. 473, 481-82 (1997) (describing proposed bill requiring a study to be done by the Justice Department to look into the necessity of legislation to regulate pornography on the Internet in light of penal laws that prohibited the dissemination of obscene material and child pornography).

[84] 141 CONG. REC. S4841-01 (daily ed. March 30, 1995) (statement of Sen. Leahy).

[85] Reno v. ACLU, 117 S. Ct. 2329, 2338-39 (1997) (ruling on the constitutionality of 47 U.S.C. § 223(a), (d), (e)(1996)).

[86] *Id.*

[87] The Telecommunications Act of 1996, 47 U.S.C. § 223(a) (1996).

> (1) in interstate or foreign communications knowingly . . .
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or . . .
> (B) to display . . . any comment, request, suggestion, proposal, image . . . 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 . . . .[88]

Finally, 47 U.S.C. § 223(e) provided that it would be a defense against prosecution under the statute if a person:

> (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or
> (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.[89]

A cursory reading of these provisions exposes the potential danger of vagueness and overbreadth in the statute.[90] For example,

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[88] *Id.* § 223(d).

[89] *Id.* § 223(e).

[90] A law is void for overbreadth if it "does not aim specifically at evils within the allowable area of [the State's] control, but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of constitutional rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (voiding a statute that prohibited picketing because it banned peaceful picketing protected by the First Amendment). Professor Lawrence Tribe states that if the prohibited conduct in the statute spills over into activities that are protected by the First Amendment, the statute is eligible for invalidation on that ground. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-27, 1022 (2d ed. 1988). *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991) (discussing the First Amendment overbreadth doctrine). *See generally* Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (discussing the First Amendment overbreadth doctrine). In contrast, a law is void for vagueness if it is so vague that a person "of common intelligence must necessarily guess at its meaning and

section 223(a) includes both indecent and obscene speech in the category of material that is banned from the Internet.[91] The result of this merger creates an overbroad category of speech susceptible to criminalization, and it also demonstrates Congress' dubious grasp of current First Amendment law in the area of indecency.[92] The failure to distinguish obscene speech, which is afforded no First Amendment protection, from indecent speech, which is constitutionally protected, creates the risk of censoring protected speech.[93] Without narrowly defining the type of speech the statute seeks to suppress, the scope of the statute is overbroad.[94] The American Civil Liberties Union ("ACLU") issued a statement shortly after Senator Exon's initial proposal stating that even if the protection of children from indecent material on the Internet was a compelling government interest, the CDA was not narrowly tailored to meet that goal.[95] Fear of potential liability would therefore chill the dissemination of protected indecent speech on the Internet, because rather than risk prosecution under the broad scope of the CDA, an

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differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (discussing various contexts in which the vagueness doctrine could appropriately be applied). *See* TRIBE, *supra*, § 12-31, at 1033-35.

[91] 47 U.S.C. § 223(a) (criminalizing the transmission of any communication "which is obscene or indecent").

[92] *See* Spiliopoulos, *supra* note 75, at 351 (arguing that Congress made no attempt in section 223(a) to distinguish between non-obscene speech, which is protected under the First Amendment, and obscene speech which is not protected).

[93] Spiliopoulos *supra* note 75, at 351 (stating bluntly: "Congress has drafted an unconstitutionally overbroad statute as construed because it bans constitutionally protected speech between adults.").

[94] Spiliopoulos *supra* note 75, at 351-52 (stating that the CDA bans constitutionally protected speech, noting that "[j]ust as there is only a small percentage of the population on the Internet, only a small percentage of the material found in cyberspace is pornographic").

[95] Arora, *supra* note 83, at 488-90 (quoting *ACLU Cyber-Liberties Alert, Fight Online Censorship! Axe the Exon Bill!*, (visited Apr. 24, 1997) <http://www.eff.org/pub/Censorship/Exon_bill/aclu_s314_hr1004.statement>); *see also* Brief for the Appellee at 19-20, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511) (stating, for example, that "that the CDA is ineffective at achieving the government's goal because it will not prevent minors from accessing the 'indecent' material posted outside the United States").

individual would simply refrain from exercising his or her right to access this speech.[96]

In addition to its failure to distinguish obscene from indecent speech, the CDA is replete with vague statutory language.[97] Many of the key terms of the provisions are not defined, including "obscene," "indecent," and "patently offensive."[98] Nor does the language of section 223(a) indicate whether sexually explicit images on the Internet fall within the scope of the statute.[99] Absent a clear definition of what constitutes obscene, as opposed to indecent, material the transmittor must censor the material himself to avoid possible criminal sanctions.[100] It is precisely this self-censorship for fear of liability, in light of a constitutionally vague statute, which has a chilling effect on protected speech.[101]

No less vague is the language of section 223(d) that imposes criminal sanctions for speech that is "patently offensive as

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[96] Arora, *supra* note 83, at 490 (stating that "overbreadth would chill Internet users from employing protected, albeit indecent, speech" because of a fear of prosecution under the CDA).

[97] Spiliopoulos, *supra* note 75, at 355 (stating that "[t]he problem of vagueness in the language of the Act deters individuals from freely disseminating their ideas on the Internet"). *See supra* note 90 (discussing the vagueness doctrine).

[98] Spiliopoulos, *supra* note 75, at 355 (asking that "[i]f no definitions exist for indecent, obscene and patently offensive, then how can we assume that content providers would be able to accurately distinguish between protected and unprotected speech?"). *See supra* note 90 (discussing the vagueness doctrine).

[99] Spiliopoulos *supra* note 75, at 353-54 (stating that the chilling effect of the statute's vagueness would result in the suppression of "life-saving information" on the Internet, such as safe-sex information on AIDS Websites, or graphic content concerning human rights abuses against African women from genital mutilation).

[100] William Bennett Turner, *The First Amendment and the Internet*, 482 PLI/PAT 33, 45 (1997) (stating that "[t]he problem with the CDA, however, is that it goes beyond hard core obscene material to make it a felony to communicate merely 'indecent' . . . material. The Court has never before upheld a criminal statute outlawing speech that is not legally obscene.").

