THE CYBERWORLD CANNOT BE CONFINED TO SPEECH THAT WOULD BE SUITABLE FOR A SANDBOX[1]

"Congress shall make no law . . . abridging the freedom of speech."[2] Our Founding Fathers could never have foreseen the powerful and controversial effect that these ten simple words would have on our nation.[3] The guarantee of freedom of speech is essential to our government and our society, among other reasons, to encourage the "marketplace of ideas,"[4] to enhance political participation,[5] and to amplify personal autonomy.[6] Despite these important interests,

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[1] *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").

[2] U.S. CONST. amend. I. The First Amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the government for a redress of grievances." *Id.*

[3] *See* Michael Kent Curtis, *Critics of "Free Speech" and the Uses of the Past*, 12 CONST. COMMENTARY 29, 29 (1995) (focusing on the complex and emotional divisions existing between advocates of free speech and those who feel that free speech is a threat to equality); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 576 (1978) (describing the First Amendment as the "Constitution's most majestic guarantee" and a "basic element of our fundamental law"). *See generally* Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203 (1994) (providing an overview of differing philosophies of free speech throughout the past century).

[4] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The "marketplace of ideas" theory was expressed by Justice Holmes, who wrote, "The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." *Id.*

[5] *See* TRIBE, *supra* note 3, at 577. The conception of the "marketplace of ideas" is not an exclusive argument for the freedom of speech. *See id.* at 576-77. In order to analyze the First Amendment, the Court has relied on several types of theories because of the large variety of communicational modes. *See id.* at 579. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (proffering the theory that freedom of speech is necessary to preserve self-government within the system of democracy).

[6] *See* Cohen v. California, 403 U.S. 15, 26 (1971). Justice Harlan emphasized that freedom of speech allows not only the conveyance of ideas of precise expression, but it allows for the conveyance of inexpressible emotions too. *See id.* Harlan articulated, "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive

the United States Supreme Court has interpreted the First Amendment to exclude specific classifications of speech from its umbrella of protection.[7] Among these unprotected classifications is obscene speech, which the Court has deemed lacking in all of the values that motivated the Founders to protect free speech.[8] Nonetheless, the Court has traditionally protected sexually oriented, indecent speech when that speech does not rise to the level of obscenity.[9] Although the Court has recognized several purposes for regulating both inde-

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function which practically speaking, may often be the more important element of the overall message sought to be communicated." *Id.* Justice Frankfurter expressed the importance of freedom of all types of speech: "One of the prerogatives of American citizenship is the right to criticize public men and measures — and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." Baumgartner v. United States, 322 U.S. 665, 673-74 (1944); *see also* TRIBE, *supra* note 3, at 579.

[7] *See* New York v. Ferber, 458 U.S. 747, 758 (1982) (holding that material depicting children engaged in sexual conduct is unprotected speech, even if the material is not obscene); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that advocacy directed at producing or inciting imminent lawless action and likely to produce or incite such action is not constitutionally protected speech); Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscene speech is not constitutionally protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that "fighting words" and defamation receive no First Amendment protection).

There are two ways in which the government may attempt to regulate speech. *See* TRIBE, *supra* note 3, at 580. The government's regulation may be aimed at the content of speech, known as "content-based" regulations. *See id.* These attempts are considered presumptively against the First Amendment if they are not directed at unprotected speech. *See id.* at 581. Alternatively, the government's regulation may be aimed at the secondary effects of speech, known as "content-neutral" regulations. *See id.* at 580. In scrutinizing content-neutral regulations, the Court will generally balance the competing interests. *See id.* at 581. Content-neutral statutes will be held constitutional provided that "they do not *unduly* constrict the flow of information and ideas." *Id.* at 581-82.

[8] *See* United States v. Reidel, 402 U.S. 351, 354 (1971) (holding that the government may prohibit the mailing of obscene material); *Roth*, 354 U.S. at 485.

