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William D. Deane

COMMENTS

COPA AND COMMUNITY STANDARDS ON THE INTERNET: SHOULD THE PEOPLE OF MAINE AND MISSISSIPPI DICTATE THE OBSCENITY STANDARD IN LAS VEGAS AND NEW YORK?

William D. Deane[+]

"It is no exaggeration to conclude that the content on the Internet is as diverse as human thought."[1] Diversity is normally considered a positive trait; nevertheless, diverse speech is often suppressed when it's subject matter departs too radically from accepted moral and social norms.[2] Sexually explicit expression has long presented a perplexing paradox in America. On the one hand, many people condemn such expression as being immoral and devoid of any social or cultural value.[3] On the other hand, sex has consistently provided a profitable market for those willing to deal in a taboo trade.[4]

[+] J.D. Candidate, May 2002, Catholic University, Columbus School of Law.

1. ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

2. *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 166 (1999). Lessig argues that the First Amendment only protects against governmental restraints on free speech. *Id.* at 164. However, a free speech analysis that does not consider forces other than the government would be "radically incomplete." *Id.* According to Lessig there are three other factors that play a role in constraining and protecting speech: the market, architecture, and social norms. *Id.* For instance, although the law protects one's right to advocate for the legalization of marijuana, society (one's neighbors) may disregard such an advocate, the communications market (television stations, radio stations, newspapers, etc.) may refuse to disseminate such views because of their unpopularity, and as such, an advocate would have a difficult time gaining access to a wide audience. *Id.* at 165-66.

3. Robert Corn-Revere, *New Age Comstockery*, 4 COMM. L. CONSPECTUS 173, 173-75 (1996) (defining "Comstockery" as "the overzealous moralizing like that of Anthony Comstock, whose Society for the Suppression of Vice censored literature in America for more than sixty years"). Anthony Comstock was the leader of an anti-obscenity movement in the late 1800s that resulted in the banning of classic literature by authors such as D.H. Lawrence, Theodore Dreiser, Edmund Wilson, James Joyce, Tolstoy, and Balzac. *Id.* at 173. Corn-Revere warns that this "overzealous moralizing" returned to America in the form of the Communications Decency Act of 1996. *Id.*

4. Just how profitable the pornography industry truly is has been a subject of debate. Some sources have claimed that the pornography industry generates as much as

In the second half of the 1990s, the Internet became a busy marketplace as well.[5] As of August 2001, approximately 459 million people worldwide had home-based access to the Internet.[6] Electronic commerce,[7] or e-commerce, accounted for 2.6 billion dollars in revenue in 1996, and predictions for the year 2002 range from 200 billion to more than 500 billion dollars.[8] Vendors of sexually explicit materials have

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ten to fourteen billion dollars in annual revenues. Frank Rich, *Naked Capitalists*, N.Y. TIMES, May 20, 2001, at 51; Kenneth Li, *Silicone Valley: Porn Goes Public*, THE INDUSTRY STANDARD, Nov. 6, 2000, *available at* http://www.thestandard.com/article/0,1902,19696,00.html. A recent Forbes.com article rebutted those figures, stating that the industry's annual revenues are actually between 2.6 to 3.9 billion dollars. Dan Ackman, *How Big is Porn?*, FORBES.COM (May 25, 2001), *at* http://www.forbes.com/2001/05/25/0524porn.html. Of that amount, Forbes.com indicated that Internet pornography makes up approximately one billion dollars. *Id.*

While these numbers may seem small in comparison to mainstream industries such as traditional broadcast and cable television, which netted 32.3 billion and 45.5 billion dollars respectively in 1999, pornographers are still clearly making a significant amount of money. *Id.* Furthermore, even without huge revenues, the pornography industry, particularly Internet pornography, can be extremely profitable for individual dealers due to low start-up and overhead costs. Larry Rulison, *Selling Sex: Webmasters Profit in Pornography*, BALTIMORE BUSINESS JOURNAL, Sept. 22, 2000, *available at* http://baltimore.bcentral.com/baltimore/stories/ 2000/09/25/story2.html.

5. Angela E. Wu, *Spinning a Tighter Web: The First Amendment and Internet Regulation*, 176 N. ILL. U. L. REV. 263, 267 & n.27. In layman's terms, the Internet is a giant network of computers. HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 361 (17th ed., 2001). More specifically "the Internet is many large computer networks joined together over high-speed backbone data links . . . The Internet, in short, is a network of computer networks." *Id.* Any person with a computer, modem, telephone line, and access to an Internet Service Provider (ISP) can log on to the Internet. *Id.*

6. *World Wide Adoption of Internet, PCs Continues to Increase*, CYBERATLAS, (Aug. 29, 2001), *at* http://cyberatlas.internet.com/big_picture/geographics/print/0,,5911_875361,00.html. Forty percent of those connected to the Internet live in the United States and Canada. *Id.* In September 2001, the United States accounted for approximately 168.6 million of those with at-home Internet access. Nielsen//NetRatings, *September Internet Universe, at* http://www.nielsen-netratings.com/hot_off_the_net_i.jsp (last visited Oct. 26, 2001). Approximately fifty-eight percent of the United States population is connected to the Internet. *U.S. Internet Audience Up 16 Percent in Past Year*, CYBERATLAS, (Aug. 13, 2001), *at* http://cyberatlas.internet.com/big_picture/geographics/article/0,1323,5911_864541,00.html. In the month of September 2001, the average American Internet user accessed the World Wide Web nineteen times, visited forty unique sites, and spent over ten hours surfing the Web at home. Nielsen//NetRatings, *Average Web Usage, Month of September 2001, U.S., at* http://pm.netratings.com/nnpm/owa/NRpublicreports.usagemonthly (last visited Oct. 26, 2001). Those numbers climbed even higher at work where the average user logged on forty-three times, visited thirty-two unique sites, and spent over twenty-three hours on the Internet. *Id.*

7. NEWTON, *supra* note 5, at 245 (defining "Electronic Commerce" as "[u]sing electronic information technologies to conduct business between trading partners").

8. H.R. REP. NO. 105-775, at 7 (1998). *See also* ACLU v. Reno, 31 F. Supp. 2d 473, 486 (1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom.*, Ashcroft v. ACLU,

taken notice of this bustling marketplace.[9] In 1998, the World Wide Web[10] housed approximately twenty-eight thousand adult Web sites, generating close to 925 million dollars in annual revenues.[11]

Fearing that such sexually explicit material may have damaging effects on children, federal and state lawmakers labored to draft laws to restrict the dissemination of sexually explicit materials on the Internet.[12] The Child Online Protection Act of 1998 (COPA) was the second attempt by Congress[13] to safeguard children from sexually explicit material on the Internet.[14]

To ensure that COPA's restriction on speech complied with the First Amendment, Congress imported language from *Miller v. California*,[15] a Supreme Court decision that defined the standard for determining obscenity. *Miller* instructs that a jury should apply their own community's standards to determine whether material is obscene.[16]

Notwithstanding Congress' efforts, the American Civil Liberties Union

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121 S. Ct. 1997 (2001) (finding that estimated total revenues from the Internet will reach 1.4 to three trillion dollars by the year 2003).

9. Li, *supra* note 4. According to Datamonitor, a business information company that provides market reports and analysis, online sales of "videos, DVDs, site subscriptions and sex toys" would amount to 1.4 billion dollars in 2000, up from 980 million dollars in 1998. *Id.* This increase in sales "puts online porn revenues on par with online sales of books and way ahead of airline tickets." *Id.*

10. The "World Wide Web" is defined as:

> [T]he universe of accessible information available on many computers spread through the world and attached to that gigantic computer network called the Internet. The Web has a body of software, a set of protocols and a set of defined conventions for getting at the information on the Web. The Web uses hypertext and multimedia techniques to make the Web easy for anyone to roam, browse and contribute to.

NEWTON, *supra* note 5, at 774.

11. H.R. REP. NO. 105-775, at 7 (1998) (citing *Wired Magazine*).

12. *See, e.g.*, The Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-2736 (1998) (codified at 47 U.S.C. § 231 (Supp. V 2000)); The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified at 47 U.S.C. § 560 (1996)); N.M. STAT. ANN. § 30-37-3.2 (Michie 2001); N.Y. PENAL LAW § 235.21 (McKinney 2000).

13. The first attempt, two sections contained within the Communications Decency Act of 1996, was struck down as an unconstitutional restriction on speech protected by the First Amendment. *See* Reno v. ACLU, 521 U.S. 844, 849 (1997) (Reno I).

14. *See* 47 U.S.C. § 231 (Supp. V 2000); *see also* H.R. REP. NO. 105-775, at 5 (1998).

15. 413 U.S. 15 (1973) (vacating and remanding a criminal conviction for mailing unsolicited sexually explicit material in violation of a California statute). In *Miller*, the Court spoke of using "contemporaneous community standards" for determining obscenity. *Id.* at 37. This language was incorporated into COPA. 47 U.S.C. § 231(e)(6) (Supp. V 2000).

16. *Miller*, 413 U.S. at 37.

(ACLU) challenged COPA as unconstitutional under the First and Fifth Amendments.[17] The United States District Court for the Eastern District of Pennsylvania granted a preliminary injunction against the enforcement of COPA, ruling that the ACLU was likely to prevail on the merits.[18] On June 22, 2000, the Court of Appeals for the Third Circuit affirmed the District Court's preliminary injunction, holding that COPA's community standards test is likely to be found unconstitutional as applied to the Internet.[19] On May 21, 2001, the United States Supreme Court granted certiorari to determine whether the Third Circuit properly enjoined enforcement of COPA based on its determination that the community standards test violates the First Amendment.[20]

This Comment focuses on the issue that faces the Supreme Court this term, whether COPA infringes upon the First Amendment by relying on a community standards approach to define what material is harmful to minors. Part I of this Comment provides background information regarding the troubled First Amendment jurisprudence dealing with obscenity and indecency. Part I further analyzes how legislatures and courts have applied obscenity and indecency tests to traditional forms of media, such as print, broadcast television and radio, cable television, and telephony, as well as new forms of electronic communication. Part I concludes with a discussion of COPA. Part II analyzes the community standards test mandated by COPA and concludes that the test is unconstitutional when applied to Internet communications. Part II also introduces several alternative solutions to protect children from harmful content on the Internet. Part III analyzes the several proposed alternatives to direct government regulation of the Internet. Finally, this Comment concludes that parental oversight combined with user-controlled filters and tagging technology are the most effective and least restrictive means of protecting children from harmful material on the Internet.

I. A HISTORY OF THE REGULATION OF SEXUALLY EXPLICIT SPEECH

The First Amendment of the U.S. Constitution grants broad protection

17. *See* ACLU v. Reno, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom.*, Ashcroft v. ACLU, 121 S. Ct. 1997 (2001) (granting a preliminary injunction against the enforcement of COPA).

18. *Id.*

19. ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000) (Reno II), *cert. granted sub nom.*, Ashcroft v. ACLU, 121 S. Ct. 1997 (2001) (affirming the judgment to enjoin enforcement of COPA because of the ALCU's likelihood of success on the merits of the case).

20. Aschroft v. ACLU, 121 S. Ct. 1997 (2001).

for the freedom of speech.[21] This protection, however, is not absolute.[22] The courts use a number of methods to determine whether a particular governmental restraint of speech violates the First Amendment.[23] Two approaches in particular have been used by the Supreme Court over the years: the "ad hoc balancing" test and the "definitional balancing" test.[24] In either case, the court balances the government's interest in restraining speech against the speaker's interest in being heard.[25]

Under the ad hoc approach, courts calibrate the scales of justice by choosing the appropriate level of scrutiny to apply before weighing the competing interests at issue.[26] The Supreme Court has mandated varying levels of scrutiny for analyzing the constitutionality of laws restricting free speech.[27] Content-based restrictions[28] of speech must survive a strict

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21. The First Amendment to the U.S. Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

22. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

23. *See generally* HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW § 1.2 (Practitioner's ed. 1999) (describing the varying methodologies for interpreting the text of the First Amendment).

24. *Id.* The ad hoc approach asks the judiciary to determine which of the two competing interests, the government's interest in restricting speech or the First Amendment's interest in protecting free speech, are more important under the particular circumstances of each case. *Id.* at 9 n.17 (citing Am. Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950)). The definitional approach simply categorizes certain types of speech as unprotected by the First Amendment because, as a rule, the government's interest outweighs the value of those particular classes of speech. *Id.* at 9 n.18 (citing William T. Mayton, *From a Legacy of Suppression to the "Metaphor of the Fourth Estate,"* 39 STAN. L. REV. 139, 140 n.9 (1986); Frederick F. Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 562 n.4 (1989)).

25. *Id.* at 9 nn. 11-18.

26. *Id.* at 9.

27. *Compare* United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000), *and* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (applying strict scrutiny analysis to laws restricting speech on the basis of the content of that speech), *with* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (applying intermediate scrutiny to the Universal Military Training and Service Act of 1948), *and* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (explaining that intermediate scrutiny is used when analyzing content-neutral regulations).

28. Laws are content-based when they disfavor certain types of speech as against other types of speech because of the ideas or views that that particular type of speech expresses. *Playboy*, 529 U.S. at 811 (holding that laws restricting speech as "defined by its content" are content based restrictions); *Turner Broad.*, 512 U.S. at 643 (holding that regulations that "suppress, disadvantage, or impose differential burdens upon speech because of its content" are content-based and thus, subject to strict scrutiny); Burson v. Freeman, 504 U.S. 191, 197 (1992) (elucidating that laws are content-based when they disfavor certain expressions due to their ideas or opinions); Boos v. Barry, 485 U.S. 312,

scrutiny analysis.[29] Strict scrutiny, the highest standard of review the Court applies, requires the government to narrowly tailor its regulation to promote a compelling governmental interest and to use the least restrictive means necessary to serve that interest.[30] Generally, any law restraining speech on the basis of its content must meet this heightened standard of review in order to be found constitutional.[31] Content-neutral restrictions,[32] on the other hand, are analyzed under a less rigorous standard labeled intermediate scrutiny.[33]

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321 (1988) (arguing that content-based speech "focuses *only* on the content of the speech and the direct impact that speech has on its listeners").

29. *See, e.g.*, *Playboy*, 529 U.S. at 813 ("Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny."); *Turner Broad.*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

30. *See, e.g.*, *Playboy*, 529 U.S. at 813 ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest .... If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *Reno I*, 521 U.S. 844, 874 (1997) ("[The CDA's] 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."); *Sable*, 492 U.S. at 126 (indicating that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"); *see also* Cohen v. California, 403 U.S. 15, 22-23 (1971) (holding that the government lacked a compelling reason to bar a profane work printed on a tee shirt).

31. *See supra* note 29.

32. Content-neutral laws are those laws that regulate speech "without reference to the ideas or views expressed." *Turner Broad.*, 512 U.S. at 643; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that the government may impose "reasonable restrictions" on the time, place, and manner of speech in a public forum so long as those restrictions are not aimed at the content of the speech); City of Renton v. Playtime Theatres, 475 U.S. 41, 46-47 (1986) (holding that a zoning ordinance concerned with the "secondary effects" of adult movie theaters was a content-neutral "time, place, and manner regulation"); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (holding that an ordinance prohibiting the posting of signs on public property "is neutral – indeed it is silent – concerning any speaker's point of view"); Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981) (holding that a regulation concerning solicitation at a state fair was a permissible time, place, and manner restriction). The *Heffron* Court said that the regulation was content-neutral because it "applie[d] evenhandedly to all who wish to distribute and sell written materials or to solicit funds." *Id.*

33. *See Turner Broad.*, 512 U.S. at 642 (noting that laws that do not regulate speech on the basis of content are subject to an intermediate level of scrutiny "because in most cases [those laws] pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue"); *see also Renton*, 475 U.S. at 46-47; United States v. O'Brien, 391 U.S. 367, 377 (1968). Under intermediate scrutiny, a government law or regulation comports with the First Amendment "if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is

The definitional balancing test contemplates that certain classes of speech are simply not protected by the First Amendment.[34] Over the years, the Supreme Court has identified several categories of speech that are not afforded First Amendment protection, including: libelous speech,[35] incitement,[36] so called "fighting words,"[37] and obscene speech.[38]

A. Regulation of Obscene Speech

1. The First Amendment Does Not Protect Obscene Speech

Using a definitional balancing approach, the Supreme Court, in *Roth v. United States*,[39] held that obscene speech is not protected by the First Amendment.[40] Affirming the criminal conviction of a book and magazine publisher, the majority defined obscenity as "material which

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essential to the furtherance of that interest." *Id.*

34. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (stating that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words").

35. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (noting that libelous or defamatory communications are not "within the area of constitutionally protected speech"). *But see* N.Y. Times v. Sullivan, 376 U.S. 254, 268-70, 284-86 (1964) (raising the bar for libel plaintiffs by requiring them to prove "actual malice" on the part of the publisher).

36. Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that the government may outlaw speech that creates a "clear and present danger" of inciting others to criminal or destructive behavior). *But see* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (holding that in order to punish a speaker for incitement, the government must prove that (1) the speaker intended to cause imminent lawless action and (2) that such lawless action was likely to occur under the circumstances).

37. *Chaplinsky*, 315 U.S. at 571-72 (holding speech that by its "very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace" is not protected by the First Amendment).

38. *See* discussion *infra* Part I.A.1.

39. 354 U.S. 476 (1957).

40. *Id.* at 485. Roth, a book and magazine publisher, had been convicted of circulating obscene materials through the mail in violation of the Comstock Act, codified at 18 U.S.C. § 1461 (1994), as amended. *Id.* at 480. Rejecting Roth's argument that the Comstock Act infringed upon the First and Fourteenth Amendments, the Supreme Court held that "obscenity is not within the area of constitutionally protected speech or press." *Id.* at 485. The Court did, however, emphasize that "sex and obscenity are not synonymous." *Id.* at 487. Thus, sexually oriented material that does not rise to the level of obscenity retains First Amendment protection. *Id.* This left the Court with the difficult task of defining exactly what should be considered obscene. The task is difficult because the determination of what is obscene versus what is art or science is a subjective determination often viewed differently from one set of eyes to the next. *See* Cohen v. California, 403 U.S. 15, 25 (1971) (arguing that "one man's vulgarity is another's lyric").

deals with sex in a manner appealing to [the] prurient interest."[41] Justice Brennan defined prurient as "material having a tendency to excite lustful thoughts."[42] In an attempt to safeguard the First Amendment's protection of free speech, the *Roth* Court constructed a standard for judging whether sexually explicit expression rises to the level of obscenity: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to [the] prurient interest."[43] The "contemporary community standards" language remains to this day despite the Court's struggle to redefine obscenity in the years following *Roth*.

2. The Supreme Court's Struggle to Define Obscenity

For sixteen years following *Roth* (1957 to 1973), the Supreme Court struggled to apply a consistent obscenity standard in individual cases.[44] Although a clear majority of the Court agreed that obscenity was not protected speech,[45] and that the *Roth* standard governed the determination of obscenity, the Court could not reach a consensus on how to apply the *Roth* standard.[46]

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41. *Roth*, 354 U.S. at 487.

42. *Id.* at 487 n.20 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged, 2d ed., 1949)) (defining prurient as: "Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd"). A more contemporary definition of prurient is: "having or expressing lustful ideas or desires; tending to excite lust." WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d College ed., 1991).

43. *Roth*, 354 U.S. at 488-89.

44. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 79-83 (1973) (Brennan, J., dissenting) (describing the diverging methods used by Supreme Court Justices to separate obscene speech from protected speech); *see also* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704-05 (1968) (Harlan, J., concurring in part, dissenting in part) (admitting that the *Roth* standard has "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication").

45. Only Justices Black and Douglas rejected the *Roth* holding outright. They maintained that the First Amendment provides unconditional protection of free speech and does not withhold protection from obscene speech. *Paris Adult Theatre*, 413 U.S. at 80 (Brennan, J., dissenting) (describing the conflicting views on the Court concerning the regulation of obscene speech); Ginzburg v. United States, 383 U.S. 463, 476, 482 (1966) (dissenting opinions); Jacobellis v. Ohio, 378 U.S. 184, 196 (1964) (Black, J., concurring); *Roth*, 354 U.S. at 508 (Douglas, J., dissenting)).

46. Justice Harlan opined that the federal government had the authority to restrict distribution of "hard core" pornography only, while the states could ban "any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material." *Paris Adult Theatre*, 413 U.S. at 80-81 (Brennan, J., dissenting) (citing *Jacobellis*, 378 U.S. at 204 (dissenting opinion); *Ginzburg*, 383 U.S. at 493 (dissenting opinion); A Quantity of Books v. Kansas, 378 U.S. 205, 215 (1964) (dissenting

One of the principal disagreements between the Justices was whether a local or national standard should apply to the community standards test. Justices Harlan and Brennan advanced a national standard, reasoning that to apply different standards of First Amendment protection from one community to the next would violate the Constitution.[47] Chief Justice Warren, conversely, argued in favor of a local standard because he believed it would be problematic to identify a single "provable 'national standard.'"[48] After a failed effort to clarify the *Roth* standard in 1966,[49] the Court completely abandoned efforts to reach a uniform standard.[50]

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opinion); *Roth*, 354 U.S. at 496 (separate opinion)).

Justice Stewart, on the other hand, believed that *both* the state and federal government could only regulate hard core pornography. *Paris Adult Theatre*, 413 U.S. at 81 (Brennan, J., dissenting) (citing *Jacobellis*, 378 U.S. at 197; *Ginzburg*, 383 U.S. at 497 (dissenting opinion)).

47. *See* Manual Enters. v. Day, 370 U.S. 478, 488 (1962) (Harlan, J., concurring) (arguing that a local standard of obscenity would have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency"); *see also Jacobellis*, 378 U.S. at 194 (arguing that a local community standard of obscenity would chill free speech).

> [T]o sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors would be reluctant to risk criminal conviction in testing the variation between the two places . . . . The result would thus be "to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."

Id. (quoting Smith v. California, 361 U.S. 147, 154 (1959)).

48. *Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting). Chief Justice Warren conceded Justice Brennan's argument that a local standard "may well result in material being proscribed as obscene in one community but not in another," but he countered that the communities of America "are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." *Id.* at 200-01 (Warren, C.J., dissenting).

49. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966). In *Memoirs*, a three-justice plurality (Chief Justice Warren and Justices Brennan and Fortas) attempted to expand upon the *Roth* standard. *Id.* at 418. The *Memoirs* plurality established a three-part test for determining obscenity:

> [I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. According to the plurality, all three prongs had to be met before a form of expression could be branded obscene. *Id.* Notwithstanding their efforts, the *Memoirs* test never garnered a majority of the Court. Miller v. California, 413 U.S. 15, 23-25 (1973).

50. *See* Redrup v. New York, 386 U.S. 767, 770-71 (1967) (per curiam). In *Redrup*,

Finally, in 1973, a majority of the Supreme Court agreed on an obscenity test that is still intact today.[51] In *Miller v. California*,[52] the Court established a three-pronged test for determining whether sexually explicit material is obscene:

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[53]

While announcing that obscenity would be measured according to the contemporary standards of each individual local community, the *Miller* Court acknowledged that First Amendment protections do not vary from one community to the next.[54] The Court rationalized, however, that the United States is "too big and too diverse" to mandate a uniform national obscenity standard.[55] Moreover, the contemporary community standards

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the Court abandoned attempts to agree on a uniform definition of obscenity; instead, each justice simply applied their own separate definition on a case-by-case basis. *See id.* During the period following *Redrup*, the Court would release a per curiam opinion in favor of the side garnering at least five votes. *Id.* Twenty-eight subsequent cases followed the *Redrup* technique. *Paris Adult Theatre*, 413 U.S. at 82 n.8.

51. *See Miller*, 413 U.S. at 25 ("[T]oday, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment.").

Similar to *Roth*, the Supreme Court in *Miller* affirmed the conviction of a publisher accused of disseminating sexually explicit materials through the mail. *Id.* at 16-20.

52. 413 U.S. 15 (1973).

53. *Id.* at 24 (citations omitted). The Court also provided examples of how states could write statutes regulating obscene material. *Id.* at 25. The Court announced that the following classes of communication could be regulated by state governments: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.*

On the same day as the *Miller* decision, the Court also held, in *Paris Adult Theatre*, that state governments may regulate or ban outright the presentation of obscene subject matter (i.e., pornographic films) in areas of public accommodation, even if the audience is fully composed of consenting adults. *Paris Adult Theatre*, 413 U.S. at 69. The Court held that, so long as the material prohibited falls within *Miller's* definition of obscenity, nothing precludes the states from regulating or prohibiting its exhibition to the public. *Id.* Taken together, the Supreme Court's decisions in *Miller* and *Paris Adult Theatre* make clear that state and federal governments can constitutionally restrain the dissemination of obscene material; even when such material is disseminated to consenting adults only.

54. *Miller*, 413 U.S. at 30.

55. *Id.* (holding that determining what appeals to the "prurient interest" or is "patently offensive" are questions of fact that cannot be determined under a national standard). The Court rejected the notion of a national standard as being unworkable

approach adopted in *Miller* attempted to give the people of each individual community some control over the types of materials that entered into their community.[56]

The Court implemented the community standards language to instruct triers of fact that they must apply an external objective standard, not simply their own subjective opinion, when determining whether sexually explicit expression appeals to the prurient interest and is patently offensive.[57] Under *Miller*, the trier of fact (most often a jury) must look to the aggregate standard of a given community—the average beliefs of the community affected by the expression in question.[58] The *Miller* Court, however, left open the definition of "community."[59] In subsequent cases, therefore, the Court stated that the jury instructions need not identify the specific community to be applied.[60]

3. *Variable Obscenity: The Government's Interest in Protecting Children*

Protecting children from the harmful effects of sexually explicit speech has long been a leading concern of both state and federal lawmakers.[61] Such legislative efforts have met with varying degrees of success at the Supreme Court.[62] In *Ginsberg v. New York*,[63] the Court altered the

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because, "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." *Id.*

56. Phillip E. Lewis, *A Brief Comment on the Application of the "Contemporary Community Standard" to the Internet*, 22 CAMPBELL L. REV. 143, 160 (1999) (stating that the reasoning behind the community standards model is to allocate to local residents some control over the type of businesses that may operate in their community).

57. *See, e.g.*, Smith v. United States, 431 U.S. 291, 305 (1977); *Miller*, 413 U.S. at 24; Roth v. United States, 354 U.S. 476, 489-90 (1957).

58. *Miller*, 413 U.S. at 24.

59. *Id.* at 31. In *Miller*, the Supreme Court defined the community at issue as the State of California. *Id.*

60. *See* Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (noting that "*Miller* approved the use of such [state-wide community] instructions; it did not mandate their use"); Hamling v. United States, 418 U.S. 87, 104 (1974) (allowing each juror to draw on the standard from the "community or vicinage from which he comes").

61. *See* United States v. Playboy Entm't Group, 529 U.S. 803, 806 (2000) (discussing the constitutionality of a federal law that sought to restrict children from viewing "sexually oriented programming"); Ginsberg v. New York, 390 U.S. 629, 638 (1968) (discussing the validity of a New York statute that proscribed the sale of obscene materials to minors).

62. *See Playboy*, 529 U.S. at 806-07 (striking down as unconstitutional a provision of the Communications Decency Act of 1996, which sought to protect children from viewing adult cable television programming that was only partially scrambled); *Reno I*, 521 U.S. 844, 849 (1997) (overturning as unconstitutional two provisions of the Communications Decency Act that attempted to protect children from sexually explicit materials on the

application of the *Roth* obscenity test when analyzing laws aimed at protecting children.[64] In that case, a magazine vendor was convicted of selling sexually explicit magazines to a sixteen-year-old boy in violation of New York Penal Law.[65] The Court acknowledged that the magazines were not obscene by adult standards and found that the New York statute would not prohibit the sale of such magazines to adults.[66] The Court, however, endorsed a technique called "variable obscenity," whereby a state may prohibit the distribution of sexually explicit materials to children, even if those materials would not be obscene when distributed to adults.[67] Under this standard, determining whether material is obscene is considered from the point of view of a minor, not that of an adult.[68] Although the Court decided *Ginsberg* before it decided *Miller*, the variable obscenity standard survives today.[69]

Internet); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 732-33 (1996) (upholding one provision of the Cable Television Consumer Protection and Competition Act of 1992 and striking down two others that were designed to shield children from indecent programming on cable television); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 117 (1989) (upholding as constitutional an amendment to section 223(b) of the Communications Act of 1934 that banned interstate transmission of obscene commercial telephone messages for the purpose of protecting minors, but striking down that portion of section 223(b) that banned indecent telephone messages); FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (affirming an FCC declaratory order issued against a radio station for broadcasting an indecent program during the day-time hours when children were most likely to be listening); *Ginsberg*, 390 U.S. at 637-38 (upholding a New York statute prohibiting the sale of obscene materials to minors); *see also* Butler v. Michigan, 352 U.S. 380 (1957).

63. 390 U.S. 629 (1968).

64. *Id.* at 635-37.

65. *Id.* at 631 (citing N.Y. PENAL LAW § 484-h (1909)).

66. *Id.* at 634-35.

67. *Id.* at 636.

68. *Id.*

> [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.

Id. (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. Ct. App. 1966)). *But see* Butler v. Michigan, 352 U.S. 380, 383 (1957) (cautioning that legislation designed to protect children from obscenity must be "reasonably restricted to the evil with which it is said to deal," so as not to "reduce the adult population . . . to reading only what is fit for children").

69. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and pyschological well-being of minors. This interest extends to shielding minors from the

4. Obscenity in the Home

An exception exists to the general rule that the First Amendment does not protect obscene speech from governmental restraint.[70] In *Stanley v. Georgia*,[71] the Supreme Court reversed a conviction for the knowing possession of obscene materials.[72] In *Stanley*, state and federal agents, acting pursuant to the authority of a search warrant, entered Stanley's home and discovered sexually explicit films unrelated to the subject of the warrant.[73] The Supreme Court reversed Stanley's conviction, holding that the "First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."[74] Justice Marshall, writing for the Court, recognized a distinction between the private possession of obscene materials and the public distribution, dissemination, or vending of such materials.[75] Justice Marshall rationalized this distinction based on two fundamental rights: "the right to receive information and ideas," and the right to privacy.[76] *Stanley*, therefore, limited the government's ability to regulate obscene material to those instances where the material has some contact with the public.[77]

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influence of literature that is not obscene by adult standards.").

70. Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that a state cannot outlaw the private possession of obscene material).

71. 394 U.S. 557 (1969).

72. *Id.* at 568. Stanley was convicted under a Georgia law that read in relevant part: "Any person . . . who shall knowingly have possession of . . . any obscene matter . . . shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony . . . ." *Id.* at 558 n.1 (citing GA. CODE ANN. § 26-6301 (Supp. 1968)).

73. *Id.* at 558.

74. *Id.* at 568. The Court stated further:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds . . . . Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Id. at 565-66.

75. *Id.* at 560-62. Justice Marshall acknowledged that the government had an important interest in regulating the commercial distribution of obscene material. *Id.* at 563-64. Nevertheless, Marshall argued that the government's interest did not extend into the privacy of one's home. *Id.* at 564.

76. *Id.* Justice Marshall wrote that the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society . . . . [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Id.*

77. *Id.* at 568 (stating that while "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of

Nevertheless, the Court has narrowly applied any limits on government regulation of obscenity.[78]

B. Regulation of Indecent Speech

Sexually explicit speech or expression that does not meet all three prongs of the *Miller* test generally falls into a category commonly labeled "indecency."[79] Unlike obscene speech, which does not receive any First Amendment protection, the Court has accorded indecent speech a qualified level of First Amendment protection.[80] In *FCC v. Pacifica Foundation*,[81] the Court supplied a broad definition of indecency: "nonconformance with accepted standards of morality," including non-sexual references to excretory functions.[82] The *Pacifica* Court added that "indecency is largely a function of context – it cannot be adequately judged in the abstract."[83]

The context of where and when indecent speech was uttered was of critical importance to the *Pacifica* case.[84] The FCC had issued a declaratory order against the Pacifica Foundation for the daytime broadcast of comedian George Carlin's monologue entitled "Filthy Words."[85]

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his own home").

78. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 65-66 (1973) (declining to extend a "zone of privacy" to wherever consenting adults may go to view sexually explicit matter). The protection offered by *Stanley* only exists within one's home. *Id.*; *see also* United States v. 12 200-foot Reels of Super 8mm Film, 413 U.S. 123, 128 (1973) (refusing to extend *Stanley* to the importation of obscene materials); United States v. Reidel, 402 U.S. 351, 355 (1971) (holding that mailing obscene materials is public conduct and is therefore not protected by the *Stanley* exception).

79. FCC v. Pacifica Found., 438 U.S. 726, 738-41 (1978).

80. *Id.* at 744-46.

81. 438 U.S. 726 (1978).

82. *Id.* at 740, 743.

83. *Id.* at 742, 747 (establishing that the First Amendment protection afforded "patently offensive sexual and excretory language" may fluctuate depending upon the context within which the speech was uttered).

The FCC currently defines "indecency" as: "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *In re* Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 705 n.10, *vacated sub nom.* Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993).