[101] Spiliopoulos, *supra* note 75, at 355. *See also* Meyer, *supra* note 2, at 1987 (stating that "[a] governmentally imposed requirement to control obscenity and child pornography online, such as that contained in the Exon bill, would not only be ineffective but also unconstitutional").

measured by contemporary community standards."[102] The language in this instance is borrowed from the Supreme Court's analysis of obscenity in *Pacifica*.[103] Using this language, however, is problematic for several reasons. The medium regulated in *Pacifica* was broadcasting, and the Supreme Court was concerned with the open access to television and radio and the high probability of children inadvertently accessing adult material.[104] Cyberspace creates a significantly different environment where access to adult material is rarely inadvertent, and an individual must take formal steps to reach adult sites.[105] And although Congress sought to adopt the present legal standards of indecency, those standards are no less amorphous and vague when applied to the Internet.[106] Furthermore, the community standard used to establish what material is patently offensive is ill suited to the ubiquitous nature of the Internet community.[107]

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[102] 47 U.S.C. § 223(d)(1)(B) (1996). *See supra* note 90 (discussing the vagueness doctrine).

[103] FCC v. Pacifica Found., 438 U.S. 726, 732 (1978) (defining indecency as material "that describes, in terms patently offensive as measured by contemporary community standards . . . sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience"). *See supra* Part I.B, discussing the *Pacifica* Court's contextual approach to a definition of indecency.

[104] Spiliopoulos, *supra* note 75, at 363 ("The steps to find pornography, or any materials on-line, are much more labor-intensive then simply turning the dial of a television or flipping the on switch of a radio.").

[105] Spiliopoulos, *supra* note 75, at 363. One of the Court's concerns in *Pacifica* was to protect the "unwilling" participant—the individual who would inadvertently tune into an indecent broadcast. 438 U.S. at 748-49. The potential for an unwilling participant on the Internet is far lower given the active steps the individual must take to gain access, including, for example, logging on to the Internet and "surfing" to adult sites. Spiliopoulos, *supra* note 75, at 363.

[106] Spiliopoulos, *supra* note 75, at 355 (emphasizing the chilling effect of the statute's vagueness).

[107] Spiliopoulos, *supra* note 75, at 356. This point is best illustrated by the result in *United States v. Thomas*, 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996). *See infra* Part I.A, discussing the inadequacy of applying the community standard to the Internet. For an alternative view that the contemporary community standard is appropriately applied to the Internet, see Timothy S. T. Bass, Comment, *Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard*, 1996 U. CHI. LEGAL F. 471, 480 (arguing that

Finally, the affirmative defenses laid out in § 223(e) also are vague and make it difficult for the finder of fact to make determinations.[108] For example, it is difficult for the fact finder to determine, and the defendant to prove, that defendant made a "good faith, reasonable and effective" effort to prevent access to children.[109] Moreover, the term "effective" is a misnomer because if a defendant's efforts were effective, he would have successfully prevented access to minors, thereby avoiding any unlawful conduct.

III. *RENO V. ACLU*: JUDICIAL REVIEW OF A CONSTITUTIONAL CHALLENGE

Immediately after President Clinton signed the CDA into law,[110] several plaintiffs filed suit[111] against Attorney General Janet Reno and the Justice Department challenging the constitutionality of two of its provisions: sections 223(a) and (d).[112] These

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senders of obscene material "are probably aware that receivers in multiple jurisdictions can download the material" and therefore this affords sufficient notice to the sender). *Id.* 480. This reasoning overlooks the fact that the mere potential for criminal liability in a foreign jurisdiction would chill speech on the Internet.

[108] 47 U.S.C. § 223(e) (1996). It is a defense against prosecution if a person: (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors . . . which may involve any appropriate measures . . . feasible under such technology. *Id. See also* Spiliopoulos, *supra* note 75, at 353-54 (stating that present technology offers no feasible and reasonable way to restrict access to minors, therefore providers of obscene material may still be liable).

[109] Spiliopoulos, *supra* note 75, at 350-51.

[110] *See supra* Part II.A, discussing the enactment of the CDA.

[111] ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). Plaintiffs included, among others, the ACLU, Human Rights Watch, Electronic Frontier Foundation, and Journalism Education Association. As a clever and somewhat ironic method of gaining standing, the ACLU posted on its website a copy of the Supreme Court opinion in *FCC v. Pacifica Foundation*, which included as an appendix the manuscript of George Carlin's indecent monologue. Brief for the Appellee at 18, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511). The ACLU argued that the mere presence of the *Pacifica* decision on its website violated the CDA. *Id.*

[112] *ACLU*, 929 F. Supp. at 828.

plaintiffs sought a preliminary injunction against enforcement of both provisions.[113] After extensive fact finding,[114] the District Court granted a preliminary injunction on the grounds that the term "indecent" in the statute was too vague to impose criminal liability.[115] A second suit was subsequently filed by another group of plaintiffs adversely affected by the statute[116] and both actions were consolidated.[117] In the consolidated action, Chief Justice Sloviter, in Pennsylvania District Court, questioned the state's compelling interest in regulating material on the Internet of such broad scope.[118] The District Court ruled that the terms "indecent" and "patently offensive" were too vague to pass constitutional muster.[119] As a result, reasoned the District Court, "speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution."[120] According to the District Court, the chill on protected speech under the First Amendment was too great a constitutional price to pay.[121] The District Court, therefore, entered an injunction against the enforcement of section 223(a)(1)(B) to the extent that it related to indecent speech, and unconditionally enjoined the enforcement of section 223(d)(1) and (2) because the provisions failed to distinguish obscenity or child pornography from indecent content.[122]

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[113] *Id.* at 826.

[114] *Id.* at 830. The district court's findings of fact regarding the history and nature of the Internet totaled forty-eight paragraphs and were excerpted from the stipulation of the parties filed with the court. *Id.*

[115] *Id.* at 859-60.

[116] Reno v. ACLU, 117 S. Ct. 2329, 2339 (1997) (listing over twenty organizations who filed a second suit, including Apple Computers, Inc. and CompuServe, Inc.).

[117] *Id.*

[118] *ACLU*, 929 F. Supp. at 853 (stating "I am far less confident than the government that its [legal authority] has shown a compelling interest in regulating the vast range of online material covered or potentially covered by the CDA").

[119] *Id.* at 849.

[120] *Id.*

[121] *Id.*

[122] *Reno*, 117 S. Ct. at 2340. Child pornography, like obscenity, is given no constitutional protection. New York v. Ferber, 458 U.S. 747, 752 (1982) (holding that films of boys masturbating, though not obscene according to the *Ferber*

Subsequently, the government appealed to the Supreme Court under the CDA's special review provisions.[123]

A. The Court's History of the Internet

What is immediately striking about the *Reno* opinion is the detailed discussion of the history and nature of the Internet which the Supreme Court inherited from the district court findings.[124] These findings concerning the Internet were stipulated by the parties in the district court action.[125] The *Reno* Court's first observation concerned the "extraordinary growth" of the Internet since its original application to military communications in the late 1960's.[126] The Supreme Court noted that at the time of trial there were forty million Internet users,[127] and the number of users was expected to grow to over two hundred million by 1999.[128] The Internet was characterized not only in terms of tremendous growth

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Court, are not constitutionally protected speech).