In order for speech to be classified as obscene, it must meet the difficult threshold set forth in *Miller v. California*. *See* Miller v. California, 413 U.S. 15, 24 (1973). Obscene speech has been held to be categorically unprotected speech in all contexts because its content is extremely offensive to moral standards. *See Roth*, 354 U.S. at 485. In *Roth*, the defendant was prosecuted under a federal statute for mailing obscene material. *See id.* at 481. The Supreme Court held that obscene "utterances 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 485. *But see* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that government may not prohibit private possession of obscenity).

[9] *See* Sable v. FCC, 492 U.S. 115, 126 (1989); New York v. Ferber, 458 U.S. at 764-65; Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (holding that a zoning ordinance that prohibited live nude dancing was unconstitutional).

cent and obscene speech, including preventing secondary effects[10] and preserving a moral society,[11] few purposes have been more pervasive than protecting children from exposure.[12]

As new communication technologies have evolved since the birth of the First Amendment, the danger of children being exposed to obscene or indecent speech has increased dramatically.[13] These changes in mass communication media over the past several decades have prompted the Court to uphold Congress's regulation of otherwise constitutionally protected, sexually oriented, indecent speech.[14] Thus, the Court is continuously faced with the issue: How much governmental regulation is justified to protect children from this material without infringing upon adults' constitutional rights?[15]

In addressing this question, the Supreme Court has maintained a fine balance[16] between permissible governmental regulations and

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[10] *See* City of Renton v. Playtime Theatres, 475 U.S. 41, 54-55 (1986); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973) (recognizing the interest of the public safety, quality of life, and tone of commerce in restricting obscene material).

[11] *See* Barnes v. Glen Theatre, 501 U.S. 560, 569-72 (1991) (upholding a public indecency statute that required nude dancers to wear pasties and G-strings); *see also Roth*, 354 U.S. at 485 (holding that the legislature may act to protect "the social interest in order and morality").

[12] *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (holding that the interest in protecting children justifies regulating otherwise protected speech); *Paris Adult Theatre*, 413 U.S. at 58 (recognizing an interest of the public safety, quality of life, and tone of commerce in restricting obscene material); Ginsberg v. New York, 390 U.S. 629, 640 (1968) (articulating that the state has an interest in the well-being of children); Prince v. Massachusetts, 321 U.S. 158, 169-70 (1944) (opining that restricting harmful material is necessary for healthy, well-rounded children).

[13] *See* Allen S. Hammond, VI, *Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259, 266-71 (1996) (explaining the harmful effects of indecent speech on children and the greater control of access that children have to indecent speech due to modern media of communication).

[14] *See Pacifica*, 438 U.S. at 749 (holding that the government may utilize content-based regulations that target constitutionally protected speech in certain contexts). For a summary of several indecency-based and obscenity-based laws, see LANCE ROSE, NETLAW: YOUR RIGHTS IN THE ONLINE WORLD 248-49 (1995). *See generally* Nicholas Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 BROOK. L. REV. 1037 (1994) (discussing the history of obscene and pornographic speech and governmental attempts to regulate them).

[15] *See* Sable v. FCC, 492 U.S. 115, 126 (1989). The legitimate interest in protecting children from harmful material must be achieved "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Id.*

[16] *See* ROSE, *supra* note 14, at 249. The Supreme Court struck a balance with Congress that the First Amendment generally protects sexually oriented material from government interference, unless the material is deemed to be child pornography or obscene. *See id.*

protection of the freedom of speech by applying distinct levels of scrutiny to each medium.[17] Most recently, in *Reno v. ACLU*,[18] the Court examined the newest mode of communication — the Internet. The Court held that two provisions of the Communications Decency Act (CDA)[19] that attempted to prevent dissemination of "indecent"