84. *Pacifica*, 438 U.S. at 729-30. The indecent monologue at issue was broadcast over the radio at approximately two o'clock on a Tuesday afternoon. *Id.* at 729. A man who had been driving with his young son when the broadcast aired filed a complaint with the FCC. *Id.* at 730.

85. *Id.* at 730 (citing *In re* Citizen's Complaint Against Pacifica Found. Station

A plurality of the Supreme Court upheld the FCC order, reasoning that the broadcast of an indecent program, at a time when children were likely to hear it, was the equivalent of a nuisance.[86] Therefore, the FCC was within its authority to impose sanctions.[87] Justice Stevens asserted that the FCC order was content-neutral,[88] because it was a reaction to the context of Carlin's monologue, not its content.[89] Justice Stevens further stated that indecent speech was less deserving of protection than other speech; he argued that sexually explicit speech and speech referring to excretory functions "surely lie at the periphery of First Amendment concern."[90]

C. Application of the Obscenity and Indecency Standards to Traditional Forms of Media

The First Amendment does not protect the free expression of obscene speech in any medium.[91] Nevertheless, the Supreme Court has not treated all mediums uniformly. The Court has faced the issues of

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WBAI, 56 F.C.C. 2d 94, 99 (F.C.C. 1975)). The FCC found the broadcast to be indecent and in violation of 18 U.S.C. § 1464 (1994). Section 1464 provides that: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1994).

86. *Pacifica*, 438 U.S. at 750 (maintaining that "a 'nuisance may be merely a right thing in the wrong place, – like a pig in the parlor instead of the barnyard.'") (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

87. *Id.* at 750-51. The plurality opinion emphasized the narrowness of the *Pacifica* holding, limiting it to the context of the situation (especially the time of day), the content of the program, and the nature of broadcasting. *Id.* at 750.

88. *See* discussion *supra* note 32.

89. *Pacifica*, 438 U.S. at 746-48.

90. *Id.* at 743. Justice Stevens argued that restrictions on indecent speech only alter the form of the speech, not its substantive content. *Id.* at 743 n.18. According to Justice Stevens, most of the thoughts conveyed by indecent speech could be expressed without the use of offensive language. *Id.* Justice Stevens cited to Justice Murphy's statement in *Chaplinsky v. New Hampshire*, that indecent expressions "are no essential part of any exposition of ideas, and are 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." *Id.* at 746 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). *But see* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (establishing that indecent expression is protected by the First Amendment and content-based governmental restrictions of that expression are subject to strict scrutiny). The *Sable* Court, applying strict scrutiny to a federal statute regulating obscene and indecent telephone messages, stated that the government may only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.*

91. *See, e.g.*, *Sable*, 492 U.S. at 125; Miller v. California, 413 U.S. 15, 18-19 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).

obscenity and indecency in several different mediums: print, broadcast television and radio, cable television, telephony, and, most recently, the Internet.[92] Due to the distinct characteristics of each medium, the Court has applied differing standards of First Amendment protection.[93] The following discussion compares the different standards that are applied to each medium.

1. Broadcast Versus Print Media

Print mediums, particularly newspapers, have traditionally enjoyed the most rigorous First Amendment protection.[94] Television and radio broadcasters, on the other hand, have not received the same level of protection from the Court.[95] The very nature of broadcasting was important to the Supreme Court's contextual analysis of the indecent radio broadcast in *Pacifica*.[96] Declining to apply strict scrutiny to the FCC order, Justice Stevens emphasized three rationales for a lower level of First Amendment protection for broadcasting: (1) that broadcasting has traditionally been subject to regulation in the public interest; (2) the pervasive nature of broadcasting and its ability to invade the privacy of one's home; and (3) its easy accessibility to children.[97] According to Justice Stevens, because broadcast radio enters private homes "the

92. *See, e.g.*, *Reno I*, 521 U.S. 844, 844 (1997) (striking down as unconstitutional a federal statute restricting indecent and patently offensive material on the Internet); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 733 (1996) (upholding in part and striking down in part a federal statute restricting sexually explicit programming on cable television); *Sable*, 492 U.S. at 117 (upholding in part and striking down in part a federal statute restricting obscene and indecent telephone messages); *Pacifica*, 438 U.S. at 741 (upholding an FCC declaratory order against a radio station that had broadcast an indecent program).

93. *Pacifica*, 438 U.S. at 748.

94. *See, e.g.*, N.Y. Times v. United States, 403 U.S. 713, 714 (1971) (holding that governmental prior restraints imposed upon a newspaper "come[] to this Court bearing a heavy presumption against . . . constitutional validity"); Smith v. California, 361 U.S. 147, 153-55 (1959) (striking down as unconstitutional a city ordinance that made it unlawful for bookstores to possess obscene or indecent books); Near v. Minnesota, 283 U.S. 697, 715-16 (1931) (holding that the First Amendment bars prior restraints of the press and that such restraints are only permissible in exceptional cases, such as publications threatening national security).

95. *See Pacifica*, 438 U.S. at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."); *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (stating that "[a]lthough broadcasting is clearly a medium affected by a First Amendment interest differences in the characteristics of new media justify differences in the First Amendment standards applied to them") (citation omitted).

96. *Pacifica*, 438 U.S. at 748-50. *See* discussion *supra* Part I.B.

97. *Id.* at 731, 748-50.

individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[98] Justice Stevens also cited broadcasting's ready availability to children and its ability to "enlarge[] a child's vocabulary in an instant," as a reason for a lesser standard of review.[99]

A comparison of two earlier Supreme Court cases provides the best illustration of the disparate treatment between newspaper publishers and broadcasters. In *Red Lion Broadcasting Co. v. FCC*,[100] the Court upheld the FCC's fairness doctrine, requiring broadcasters to (1) air issues of great public importance and (2) take steps to assure that the contrasting views concerning those issues are equally presented.[101] The Court also upheld a corollary to the fairness doctrine, the personal attack rule, requiring broadcasters to furnish to a person who had been personally attacked on the broadcaster's station an equal opportunity to respond.[102] Just five years later, in a strikingly similar case, *Miami Herald Publishing Co. v. Tornillo*,[103] the Court held that a state right-of-reply statute constituted an unconstitutional infringement of the First Amendment rights of newspaper publishers.[104]

The Court distinguished *Red Lion* from *Miami Herald* based on the issue of spectrum scarcity. The *Red Lion* Court reasoned that, due to the

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98. *Id.* at 748 (citation omitted). Justice Stevens argued that turning off the radio or changing stations after realizing the nature of the program was an insufficient remedy because damage could be done instantaneously. *Id.* at 748-49. Moreover, prior warnings concerning the nature of the broadcast would prove ineffective because of the ability of the broadcast audience to tune in and out at any time. *Id.*

99. *Id.* at 749-50. Justice Stevens acknowledged the impossibility of restricting broadcast dissemination to children without also restricting its dissemination to adults; however, he found solace in knowing that adults who wished to listen to such broadcasts could still do so by purchasing tapes, going to nightclubs, or listening to the program in the late evening hours when its broadcast would not be a nuisance. *Id.* at 750 n.28.

100. 395 U.S. 367 (1969). The case reviewed the "fairness doctrine" as promulgated by the FCC. *See id.* at 369. The Court examined an FCC order requiring a radio station to furnish a person who had been personally attacked on that station with an equal opportunity to respond, and the FCC's codification of the "personal attack" rule in 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (all identical). *Id.* at 375, 386. Essentially, the fairness doctrine requires that the "discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." *Id.* at 369.

101. *Id.* at 388-89, 391.

102. *Id.* at 373-75 (citing 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679); *see also id.* at 389-91.

103. 418 U.S. 241 (1974).

104. *Id.* at 257-58. The right-of-reply statute at issue required that a newspaper provide space for a reply to any political candidate attacked by that newspaper. *Id.* at 243. The *Miami Herald* Court held that the right-of-reply statute interfered with the editorial discretion of the publisher. *Id.* at 257-58. Furthermore, the Court held that the statute created a chilling effect on the publisher's First Amendment rights because it implicitly discouraged newspapers from criticizing political candidates. *Id.*

limited number of broadcasting frequencies, the FCC's regulation of the broadcasting industry "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."[105] The *Red Lion* Court found that because the federal government had the responsibility to license the broadcast spectrum in the public interest,[106] the government was authorized to regulate the use of the spectrum to ensure it was used to serve the public interest.[107] Furthermore, the Court emphasized that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[108]

Pacifica and *Red Lion* notwithstanding, the government does not have a free hand in regulating the content of broadcast television and radio.[109] The *Pacifica* Court specifically held that the FCC order in that case was not a content-based restriction.[110] The Court also limited its holding to the context of the circumstances of that particular case.[111] Additionally, in recent years both the FCC and the courts have questioned the vitality of the scarcity doctrine.[112]

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105. *Red Lion*, 395 U.S. at 375, 388-89. By the 1920s, broadcasters outnumbered available frequencies. *Id.* at 388. This congestion led to the passage of the Radio Act of 1927 and the Communications Act of 1934, allowing the federal government to take control of the spectrum and license it to broadcasters in service of the public interest. *Id.* at 387-89, 396.

106. 47 U.S.C. § 309(a) (1994). Due to the spectrum scarcity dilemma, Congress delegated authority to the FCC to license broadcasters. 47 U.S.C. § 309(a) (1994). Under the Communications Act of 1934, as amended, the FCC has the authority to grant licenses to broadcasters to serve the "public interest, convenience, and necessity." 47 U.S.C. § 309(a) (1994).

107. *Red Lion*, 395 U.S. at 388-89. The Court stated that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* at 390.

108. *Id.* "Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them." *Id.* at 394 (citing 47 U.S.C. § 301). The Court found that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Id.* at 389 (quoting Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943)).

109. *See* FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (emphasizing the narrowness of the Court's holding and limiting that holding to the context of that particular case).

110. *Id.* at 746 ("If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content . . . . First Amendment protection might be required. But that is simply not this case."). Justice Stevens further explained that the FCC was not objecting to Carlin's viewpoint, but only "to the way in which it is expressed." *Id.* at 746 n.22.

111. *Id.* at 746-48.

112. *See* Telecomms. Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) (questioning the Supreme Court's reliance on scarcity as a rationale for distinguishing between the broadcast and print media). Indeed, the FCC

2. Telephone Messages

In *Sable Communications of California, Inc. v. FCC*,[113] the Supreme Court upheld a federal statute banning *obscene* interstate commercial telephone messages.[114] The Court, however, unanimously struck down that portion of the statute banning *indecent* interstate commercial telephone messages.[115] In contrast to the plurality opinion in *Pacifica*,[116] the *Sable* Court held that "[s]exual expression which is indecent but not obscene is protected by the First Amendment."[117] Distinguishing *Sable* from *Pacifica*, the Court noted that sexually explicit dial-in telephone services are neither as pervasive nor as accessible to children as radio broadcasts.[118] The *Sable* Court placed the burden of proof on the government to show that less restrictive means would not effectively protect children from indecent material, and extended very little deference to the "conclusory statements" of legislators.[119] Thus, *Sable* established that strict scrutiny must be used to analyze content-based restrictions on indecent speech transmitted over the telephone.[120]

3. Cable Television

In *Turner Broadcasting System, Inc. v. FCC*,[121] the Supreme Court rejected the government's argument that the same "less rigorous"

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abandoned the fairness doctrine in 1987, after the Commission found the doctrine unconstitutional. *In re* Complaint of Syracuse Peace Council, 2 FCC Rcd. 5043, 5057-58 (1987). Furthermore, the corollaries to the fairness doctrine, the personal attack and political editorial rules, were later repealed by a mandamus order of the District of Columbia Circuit. *See* RTNDA v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000).

113. 492 U.S. 115 (1989).

114. *Id.* at 124. The federal statute at issue was the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1982). Congress designed the statute to protect minors from accessing "dial-a-porn." *Sable*, 492 U.S. at 120.

115. *Sable*, 492 U.S. at 131.

116. *Pacifica*, 438 U.S. at 743-46.

117. *Id.* at 126.

118. *Id.* at 127-28 (rationalizing that a listener must take affirmative steps in order to receive the indecent messages of a dial-a-porn service). Comparing the pornographic dial-in service to indecent or obscene broadcasting, the Court reasoned that "[u]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Id.* at 128.

119. *Id.* at 129-30 ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.") (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)).

120. *Id.* at 126 ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

121. 512 U.S. 622 (1994).

standard of First Amendment scrutiny that applied to broadcast regulations should also apply to cable television regulations.[122] In *Turner Broadcasting* the plaintiff challenged sections four and five of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act),[123] which required cable television operators to dedicate a specified portion of their channels to local commercial and public broadcast stations.[124] The *Turner Broadcasting* Court, however, did not apply strict scrutiny because it found the "must-carry" provisions were content-neutral, and therefore were only subject to intermediate scrutiny.[125]

Two years later, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[126] a plurality of the Supreme Court struck down two out of three provisions of the 1992 amendment to the Cable Act of 1984.[127] The Court upheld the first provision, allowing cable operators to

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122. *Id.* at 637-38. The Court reasoned that cable television does not have the same inherent characteristics that lead to the regulation of broadcasting. *Id.* at 637-39. Due to advances in technology, the availability of cable channels is not scarce like the broadcast spectrum. *Id.* at 638-39. "Nor is there any danger of physical interference between two cable speakers attempting to share the same channel." *Id.* at 639.

123. 47 U.S.C. §§ 534-535 (1994).

124. *Turner Broad.*, 512 U.S. at 630-34. In the late 1980s, Congress became concerned that over-the-air broadcast television stations were increasingly unable to compete with cable television operators for a viewing audience. *Id.* at 632-33. Congress believed regulation of the cable television market "was necessary to correct this competitive imbalance." *Id.* at 633. Thus, under the Cable Act, cable television operators were required to carry the signals of a specified number of local commercial broadcast television stations. 47 U.S.C. § 534(b)(1). Similarly, the Cable Act required cable television operators to carry the signals of a number of noncommercial educational television stations. 47 U.S.C. § 535(b)-(c).

125. *Turner Broad.*, 512 U.S. at 661-62. Intermediate scrutiny involves a two-part analysis with the second part being a balancing test. *Id.* at 662. First, the statute in question must further an "important or substantial governmental interest," and that interest must be "unrelated to the suppression of free expression." *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). Second, the restriction on free speech must be "no greater than is essential to the furtherance of that interest." *Id.* (quoting *O'Brien*, 391 U.S. at 377). The *Turner* Court emphasized that this analysis did not require the statute to use the least restrictive means possible to achieve its purpose. *Id.* Essentially, intermediate scrutiny requires an important governmental interest furthered by narrowly tailored means. *See id.*

126. 518 U.S. 727 (1996).

127. *Id.* at 733. Justice Breyer, writing for the plurality, refused to apply one of the traditional First Amendment standards of review. *Id.* at 741-42. Instead, Justice Breyer attempted to lay down a flexible standard of review to allow the law to adapt to the rapid changes occurring in the telecommunications industry. *Id.* at 742-43. He applied "close[] scrutin[y]," which required the government to prove it was addressing an "extremely important problem, without imposing . . . an unnecessarily great restriction on speech." *Id.* at 743.

Five Justices of the *Denver* Court refused to endorse Justice Breyer's rejection of a traditional standard of review; however, those justices were split as to just how to apply

ban indecent programming on leased channels.[128] Nonetheless, the Court struck down the third provision, allowing cable operators to ban indecent programming on public access channels.[129] The Court also struck down the second provision, dubbed the "segregate and block" provision.[130] The segregate and block provision *required* a cable operator, who chose not to ban indecency on leased channels, to segregate indecent programs onto one channel and block that channel from all subscribers.[131] A subscriber was required to make a written request to gain access to the segregated channel.[132] The Court held that the segregate and block provision abridged the First Amendment by allowing cable operators to ban speech on the basis of content.[133]

More recently, in *United States v. Playboy Entertainment Group*,[134] the Supreme Court struck down a provision of the Telecommunications Act

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the traditional standards. Justice Kennedy and Justice Ginsburg applied strict scrutiny and found that all three provisions violated the First Amendment. *Id.* at 781-83 (Kennedy, J., concurring). In an opinion that would have upheld all three sections, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, approached the problem from a different angle. *Id.* at 822 (Thomas, J., concurring). Thomas argued that Kennedy and the plurality had erroneously focused on the *programmer's* free speech rights: "*Turner* strongly suggests that the proper question is whether the leased and public access requirements . . . are improper restrictions on the *operators'* free speech rights . . . the constitutional presumption properly runs in favor of the operators' editorial discretion, and that discretion may not be burdened without a compelling reason . . . ." *Id.*

128. *Id.* at 733. After noting the government's compelling interest in protecting children from harmful material, the plurality went on to uphold the provision for three reasons: (1) cable television programs are just as pervasive and accessible to children as the radio broadcasts in *Pacifica*; (2) the provision did not require that cable operators ban indecent material on leased channels; and (3) the provision merely returned to cable operators the discretion to ban indecent materials. *Id.* at 743-46.