[123] *Reno*, 117 S. Ct. at 2340-41 (citing special review provisions of the CDA, Pub. L. 104-104, § 561, 110 Stat. 142-143 (1996)).

[124] Of the sixty-three pages that comprise the majority opinion, the initial sixteen pages are devoted to a discussion of the Internet. *Id.* at 2334.

[125] *ACLU*, 929 F. Supp. at 830. The district court excerpted one hundred and twenty-three paragraphs of the two hundred and eighty-six stipulated paragraphs by the parties on the history of the Internet. *Id.* at 830-849. In light of the comprehensive nature of the stipulation, the district court's findings will likely play a role in future Internet cases.

[126] *Reno*, 117 S. Ct. at 2334. Originally, the military program called ARPANET (Advanced Research Project Agency-NET) was used by a network of military defense contractors and universities doing defense-related research. *ACLU*, 929 F. Supp. at 831.

[127] *Reno*, 117 S. Ct. at 2334.

[128] *Id. See also ACLU*, 929 F. Supp. at 831 (1996) The district court in its findings of fact noted:

> In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked. Today, over 9,400,000 host computers worldwide, of which approximately 60 percent located within the United States, are estimated to be linked to the Internet.

Id.

in users but also by the myriad ways information could be retrieved: including electronic mail[129] (e-mail), mail exploders,[130] newsgroups,[131] chat rooms[132] (which allow individuals to enter a discreet area of a site from different computers and enables them to simultaneously write to each other in conversational style), and the best known of retrieval systems, the World Wide Web.[133]

The Court effectively illustrated the simplicity of navigating on the internet and the plethora of information that an individual can access.[134] Included in this cyberspace was sexually explicit information that could be accessed either intentionally or inadvertently during the course of an imprecise search.[135] Justice Stevens, writing for the majority, clearly indicated that sexually explicit content on the internet was ubiquitous and "extend[ed] from the modestly titillating to the hardest core."[136] The characterization of the Internet as a technology boom with limitless

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[129] *Reno*, 117 S. Ct. at 2335. *See also* Brief for the Appellee at 11, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511).

[130] *Reno*, 117 S. Ct. at 2335 (explaining that mail exploders are servers that automatically send information to mailing lists).

[131] *Id.* (stating that newsgroups are servers that post over one hundred thousand messages daily).

[132] *Id.* (allowing individuals to enter a site from different computers and enabling them to write to each other, simultaneously, in conversational style).

[133] *Id.* at 2335-36.

[134] *Id.* Justice Stevens stated:

> Navigating the [World Wide] Web is relatively straightforward. The user may either type the address of a known page or enter one or more keywords into a commercial 'search engine' in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the 'surfer,' or, through its links, it may be an avenue to other documents located anywhere on the Internet . . . . The Web is thus comparable, from the reader's viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

Id.

[135] *Id.* at 2336.

[136] *Id.* at 2335.

possibilities for the free dissemination of all imaginable content[137]—including sexually explicit material—suggests that the government's interest in protecting children from this content justified regulation of the Internet.[138] With this government interest in mind, the *Reno* Court explored the means presently available to shield material deemed harmful to children.[139] For example, Age Verification Software was viewed by the Court as an ineffective means of determining a user's age, and therefore, it could not guarantee that only adults could access adult sites.[140] Furthermore, the requirement of a credit card would be prohibitive both to some adult users, who genuinely wanted to access adult cites, and to non-commercial web pages that contained indecent material.[141] The Supreme Court also discussed the effectiveness of Parental Control Software,[142] which a user could download onto a home computer and use to avoid any site containing sexual expletives.[143] The problem with this software was that it only

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[137] *Id.* Justice Stevens, quoting from the district court opinion, emphasized that "it is 'no exaggeration to conclude that the content on the Internet is as diverse as human thought.'" *Id.* (quoting *ACLU*, 929 F. Supp. at 842).

[138] Brief for the Appellant at 19, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511) (arguing that regulation of the Internet was appropriate because "Congress sought to make the Internet a resource that all Americans could use without fear that their children would be exposed to the harmful effects of indecent material").

[139] *Reno*, 117 S. Ct. at 2338.

[140] *Id.* The Supreme Court in *Reno* described parental software in the following way: "A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features." *Id.*

[141] *Id.* at 2336. Justice Stevens appeared to agree with Appellees' argument that non-commercial web pages could not necessarily afford to pay the service charges associated with credit card use. *Id.* In any event, the government was unable to demonstrate, according to Justice Stevens, that credit card verification could ensure that the credit card user was over eighteen years-old. *Id.*

[142] *Id.* at 2335. The district court identified several proprietary versions of "parental control software," which is software designed to allow a parent to control what Internet content can be accessed from the home computer. *See* ALCU v. Reno, 929 F. Supp 824, 839-842 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

[143] *Reno*, 117 S. Ct. at 2325.

detected obscene words and could not detect sites that contained only images.[144] The Court appeared satisfied, nonetheless, with the government's evidence that a "reasonably effective" parental control software would be available soon.[145]

B. The Supreme Court Rejects the Government's Arguments

Aware of the potential exposure to children of pornographic material, in light of its consideration of the Internet's history and technology, the Supreme Court assessed the government's argument in *Reno* that the CDA was constitutional.[146] The government relied on three cases to support its contention that the CDA did not infringe First Amendment rights: *Ginsberg v. New York*,[147] *FCC v. Pacifica Foundation*,[148] and *Renton v. Playtime Theaters*.[149] The Supreme Court ruled that none of these cases was applicable to the CDA.[150]

1. Ginsberg v. New York

In *Ginsberg,* the defendant was convicted for selling "girlie" magazines—which the state admitted were not obscene for adults—to a sixteen year-old boy.[151] This sale was a violation of a New York statute prohibiting the sale to minors under seventeen years of age of material defined as harmful to minors.[152] The

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[144] *Id.*

[145] *Id.*

[146] *Id.* at 2341-44.

[147] 390 U.S. 629 (1968).

[148] 438 U.S. 726 (1978).

[149] 475 U.S. 41 (1986).

[150] *Reno*, 117 S. Ct. at 2341 (stating that "[a] close look at these cases, however, raises—rather than relieves—doubts concerning the constitutionality of the CDA").