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[17] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). In deciding what level of scrutiny to apply to broadcasting, Justice White wrote, "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Id.* (citations omitted); *see also* JONATHAN WALLACE & MARK MANGAN, SEX, LAWS, AND CYBERSPACE 231-34 (1996) (reviewing the history of governmental regulation of mass media of communication). Each new medium of communication has driven our society closer together, although each has been met with fear and trepidation at first. *See id.* at 231. In 1535, King Francois I, fearing that the new medium of printed books might cause blasphemy and political opposition, banned all printing. *See* Jonathan Wallace & Mark Mangan, *Sex, Laws, and Cyberspace* (visited July 19, 1998) <http://www.spectacle.org/freespch/compass/.html>. In the United States of America, the introduction of the telephone was met with skepticism because of the potential for offensive language. *See id.* Congress, in fear of new media, has often hastily attempted to regulate without studying either the medium or the potential effects of the regulation. *See* WALLACE & MANGAN, *supra*, at 232; *see also* THOMAS J. SMEDINGHOFF, ONLINE LAW 310-13 (1996) (discussing the different problems associated with each of the major mass communication media and how the Court must take these differences into consideration).

[18] 117 S. Ct. 2329 (1997).

[19] Pub. L. No. 104-104, § 502, 110 Stat. 133 (1996) (codified at 47 U.S.C. § 223(a)-(h)). The first provision at issue provides in pertinent part:

> Whoever —
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> (1) in interstate or foreign communications — . . .
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> (B) by means of a telecommunications device knowingly —
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> (i) makes, creates, or solicits, and
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> (ii) initiates the transmission of,
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> any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . .
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> (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,
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> shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(a) (1996).

The second provision at issue provides in pertinent part:

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

and "patently offensive" material to minors were vague and facially overbroad in violation of the First Amendment's guarantee of freedom of speech.[20]

The CDA, part of the Telecommunications Act of 1996,[21] included two hastily drafted provisions designed to protect minors from receiving harmful material via the Internet.[22] These two provisions subjected violators to criminal liability for the transmission of any "indecent" or "patently offensive" material to minors via the Internet.[23] Immediately after President Clinton signed the Telecommunications Act, the American Civil Liberties Union and several other groups filed suit against the Attorney General of the United States and the Department of Justice.[24] Two weeks later, the Ameri-

> communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
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> (2) knowingly permits any telecommunications facility under such person's control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,
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> shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(d) (1996).

[20] *See Reno*, 117 S. Ct. at 2346, 2348.

[21] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.). Title V of the Telecommunications Act was known as the "Communication Decency Act of 1996" (CDA). *See Reno*, 117 S. Ct. at 2338. President Clinton signed the Telecommunications Act on February 8, 1996. *See id.* at 2339. The primary purpose of the Telecommunications Act was not to address the Internet, but rather to encourage "the rapid development of new telecommunication technologies." *Id.* at 2337-38 (citations omitted). The Telecommunications Act was approved by the Senate in an 84-16 vote in the summer of 1995. *See* WALLACE & MANGAN, *supra* note 17, at 186.

[22] *See Reno*, 117 S. Ct. at 2338 & n.24. The CDA provisions were hardly deliberated by Congress and were not subject to any hearings. *See id.* Senator Leahy stated, "'The Senate . . . passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor.'" *See id.* (quoting *Cyberporn and Children: The Scope of the Problem, the State of Technology, and the Need for Congressional Action: Hearing on S. 892 Before the Senate Comm. on the Judiciary*, 104th Cong. 7-8 (1995) (statement of Senator Leahy)); *see also* Richard Raysman & Peter Brown, Reno v. ACLU — *The First Amendment Meets the Internet*, N.Y.L.J., July 8, 1997, at 3 (describing the CDA as hastily drafted legislation). Senator Exon, a Democrat, proposed the CDA as an amendment to the Telecommunications Act. *See* WALLACE & MANGAN, *supra* note 17, at 177.

[23] *See* 47 U.S.C. § 223 (a), (d) (1996). The penalty for violating the CDA includes fines of up to $250,000 under Title 18 or imprisonment for no more than two years. *See* Raysman & Brown, *supra* note 22, at 3.