129. *Id.* at 733. The plurality distinguished public access channels from leased channels in striking down the public access channel provision. *Id.* at 760-64. The plurality emphasized that cable operators "have not historically exercised editorial control" over public access channels. *Id.* at 761. Therefore, this provision, unlike the leased channel provision, "does not restore to cable operators editorial rights that they once had." *Id.* Furthermore, the plurality argued that the provision was simply not necessary because "the public/nonprofit programming control systems now in place would normally avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming." *Id.* at 763-64.

130. *Id.* at 758, 760.

131. *Id.* at 735.

132. *Id.*

133. *Id.* at 760. The Court noted that the segregate and block provision, unlike the other two provisions, *required* cable operators to block indecent speech. *Id.* at 753-54. Furthermore, the plurality argued that section 504 of the Telecommunications Act of 1996 offered a less restrictive method of safeguarding children. *Id.* at 756 (citing The Communications Decency Act of 1996, § 504, 47 U.S.C. § 560 (1999)).

134. 529 U.S. 803 (2000).

of 1996.[135] Section 505 of the act required cable operators to either limit sexually explicit programming to late-night hours[136] or to "fully scramble or otherwise fully block" those channels for all viewers not subscribed to them.[137] The purpose of the provision was to protect children from the possible harms of sexually explicit "signal bleed."[138]

Section 505 failed the Court's strict scrutiny analysis.[139] Justice Kennedy held that section 504 of the Telecommunications Act of 1996[140] provided a less restrictive method of achieving the same purpose as section 505.[141] Justice Kennedy's opinion emphasized the principle that the right of expression will trump content-based restrictions enacted to protect the sensitivities of children.[142]

D. Application of Obscenity and Indecency Standards to the Internet

1. The Communications Decency Act of 1996

The Communications Decency Act of 1996 (CDA) was Congress' first attempt to restrict obscene and indecent content on the Internet.[143] The

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135. *See* Section 505 of the Telecommunications Act of 1996, 47 U.S.C. § 561 (1994 & Supp. II 1997).

136. *Playboy*, 529 U.S. at 806 (citing 47 U.S.C. § 561(a) (1994 & Supp. III 1998)) (designating the hours between 10 p.m. and 6 a.m. as the late-night hours).

137. 47 U.S.C. § 561(a) (1994 & Supp. III 1998).

138. *Playboy*, 529 U.S. at 806. Signal bleed, a result of imperfect scrambling by cable operators, occurs when a cable television viewer is able to see or hear the partially unscrambled signal of a channel to which he or she is not subscribed. *Id.*

139. *Id.* at 827. The Court held that since section 505 "is a content-based speech restriction, it can stand only if it satisfies strict scrutiny . . . it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* at 813 (citations omitted).

140. 47 U.S.C. § 560 (1994 & Supp. II 1997) (requiring a cable operator to "fully scramble or otherwise fully block," free of charge, any channel a subscriber requests to be blocked).

141. *Playboy*, 529 U.S. at 816. Justice Kennedy held that the government failed to prove that section 504 would be ineffective at preventing children from viewing sexually explicit signal bleed. *Id.* at 814.

142. *Id.* at 813. The Court stated that "[w]here the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" *Id.* (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

143. 47 U.S.C. § 223(a)-(e) (1994). The CDA, enacted as Title V of the Telecommunications Act of 1996, was an attempt to update those portions of the Communications Act of 1934 that were designed to regulate access to sexually explicit telephone communications. *See* Wu, *supra* note 5, at 285 n.149. The CDA, by contrast, applied to any "telecommunications device," including the Internet and electronic mail.

CDA sought to protect children from accessing obscene or indecent material on the Internet.[144] The "indecent transmission" provision of the CDA criminalized "the knowing transmission of obscene or indecent" content to minors under eighteen years of age.[145] The "patently offensive display" provision criminalized "the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[146]

The CDA imposed fines and imprisonment of up to two years;[147] but, the act also provided two affirmative defenses.[148] Under the CDA, providers of obscene or indecent content, who took "good faith, reasonable, effective, and appropriate actions" to restrict children from accessing such content, would not be held criminally liable.[149] Similarly, the CDA provided a defense for Internet content providers who restricted, to adults only, access to their Web sites through proof of age techniques, such as credit card verification or adult access codes.[150]

2. Reno v. ACLU

On February 8, 1996,[151] the ACLU filed suit in federal district court challenging the constitutionality of the patently offensive display and

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47 U.S.C. § 223(a)(1)(A) (1994).

144. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 502 (d)(1)(A)-(B), 110 Stat. 56 (1996). In proposing the amendment to the Telecommunications Act that ultimately became the CDA, Senator James Exon stated that Congress should "make that superhighway [the Internet] a safe place for our children and our families to travel on." Wu, *supra* note 5, at 285 n.149 (quoting 141 CONG. REC. S8087-S8088 (daily ed. June 9, 1995) (statement of Sen. Exon)).

145. *Reno I*, 521 U.S. 844, 859 (1997) (citing 47 U.S.C. § 223(a) (1994 & Supp. II 1997)).

146. *Id.* (citing 47 U.S.C. § 223(d)).

147. 47 U.S.C. § 223(a), (d) (1994 & Supp. IV 1999) (declaring that violators "shall be fined under title 18, or imprisoned not more than two years, or both").

148. 47 U.S.C. § 223(e)(5) (1994 & Supp. IV 1999). The act provided in relevant part:

> It is a defense to prosecution . . . that 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.

47 U.S.C. § 223(e)(5) (1994 & Supp. IV 1999).

149. 47 U.S.C. § 223(e)(5)(A) (1994 & Supp. IV 1999).

150. 47 U.S.C. § 223(e)(5)(B) (1994 & Supp. IV 1999).

151. The same day the Telecommunications Act of 1996 was signed into law by President Clinton. Pub. L. No. 104-104, 110 Stat. 161 (1996).

indecent transmission provisions of the CDA.[152] Following an evidentiary hearing, a three-judge panel of the United States District Court for the Eastern District of Pennsylvania[153] unanimously granted a preliminary injunction against enforcement of both provisions of the CDA.[154] The United States Supreme Court, following the expedited review process of the CDA,[155] granted certiorari to review the district court's decision.[156]

In *Reno v. ACLU* (*Reno I*),[157] the Supreme Court affirmed the district court's decision, holding that both the patently offensive display provision and the indecent transmission provision of the CDA violated the First Amendment.[158] Justice Stevens emphasized the overbreadth of the two provisions of the CDA.[159] Justice Stevens wrote that in its attempt to protect children, "the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[160]

Additionally, Justice Stevens argued that the imprecise language in the CDA provisions was unconstitutionally vague.[161] Justice Stevens' majority opinion rejected the government's argument that the CDA was

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152. ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

153. Reno v. ACLU, 521 U.S. 844, 861-62 & n.29 (1997).

154. *Reno*, 929 F. Supp. at 851, 857.

155. *Reno*, 521 U.S. at 864.

156. Reno v. ACLU, 519 U.S. 1025 (1996).

157. 521 U.S. 844 (1997).

158. *Id.* at 849. Justice Stevens delivered the opinion of the Court, joined by Justices Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. *Id.* at 848. Justice O'Connor, joined by Chief Justice Rehnquist, filed an opinion concurring in the judgment in part and dissenting in part. *Id.* at 886 (O'Connor, J., concurring in part, dissenting in part). It is interesting to note that by writing the majority opinion and applying strict scrutiny analysis to the CDA, Justice Stevens reversed his previous position in *Pacifica* that indecent speech was a lesser-valued member of the protected speech club. *Compare* FCC v. Pacifica Found., 438 U.S. 725, 743 (1978) (arguing that indecent expression "surely lie[s] at the periphery of First Amendment concern"), *with Reno I*, 521 U.S. at 874-75 (arguing in favor of a strict scrutiny analysis of the CDA).

159. *Reno I*, 521 U.S. at 874.

160. *Id.*

161. *Id.* at 870-72. Justice Stevens noted the CDA's inconsistent use of language. *Id.* at 870-71. The patently offensive display provision banned "indecent" content. *Id.* at 871 (citing 47 U.S.C. § 223(a) (1994 & Supp. II 1997)). The indecent transmission provision, on the other hand, banned material that was "patently offensive as measured by contemporary community standards." *Id.* (quoting 47 U.S.C. § 223(d) (1994 & Supp. II 1997)). Justice Stevens believed that this inconsistent language would cause confusion among speakers. *Id.* Because the CDA imposed criminal penalties against violators, Justice Stevens reasoned that such imprecise statutory language would have a chilling effect on free speech. *Id.* at 871 -72.

no more vague than the obscenity standard established in *Miller v. California*.[162] The opinion pointed out that the CDA had only adopted one of the three prongs necessary to the *Miller* obscenity test.[163] Furthermore, the prong that the CDA did adopt, the patently offensive prong, was incomplete because it did not include the requirement that "the proscribed material be 'specifically defined by the applicable state law.'"[164] According to the majority, this requirement would help "reduce[] the vagueness inherent in the open-ended term 'patently offensive,'" and would thereby lend guidance to speakers endeavoring to avoid liability.[165]

Justice Stevens applied strict scrutiny analysis to the CDA due to its content-based restrictions on speech.[166] The majority found that the burden on adult speech was unacceptable because less restrictive alternatives existed and those alternatives would be just as effective at protecting children as the CDA provisions.[167] Furthermore, the Court refused to defer to the "congressional judgment" that a total ban on indecent speech was the least restrictive method to protect children on the Internet.[168]

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162. *See id.* at 872 (citing Miller v. California, 413 U.S. 15 (1973)). In the patently offensive display provision of the CDA, Congress imported language directly from *Miller*. *Id.* *Compare Miller*, 413 U.S. at 24 (defining the obscenity test as determining "whether 'the average person, applying contemporary community standards' would find that the work . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"), *with* 47 U.S.C. § 223(d)(1)(B) (1994 & Supp. II 1997) (prohibiting the use of any "interactive computer service" to display material that "depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs").

163. *Reno I*, 521 U.S. at 873. Justice Stevens argued that adopting just one prong of the three-prong *Miller* test was insufficient. *Id.* Justice Stevens explained that while the word "trunk" may have several meanings standing alone (it could "refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal"), "its meaning is clear when it is one prong of a three-part description of a species of gray animals." *Id.* at 873 n.38.

164. *Id.* at 873 (citing *Miller*, 413 U.S. at 24).

165. *Id.* at 871-72 (arguing that without such specificity, "the vagueness of such a regulation" will have an "obvious chilling effect on free speech").

166. *Id.* at 874 (holding that the CDA "lacks the precision that the First Amendment requires when a statute regulates the content of speech"). Justice Stevens noted several possible alternatives to the CDA that provided less restrictive means at protecting children. *Id.* at 879. He then concluded that in light of the CDA's "heavy burden on protected speech," the statute's affirmative defenses did not "constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid constitutional provision." *Id.* at 882.

167. *Id.* at 874-75.

168. *Id.* at 875-76 (refusing to defer to "congressional judgment" without more). "*Sable* thus made clear that the mere fact that a statutory regulation of speech was enacted

The *Reno I* Court struck down the CDA provisions despite previous Supreme Court decisions upholding governmental restrictions of indecent speech for the purpose of protecting minors.[169] The government cited three such cases in their argument in support of the CDA: *Ginsberg v. New York*,[170] *FCC v. Pacifica Foundation*,[171] and *Renton v. Playtime Theatres, Inc.*[172] Nevertheless, Justice Stevens' majority opinion held that its decision comported with those earlier cases, even though the ultimate holdings were different.[173] Justice Stevens argued that the state statute at issue in *Ginsberg* was both narrower in scope and less vague.[174] Additionally, Justice Stevens argued that the FCC's declaratory order in *Pacifica* was more narrowly tailored than the CDA's broad prohibition of indecent or patently offensive material on the Internet.[175]

Most notably, however, Justice Stevens distinguished *Reno I* from *Pacifica* by distinguishing the Internet from broadcasting.[176] Justice

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for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity." *Id.* at 875 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 129-30 (1989)). Justice Stevens made clear that in enacting a statute to protect children from sexually explicit speech, Congress must be certain that the statute is designed to affect that goal "without imposing an unnecessarily great restriction on speech." *Id.* at 876 (quoting Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 741 (1996)).

169. *See id.* at 864-68.

170. 390 U.S. 629 (1968); *see also supra* Part I.A.3.

171. 438 U.S. 726 (1978); *see also supra* Part I.B. & I.C.1

172. 475 U.S. 41, 46-50 (1986) (holding that a zoning ordinance restricting the location of adult movie theaters was a content neutral time, place, and manner regulation because it was only concerned with the secondary effects that adult entertainment establishments have on their community).

173. *Reno I*, 521 U.S. 844, 864 (1997) (arguing that *Ginsberg v. New York*, 390 U.S. 629 (1968), *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) all support the *Reno I* Court's majority decision to strike down the CDA as unconstitutional).

174. *Id.* at 865. Stevens argued that four conditions distinguished the statute upheld in *Ginsberg* from the CDA. First, in *Ginsberg*, the right of parents to rear their children without government interference was preserved by allowing the parent to buy adult materials for their children if they so desired. *Id.* Whereas, under the CDA, a parent could seemingly be found in violation for sending an email with indecent content to his or her child. *Id.* at n.32. Second, the statute in *Ginsberg* only applied to commercial transactions and provided a more specific definition of indecency. *Id.* Third, the New York statute further required prohibited material to be found "utterly without redeeming social importance for minors." *Id.* (quoting *Ginsberg*, 390 U.S. at 646). Finally, the New York statute defined a minor as under age seventeen as opposed to under age eighteen. *Id.* at 863-66.

175. *Id.* at 867. The FCC order only applied to one specific broadcast and was not a "broad categorical prohibition" like the CDA. *Id.* Additionally, the FCC order did not impose criminal sanctions as did the CDA. *Id.*

176. *Id.* (noting that the Internet does not have a history of lesser First Amendment

Stevens reasoned that the newborn Internet does not have a history of lesser First Amendment protection as does radio and television.[177] According to Justice Stevens, the rationales that explain the lesser level of protection for speech on radio and television do not apply to speech on the Internet.[178] The scarcity of available frequencies is the primary rationale for the government's extensive regulation of radio and television.[179] Scarcity, however, is not an issue on the Internet.[180] The Court noted that the Internet's "relatively unlimited, low-cost capacity for communication" provides an accessible forum for anybody who cares to use it.[181] Additionally, the Internet, unlike radio and television, does not invade the home, snaring the unwary user and holding them a captive audience.[182] Justice Stevens cited the lower court's finding in *Reno I* that "the risk of encountering indecent material [on the Internet] by accident is remote because a series of affirmative steps is required to access specific material."[183]

Finally, the *Reno I* majority rejected the government's argument that the CDA provisions were merely content-neutral time, place, and manner restrictions akin to the municipal zoning ordinance upheld in *Renton*.[184] In rejecting the government's "cyberzoning" argument, Justice Stevens found that the CDA's primary purpose, to protect children from indecent and patently offensive speech, was content-based and could not be "properly analyzed as a form of time, place, and manner regulation."[185]

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protection as does radio and television broadcasting).

177. *Id.*

178. *Id.* (noting that the Internet required "a series of affirmative steps . . . to access specific material").

179. *Id.* at 868 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399-400 (1969)); *see also supra* Part I.C.1.

180. *Id.* at 868.

181. *Id.* at 870. At the time of this case, the government estimated that approximately forty million people worldwide used the Internet. *Id.* Today, that figure has grown to more than 459 million. *World Wide Adoption of Internet*, *supra* note 6.

182. *Id.* at 867-69. "Communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" *Id.* at 869 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

183. *Id.* at 867.

184. *Id.* at 867-68 (rejecting the government's argument that the CDA was merely a form of "cyberzoning" because the CDA, unlike a narrow time, place, and manner regulation, "applies broadly to the entire universe of cyberspace").