[151] *Ginsberg*, 390 U.S. at 631 (stating that defendant allegedly "sold a 16-year-old boy two 'girlie' magazines on each of two dates in October 1965").

[152] *Id.* at 633. Section 484-h of the N.Y. Penal Law as enacted by L. 1965, ch. 327, provided in pertinent part: "It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor: (a) any picture, photograph . . . or image of a person or portion of the human body which depicts

Supreme Court in *Ginsberg* held that the statute was constitutional on the grounds, *inter alia*, that it prevented children from obtaining indecent material without limiting an adult's First Amendment right to access this material.[153] The *Reno* opinion distinguished the holding in *Ginsberg* based on several factors. First, the majority opinion ruled that the statute in *Ginsberg* was far narrower in scope than the CDA.[154] For example, Justice Stevens noted that the New York statute applied solely to commercial transactions, while the CDA was not so limited.[155] Second, the New York statute defined material harmful to minors as "utterly without redeeming social importance for minors."[156] According to Justice Stevens, the New York statute at issue in *Ginsberg* was constitutional because it narrowly targeted commercial speech deemed harmful to minors and distinguished it from speech that might have some value to adults.[157] The absence of a precise definition of "indecent" in section 223(a) of the CDA, and the CDA's blanket prohibition of all such material on the Internet, is what ultimately set it apart from the New York statute in *Ginsberg*.[158] The CDA made no attempt to distinguish between its prohibition of "obscene" material, afforded no First Amendment protection, and "indecent" material, which, although harmful to minors, is given First Amendment protection.[159]

2. *FCC v. Pacifica Foundation*

In *Pacifica*, the Supreme Court upheld an order of the Federal Communications Commission ("FCC") that advised imposing sanctions on the Pacifica Foundation for the afternoon radio

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PENAL LAW § 484-h (McKinney 1965)).

[153] *Id.* at 643.

[154] *Reno*, 117 S. Ct. at 2341.

[155] *Id.* The New York statute criminalized the "transmission of, *any* comment, request, suggestion, proposal, image, or other communications which is obscene or indecent." *Id.* (emphasis added).

[156] *Ginsberg*, 390 U.S. at 646.

[157] *Reno*, 117 S. Ct. at 2341.

[158] *Id.*

[159] *Id.* at 2344.

broadcast of a monologue entitled "Filthy Words" by the comedian George Carlin.[160] Justice Stevens, writing for the *Reno* majority, distinguished the holding in *Pacifica* on the grounds that the FCC order sought to regulate the time of day of the broadcast and not its content.[161] Consequently, access to the indecent material was not completely prohibited. It was simply regulated at times of the day when the material would be harmful to children. The CDA, by contrast, was a content-based statute, completely prohibiting access to indecent material.[162] Justice Stevens added that radio broadcasting, the medium at issue in *Pacifica*, was accessed by children with relative ease and, thus, a compelling interest existed to avoid inadvertent contact by children with indecent material.[163] In contrast, pornographic sites on the Internet, the Court reasoned, were all preceded by a warning page requiring a child to take affirmative steps to enter these sites.[164]

3. *Renton v. Playtime Theaters*

In *Renton*, a zoning ordinance that kept adult movie theaters out of residential neighborhoods was held to be constitutional.[165] The government argued in *Reno* that the effect of the CDA was to create adult "cyberzones"[166] in the manner of the city of

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[160] FCC v. Pacifica Found., 438 U.S. 726, 730 (1978). Although the FCC ultimately never imposed sanctions it did state that it could revoke the license of the radio station owned by Pacifica Foundation that broadcast the monologue. *Id.*

[161] *Reno*, 117 S. Ct. at 2342.

[162] *Id. See supra* Part II.B, discussing the content-based statutory provisions of the CDA.

[163] *Id.* Another, perhaps less compelling, argument made by Justice Stevens against the applicability of *Pacifica* was the fact that the broadcast medium was historically heavily regulated, and therefore the FCC's order in *Pacifica* was consistent with this history. *Id.* By contrast, added Justice Stevens, the Internet had no history of regulation. *Id.*

[164] *Id.* Although the affirmative steps concept discussed in the opinion appear to contradict the *Reno* Court's discussion earlier in the opinion of the relative ease of navigation on the Internet, the Court was merely establishing that pornographic sites are accessed only be the volitional act of an individual. *Id.*

[165] Renton v. Playtime Theaters, 475 U.S. 41, 55 (1986).

[166] Brief for the Appellants at 16, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511). The term "cyberzones," apparently coined by Appellants, and

Renton.[167] Justice Stevens emphasized that, just as in *Pacifica*, the Renton ordinance was not a content-based statute.[168] The ordinance sought merely to control the location where adult films could be watched.[169] By contrast, the CDA was a "content-based blanket restriction on speech."[170] Rather than bolster the government's argument for the constitutionality of the CDA, Stevens viewed *Renton, Pacifica,* and *Ginsberg* as consistent with the application of a strict scrutiny review of the CDA's provisions.[171]

C. The Rationale for Striking Down the CDA's Provisions

The Supreme Court advanced three main reasons why the provisions of the CDA were unconstitutional. First, the CDA was unconstitutionally overbroad.[172] Second, the CDA's failure to distinguish "indecent" from "obscene" material resulted in provisions that did not pass a vagueness challenge.[173] Finally, the language of the CDA completely ignored the *Miller* standard for obscenity.[174]

The Supreme Court regarded the breadth of material covered by the CDA as "wholly unprecedented."[175] According to the Court, the CDA was a complete ban of indecent speech that would affect nonprofit groups, individuals, and commercial organizations.[176] To illustrate, Justice Stevens used the example of the California

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adopted by the Supreme Court in *Reno*, refers to restricted areas on the Internet, exclusively for adult material, where children would be unable to enter. *Id.*

[167] *Id.* ("Just as the cities of Detroit and Renton could direct adult theaters away from residential neighborhoods, so Congress could direct purveyors of indecent material away from areas of cyberspace that are easily accessible to children."). *Id.*

[168] *Reno*, 117 S. Ct. at 2342.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 2343.

[172] *Id.* at 2347. *See supra* note 90 (discussing the overbreadth doctrine).

[173] *Id.* at 2348. *See supra* note 90 (discussing the vagueness doctrine).

[174] Reno v. ACLU, 117 S. Ct. 2329, 2348 (1997). *See supra* note 24-26 and accompanying text (discussing the *Miller* three-part test of obscenity).

[175] *Id.* at 2347.