[24] *See Reno*, 117 S. Ct. at 2339. The plaintiffs were originally made up of 20 civil rights and Internet groups. *See id.* They filed their complaint on February 8, 1996. *See id.*

can Library Association, several on-line services, and numerous civil rights groups filed a similar suit.[25] These two cases were subsequently consolidated into one cause of action before a three-judge panel in the United States District Court for the Eastern District of Pennsylvania.[26] The panel granted the plaintiffs' motion for a temporary restraining order to prevent the enforcement of the two challenged provisions of the CDA.[27]

One week after the original complaint was filed, District Judge Buckwalter entered a temporary restraining order preventing the enforcement of § 223(a)(1)(B)(ii). *See* ACLU v. Reno, 24 Media L. Rep. (BNA) 1379 (E.D. Pa. 1996). Judge Buckwalter based this decision on his finding that the term "indecent" was too vague for the basis of a criminal prosecution. *See id.*

Joe Shea, editor of the American Reporter, also filed a separate complaint on February 8, 1996 in New York federal court claiming that the CDA violated the First Amendment. *See* Shea v. Reno, 930 F. Supp. 916, 922 (S.D.N.Y. 1996). In *Shea*, the court granted a preliminary injunction preventing the enforcement of the CDA. *See id.* at 950. The court held that the CDA was overbroad and could not be saved by the affirmative defenses in the statute. *See id.* One day after the *Reno* decision, the Court affirmed *Shea v. Reno* without an opinion. *See* Shea v. Reno, 117 S. Ct. 2501 (1997).

[25] *See Reno*, 117 S. Ct. at 2339. For a summary of several critical opinions of the CDA, see JONATHAN ROSENOER, CYBERLAW — THE LAW OF THE INTERNET 187 (1997). Supporters of the CDA argue that the dangers of pornography on the Internet necessitate restriction of indecent speech. *See* Cathleen A. Cleaver, *Kids Need Protection in Cyberspace, Too*, NEWSDAY, Feb. 12, 1996, at A25. Advocates claim that courts will take literary value into account and that the CDA will thus not criminalize such works as Shakespeare or Joyce. *See id.* Furthermore, supporters argue that the types of material on the Internet go beyond indecency and into the realm of barbarism. *See* Arianna Huffington, *Curbing Internet Pornography Would Safeguard Our Children*, ST. LOUIS POST-DISPATCH, March 29, 1996, at 17C. Supporters claim that the CDA is necessary because parents are not able to control the cultural influences that mold their children's lives. *See id.*

[26] *See Reno*, 117 S. Ct. at 2339. The panel was assembled pursuant to an expedited review provision in the CDA. *See id.*

[27] *See* ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996). The preliminary injunction prevented the enforcement of the prohibitions in § 223(a)(1)(B) only to the extent that they relate to "indecent" communications, however, the decision still permitted the government to prosecute individuals who send "obscene" material or child pornography, as these materials are not protected by the First Amendment. *See id.* Each of the three judges wrote a separate opinion, but their judgment was unanimous. *See id.* Chief Judge Sloviter, although holding that the governmental interest may be compelling with respect to some material, concluded that the provisions were overbroad and vague with respect to the terms "indecent" and "patently offensive." *See id.* at 854, 856. Chief Judge Sloviter further held that the affirmative defenses were not feasible. *See id.* at 856. Judge Buckwalter was concerned with the "fundamental constitutional principle" of "simple fairness" and that criminal enforcement of the CDA would be unfair because of their vagueness. *See id.* at 861. Judge Dalzell opined that the provisions at issue infringed upon the freedom of speech guaranteed by the First Amendment. *See id.* at 883. The judge stated that the Internet is the "most participatory form of mass speech yet developed" and should therefore be given the highest protection. *Id.*

The government appealed to the United States Supreme Court under the CDA's special review provisions.[28] The Supreme Court noted probable jurisdiction,[29] and through the decision, safeguarded the Internet from future governmental interference by providing full protection of the First Amendment to the new medium.[30] The Court found the provisions of the CDA to be content-based blanket restrictions on speech.[31] Therefore, the Court reverted to traditional strict scrutiny standards[32] and held that the interest in protecting minors was not compelling enough to outweigh the interest in protecting adults' access to constitutionally protected speech on the Internet.[33] The Court found that the provisions were not narrowly tailored[34] and that they were vague and overbroad in violation of the First Amendment.[35]