185. *Id.* at 868 (quoting Renton v. Playtime Theatres, 475 U.S. 41, 46 (1986)). The *Renton* ordinance restricted the zoning of adult movie theaters to distance them from residential neighborhoods. *Renton*, 475 U.S. at 44. In *Reno I*, Justice Stevens emphasized that the *Renton* ordinance was a content-neutral regulation, and thus the Court applied

After dispensing with the government's line of cases, the *Reno I* Court searched for case law dealing with subject matter analogous to the Internet. The majority found *Sable Communications of California, Inc. v. FCC*[186] to be the most analogous precedent to apply in *Reno I*.[187] In striking down a statute prohibiting indecent interstate commercial telephone messages, the *Sable* Court distinguished telephony from broadcasting.[188] The *Reno I* majority compared logging onto an Internet pornography site to placing a telephone call to a dial-a-porn hotline; both require affirmative steps by the user to receive the offensive content.[189]

Concluding that the CDA's heavy burden on free speech and expression was not narrowly tailored, the *Reno I* Court struck down the CDA as facially unconstitutional.[190] Referring to the *Sable* Court's admonition not to "burn[] the house to roast the pig,"[191] the *Reno I* Court remarked that the CDA "threaten[ed] to torch a large segment of the Internet community."[192] The Supreme Court's decision in *Reno I* made

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intermediate scrutiny. *Reno I*, 521 U.S. at 867. The zoning ordinance in *Renton* was aimed at controlling the "secondary effects" adult movie theaters have on their community, not at controlling the content of speech within those theaters. *Renton*, 475 U.S. at 48-49. The "secondary effects" the Court referred to included increased crime rates, decreased retail trade, decreased property values, and a decrease in the overall "quality of urban life." *Id.* at 48. Since the *Renton* ordinance was only aimed at controlling the incidental effects that speech had on its community, and was not concerned with the content of the speech itself, the *Renton* Court found the ordinance to be content-neutral. *Id.* The purpose of the CDA, however, was to "protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech." *Reno I*, 521 U.S. at 868.

186. 492 U.S. 115 (1989).

187. *Reno I*, 521 U.S. at 869-70. The *Reno* Court held that the district court had been "correct to conclude that the CDA effectively resembles the ban on 'dial-a-porn' invalidated in *Sable*." *Id.* at 875 (citing *Sable*, 492 U.S. at 129).

188. *Id.* at 869-70 (citing *Sable*, 492 U.S. at 128) (distinguishing dial-a-porn telephone services from radio broadcasts, public displays, and unsolicited mailings)). The *Sable* Court argued that there cannot be a "captive audience" in the context of the dial-it medium. *Sable*, 492 U.S. at 128. Contrasting the dial-it medium from broadcasting, the Court noted that "[u]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Id.*

189. *Reno I*, 521 U.S. at 870 ("Placing a telephone call . . . is not the same as turning on a radio and being taken by surprise by an indecent message.") (quoting *Sable*, 492 U.S. at 128).

190. *Id.* at 882 (labeling the CDA a "patently invalid unconstitutional provision").

191. *Id.* (quoting *Sable*, 492 U.S. at 127).

192. *Id.* The *Reno I* Court also considered the possibility that the strictest communities would be empowered to govern all content on the Internet. *Id.* at 877-78. According to the Court, "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id.*

clear that statutes attempting to regulate content on the Internet would be subject to the highest level of scrutiny.[193]

3. State Efforts to Protect Children Online

Several states have passed laws modeled after the CDA.[194] New York enacted a statute that prohibited the use of "any computer communication system" to make available data that is "harmful to minors."[195] The New York law imported much of the language from the *Miller* test into its definition of "harmful to minors."[196] The American Libraries Association challenged the statute as an unconstitutional violation of both the First Amendment and the Commerce Clause.[197] The United States District Court for the Southern District of New York enjoined enforcement of the statute on the grounds that it violated the Commerce Clause, but refrained from issuing a holding on the First Amendment issues.[198] The district court, did not, however, enjoin

193. *Id.* at 879; *see also* Kelly M. Doherty, *WWW.Obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 277-78 (1999) (arguing that COPA is unconstitutional because its restrictions are not tailored narrowly enough to meet the high standard of strict scrutiny).

194. *See, e.g.*, N.M. STAT. ANN. § 30-37-3.2 (Michie 1998); N.Y. PENAL LAW § 235.21 (McKinney 2000).

195. The New York statute provided in relevant part:

> Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, [to] intentionally use[] any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

N.Y. PENAL LAW § 235.21(3) (McKinney 2000).

196. The New York statute defined "harmful to minors" as:

> [T]hat quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (a) Considered as a whole, appeals to the prurient interest in sex of minors; and (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

N.Y. PENAL LAW § 235.20(6) (McKinney 2000).

197. Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 161 (S.D.N.Y. 1997).

198. *Id.* at 183-84. The district court found that the statute violated the "dormant" Commerce Clause, a reading of the Commerce Clause that "restricts the individual states' interference with the flow of interstate commerce . . . ." *Id.* at 169. The district court gave three reasons for its decision: (1) "the Act represents an unconstitutional projection of New York law into conduct that occurs wholly outside New York"; (2) "the burdens on interstate commerce resulting from the Act clearly exceed any local benefit derived from it"; and (3) "the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether." *Id.*

enforcement of a similar provision that targets sexual predators of children.[199]

New Mexico also adopted a statute substantially similar to the CDA.[200] The American Civil Liberties Union challenged the New Mexico statute as violating the First Amendment and the Commerce Clause.[201] As in New York, the United States District Court for the District of New Mexico granted a preliminary injunction against enforcement of the statute.[202] This time, however, the district court held that the plaintiffs were likely to succeed on the merits of both their First Amendment and Commerce Clause claims.[203] On appeal, the Tenth Circuit affirmed the preliminary injunction on both grounds.[204] More recently, two other CDA modeled state statutes met similar fates in Michigan and Virginia.[205]

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199. N.Y. PENAL LAW § 235.22 (McKinney 2000). This provision, like section 235.21, prohibits the dissemination of material harmful to minors through the use of a computer communication system. *Compare* N.Y. PENAL LAW § 235.21 (McKinney 2000), *with* N.Y. PENAL LAW § 235.22(1) (McKinney 2000). Section 235.22, however, also requires that the offender "invite[ ] or induce[ ] a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him . . . ." N.Y. PENAL LAW § 235.22(2) (McKinney 2000). Section 235.21 was only a second degree crime, N.Y. PENAL LAW § 235.21 (McKinney 2000), whereas section 235.22 is a first degree offense. N.Y. PENAL LAW § 235.22 (McKinney 2000).

200. N.M. STAT. ANN. § 30-37-3.2(A) (Michie 1998 & Supp. 2001). The New Mexico statute outlawed:

> Dissemination of material that is harmful to a minor by computer consists of the use of a computer communications system that allows the input, output, examination or transfer of computer data or computer programs from one computer to another, to knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct.

N.M. STAT. ANN. § 30-37-3.2(A) (Michie 1998 & Supp. 2001).

201. ACLU v. Johnson, 194 F.3d 1149, 1152 (10th Cir. 1999).

202. ACLU v. Johnson, 4 F. Supp. 2d 1029, 1034 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

203. *Id.* at 1033-34.

204. *Johnson*, 194 F.3d at 1152. Just as the Supreme Court ruled in *Reno I*, the Tenth Circuit found that the New Mexico statute "unconstitutionally burdens otherwise protected adult communication on the Internet." *Id.* at 1160. Despite New Mexico's attempts to distinguish their statute from the CDA, the Tenth Circuit held that "the essence of the Supreme Court's rationale [in *Reno I*], and the similarities between the two statutes, do compel the same result." *Id.* at 1158.

205. Cyberspace Communications, Inc. v. Engler, 142 F. Supp. 2d 827, 829 (E.D. Mich. 2001) (granting summary judgment for the plaintiff and permanently enjoining enforcement of a Michigan statute prohibiting the use of the Internet to display or disseminate to minors material that is harmful to minors); PSINET, Inc. v. Chapman, 108 F. Supp. 2d 611, 613-17 (W.D. Va. 2000) (granting a preliminary injunction against

4. Filtering Technology

In the wake of the CDA's failure and the failure of several similar state statutes, parents and lawmakers have turned to technology for an answer.[206] Filtering software exists that allows parents to control what Web sites their children can access when they are online.[207] Such

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enforcement of a Virginia statute making it illegal to display or disseminate to juveniles electronic files containing material that is harmful to juveniles).

206. *Digital Chaperones For Kids: Which Internet Filters Protect the Best? Which Get in the Way?*, CONSUMER REPORTS ONLINE (Mar. 2001), *at* http://www.consumerreports.org/main/detail.jsp?CONTENT%3C%3Ecnt_id=18867&FOLDER%3C%3Efolder_id=18151&bmUID=1005947602876 (stating that in light of Congress' failures, parents are left with the ultimate responsibility for protecting their children from harmful content on the Internet).

207. *Digital Chaperones, supra* note 206 (noting that the number of software filters on the market has grown from "a handful to well over a dozen" since 1997); *Ratings: Filtering Software*, CONSUMER REPORTS ONLINE (Mar. 2001), *at* http://www.consumerreports.org/main/detail.jsp?CONTENT%3C%3Ecnt_id=18871&FOLDER%3C%3Efolder_id=18151&bmUID=1005947616750 (listing the leading commercial software filters and rating them on their ability to filter harmful Web sites versus how often they block legitimate Web sites); *see also* Net Nanny 4, *Net Nanny 4: Product Description* (Nov. 16, 2001), *at* http://www.netnanny.com/home/net_nanny_4/product_description.asp (advertising the ability to "[f]ilter out the negative sites or only allow access to the positive sites"); Cyber Patrol for Home, *Cyber Patrol for Home for Individual PC or Macintosh* (Nov. 16, 2001), *at* http://www.surfcontrol.com/products/cyberpatrol_for_home/product_overview/index.html (providing customers with the ability to customize their software so that each member of a family can have different levels of filtering).

Consumer Reports also rated an online filtering service provided by America Online. *Ratings: Filtering Software, supra.* Subscribers of America Online do not need to buy their own stand-alone filters. *Id.* America Online provides one of the most efficient filters on the market and its price is included in the regular subscription charge. *Id.*; *see also Digital Chaperones, supra* note 206.

Consumer Reports provided a description of how filters operate. *Digital Chaperones, supra* note 206. Filters essentially work as a gateway between a computer's Web browser and the Internet connection. *Id.* The theory is that the filter will open the gate for legitimate content but will close it when the user attempts to connect to an objectionable Web site. *Id.*

There are three methods for determining when the gate should close. *Id.* One method, software analysis, enables the software itself to determine whether a given Web site is objectionable. *Id.* Certain images or phrases embedded within a Web site will trigger the software to block the site. *Id.* Software filters are the most prone to mistakenly blocking legitimate Web sites because a single prohibited word taken out of context may activate the filter. *Id.* Human analysis, where a filtering company's staff manually searches for objectionable sites on the Web in order to create a list of banned sites, is more accurate but is also prone to missing many offensive sites given the dynamic nature of the Web. *Id.* A third method is Web site labeling. *Id.* Under this approach Web publishers voluntarily rate the content on their Web sites and a user's browser filters sites according to these labels. *Id.* This approach, however, relies on the honesty of the Web publishers to voluntarily and objectively rate their own content. *Id.* This labeling approach has been sharply criticized by Lawrence Lessig. Lawrence Lessig, *What Things Regulate Speech:*

technology can also be used to track the Web sites, newsgroups, and chat rooms their children visit.[208] Most private filtering software packages cost between forty and eighty dollars and are usually purchased on a subscription basis, because the software has to be updated periodically.[209] Nevertheless, filtering technology has been criticized for being both under and over inclusive.[210] Filters often fail to block a certain percentage of objectionable Web sites.[211] Those same filters also sometimes block Web sites that contain legitimate material, such as Web sites concerning gay rights, abortion rights, and sex education.[212]

Despite the imperfections of software filters, local governments and federal lawmakers have urged the use of filters in public schools and libraries.[213] A Virginia public library's policy to restrict the Internet access of its patrons was the first Internet filter case to catch the attention of free speech advocates.[214] The Board of Trustees of the Loudoun

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CDA 2.0 vs. Filtering, at 38-47 (May 12, 1998), *at* http://cyber.law.harvard.edu/works/lessig/what_things.pdf; *see also* LESSIG, *supra* note 2 at 177-82 (arguing against the adoption of the Platform for Internet Content Selection (PICS)).

208. *Ratings: Filtering Software*, *supra* note 207 (noting that Cyber Patrol, Cybersitter, Cyber Snoop, and Net Nanny have the ability to log online activity); *see also* Net Nanny, *supra* note 207 (advertising an ability to "[t]rack your family's online activities").

209. *Ratings: Filtering Software*, *supra* note 207; *see also, e.g.*, Cyber Patrol, *supra* note 207.

210. Lessig, *supra* note 207, at 33-35 (arguing that blocking technology is crude, overly broad, and susceptible to the subjective judgments of those who design the filter).

211. *Digital Chaperones*, *supra* note 206. Consumer Reports tested six stand-alone software filtering programs and also tested America Online's filtering controls. *Id.* Using each filter's settings for children ages thirteen to fifteen, Consumer Reports attempted to access eighty-six Web sites containing sexually explicit content, violent content, or promoting drugs, tobacco, crime, or bigotry. *Id.* America Online's "Young Teen" setting performed the best, allowing uncensored access to only one such Web site. *Id.* The other filters, however, all failed to block 20 percent or more of the offensive Web sites. *Id.*

212. *Id.* ("In some cases, filters block harmless sites merely because their software does not consider the context in which a word or phrase is used. Far more troubling is when a filter appears to block legitimate sites based on moral or political value judgments."). Consumer Reports, again calibrating the filters to block material inappropriate for thirteen to fifteen year-old children, attempted to access fifty-three Web sites "that featured serious content on controversial subjects." *Id.* This time, America Online's Young Teen filter was the worst offender, blocking sixty-three percent of the sites. *Id.* Most filters, however, "blocked only a few sites." *Id.*

Consumer Reports concluded that filtering software was "no substitute for parental supervision. Most of the products we tested failed to block one objectionable site in five. America Online's Young Teen . . . setting provides the best protection, though it will likely curb access to Web sites addressing political and social issues." *Id.*

213. *See, e.g.*, Mainstream Loudoun v. Bd. of Trs. of the Loudoun County Library, 24 F. Supp. 2d 552, 556 (E.D. Va. 1998).

214. *Id.* at 556.

County Library passed a "Policy on Internet Sexual Harassment" that included the installation of software filters on all library computers to block access to Web sites displaying obscene material or any other material "deemed harmful to juveniles."[215] Mainstream Loudoun, a Loudoun County non-profit organization, and several local residents sued the library contending that the Internet policy violated the First Amendment.[216] In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, the United States District Court for the Eastern District of Virginia granted the plaintiff's motion for summary judgment and permanently enjoined the library from enforcing the Internet filtering policy.[217]

Undeterred by the result in *Mainstream Loudoun*, Congress passed its own Internet filtering law in late 2000: the Children's Internet Protection Act (CHIPA).[218] CHIPA mandates that public schools and libraries that receive federal funds must install filtering software on computers used by patrons who are younger than eighteen.[219] The public schools and libraries are given discretion to determine what kind of filtering software to install, but the filters must be targeted to block material that is obscene or meets the definition of being harmful to minors.[220] Schools and libraries that decide to opt-out of CHIPA's filtering requirement lose their eligibility to receive federally mandated discounts from

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215. *Id.*

216. *Id.* at 552, 556-57.

217. *Id.* at 570. The district court found that the Internet policy was a content-based regulation of speech and therefore applied a strict scrutiny analysis. *Id.* at 563. The court concluded the policy failed strict scrutiny review because it was not narrowly tailored to further a compelling governmental interest. *Id.* at 570.

218. The Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-343 to 2763A-350 (2000) (codified at 47 U.S.C. § 254 (2000)).

219. 47 U.S.C. § 254(h)(5)(B) (2000) (requiring public schools to employ the "operation of a technology protection measure with respect to any of its computers with Internet access"); *Id.* § 254(h)(6)(B) (2000) (requiring the same technological measures for libraries).

220. *Id.* § 254(h)(5) (2000) (laying out the certification requirements for schools); *Id.* § 254(h)(6) (2000) (laying out the certification requirements for libraries).

CHIPA defines harmful to minors as:

> [A]ny picture, image, graphic image file, or other visual depiction that -- (i) taken as a whole and with respect to minors, appeals to the prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

47 U.S.C. § 254(h)(7)(G) (2000).

telecommunication service providers.[221]

Not surprisingly, a combination of libraries, free speech organizations, Internet Web providers, and individuals filed two lawsuits challenging the constitutionality of CHIPA.[222] Following the CDA review process, the two lawsuits were assigned to a special three-judge panel in the Eastern District of Pennsylvania.[223] The three-judge panel denied the government's motion to dismiss the two cases and the panel is scheduled to hear the cases in early 2002.[224] Any appeal of the panel's decision would go directly to the U.S. Supreme Court.[225]

E. Back to the Drawing Board: The Child Online Protection Act of 1998

1. The Child Online Protection Act of 1998

The Child Online Protection Act of 1998[226] (COPA) is essentially a revision of the CDA.[227] With *Reno I* in mind, Congress tried again to enact a statute that would restrict minors from accessing harmful materials on the Word Wide Web.[228] COPA criminalizes the commercial

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221. 47 U.S.C. § 254(h)(5)(F); 47 U.S.C. § 254(h)(6)(F).