[176] *Id.*

Museum of Photography Web site[177] which would be liable under the CDA for showing Robert Mapplethorpe's photography of male nudes to help advertise a touring exhibit of his photography.[178] The CDA's failure to distinguish indecent from obscene material would therefore have the effect of prohibiting the dissemination of non-pornographic material and speech of serious educational value.[179]

Having determined that the CDA provisions were content based,[180] the Supreme Court reasoned that vagueness in the statute's terminology would have a chilling effect on free speech.[181] Additionally, ambiguities regarding the scope of the CDA's coverage immediately raised First Amendment concerns.[182] The Court noted that the statute's ambiguous and inconsistent language would "provoke uncertainty among speakers about how the two standards relate to each other."[183] Furthermore, the issue of vagueness was of particular concern to the Court because the CDA was a criminal statute.[184] The severity of the

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[177] *UCR/California Museum of Photography* (visited Nov. 4, 1998) <http://www.cmp.ucr.edu/site/museum.html>.

[178] *Reno*, 117 S. Ct. at 2336.

[179] *Id.* at 2348.

[180] *See supra* note 59 (discussing content-based regulations).

[181] *Reno*, 117 S. Ct. at 2344-45. For example, the Supreme Court noted that the CDA used inconsistent linguistic forms which contributes to its vagueness:

> For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word "indecent," . . . while the second speaks of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," . . . . Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean.

Id. at 2344 (citations and footnotes omitted). *See supra* note 90 (discussing the Supreme Court's vagueness doctrine).

[182] *Id.*

[183] *Id.*

[184] *Id.* at 2344-45 (stating that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images").

punishment, coupled with ambiguity in the statutory language, would therefore stifle speech that was only arguably unlawful.[185]

The Court's discussion of the *Miller* standard[186] addressed the issue of vagueness and suggested an alternative to the CDA's constitutional shortcomings.[187] The *Reno* Court rejected the government's assertion that the CDA was no less vague than the obscenity standard in *Miller*.[188] The Supreme Court noted that the adoption in section 223(d) of the term "patently offensive" comprised the second prong of the *Miller* three-part test, but disagreed that the CDA and *Miller* were therefore of equal specificity.[189] What narrowed the *Miller* definition of obscenity, according to the Court, was the combination of all three parts of the test.[190] Moreover, *Miller* specifically defined obscenity in terms of applicable state law,[191] and reduced the scope of obscene material to sexual conduct, while the CDA included "excretory activities"[192] and "organs"[193] of a sexual or excretory nature.[194] Finally, the *Miller* requirement that the work "lack serious literary, artistic, political, or scientific value" was conspicuously absent in the CDA.[195]

Ultimately, the CDA failed the Supreme Court's strict scrutiny analysis because the Act swept too broadly and would have the effect of suppressing speech which is protected by the First Amendment.[196] The Court determined that the First Amendment

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[185] *Id.*

[186] *See supra* Part I.A, discussing the *Miller* standard of obscenity.

[187] *Reno*, 117 S. Ct. at 2345.

[188] *Id.* at 2347.

[189] *Id.* at 2345.

[190] *Id.*

[191] *Id. See* Miller v. California, 413 U.S. 15, 24 (1973) (discussing the contemporary community standard). *See also* Part I.A, discussing more generally the obscenity standard in *Miller*.

[192] 47 U.S.C. § 223 (d).

[193] *Reno v. ACLU*, 117 S. Ct. at 2345 (citing section 223(d)).

[194] 47 U.S.C. § 223(d).

[195] *Id. See Miller*, 413 U.S. 15, 24 (1973).

[196] *Id.* at 2350.

price was too great, even in light of the substantial government interest in protecting children.[197]

IV. CHAMPION OF FREE SPEECH OR BLUEPRINT FOR SPEECH REGULATION?

Though most commentators view Justice Stevens' decision as the final word on regulation of sexually explicit material on the Internet,[198] the door to significant regulation has been left open. The Supreme Court's application of strict scrutiny would not be fatal to amended legislation if the government made a more convincing argument that no less restrictive alternatives existed to protect children, in apparent contravention of the Supreme Court's holding in *Butler v. Michigan*.[199] The Supreme Court's emphasis on the failure of the CDA to fully incorporate the obscenity standard of *Miller*[200] also suggests that amended legislation that closely adheres to the *Miller* model would pass constitutional muster. In the months following the *Reno* decision, two bills[201] presented to Congress were arguably tailored to these constitutional concerns.[202] As a result of this legislative activity in the aftermath of *Reno*, the recent enactment of the Child Online Protection Act has ushered in a new era of regulation of the Internet.[203]

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[197] *Id.* The Court noted that "[i]n *Sable*, we remarked that the speech restriction at issue there amounted to 'burn[ing] the house to roast the pig.' The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community." *Id.* (citation omitted).

[198] *See, e.g.*, Felsenthal & Sandberg, *supra* note 9, at B1 (discussing how *Reno* champions free speech).

[199] 352 U.S. 380, 383 (1989). *See supra* Part I.C, discussing the holding in *Butler*.

[200] *See supra* Part I.A, discussing the obscenity standard enunciated in *Miller*.

[201] This first bill was sponsored by senator Coates and nicknamed the "Son of CDA." S. 1482, 105th Cong. (1997). The second bill was sponsored by senator Oxley and was named the "Child Online Protection Act." H.R. 3783, 105th Cong. (1997).

[202] *See infra* Part IV.C, discussing two bills before Congress that sought once again to amend the CDA in light of the *Reno* decision.

[203] *See infra* Part IV.C.2, discussing the enactment of the Child Online Protection Act.

A. Do "Less Restrictive Alternatives" Exist?

In applying a strict scrutiny analysis to the CDA, the *Reno* Court concluded that "[the] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."[204] Conversely, the government would be justified in suppressing constitutionally protected speech if findings demonstrated that no less restrictive alternatives existed.[205] In *Reno*, however, the Court appeared satisfied with the trial court's finding that alternative methods existed of protecting children from exposure to pornography on the Internet.[206]

The *Reno* majority squarely supported the argument set forth in the Appellees' brief that less intrusive alternatives to a complete ban on cyberporn existed.[207] This argument was based on the stipulated findings in the trial court[208] that included the availability of parental control software for home computers allowing parents to limit a child's access to the Internet,[209] additional

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[204] Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997).

[205] *Id.*

[206] *Id.* at 2336 (citing a lower court finding that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available").

[207] Brief for the Appellee at 36, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511). The appellee brief argued:

> It is always true that only an 'absolute ban' on adult speech can offer 'certain protection against assault by a determined child' . . . [b]ut the Court has repeatedly rejected the notion that the First Amendment rights of adults can be sacrificed to achieve that certainty, especially when less restrictive alternatives exist.