In 1968, the Supreme Court set forth a standard of review applicable to print-based media and minors in *Ginsberg v. New York*.[36] In *Ginsberg*, the Court examined a statute that prohibited the sale of material to minors that is obscene as to minors even if the material is not obscene as to adults.[37] The Court determined that the magazines

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[28] *See Reno*, 117 S. Ct. at 2340-41 (citing Communications Decency Act of 1996, Pub. L. No. 104—104, § 561, 110 Stat. 142, 142-43 (1996)).

[29] *See id.* at 2340-41.

[30] *See Reno*, 117 S. Ct. at 2351; Raysman & Brown, *supra* note 22, at 3. Justice Stevens concluded his opinion by stating that the freedom of expression outweighs any unproven theoretical benefits of censorship. *See Reno*, 117 S. Ct. at 2351.

[31] *See Reno*, 117 S. Ct. at 2348.

[32] *See id.* at 2343. The Court found that none of the special factors that have justified regulating content over broadcast media, such as invasive nature or scarcity of spectrum, were present in the Internet medium and, therefore, the Court closely analyzed the statute to determine whether there were any less restrictive means. *See id.* at 2343-44, 2346-48; *cf.* Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976 (1997) (expressing the opinion that the Court is creating fundamental changes in First Amendment precedence even though telecommunications and telecommunication regulations have not changed much).

[33] *See Reno* 117 S. Ct. at 2346. The Justice stated that there is a legitimate interest to protect minors from receiving harmful material on the Internet. *See id.*

[34] *See id.* at 2348.

[35] *See id.* at 2346, 2347. The Court exclaimed that the "breadth of the CDA's coverage is wholly unprecedented." *Id.* at 2347.

[36] 390 U.S. 629 (1968).

[37] *See id.* at 631. The statute set forth a test to determine whether the material was obscene as to minors. *See id.* The statute prohibited material that:

> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
> (iii) is utterly without redeeming social importance for minors.

sold in violation of the statute were obscene as to minors, yet merely indecent as to adults.[38] Noting that obscene speech is categorically unprotected speech, the Court held that the statute was valid.[39] The Court reasoned that material that is constitutionally protected for adults may be obscene as to minors and, thus, restricted from minors.[40] *Ginsberg* demonstrated that although adults may not be restricted from receiving indecent material in the print media, minors may be prevented from exposure to that material by classifying it as obscene as to them.[41]

In 1973, after many years of struggling to define obscene speech, the Court, in *Miller v. California*,[42] set forth the test for obscenity that is still the standard today.[43] In *Miller*, the defendant had been convicted under a California statute that prohibited the mail-

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1965 N.Y. LAWS 327.

The Court held that the statute was not void for vagueness because it adequately gave proper notice of the specific type of material that was illegal and it only punished those who were aware of the type of material they were selling. *See Ginsberg*, 390 U.S. at 643, 645.

[38] *See Ginsberg*, 390 U.S. at 634.

[39] *See id.* at 635, 637.

[40] *See id.* at 636. Justice Brennan explained that there is a distinction between what adults consider obscene and what minors consider obscene. *See id.* The Justice noted that it is in the state's interest to help raise children without exposure to harmful material. *See id.* at 639-40. However, the Court added, this statute allows parental discretion and authority by permitting parents to buy such material for their children if they so desire. *See id.* at 639.

[41] *See id.*

[42] 413 U.S. 15 (1973).

[43] *See* Elaine M. Spiliopoulos, *The Communications Decency Act of 1996*, 7 DEPAUL J. ART & ENT. L. 336, 341 (1996) (noting that the *Miller* standard is still used to test for obscenity). *See generally* P. Heath Brockwell, *Grappling with* Miller v. California: *The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131 (1993-1994) (tracing the history of the Court's attempts to define obscenity).