222. Shannon P. Duffy, *Libraries, ACLU Challenge New Law: It's the Third Suit Against Laws Meant to Protect Children From Internet Pornography*, 224 THE LEGAL INTELLIGENCER 1 (Mar. 21, 2001). One suit was filed by the American Library Association along with the American Civil Liberties Union of Pennsylvania. *Id.* The other suit was filed by the Multnomah County Public Library and a coalition of libraries, library associations, individual library patrons, and Internet publishers. *Id.*

223. Am. Library Assoc. v. United States, No. 01-1303 (E.D. Pa. July 2001) (denying motion to dismiss); Multnomah County Pub. Library v. United States, No. 01-1322 (E.D. Pa. July 2001) (denying motion to dismiss); *see also Lawsuits Challenging Requirement For Library Internet Filtering Can Proceed*, 2 No. 11 ANDREWS E-BUS. L. BULL. 3 (Sept. 2001).

224. Am. Library Assoc. v. United States, No. 01-1303 (E.D. Pa. July 2001) (denying motion to dismiss); Multnomah County Pub. Library v. United States, No. 01- 1322 (E.D. Pa. July 2001) (denying motion to dismiss), *available at* http://www.paed.uscourts.gov/documents/3jic/ORDER2.HTM; *Lawsuits Challenging Requirement, supra* note 223.

225. *Lawsuits Challenging Requirement, supra* note 223.

226. Pub. L. No. 105-277, 112 Stat. 2681-736 (codified at 47 U.S.C. § 231 (1998)). The Act was signed into law by President Clinton on October 21, 1998. Doherty, *supra* note 193, at 280 & n.158 (citing David Walsh, *World Socialist Website, U.S. Group Sues Over Attempt at Internet Censorship*, http://www.wsws.org/news/1998/oct1998/net024.html (last visited Nov. 1, 1998); Frank James, *Internet Anti-Smut Law Challenged as Unconstitutional*, CHI. TRIB., Oct. 23, 1998, at 3 (suggesting that President Clinton was pressured into signing COPA, despite reservations about its constitutionality, in order to distance himself from the Monica Lewinsky scandal and to allow the White House to "regain its moral compass")).

227. Congress enacted COPA as an amendment to section 223 of the Communications Act of 1934. *See* H.R. REP. NO. 105-775, at 1, 5 (1998).

228. Congress indicated that:

use of the World Wide Web to transmit material that may be harmful and accessible to minors.[229] In defining material that is "harmful to minors," COPA largely imported the standards laid down in *Miller* and *Ginsberg*:[230]

> The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that —
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[231]

COPA, like the CDA before it, provides affirmative defenses to

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> The purpose of H.R. 3783 [COPA] is to amend the Communications Act of 1934 by prohibiting the sale of pornographic materials on the World Wide Web (or the Web) to minors. H.R. 3783 has been carefully drafted to respond to the Supreme Court's decision in Reno v. ACLU . . . and the Committee believes that the bill strikes the appropriate balance between preserving the First Amendment rights of adults and protecting children from harmful material on the World Wide Web.

H.R. REP. NO. 105-775, at 1 (1998).

229. 47 U.S.C. § 231(a)(1) (1994 & Supp. V 2000) provides:

> Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

A "minor" is defined as any person under seventeen years of age. 47 U.S.C. § 231(e)(7) (1994 & Supp. V 2000). A person is considered "engaged in the business" if the posting on the Web of material harmful to minors is "a regular course of such person's trade or business, with the objective of earning a profit." 47 U.S.C. § 231(e)(2)(B) (1994 & Supp. V 2000). Additionally, intentional violators are subjected to a fifty thousand dollar fine for each violation, and each day of a violation constitutes a separate violation. 47 U.S.C. § 231(a)(2) (1994 & Supp. V 2000).

230. *See* H.R. REP. NO. 105-775, at 27-28 (1998). "The Committee intends for the definition of material harmful to minors to parallel the *Ginsberg* and *Miller* definitions of obscenity and harmful to minors . . . . In essence, the Committee intends to adopt the 'variable obscenity' standard for minors." *Id.*

231. 47 U.S.C. § 231(e)(6) (1994 & Supp. V 2000).

defendants who, in good faith, attempt to bar minors from access to their sexually explicit material through one of the following three methods: (1) requiring a credit card or adult personal identification number; (2) age verification; or (3) other technological measures.[232]

2. ACLU v. Reno

The day after COPA was signed into law, the ACLU and several other interested parties[233] filed a lawsuit in the Eastern District of Pennsylvania seeking to enjoin its enforcement.[234] The ACLU challenged COPA on three grounds: (1) that its facial and as-applied prohibition of protected speech is a violation of the First Amendment; (2) that it is facially unconstitutional for abridging the First Amendment rights of minors; and (3) that it is void for vagueness under the First and Fifth Amendments.[235]

Following a hearing on November 19, 1998, the district court entered a temporary restraining order, enjoining enforcement of COPA from November 20, 1998, to December 4, 1998.[236] On February 1, 1999, the district court denied the government's motion to dismiss and granted plaintiffs' motion for a preliminary injunction against enforcement of COPA.[237]

The government appealed the district court's decision to the United States Court of Appeals for the Third Circuit.[238] In *ACLU v. Reno* (*Reno II*),[239] the Third Circuit held that the ACLU's constitutional challenge of

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232. 47 U.S.C. § 231 (c)(1)(A)-(C) (1994 & Supp. V 2000).

233. Seventeen plaintiffs filed suit in *ACLU v. Reno*: American Civil Liberties Union (on behalf of all its members); A Different Light Bookstore; American Booksellers Foundation for Free Expression; ArtNet; The Blackstripe; Condomania; Electronic Frontier Foundation (on behalf of all its members); Electronic Privacy Information Center; Free Speech Media, LLC; Internet Content Coalition; OBGYN.NET; Philadelphia Gay News; PlanetOut Corporation; Powell's Bookstore; RIOTGRRL; Salon Magazine; and Westock.com. *ACLU v. Reno II Victory! Appeals Court Rejects Congress' Second Attempt at Cyber-Censorship* (June 22, 2000), *available at* http://www.aclu.org/news/2000/n062200b.html.

234. ACLU v. Reno, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999), *aff'd*, ACLU v. Reno, 217 F.3d 162 (3d. Cir. 2000).

235. *Id.*

236. *Id.*

237. *Id.* at 499. The district court applied strict scrutiny to COPA based on the finding that the statute was a content-based restriction of non-obscene sexual expression. *Id.* at 492-93. The Court further found that plaintiffs had established a "likelihood of success on the merits," irreparable harm from enforcement of the statute, and that the balance of interests weighed in their favor. *Id.* at 498.

238. ACLU v. Reno, 217 F.3d 162, 165 (3d Cir. 2000), *cert. granted sub nom.*, 121 S. Ct. 1997 (2001).

239. *Id.*

COPA was likely to succeed on the merits, and therefore affirmed the district court's grant of a preliminary injunction.[240]

The Third Circuit agreed with the district court that COPA is a content-based restriction of free speech, and therefore is "both presumptively invalid and subject to strict scrutiny analysis."[241] The Third Circuit focused its opinion on COPA's reliance of the contemporary community standards test to determine the lawfulness of content on the World Wide Web.[242]

In analyzing the application of the contemporary community standard test to the Internet, the Third Circuit first noted that the Internet is a borderless medium that is not geographically constrained like other traditional mediums.[243] Every Web site has the potential to reach a world-wide audience.[244] The Third Circuit further noted the district court's finding that "Web publishers cannot 'prevent [their site's] content from entering any geographic community.'"[245] In other words, Web publishers cannot tailor their message to reach only those communities that would approve of the message; all Internet users world-wide have access to any given Web site.[246]

The Third Circuit reasoned, therefore, that a Web publisher endeavoring to stay within the law is forced to "abide by the most restrictive and conservative state's community standards in order to avoid criminal liability."[247] The Third Circuit argued that tailoring content to conform to the strictest community's standard imposed an impermissible burden on free speech.[248] This approach would force Web publishers to either censor their content to conform to the strictest community standard, or install a credit card or age verification system to employ COPA's affirmative defenses.[249] The Third Circuit found that

240. *Id.* at 166.

241. *Id.* at 173 (quoting *Reno*, 31 F. Supp. 2d at 493). Thus, the Third Circuit analyzed COPA to determine whether it is narrowly tailored to further a compelling state interest, and that it achieves that interest through the least restrictive means. *Id.*

242. *Id.* at 173-74 ("We are not persuaded that the Supreme Court's concern with respect to the 'community standards' criterion has been sufficiently remedied by Congress in COPA."); *see also Reno I*, 521 U.S. 844, 877-78 (1997).

243. *Reno II*, 217 F.3d at 168-69.

244. *Id.* at 169.

245. *Id.* (citing *Reno*, 31 F. Supp. 2d at 484) (finding that Web publishers have no control over which Internet users may access their site, and therefore have no way to block access based on geographic community).

246. *Id.*; *see also* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 171 (S.D.N.Y. 1997).

247. *Reno II*, 217 F.3d at 166.

248. *Id.*

249. *See* 47 U.S.C. § 231(c) (1994 & Supp. IV 1999); *see also Reno II*, 217 F.3d at 175.

credit card and age verification systems could be costly for Web publishers to install and maintain.[250] More importantly, such systems have a tendency to deter potential patrons, resulting in a loss in traffic, and therefore a loss in potential revenue for the Web publishers.[251]

Finally, those Web publishers who choose to censor their message rather than install a costly age verification system, would deprive adult Internet users of their First Amendment right to access the uncensored materials.[252] Thus, the Third Circuit found that COPA results in an "overreaching burden and restriction on constitutionally protected speech." [253]

The Third Circuit, however, emphasized the narrowness of its holding; the court made clear that it was not challenging the *Miller* test.[254] The Third Circuit believed the community standards test in *Miller* would continue "to be a useful and viable tool in contexts *other than* the Internet and the Web under present technology."[255] According to the Third Circuit, the *Miller* test, which was created to review a state statute banning the distribution of sexually explicit materials through the mail, does not apply to the Internet.[256] The defendants in *Miller* could control where they mailed their sexually explicit material, whereas a Web publisher does not have such control.[257] Nevertheless, the Third Circuit theorized that advances in new technology (i.e., technology that would allow Web publishers to control where their information was disseminated) could make the application of community standards to the

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250. *Reno II*, 217 F.3d at 171 (acknowledging that the age verification systems are likely to be less costly than the credit card verification systems). Citing to the district court's findings, the Third Circuit noted that Web publishers could hire a company specializing in adult verification services for a percentage of the fees generated by visitors to the Web site. *Id.* at 170-71.

251. *Id.* at 171. Both types of verification systems typically require Web site visitors to reveal personal information, including credit card numbers. *Id.* These type of invasive questions dissuade people who might otherwise access the site. *See id.*

252. *Id.* at 177.

253. *Id.*

254. *Id.* at 180 ("Our holding in no way ignores or questions the general applicability of the holding in *Miller* with respect to 'contemporary community standards.'").

255. *Id.*

256. *Id.* ("*Miller*, however, has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications.").

257. *Id.* *Compare id.* (finding that Web publishers cannot control where their communications are received), *with* Miller v. California, 413 U.S. 15, 24 (1973) (creating the contemporary community standards test to restrict the mailing of unsolicited sexually explicit material where the sender can control the destination of the material).

Internet constitutional.[258]

II. AN ANALYSIS OF CONTEMPORARY COMMUNITY STANDARDS AS APPLIED TO THE INTERNET: APPROACHES IN LIGHT OF VARIOUS CONGRESSIONAL ATTEMPTS

A. The Community Standards Test Cannot Apply to the Internet

Even prior to its application to the Internet, the contemporary community standards test did not enjoy universal acceptance.[259] In *Roth*, the first case to enunciate a community standards approach for measuring obscenity, Justice Douglas, joined by Justice Black, voiced a vigorous dissent.[260] Believing that such a standard was repugnant to the First Amendment's protection of free speech, Justice Douglas wrote: "Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment."[261] Justice Douglas found the community standards test troubling because it allowed juries to censor protected speech for their own personal and subjective reasons.[262]

1. No Geographic Internet Community Exists

Several commentators have argued that the rationale behind the *Miller* test does not apply to the Internet.[263] One reason for measuring

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258. *Reno II*, 217 F.3d at 181 ("We also express our confidence and firm conviction that developing technology will soon render the 'community standards' challenge moot, thereby making congressional regulation to protect minors from harmful material on the Web constitutionally practicable.").

259. *Miller*, 413 U.S. at 39-40 (Douglas, J., dissenting) (arguing that the First Amendment protects obscene speech and that the *Miller* test is vague); Paris Adult Theatre v. Slaton, 413 U.S. 49, 109-113 (1973) (Brennan, J., Stewart, J., and Marshall, J., dissenting) (arguing against the application of any obscenity test because the "First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials"); Roth v. United States, 354 U.S. 476, 511-12 (1957) (Douglas, J., and Black, J., dissenting) (arguing that the community standards test "conflicts . . . with the command of the First Amendment").

260. *Roth*, 354 U.S. at 508-14 (Douglas, J., dissenting).

261. *Id.* at 512.

262. *Id.* ("Under this test, juries can censor, suppress, and punish what they don't like, provided the matter relates to 'sexual impurity' or has a tendency to 'excite lustful thoughts.' This is community censorship in one of its worst forms."). Justice Douglas took a hands-off approach to speech. He argued that the government could only regulate antisocial conduct, not speech. *Id.* at 512-13. To do otherwise would allow the censor to suppress speech on the basis of his or her own moral code. *Id.* at 513.

263. *See, e.g.*, Doherty, *supra* note 193, at 286-89 (arguing that since the community standards test "can produce different results based on the location of the receiver,

obscenity with local community standards is to give the "people [of a community] . . . some control over the type of establishments that may operate in their neighborhood."[264] This rationale does not ring true for the Internet.[265] While some commentators argue that there is a "cyber community" or a "virtual community,"[266] these phrases ring hollow in the absence of a true geographic community on the Internet.[267]

COPA, like the *Miller* test before it, applies the community standard of the receiver for determining whether material is harmful to minors.[268] The *Miller* test contradicts itself, however, when applied to Internet communications. The Supreme Court in *Miller* explicitly rejected the idea that juries should apply a national community standard.[269] Writing

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reasonable users will be unable to predict what is deemed harmful to minors"); Jill Jacobson, *The Child Online Protection Act: Congress's Latest Attempt to Regulate Speech on the Internet*, 40 SANTA CLARA L. REV. 221, 249-50 (1999) (arguing that the community standards test is overly burdensome to Web posters because it is "impossible for an online content provider to ascertain the standards of each community that could potentially access its material"); Philip E. Lewis, *A Brief Comment on the Application of the "Contemporary Community Standard" to the Internet*, 22 CAMPBELL L. REV. 143, 158-61 (1999) (arguing that the original rationale for the contemporary community standards test, to give people of a geographic community some control over what type of businesses may operate in their community, does not apply to the Internet); Heather L. Miller, *Strike Two: An Analysis of the Child Online Protection Act's Constitutional Failures*, 52 FED. COMM. L.J. 155, 174-75 (1999) (arguing that an application of the community standards test that applies the community standards of the receiver is problematic because, unlike other communication media, the Web poster has no control over where his or her transmission is received).

264. Lewis, *supra* note 263, at 160.

265. *Id.* at 158-61

266. *Developments – The Law of Cyberspace*, 112 HARV. L. REV. 1577, 1598-99 (1999) (advocating the creation of a virtual community standard based on specific, discrete Internet communities); Wu, *supra* note 5, at 302 (proposing the formation of an international executive board to create a workable virtual community standard for the Internet).

267. *See* Donald T. Stepka, *Obscenity On-line: A Transactional Approach to Computer Transfers of Potentially Obscene Material*, 82 CORNELL L. REV. 905, 935-36 (1997) (arguing against adoption of a virtual or "cyber-community" standard).

268. 47 U.S.C. § 231(e)(6) (1994 & Supp. IV 1999); *Reno II*, 217 F.3d 162, 167-68 (3d Cir. 2000); *see also* Hamling v. United States, 418 U.S. 87, 105 (1974) (holding that it was appropriate for jurors in an obscenity case, brought under 18 U.S.C. § 1461, to draw from the community standards existing in the Southern District of California (the standard of the community where the case was being tried)); Miller v. California, 413 U.S. 15, 31, 33-34 (1973) (instructing juries in an obscenity case to apply the community standards of the geographic locale where the sexually explicit materials were received).