Id. (citations omitted).

[208] ACLU v. Reno, 929 F. Supp. 824, 839 (E.D. Pa 1996).

[209] *Id.* Paragraphs fifty-four through seventy-three of the stipulated findings of fact discuss user-based software designed to enable parents and other adults to limit Internet access to children. *Id.* at 839-42. This software includes Cyber Patrol, CYBERsitter, The Internet Filter, Net Nanny, Surfwatch, and WebTrack to name a few. *Id.* at 839. To help adults screen inappropriate material for their kids, the World Wide Web Consortium created the "Platform for Internet Content

filtering of content by the major on-line services,[210] the existence of adult warning pages that precede entry to most pornographic sites,[211] and government efforts to educate the public about the dangers of sexually explicit content on the Internet.[212]

However, the trial court agreed with the government's argument that parental control software was generally ineffective.[213] The parties stipulated that this software could screen for suggestive words or identify sexually explicit sites, but could not identify sites that had only sexually explicit images without accompanying text.[214] Despite this stipulation, the trial court found that a "reasonably effective" method for screening unwanted content would "soon be widely available."[215] The Supreme Court agreed with the lower court on this point.[216] Ultimately, the government was unable to convince the Supreme Court that these alternative methods were insufficient to safeguard against children's exposure to pornography on the Internet.[217] The *Reno* Court concluded that the government had not met its burden to prove that no less intrusive alternatives to regulation of the Internet existed.[218]

In the majority opinion, Justice Stevens conceded that, even assuming parental control software was one hundred percent

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Selection" (PICS) which rates content on the Internet and allows parents to pick and choose what content can be accessed by their home computer. *Id.* at 838.

[210] *Id.*

[211] *Id.* at 844.

[212] *Id.* at 838.

[213] Brief for the Appellant at 40, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511) (quoting Sen. Grassley, 142 CONG. REC. S706) (emphasizing the ineffectiveness of parental software on the basis that "it is only partially effective in screening indecent material and that Congress determined that it would not be fair for parents to have 'the sole responsibility to spend their hard-earned money to ensure that cyberporn does not flood into their homes through the personal computers'").

[214] *ACLU*, 929 F. Supp. at 842.

[215] *Id.*

[216] Reno v. ACLU, 117 S. Ct. 2329, 2336 (1997).

[217] Brief for the Appellant at 25, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511). Appellants unsuccessfully argued that in addition to not being able technically effective, the parental software was simply not being used by American families. *Id.* at 16-17.

[218] *Reno*, 117 S. Ct. at 2348.

effective in screening sexually explicit content, software still could not guarantee the shielding of children from harmful material.[219] The Court found that parental control software had to be purchased,[220] thus discouraging use by parents already skeptical of its effectiveness.[221] Even if parental control software came preloaded on every home computer there would be no effective way of ensuring that all parents would use it.[222] Some parents still would allow unrestricted access to the Internet for their children—with these homes inevitably becoming meeting places for every curious neighborhood child.[223] Given the likelihood that many parents would choose not to use computer software to monitor the content suitable for their children, this method seems hardly an effective means of promoting the compelling governmental interest of protecting all children from explicit sexual material.[224]

The appellees argued that most adult sites on the Internet were preceded by adult warning pages which insured that children could not inadvertently enter these sites.[225] This argument seriously underestimates the curiosity of adolescent children and disregards the ease with which the viewer can bypass the warning page with one click of the mouse.[226]

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[219] *Id.* at 2347.

[220] *Id.* at 2348-49.

[221] *Id.*

[222] *Id. See also* Volokh, *supra* note 22, at 150 (stating "[f]ilters work only on those computers on which they are installed and activated, and parents have little control over the computers used by their children and friends").

[223] *See* Volokh, *supra* note 22, at 150-151. Professor Volokh argues:

> So long as even a significant minority of homes in a particular social circle don't use shielding software—whether intentionally or carelessly—most kids in the circle will be able to get access to indecent material. They'll be able fairly quickly to find out who has the unshielded computer, and then come over to see what they want to see.

Id.

[224] *See* Volokh, *supra* note 22, at 151.

[225] Brief for the Appellee at 15, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511).

[226] *See* Volokh, *supra* note 22, at 150-151.

It is unclear why the court appeared satisfied with the mere promise that future software technology would adequately support the state's interest in protecting children.[227] If the government were to make a more compelling showing of the inherent inadequacy of parental control software as a means of keeping Internet pornography away from children, the Supreme Court might reluctantly conclude that no less restrictive means exist.[228]

B. Amending the CDA using the Miller[229] Standard

The *Reno* Court's use of *Miller v. California* as a First Amendment foil to the CDA begs the question of whether the Supreme Court would have ruled differently on the constitutionality of the CDA if Congress had adopted wholesale the *Miller* standard of obscenity.[230] Whether present obscenity standards apply to the Internet is still an unanswered question. Though *Miller* is arguably more specific and targets a narrower class of material, there is still no bright line distinction between obscene speech, and speech which is indecent but protected under the First Amendment.[231] Furthermore, the contemporary community standard is problematic for the Internet.[232] Justice Stevens alluded to this problem when

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[227] *See* Volokh, *supra* note 22, at 149 (stating that "the Court is wrong. None of the Court's proposed alternatives to the CDA—or any other alternatives I would imagine—would have been as effective as the CDA's more or less total ban.").

[228] *See* Volokh, *supra* note 22, at 166. Volokh argues that Justice Stevens' ruling that the lack of an equally effective alternative to protecting children from cybersmut could justify a restriction on speech (what Professor Volokh calls the "pregnant negative") is inconsistent with the holding in *Butler* which prohibited a total ban on pornographic material on the basis that the government may not "reduce the population to reading what is fit for children." *See* Volokh, *supra* note 22, at 166 (citing *Butler*, 352 U.S. 380, 383). *See also supra* Part I.C, discussing *Butler*. If Professor Volokh is indeed correct in his analysis, then the fact that *Reno* quotes this very language from *Butler* is a true irony.

[229] Miller v. California, 413 U.S. 15 (1973).

[230] *See supra* Part I.A, discussing the obscenity standard enunciated in *Miller*.

[231] *See supra* Part I.A, discussing the First Amendment distinctions between obscene and indecent speech.