Justice Burger noted that there has never been a majority that has agreed on a definition of obscene material subject to regulation. *See Miller*, 413 U.S. at 22.

The *Miller* test for obscenity is:

> (a) whether '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.

Miller, 413 U.S. at 24 (citations omitted).

The same year that *Miller* was decided, the Court applied this new standard for obscenity to *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (holding that Georgia may regulate pornographic theaters so long as the films met the definition of obscenity set forth in *Miller*).

ing of unsolicited, obscene material.[44] The Court vacated Miller's conviction[45] and drafted a new definition of obscenity for federal and state legislatures to follow.[46] Justice Burger's opinion in *Miller* maintained that states have a legitimate interest in prohibiting obscene material.[47] Since obscene speech is categorically unprotected speech, the Justice stressed that clear standards defining obscene speech are necessary in order to give proper notice to speakers[48] and to permit states to regulate obscene speech without violating the First Amendment.[49]

The Court scrutinized the broadcast media, in *FCC v. Pacifica Foundation*,[50] in 1978. In *Pacifica*, the Court considered whether the government may regulate constitutionally protected, indecent

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[44] *See Miller*, 413 U.S. at 15. The statute under which Miller was convicted, § 311.2(a) of the California Penal Code, reads in pertinent part:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor . . . ."

Id. at 18 n.1 (citations omitted).

"Obscene" material is defined under § 311 as material,

> "[T]hat to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

Id. (citations omitted).

[45] *See id.* at 37.

[46] *See id.* at 24. The California statute at issue in *Miller* was based on an obscenity definition that the Court had previously drafted in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *See Miller*, 413 U.S. at 15. *Miller*, however, held that the "'utterly without redeeming social value'" test used in *Memoirs* was insufficient. *Id.* at 24 (quoting *Memoirs*, 383 U.S. at 419). Prior to *Memoirs*, the Court had used an obscenity definition as set forth in *Roth*. *See* Brockwell, *supra* note 43, at 133-34.

Some scholars believe that the *Miller* test is inefficient because it uses an objective standard. *See* Brockwell, *supra* note 43, at 136. It is very difficult, however, for judges or juries to use *Miller's* test without allowing their own subjective viewpoints to enter their opinions. *See id.*; *see also* WALLACE & MANGAN, *supra* note 17, at 254-55 (stating that the Supreme Court will overrule *Miller* because it allows community standards as part of its test, yet these local standards cannot fairly be applied to a global network such as the Internet).

[47] *See Miller*, 413 U.S. at 18.

[48] *See id.* at 27.

[49] *See id.* at 23-24.

[50] 438 U.S. 726 (1978).

speech transmitted over radio airwaves.[51] Specifically, the Court determined whether an FCC order attempting to regulate offensive language on the radio was valid.[52] The Court stated that it is necessary to examine both the content and the context of speech during a First Amendment analysis.[53] The Court concluded that the content of the radio broadcast in *Pacifica* was protected indecent speech.[54] In light of children's access to the radio medium, however, the Court decided that special restrictions were appropriate.[55] In its analysis, the Court noted that broadcast media have traditionally received the least amount of First Amendment protection.[56] Furthermore, the Court distinguished broadcast media from other media because offensive material may confront citizens in the privacy of their homes and because "broadcasting is uniquely accessible to children."[57] The

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[51] *See id.* at 729. The FCC found the power to regulate under 18 U.S.C. § 1464 (1994), which stated that the FCC may prevent the use of, "'any obscene, indecent, or profane language by means of radio communications,'" and 47 U.S.C. § 303 (g) (1994), which obligates the FCC to "'encourage the larger and more effective use of radio in the public interest.'" *Id.* at 731 (quoting 18 U.S.C. § 1464 & 47 U.S.C. § 303(g)).

[52] *See id.* A New York radio station broadcasted a taped George Carlin monologue entitled "Filthy Words" over its airwaves at approximately 2:00 P.M., October 30, 1973. *See id.* A man and his young son were driving when they heard the broadcast, which consisted of George Carlin repeating a list of dirty words over and over again. *See id.* The man made a complaint to the FCC, which then issued an order stating that the radio station could have been sanctioned. *See id.* at 730. The FCC stated that rather than prohibit speech, it would use principles similar to the laws of nuisance to channel the offensive language out of daytime hours. *See id.* at 731.