269. *Miller*, 413 U.S. at 31-32 ("Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact."); Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting) (arguing that there is "no provable 'national standard'" nor should there be one).

for the majority, Chief Justice Burger argued it was "neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[270] Rather, the *Miller* Court endorsed the use of a local community standard test.[271] The problem with applying the *Miller* test to Internet communications is that although the jury is instructed to apply their own local standard, that standard will become a *de facto* international standard. Since the Internet is a global medium, the local community standard used to determine whether content is harmful to minors will govern world-wide communications.[272] The result is an international, not merely a local, community standard determining content that is appropriate on the Internet.[273] Thus, the people of Maine and Mississippi could control the content in Las Vegas and New York City.

Indeed, a community's standard could reach farther than any one particular case. Since the Supreme Court has mandated the use of a local community standard when confronting obscenity and harmful to minor statutes, a publisher of sexually explicit materials may find himself prosecuted in any community that is touched by his materials.[274] When someone posts material on the World Wide Web it can be received in

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270. *Miller*, 413 U.S. at 32. "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33.

271. *Id.* at 31-32; *see also Hamling*, 418 U.S. at 104-05 (holding that a juror in an obscenity case is permitted to "draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case"). *But see* Jennifer A. Rupert, *Tangled in the Web: Federal and State Efforts to Protect Children From Internet Pornography*, 11 LOY. CONSUMER L. REV. 130, 135-36 (1999) (explaining that while the *Miller* definition allows the jury to apply community standards to determine "prurient interest" and "patent offensiveness," the definition calls for a national standard to determine whether the material has "serious literary, artistic, political, or scientific value") (citing *Miller*, 413 U.S. at 24, 37).

272. *Reno II*, 217 F.3d at 177 (noting that since Web publishers cannot control where their communication is received, "such publishers would necessarily be compelled to abide by the 'standards of the community most likely to be offended by the message'") (citing *Reno I*, 521 U.S. 844, 877-78 (1997)).

273. *Id.*

274. *Hamling*, 418 U.S. at 106 (holding that the "community" implicated in a federal obscenity case is the judicial district where the case is tried); United States v. Thomas, 74 F.3d 701, 711 (6th Cir. 1996) (finding that since sexually explicit "computer-generated images . . . were electronically transferred" from California to the Western District of Tennessee, the jury should apply the community standards of the Western District of Tennessee); United States v. Peraino, 645 F.2d 548, 551 (6th Cir. 1981) (noting that "[v]enue for federal obscenity prosecutions lies 'in any district from, through, or into which' the allegedly obscene material moves") (citing 18 U.S.C. § 3237).

almost any community around the world.[275] Furthermore, the Web publisher has no control over who will view that material.[276] Therefore, Web publishers of any kind of sexual material risk liability in any community that has access to the Internet. Consequently, Web content is governed by the strictest possible community.[277] As noted earlier, both the Supreme Court and the Third Circuit have warned against this lowest common denominator outcome.[278] Furthermore, such an outcome is contrary to the very rationale behind the *Miller* Court's adoption of a local community standard test: to allow the average person, not the most pious nor the most tolerant, to determine what content is obscene.[279]

2. The Forum Shopping Problem

The community standards test allows prosecuting attorneys to shop for a forum with the most conservative community to help ensure a conviction.[280] An example of this technique was illustrated in a Sixth Circuit case, *United States v. Thomas*,[281] in which an Internet bulletin board operator in California was prosecuted in Tennessee because a United States Postal Inspector downloaded sexually explicit material off of Thomas' electronic bulletin board.[282] Rather than prosecuting in

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275. *Reno II*, 217 F.3d at 168-69.

276. *Id.* at 169.

277. *Reno I*, 521 U.S. at 877-78; *Reno II*, 217 F.3d at 175; *see also* Rupert, *supra* note 271, at 137 (providing an example of the "lowest common denominator" effect). Under Rupert's hypothetical, the Chicago Museum of Contemporary Art posts the nude works of a photographer on the Internet. *Id.* Under COPA, if anybody in any community found the images offensive, the Museum could be held criminally liable. *Id.*

278. *See supra* note 192; *see also supra* text accompanying notes 247-49.

279. *Miller*, 413 U.S. at 33 (stating that the reason for applying the contemporary community standards of the average person "is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one") (citing *Roth*, 354 U.S. at 489).

280. *See, e.g.*, *Thomas*, 74 F.3d at 705 (filing suit in the Western District of Tennessee for a Web site originating in the Northern District of California).

281. 74 F.3d 701 (6th Cir. 1996).

282. *Id.* at 705-06. The district court convicted Robert Alan and Carleen Thomas under 18 U.S.C. §§ 1462 and 1465. *Id.* Section 1462 provides, in relevant part:

> Whoever brings into the United States . . . or knowingly uses any . . . interactive computer service . . . for carriage in interstate or foreign commerce -- (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character . . . Shall be fined under this title or imprisoned not more than five years, or both . . . .

18 U.S.C. § 1462 (1994).

Section 1465 provides, in relevant part:

> Whoever knowingly transports or travels in, or uses a facility or means of,

California, prosecutors took advantage of more conservative communities in Tennessee.[283]

Therefore, as predicted by the Court in *Reno I*, forum shopping empowered a conservative community to dictate what content was permissible on the Internet.[284] Such forum shopping will likely result in a chilling of free speech on the Internet.[285] Web publishers will be hesitant to post material on the Web that they fear the more conservative communities will deem inappropriate, even though that speech might be acceptable elsewhere.[286] This, in turn, will result in self-censorship of Internet content that many people find valuable. For example, one could imagine Web publishers being hesitant to post materials on topics such as AIDS and other sexually transmitted diseases, general sexual health information, art exhibits (nudes), social and dating services, and even political material about world leaders (i.e., Ken Starr's investigation of President Clinton's executive affairs). In other words, legitimate content with serious literary, artistic, political, or scientific value (SLAPS content), that normally receives strict First Amendment protection, and that is normally measured by a national rather than a local standard,[287]

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interstate or foreign commerce or an interactive computer service . . . in or affecting such commerce for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription . . . or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1465 (1994 & Supp. V 2000).

283. *See* Doherty, *supra* note 193, at 289 & n.215 (explaining that an undercover United States Postal inspector downloaded the sexually explicit images while in Tennessee); *see also* Eric Handelman, *Comment, Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 ALB. L. REV. 709, 710-11 (1995) (arguing that "the *Miller* test is too vague to provide adequate due process protection to a potential defendant in an Internet obscenity case").

284. *Reno I*, 521 U.S. 844, 877-78 (1997).

285. ACLU v. Reno, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999) (finding that "Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites").

286. *Id.*; *see also* Jacobson, *supra* note 263, at 250 (predicting that COPA "will reduce speech on the Internet to the level of what is acceptable for children"); Miller, *supra* note 263, at 172 (speculating that under COPA Web publishers will censor themselves to make certain they will not be prosecuted); Rupert, *supra* note 271, at 144 (arguing that due to the prohibitive costs of implementing age verification systems, Web publishers will choose to censor their own material to ensure compliance with COPA).

287. The third prong of Miller's obscenity test, and the third prong of COPA's definition of material harmful to minors, requires that the banned material, when taken as a whole, "lacks serious literary, artistic, political, or scientific value." Miller v. California,

would be jeopardized by the potential for arbitrary rulings by local lay juries.[288]

B. Attempting to Craft a Community Standards Test to the Internet

There has been a tremendous amount of commentary concerning Congressional efforts to draft legislation to protect minors from pornography on the Internet.[289] Most of that commentary has been critical of Congressional statutes such as the CDA and COPA.[290] As a result, commentators have proposed several alternative solutions to the problem. This section outlines some of those alternatives.

1. Applying a Virtual Community Standard

One commentator, Angela Wu, argued for several alternatives to government regulation of sexually explicit material on the Internet.[291] Wu theorized that a virtual community standard could be applied to

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413 U.S. 15, 31, 24 (1973); 47 U.S.C. § 231(e)(6) (Supp. IV 1999). Unlike the patently offensive and prurient interest prongs, which utilize local community standards, the SLAPS prong is measured by a national standard. *Reno I*, 521 U.S. 844, 873 (1997) (describing the SLAPS prong as a "societal value" requirement that "allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value"); *see also* Pope v. Illinois, 481 U.S. 497, 500 (1987).

288. Lewis, *supra* note 263, at 163-64. Lewis argues that the function of a jury in a criminal trial is to make findings of fact, not to make subjective determinations as to the "reprehensibleness or moral quality of the conduct . . . . In the absence of any palpable standard, it can only be subjective." *Id.* at 163. Lewis goes on to compare the community standard test to Justice Stewart's admission in *Jacobellis v. Ohio*, that although he could not settle on a workable standard to define obscenity, "I know it when I see it." *Id.* at 164 (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)). The contemporary community standard test offers the same solution as Justice Stewart, the only difference is that the arbitrary determination is made by a jury rather than a judge. Not only is this determination not suitable to a jury, but it is also "an abandonment of logical thought, an application of the subjective bias of personal morality, and subsequently a failure to apply a biological understanding of human sexuality." *Id.*

289. *See, e.g.*, Doherty, *supra* note 193, at 286 (arguing that COPA's community standard test will be extremely difficult to apply to the Internet); Jacobson, *supra* note 263, at 247-50 (predicting that COPA will not survive a strict scrutiny analysis); Lewis, *supra* note 263, at 158-161 (arguing that the *Miller* test cannot be applied to the Internet because posting material on a Web site is not analogous to a newsstand selling sexually explicit magazines); Miller, *supra* note 263, at 175-76 (arguing that Web publishers will censor their own content for fear of being prosecuted under COPA); Rupert, *supra* note 271, at 143-44 (concluding that COPA unconstitutionally restricts speech); Wu, *supra* note 5, at 301-303 (prosposing several alternatives to government regulation of the Internet).

290. *See, e.g.*, *supra* note 289.

291. Wu, *supra* note 5, at 301.

determine what material is acceptable on the Internet.[292] Wu envisioned the creation of an organization to formulate a uniform international virtual community standard.[293]

2. "Netizen" Regulation

Another alternative to government regulation Wu identified was "netizen regulation."[294] According to Wu, "'[n]etizen regulation' simply refers to individual Internet users actively participating to 'regulate' the Internet."[295] Internet users have the responsibility to govern themselves without outside interference from the government.[296] Wu argued that Internet users have already instituted an informal code of behavior termed "netiquette."[297] As an example of how self-regulation works, Wu explained that users can "flame" Web sites that post inappropriate material.[298] "Flaming" is a "verbal attack in cyberspace."[299] The rationale is that the rest of the Internet community will scorn those who violate the code of behavior.[300]

3. Applying the Community Standard of the Sender

Donald Stepka endorsed a community standard test for the Internet that would involve a slight twist of COPA: applying the community standard of the sender as opposed to the receiver.[301] Stepka identified three communities that could potentially make up the COPA

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292. *Id.* at 302 ("Since the Internet is often described as a 'virtual community,' it would be appropriate for the Internet to have a 'virtual community standard,' especially with respect to what material is acceptable.").

293. *Id.* Wu hypothesized that the United Nations could create an executive board responsible for forming a "Virtual Community Organization" (VCO) composed of Internet users from around the world. *Id.* The VCO would then be responsible for articulating a uniform virtual community standard. *Id.*

294. *Id.* at 301. "Netizen" has been defined as: "a citizen of the Internet." NEWTON, *supra* note 5, at 469.

295. Wu, *supra* note 5, at 301 n.234.

296. *Id.* at 302 ("With 'netizen regulation,' the Internet is not subject to government control, but rather, is policed by members of its own 'community.'").

297. *Id.* at 301. "Netiquette" is defined as: "proper behavior on Internet." NEWTON, *supra* note 5, at 469.

298. Wu, *supra* note 5, at 301-02.

299. *Id.* at 302 n.236 (citing Lawrence Lessing, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1746 n.10 (1995)). Newton's Telecom Dictionary defines "flaming" as: "send[ing] an insulting message, usually in the form of a tirade, sent via online postings." NEWTON, *supra* note 5, at 283.

300. NEWTON, *supra* note 5, at 468 ("One usually tries to be a good net.citizen, lest one be flamed, i.e., insulted through e-mail.").

301. Stepka, *supra* note 267, at 935-37.

community: the virtual community (or cyber-community); the community where the material originated (the community of the sender); and the community where the material was received (the community of the receiver).[302] Stepka dismissed the virtual community standard deeming it unrealistic to ignore the fact that computer users are still members of their geographic communities when they are on the Internet.[303]

Stepka reasoned that applying the community standard of the receiver results in adhering to the standards of the strictest community.[304] Since the sender cannot control where his or her content is downloaded, all Web publishers must adhere to the strictest possible geographic community standard to ensure compliance with the law.[305] A Web publisher, however, can control where the Web site itself is located; thus, Stepka would have the Web publisher's local community standard apply.[306]

4. Lewis' Scientific Approach: Prosecutors Must Show Actual Harm

Phillip E. Lewis, rejecting the constitutionality of the CDA and COPA, suggested another means for drawing the line between protected

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302. *Id.* at 936-40.

303. *Id.* at 939. Stepka also believed the virtual community standard would be unworkable because "it is hard to see why there should be exactly one such community that comprises all and only cyberspace." *Id.* Indeed, considering the Internet is "as diverse as human thought," applying one community standard to all of cyberspace is just as problematic as applying one real-world community standard to all of the geographic communities of the world. ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996); Stepka, *supra* note 267, at 939.

304. Stepka, *supra* note 267, at 928. If the community standard of the receiver is used to determine obscenity, "[a]ll communities will have their standards set by the least tolerant community, in violation of the fundamental principle that communities should set their own standards." *Id.*

305. *Id.*

306. *Id.* at 939. Stepka argued that the downloading of sexually explicit materials on the Internet is distinguishable from those cases outlawing the sending of obscene materials to recipients via regular mails. *Id.* at 941. Stepka asserted that the affirmative downloading of materials from the Internet is more analogous to those cases where the consumer travels to a merchant's shop to buy such materials. *Id.* at 939. In those cases, Stepka argued, it makes the most sense to apply the standards of the community of the merchant or the Web publisher, not the purchaser's community. *Id.* As long as the materials are viewed in private, there is no reason to involve the community of the purchaser. *See id.* Under this argument, the community of the seller should have some say as to what kind of products are sold in their community. *See id.* Stepka noted, however, that if the supplier sent out a bulk email, he would then be liable to the community standards of those communities he had sent to. *Id.* at 940.

speech and unprotected obscenity.[307] According to Lewis, Internet content should only be considered obscene (i.e., harmful to minors) where a person is actually harmed by the creation and dissemination of such content.[308] Lewis did not see a reason for treating the crime of disseminating obscene materials to children any differently from other garden-variety crimes where actual harm must be proven.[309] Lewis argued that proving sexually explicit materials caused objective harm can be established just as causation of objective harm is proven in other crimes.[310]

III. TOWARD A SOLUTION THAT PROTECTS CHILDREN WITHOUT TRAMPLING UPON THE FIRST AMENDMENT

> We have exported to the world, through the architecture of the Internet, a First Amendment *in code* more extreme than our own First Amendment *in law*.[311]

This Comment argues that the contemporary community standard test used in COPA is unconstitutional.[312] COPA allows the community of the Web surfer, the receiver of Web content, to determine whether that content is harmful to minors.[313] This approach is overly burdensome of free speech because Web publishers have no control over which communities download their material.[314] Consequently, the least tolerant communities are given the power to define what content may be published on the Internet.[315] Rejecting COPA, therefore, the question remains: how can children be protected from harmful content on the Internet? The commentators above advanced several alternatives to COPA.[316] This Comment rejects those arguments in favor of leaving parents with the responsibility of protecting their children from harmful

307. Lewis, *supra* note 263, at 166-67.

308. *Id.* at 166.

309. *See id.* & n.128. According to Lewis, if Internet content does not cause objective harm, "there is not practical justification in forbidding such material." *Id.* at 166 n.128. Lewis also stressed that "[t]he mere possibility that someone might view a particular material and be offended by it does not qualify as a 'harm.'" *Id.* at 166 n.129.

310. *Id.* at 166-67.

311. LESSIG, *supra* note 2, at 167 (emphasis added).

312. *See supra* Part II.A.

313. *Id.*

314. *Id.*

315. *Id.*

316. *See supra* Part II.B.

materials on the Web. This approach, though admittedly imperfect, is the best method available to protect children while preserving the online public's First Amendment rights.