[232] *See, e.g.*, United States v. Thomas, 74 F.3d 701 (6th Cir.) (convicting two California defendants for transporting obscene computer generated material in

he pointed out that the Mapplethorpe photographs could be downloaded in Baltimore, New York, or Alabama.[233]

Notwithstanding the difficulties inherent in the statutory regulation of the Internet, Justice Stevens stated that "[the] CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute."[234] Were Congress to adopt the *Miller* three-part test as the definitional basis for an amended CDA, it would likely pass judicial scrutiny.[235]

C. *The Legislative Response to Reno: Two Bills and One New Statute*

In the months following the Supreme Court's decision in *Reno*, two bills before Congress sought again to amend the CDA by prohibiting the dissemination of pornographic material on the Internet. The first bill was sponsored by Senator Coates and was nicknamed the "Son of CDA."[236] The second bill was sponsored by Senator Oxley and was referred to as the Child Online Protection Act[237] ("COPA"). COPA was signed into law by President Clinton on October 22, 1998,[238] and, not surprisingly, the ACLU and a host of other plaintiffs filed suit in District Court in Pennsylvania challenging the statute's constitutionality.[239] Both COPA and the Coates Bill demonstrate a keen awareness by Congress of many of the constitutional concerns raised by the *Reno* Court, and the new Act appears to address some of those issues.

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interstate commerce based on the community standard in the receiving state of Tennessee), *cert. denied*, 117 S. Ct. 74 (1996).

[233] *Reno*, 117 S. Ct. 2329, 2336 (1997).

[234] *Id.* at 2346.

[235] *See supra* Part IV.C, discussing two bills presented to Congress amending the CDA to conform to the *Miller* standard.

[236] S. 1482, 105th Cong. (1997).

[237] H.R. 3783, 105th Cong. (1998).

[238] *Id.* (to be codified as 47 U.S.C. § 231).

[239] *See* Pamela Mendels, *Coalition Files Suit to Block Child Protection Act*, N.Y. CYBERTIMES, Oct. 22, 1998 (visited Nov. 5, 1998) <http://search.nytimes.-com/search/d. . .+child%7Eonline%7Eprotection%7Eact>.

1. The Coates Bill: "Son of CDA"

Less then four months after *Reno* was decided, Senator Dan Coates[240] presented a new bill in the Senate entitled Prohibition on Commercial Distribution on the World Wide Web of Material that is Harmful to Minors ("Coates Bill"), proposing to amend the Internet provisions of the CDA in light of Justice Stevens' decision in *Reno* and the *Miller* standard.[241] The Coates Bill states, in pertinent part: "[w]hoever . . . through the World Wide Web is engaged in the business of the commercial distribution of material that is harmful to minors shall restrict access to such material by persons under 17 years of age."[242] The Coates Bill defines material harmful to children as material that, "(i) taken as a whole and with respect to minors, appeals to the prurient interest in nudity, sex, or excretion . . . (ii) depicts . . . in a patently offensive way with respect to what is suitable for minors . . . (iii) lacks serious literary, artistic, political, or scientific value."[243]

Based on the changes in the proposed amendment, Senator Coates intended to address four major concerns raised by Justice Stevens in *Reno*.[244] First, the proposed legislation dealt only with commercial transactions and thus would avoid the chilling effect on non-commercial speech.[245] Second, the prohibition was directed solely to minors and would not prevent parents from accessing or purchasing material.[246] Third, the proposed legislation incorporated the third prong of the *Miller* test which requires that the material have "no social, literary, artistic, political or scientific value."[247] Finally, the proposed amendment, by lowering the age of minority

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[240] Senator Coates is a Republican from Indiana. *See generally Thomas: Legislative Information on the Internet* (visited Nov. 29, 1998) <http://thomas.loc.gov/home/thomas2.html>.

[241] S. 1482, 105th Cong. (1997).

[242] *Id.*

[243] *Id.*

[244] 143 CONG. REC. S12, 146-47 (daily ed. Nov. 8, 1997) (statement of Sen. Coates).

[245] *Id.* at S12,149.

[246] *Id.* at S12,148.

[247] *Id.*

to seventeen, avoided applying the law to persons eighteen years of age—"those nearest majority" in the words of Justice Stevens.[248]

In presenting his amendment to the Senate, Senator Coates underlined two major themes concerning Internet legislation: the compelling government interest in protecting children from harmful material on the Internet,[249] and the inadequacy of parental software as a tool for promoting that interest.[250] The Coates Bill is a good faith attempt to address the constitutional issues outlined by Justice Stevens in *Reno*.[251] Accordingly, on July 21, 1998, the Senate voted in favor of the Coates Bill; however, in light of the enactment of COPA, resolution of the bill remains undetermined.[252]

2. *Child Online Protection Act*

In April 1998, Senator Mike Oxley,[253] introduced his own scaled-back version of the CDA ("Oxley Bill") which prohibits the commercial distribution of material which is "harmful to minors."[254] On October 21, 1998, as part of the Omnibus

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[248] *Id. See* Reno v. ACLU, 117 S. Ct. 2329, 2341 (1997).

[249] 143 CONG. REC. 12,144-01, S12,149 (daily ed. Nov. 8, 1997) (statement of Sen. Coates) (stating that the underlying principle of the proposed legislation is the government's compelling interest in protecting the physical and emotional health of children).

[250] *Id.* at S12,147. In addition to asserting that the technology is not reliable, the Senator vehemently opposed the notion that much of this software is being developed by the cyberporn industry itself. Senator Coates stated: "There are millions of dollars being made on the Internet in the pornography business. There is even more money being made marketing software to terrified parents, software that doesn't work." *Id.* at S12,148.

[251] S. 1482, 105th Cong. (1997); *see generally* 143 CONG. REC. 12,144-01 (daily ed. Nov. 8, 1997) (statement of Sen. Coates) (discussing each of the *Reno* Court's criticisms of the CDA).

[252] Matt Smith, *Coates Has Busy Senate Day Discussing Issues That Impact Kids*, CONG. PRESS RELEASE, September 11, 1998.

[253] Senator Oxley is a Republican from Ohio. *See generally Thomas: Legislative Information on the Internet* (visited Nov. 29, 1998) <http://thomas.loc.gov/home/thomas2.html>.

[254] Child Online Protection Act, H.R. 3783, 105th Cong. (1998). *See also* Alan Cohen, *Congress Edges Toward Internet Obscenity Ban*, N.Y.L.J., Sept. 21,

Appropriations Act, President Clinton signed COPA into law, again amending provisions of the CDA.[255] In an example of constitutional déjà vu, the ACLU and sixteen other plaintiffs filed a challenge in Federal District Court in Pennsylvania on October 22, 1998.[256]

The preamble to COPA includes a short list of Congressional findings which emphasize the ease with which a child can access the Internet, and the government interest in protecting children from harmful material on the Internet.[257] These findings state in pertinent part that:

> (1) as access to and use of the World Wide Web becomes ubiquitous, the Web and information transmitted over it may become more invasive and intrusive in individual and family lives; (2) children now have greater opportunities for access to the World Wide Web and such access is continually expanding; (3) . . . the widespread availability of computers presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control; the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling government interest, ...[258]

COPA mandates that any individual who engages "in the business of selling and transferring, by means of the World Wide Web, material that is harmful to minors shall restrict access to such material by persons under seventeen years of age."[259] A conviction under COPA would result in imprisonment for no more than

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1998, at 1.

[255] *Today's News: Update*, N.Y.L.J., October 23, 1998, at 1.

[256] Press Release, ACLU v. Reno, *Round 2: Broad Coalition Files Challenge to New Federal Net Censorship Law* (visited November 5, 1998) <http://www.aclu.org/features/f101698a.html (including as plaintiffs, *inter alia*, A Different Light Bookstore, ArtNet, Electronic Privacy Information Center, Free Speech Media, LLC and the Internet Content Coalition, whose members include CBS New Media, Time Inc., and the New York Times Electronic Media Company among others. [hereinafter ACLU Press Release].

[257] 105 H.R. 3783, 105th Cong.

[258] *Id.*

[259] *Id.*

six month and/or a fine of up to $50,000.[260] COPA provides an affirmative defense if a defendant restricts access to persons under seventeen years of age by requiring "a verified credit card, debit account, adult access code, or adult personal identification number."[261]

This new statute offers a three-pronged definition of material that is "harmful to minors," which attempts a variation on the obscenity standard set by *Miller v. California*.[262] As defined in COPA, material "harmful to minors" is material that

> (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts . . . in a patently offensive way with respect to what is suitable for minors . . . (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[263]

In addition to providing a definition of material that is "harmful to minors,"[264] COPA—in apparent anticipation of a vagueness challenge—provides that the Federal Communications Commission will post further definitions of "harmful to minors" on its World Wide Web site.[265] The suit brought by the ACLU on behalf of sixteen plaintiffs will likely assuage those individuals and organizations who view COPA as constitutionally suspect.[266] Not least of those opposed to the new legislation is the Department of Justice ("DOJ") which expressed "serious concerns" about its constitutionality in a letter to Congress.[267] This letter, from the Office of the

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[260] *Id.*

[261] *Id.*

[262] *Id.* To compare the COPA "harmful to minors" standard to the obscenity standard enunciated in *Miller* see *supra* notes 24-26 and accompanying text (discussing the *Miller* three-part test of obscenity).

[263] H.R. 3783, 105th Cong. (1998).

[264] *See supra*, note 254 ("appeals to a prurient interest in nudity, sex, or excretion . . . in a patently offensive way with respect to what is suitable for minors.").

[265] H.R. 3783, 105th Cong.

[266] Alan Cohen, *Congress Edges Toward Internet Obscenity Ban*, N.Y.L.J., September 21, 1998 at 1.

[267] *See* ALCU Press Release, *supra* note 256 (quoting letter from the Justice Department).

Assistant Attorney General to the House of Representatives dated October 5, 1998, raised several issues concerning the constitutionality of COPA.[268] This letter discusses "numerous ambiguities concerning the scope of [COPA's] coverage" which might be problematic on First Amendment grounds.[269]

Of the list of ten "troubling ambiguities" in the DOJ letter, two are of particular interest to this note: COPA's articulation of a compelling interest to protect children and COPA's definition of material that is "harmful to minors."[270]

The prohibitions in COPA are explicitly justified based on the compelling interest to protect the "physical and psychological well-being of minors by shielding them from materials that are harmful to them."[271] The DOJ maintains that this interest alone may not be sufficient to justify the prohibition on speech.[272] According to the DOJ letter, the constitutionality of COPA "would be enhanced if Congress were to identify as the principal compelling interest the facilitation for parents' control over their children's upbringing, in addition to the government's independent interest in keeping certain materials from minors regardless of their parents' views."[273]

The definition of "harmful to others" was also constitutionally troubling to the Justice Department. COPA's "harmful as to minors" appears to mirror the definition provided in *Ginsberg*,[274] while taking into account the *Miller* standard for obscenity. However, as the Supreme Court stated in *Reno*, the statute in *Ginsberg* was much narrower in scope than the prohibition in the former CDA amendments,[275] and arguably narrower than the

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[268] Letter from L. Anthony Sutin, Acting Assistant Attorney General, *U.S. Department of Justice, Office of Legislative Affairs*, to the Honorable Thomas Bliley, Chairman, *Committee on Commerce, U.S. House of Representatives* (Oct. 5, 1998) (on file with the *Journal of Law and Policy*).

[269] *Id.*

[270] *Id.*

[271] H.R. 3783, 105th Cong. (1998).

[272] *Id.*

[273] Letter from Sutin, *supra* note 268 (discussing the constitutional implications of the *Reno* opinion).

[274] *See infra* Part III.B.1, analyzing the Supreme Court's reasoning in *Ginsberg*.

[275] Reno v. ACLU, 117 S. Ct. 2329, 2341 (1997).

prohibition in COPA.[276] The broader ban on material "harmful to minors" mandated by COPA, according to the DOJ, is likely to lead to constitutional challenges based on the statute's vagueness and overbreadth.[277]

Regardless of the outcome of the ACLU suit in the District Court of Pennsylvania, the flurry of legislative activity surrounding the Coates and Oxley Bills, culminating in the enactment of COPA, is the strongest proof yet that *Reno* is not the definitive word on Internet regulation.

CONCLUSION

The majority opinion in *Reno,* while appearing to guarantee a regulation-free Internet, effectively created a blueprint for future regulation of cyberspace. The *Reno* decision suggests that the application of strict scrutiny in the area of content regulation is not presumptively fatal to an enacted regulation. Based on Justice Stevens' version of strict scrutiny, if the government were to make an adequate showing that no less restrictive means exist to promote its interest of protecting children from harmful material on the Internet, regulations like the CDA would actually survive the Supreme Court's strict scrutiny test.

The recent enactment of the Child Online Protection Act, amending yet again the CDA provisions relating to the Internet, is proof that the *Reno* decision left the door open for legislators eager to regulate content on the Internet. Now that COPA is being challenged on constitutional grounds, the government will have another chance to prove that no less restrictive means exist to fully protect children from pornography on the Internet. If the government meets this challenge, the days of a regulation-free Internet may soon be over.

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[276] *Id.*
[277] *Id.*