A. Applying a Virtual Community Standard

Wu suggested that a virtual community standard be applied to govern content on the Internet.[317] Applying a single virtual or cyber community standard is problematic because the Internet is neither small nor localized.[318] Considering that the Web is "as diverse as human thought," it is unsuitable to define the Web as a single community.[319] Furthermore, Wu conceded that the virtual community standard may be completely disregarded by Internet users.[320]

One could, however, identify individual communities within the Internet.[321] People who regularly log on to a particular type of Web site share a common interest and are therefore members of an online community.[322] For example, those people who frequently visit news-related Web sites could constitute a news community. The news community could be further subdivided into a sports-news community and a financial-news community. One could also imagine communities consisting of consumers, pet owners, entertainment fans, various religious groups, and any other interest that can be found on the Internet, including an adult entertainment community.[323]

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317. *See supra* Part II.B.1.

318. ACLU v. Reno, 31 F. Supp. 2d 473, 484 (E.D. Pa. 1999) (finding that there is no single entity that makes up or controls the Web). The Court stated that:

> No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web. From a user's perspective, it may appear to be a single, integrated system, but in reality it has no centralized control point.

Id.

319. ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996).

320. Wu, *supra* note 5, at 303.

321. Sean P. Egan et al., *Is There Anybody Out There?*, BLINK MAG. (Oct. – Nov. 2000), *available at* http://www.earthlink.net/blink/oct00/cover.html (describing five Internet communities (love, support, hobby/special interest, business, identity) and their corresponding Web sites).

322. "Community" is defined as: "1. A neighborhood, vicinity, or locality. 2. A society or group of people with similar rights or interests. 3. A collection of common interests that arise from an association." BLACK'S LAW DICTIONARY 273 (7th ed. 1999).

323. Indeed, the Microsoft Network (MSN) has a Web site that allows users to locate, join, and create their own communities. *MSN Communities*, *at* http://communities.msn.com/home (last visited Nov. 20, 2001). Some of the general communities include: Automotive, Business, Computers & Internet, Entertainment, Games, Health & Wellness, Home & Families, Lifestyles, Money & Investing, News &

There are, however, two problems with this approach. First, the courts may have a difficult time gathering members of these communities to serve on juries in cases where community standards must be applied. Empanelling such juries could raise privacy concerns and it is likely that many members of the adult entertainment community would prefer to remain anonymous.[324] Furthermore, it is simply not practical to round up the members of a virtual community, as they may live hundreds or thousands of miles apart. Second, it is inherently unlikely that voluntary members of an adult entertainment community will find the material on a given adult Web page to be "patently offensive" or without any "value."[325] In other words, a jury made up of members of the online adult entertainment community will be stacked against the prosecution, making enforcement of such a law futile.

B. Netizen Regulation

Wu further theorized that the citizens of the Internet (netizens) can, and often do, self-regulate content on the Internet.[326] The weakness of allowing Internet users to regulate themselves is the lack of any proof that it works.[327] The threat of flaming by the Internet community may do little to deter the publishers of obscene material on the Internet.[328] Nor can the threat of flaming deter children from exploring sexually explicit Web sites either mistakenly or intentionally. Moreover, Congress created both the CDA and COPA because it did not trust Internet users to safeguard the interests of children.[329] Self-regulation, by itself, has not

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Politics, Organizations, People, Places & Travel, Religion & Beliefs, Schools & Education, Science & History, Sports & Recreation. *Id.* Those communities are broken down into sub-communities. For instance, the Automotive community contains sub-communities for Cars, Motorcycles and Auto racing. *Id.* Prodigy also hosts a number of communities. *Prodigy Communities, at* http://communities.prodigy.net/ (last visited Nov. 20, 2001).

324. *Reno II*, 217 F.3d 162, 171 (3d Cir. 2000) (noting that Web sites that install credit card and age verification systems will experience a loss in traffic because many adults will not be willing to reveal personal information).

325. 47 U.S.C. § 231(e)(6) (Supp. IV 1999).

326. *See supra* Part II.B.2.

327. LESSIG, *supra* note 2, at 166 (arguing that social norms do little to restrain controversial speech in cyberspace). Lessig notes that people in cyberspace are "likely to be more tolerant of dissident views when they know (or believe, or hope) the dissident lives thousands of miles away." *Id.*

328. *Id.* Certainly, the threat of flaming is unlikely to deter businesses that cut a healthy profit in the publishing of sexually explicit material on the Web. *See supra* note 4.

329. Section 1402 of the Child Online Protection Act of 1998: Congressional Findings, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998), states that "while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not

proven to be an effective safeguard of children on the Internet.[330]

C. Applying the Community Standard of the Sender

Stepka argued that it is both equitable and constitutional to hold Web publishers accountable to their own geographic community.[331] This approach allows the community of the sender, not the receiver to set the standard for what sexually explicit material rises to the level of unprotected obscenity.[332]

This approach appears more equitable than COPA's scheme because Web publishers are only charged with comprehending the moral standard of their own geographic community, rather than the standard of all the communities that their material may reach.[333] However, the analogy of a Web site to a "brick and mortar" store is not an exact match.[334] The rationale behind the community standard is to allow the members of a geographic community to have some control over the type of businesses transacted in their neighborhood.[335] A particular Web site often has little or nothing to do with the physical locality within which its operator lives. It is conceivable, and in a small town probably even likely, that no members of the Web publisher's geographic community will ever see the material or the Web site.[336] Under what rationale, then, should the geographic community of a Web publisher have control over what content that person publishes on the Internet? There is no relevance between the Web publisher's geographic community and his or

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provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Id.*

330. *Id.*

331. *See supra* Part II.B.3.

332. *Id.*

333. Stepka, *supra* note 267, at 939-40.

334. *See Reno II*, 217 F.3d 162, 175 (3d. Cir. 2000) (noting that "[u]nlike a 'brick and mortar outlet' . . . the uncontroverted facts indicate that the Web is not geographically constrained").

335. Lewis, *supra* note 263, at 160.

336. Given the myriad of different Internet hosts and Web sites on the Internet, most people barely scratch the surface of all the possibilities on the Internet. In January 2001, it was estimated that there were approximately 100 million Internet hosts worldwide. *Telecordia: Number of Internet Hosts Reaches 100 Million*, NUA INTERNET SURVEYS (Jan. 12, 2001), *at* http://www.nua.ie/surveys/index.cgi?f=VS&art_id=905356335&rel=true. Internet hosts were defined to include routers, Web servers, mail servers, work stations, and ports in ISPs' modem banks. Moreover, a 1999 study estimated that there were approximately 5 million individual Web sites online. *Netcraft: 5 Million Web Sites on the WWW*, NUA INTERNET SURVEYS (April 20, 1999), *at* http://www.nua.ie/surveys/index.cgi?f=VS&art_id=905354851&rel=true.

her Web site.[337]

This alternative also triggers policy implications. It is predictable that Web publishers of sexually explicit content will be encouraged to set up shop in geographic communities that are more liberal and less restrictive of sexually explicit material to avoid liability. This problem is already widespread in the case of "brick and mortar" adult entertainment businesses.[338] Nevertheless, it is arbitrary and unconstitutional to convict a person of a crime and sentence them to imprisonment for publishing material on a Web site based in Tennessee, when the same person could legally post the same material in New York.[339]

Finally, it is questionable whether this approach will actually accomplish the expressed goal of protecting children from harmful material on the Internet. Web publishers who earn a profitable business by posting sexually explicit material will likely relocate to communities that are more liberal. Additionally, a large percentage of the sexually explicit material on the Web originates from communities outside the United States.[340] Material originating from outside the United States is

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337. *Reno II*, 217 F.3d at 169 (describing the Internet's "geographically borderless nature") (citation omitted). Explaining the unique nature of the Internet, the Third Circuit stated:

> [T]he Internet "negates geometry . . . it is fundamentally and profoundly anti-spatial. You cannot say where it is or describe its memorable shape and proportions or tell a stranger how to get there. But you can find things in it without knowing where they are. The [Internet] is ambient -- nowhere in particular and everywhere at once."

Id. (quoting Doe v. Roe, 955 P.2d 951, 956 (Ariz. 1998)).

338. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54-55 (1985); Young v. Am. Mini Theatres, 427 U.S. 50, 72-73 (1976) (upholding zoning ordinances that segregated adult movie theatres to certain parts of town).

339. This was Justices Harlan's and Brennan's argument when they attempted to convince the rest of the Supreme Court that a local community standards test was unconstitutional. Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) ("We thus reaffirm the position taken in *Roth* to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.") (citation omitted); Manual Enters. v. Day, 370 U.S. 478, 488 (1962) (asserting that a localized community standard test would have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency"); *see also* Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (noting that "the constitutional limits of free expression in the Nation" should not "vary with state lines").

340. ACLU v. Reno, 31 F. Supp. 2d 477, 484 (E.D. Pa. 1999). In a study conducted in July 1998, Dr. Donna Hoffman estimated that forty percent of the content on the Web originates from outside the United States. *Id.* Moreover, European Internet firms are increasingly turning to pedaling online pornography in an effort to increase revenues. *ZDNet (UK): European Companies Turn to Porn For Profits*, NUA INTERNET SURVEYS

beyond the jurisdictional reach of COPA.[341] Inasmuch as the Internet knows no boundaries, it is impossible for the government, at least with present technology, to completely restrict sexually explicit material on the Internet.[342] COPA, or Stepka's proposed alternative, therefore, would only serve to deter non-profit and small businesses based in the United States from publishing materials on the Internet that may have some sexual content while having no effect on businesses based in foreign countries. Such a result may prove to be more of a disservice, than a benefit to the public.[343]

D. Lewis' Scientific Approach

Lewis suggested that there should only be liability for disseminating material that is harmful to children on the Internet when there is an objective finding of actual harm.[344] Lewis' approach would allow courts to eliminate the use of the "disparate and arbitrary" community standard test.[345]

Nevertheless, Lewis' solution would do little to soothe the concerns of parents in America. First, it has not been conclusively proven that obscene material does in fact harm children.[346] Therefore, the prosecution in an Internet obscenity case would probably have a difficult time proving actual harm. Parents would have to argue that viewing such material does in fact harm children, even if science has not be able to

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(Aug. 8, 2001), *at* http://www.nua.com/surveys/index.cgi?f=VS&art_id=905357062&rel=true.

341. *Reno II*, 217 F.3d 162, 172 (3d. Cir. 2000) (noting that the district court found that "even if COPA were enforced, children would still be able to access numerous foreign Web sites containing harmful material") (citing ACLU v. Reno, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999)).

342. ACLU v. Reno, 31 F. Supp. 2d 473, 496 (E.D. Pa. 1999) ("Here, this Court's finding that minors may be able to gain access to harmful to minors materials on foreign Web sites, non-commercial sites, and online via protocols other than http demonstrates the problems this statute has with efficaciously meeting its goal.").

343. The plaintiffs in *Reno II* provide a variety of services to the public and most of the information they provide is available for free. *See* Brief for Appellee at 3; *Reno*, 31 F. Supp. 2d at 484. They provide information on a variety of issues, some of them of a sexual nature. *Reno*, 31 F. Supp. 2d at 489. Plaintiffs and their users post, read, and respond to content, including "resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines." *Id.*

344. *See supra* Part II.B.4.

345. *Id.*

346. *See* Playboy Entm't Group v. United States, 30 F. Supp. 2d 702, 710, 715-16 (D. Del. 1998) (finding that the Government failed to present any "clinical evidence linking child viewing of pornography to psychological harms").

quantify the harm. Second, Lewis' technique is reactive, rather than proactive because it does not restrict harmful speech until after the damage is done.[347]

E. Leaving the Safety of Children in the Hands of Technology and Their Parents

Given the current state of technology, the only constitutional means to protect children from harmful materials on the Web is through the use of blocking or filtering technology, combined with the oversight of parents or guardians.[348] This method for restricting minors' access to sexually explicit material gives parents the freedom of choice; it allows parents to decide what type of content is appropriate for their child.[349] At the same time this method avoids limiting the adult population's access to materials that are only suitable for children.[350] Furthermore, this solution is not at odds with the holding in *Mainstream Loudoun*, or to the lawsuits filed to enjoin CHIPA.[351] This Comment simply proposes that parents must determine for themselves whether to employ the use of software filters; it does not endorse the view that the government should mandate their use.[352]

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347. Indeed, such an after-the-fact approach harkens back to the dilemma Justice Stevens attempted to remedy in *Pacifica*. FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow . . . . [T]hat option does not . . . avoid a harm that has already taken place.").

348. Parental oversight is important because of the inherent limitations of software filters. *See supra* notes 210-12. Flawed though the technology may be, many filters allow parents to manually correct their failings. *Digital Chaperones*, *supra* note 206. Some filters allow parents to block or unblock Web sites in their own discretion. *Id.* Thus, when a child complains that a legitimate Web site has been blocked, their parent can correct the software's mistake. Furthermore, many filters also keep a log of the Web sites that a user visits. *Id.* This Web site tracking feature allows parents to keep track of their child's online activities. *Id.* This tool could also be used to deter children from attempting to access adult Web sites for fear that their parents will learn of these attempts.

349. This approach is harmonious with the Supreme Court's holding in Ginsberg v. New York, 390 U.S. 629, 639 (1968) (explaining that parents have a constitutional right to raise their children as they see fit).

350. *See* Butler v. Michigan, 352 U.S. 380, 383-84 (1957) (cautioning that legislation designed to protect children from obscenity must be "reasonably restricted to the evil with which it is said to deal," so as not to "reduce the adult population . . . to reading only what is fit for children").

351. *See supra* Part I.D.4.

352. *See* Rupert, *supra* note 271, at 147 ("COPA's backers miss the point when they fret that mandated use of such software would be tantamount to private censorship. Congress should not mandate its use at all. Parents should decide for themselves whether to employ filtering and blocking software to curtail their child's Web access.").

Blocking software may be installed on home computers, enabling parents to limit their child's Web usage by blocking certain types of Web sites.[353] Some Internet Service Providers (ISPs) also provide blocking devices.[354] Concededly, blocking software is not perfect. Filtering can be both over and under inclusive.[355] Nevertheless, when filtering technology is combined with vigilant parental oversight, it is likely to be far more effective at protecting children than COPA.[356]

COPA's reach is limited to *commercial* Web sites that originate *inside* the United States.[357] Blocking software, on the other hand, filters out sexually explicit material from commercial Web sites as well as non-commercial Web sites, newsgroups, chat rooms, and any other Internet capability.[358] Furthermore, blocking software can also block materials that originate from foreign countries.[359]

IV. CONCLUSION

COPA, Congress's second attempt to regulate speech on the Internet, is an unconstitutional abridgment of the First Amendment. By leaving it to individual geographic communities to determine whether a Web publisher should be held criminally liable, the statute places an overly burdensome restriction on free speech. Since Web publishers cannot control where their material is downloaded, they will be forced to self-censor their Web site content to ensure that it will not be found "harmful to minors" in the strictest communities of America. This Comment proposes a less restrictive means to protect minors from sexually explicit material on the Web, while at the same time protecting the freedom of

353. ACLU v. Reno, 31 F. Supp. 2d 477, 492 (E.D. Pa. 1999) (noting that parents can purchase blocking software for approximately forty dollars); *see also* Part I.D.4.

354. *See* discussion *supra* Part I.D.4; *see also* LESSIG, *supra* note 2, at 177. Lessig points out that the World Wide Web Consortium has already created a filtering system called "Platform for Internet Content Selection" or "PICS." *Id.* PICS operates under a two-step process: first it rates and labels content, then it filters content according to those ratings. *Id.*

355. *Reno II*, 217 F.3d 162, 171 (3d Cir. 2000); *Reno*, 31 F. Supp. 2d at 492; *see also supra* notes 210-12; Rupert, *supra* note 271, at 147 (noting that one filter blocked sites mentioning actor Dick Van Dyke).

356. *See supra* note 348; Rupert, *supra* note 271, at 147.

357. *Reno II*, 217 F.3d at 167-68; *see also* LESSIG, *supra* note 2, at 166 (arguing that laws are an imperfect method to regulate cyberspace because speech that is illegal in one country may be legal in another).

358. Rupert, *supra* note 271, at 147 ("[F]iltering and blocking software can block out harmful material not under COPA's protective umbrella – international sites and non-Web-based materials.").

359. *Id.*; *see also* Jacobson, *supra* note 263, at 254 (stating that a tagging and filtering scheme can restrict undesired content originating outside of the United States).

expression for adults. Allowing parents to purchase their own tagging, filtering, and blocking software enables them, not the government, the freedom to choose what types of Web sites their children can access. Furthermore, this method avoids an unconstitutional intrusion on the rights of adults to choose what content they wish to access on the Web.[360]

360. United States v. Playboy Entm't Group, 529 U.S. 803, 818 (2000). The Supreme Court stated it best:

> The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

Id.