[53] *See id.* at 744. The Court explained that content-based regulations are not always invalid. *See id.* The Court illustrated that context is an important element of the analysis by quoting Justice Holmes, who said, "'the character of every act depends upon the circumstances in which it is done .... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.'" *Id.* (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)). The Court cited additional cases in which content-based restrictions on speech had been upheld. *See id.* at 745 (citing Young v. American Mini Theatres, 427 U.S. 50 (1976); Miller v. California, 413 U.S. 15 (1973); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

[54] *See id.* at 741.

[55] *See id.* at 750. The context of the broadcast medium, the Court observed, is "uniquely accessible to children, even those too young to read .... Pacifica's broadcast could have enlarged a child's vocabulary in an instant." *Id.* at 749.

[56] *See Pacifica*, 438 U.S. at 748. The Court stated that a broadcaster must be licensed with the government and may be stripped of its license if it is necessary for the public interest. *See id.* Additionally, broadcasters are required to give air time to the targets of their criticism. *See id.* (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)).

[57] *Id.* at 748-49. The Court noted that if the FCC order had targeted this broadcast because of its political content or because of any other message it was trying to

Court went on to affirm the FCC order and to hold that the Commission may regulate indecent speech in the broadcast media during times when children are likely to hear it.[58]

The Court continued its expansion of permissible regulations of speech in *City of Renton v. Playtime Theatres, Inc.*,[59] which concerned the regulation of adult movie theaters.[60] Chief Justice Rehnquist, writing for the majority, held that zoning ordinances may restrict adult movie theaters, a form of indecent speech, to certain areas of a city.[61] The zoning ordinance in *Playtime Theatres* prohibited adult movie theaters from locating near residential zones, churches, parks, or schools.[62] The majority determined that the ordinance should be classified as a time, place, and manner regulation because it did not ban adult theaters, but merely prohibited them from occupying certain areas.[63] The Chief Justice opined that the ordinance aimed to lessen the secondary effects of the theaters rather than to alter the actual content of the movies.[64] Based on this reasoning, and the Court's earlier decision in *Young v. American Mini Theatres*,[65] Chief

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convey, it would have been held invalid. *See id.* at 746.

[58] *See id.* at 750-51. The theory that government may regulate unwanted speech that can reach people's ears without warning has been referred to as the "Captive Audience Doctrine." *See* Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991); *see also* Christopher M. Kelly, *"The Spectre of a 'Wired' Nation": Denver Area Educational Telecommunications Consortium v. FCC and First Amendment Analysis in Cyberspace*, 10 HARV. J.L. & TECH. 559, 571 (1997) (stating that *Pacifica* provides a strong contention that restrictions on speech will be upheld if they prevent harmful speech from reaching children).

The Court made sure to emphasize the narrowness of the holding. *See Pacifica*, 438 U.S. at 750. For example, the Court stated that this decision does not apply to a "two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy." *Id.*

[59] 475 U.S. 41 (1986).

[60] *See id.* at 43.

[61] *See id.* at 54-55.

[62] *See id.* at 43. An adult movie theater was defined as "'[a]n enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characteri[zed] by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' . . . for observation by patrons therein.'" *Id.* at 44 (citations omitted).

[63] *See id.* at 46 (citing Young v. American Mini Theatres, Inc. 427 U.S. 50, 63 & n.18) (1976)).

[64] *See id.* at 47. The Court explained that the ordinance did not fit exactly into either a "content-based" or "content-neutral" classification. *See id.* Although the ordinance was aimed at secondary effects, it treated adult theaters differently than other types of theaters. *See id.*

[65] 427 U.S. 50 (1976). In *American Mini Theatres*, the Court held that a Detroit ordinance, which prohibited any adult movie theaters, bookstores, or similar establishments from locating within 1000 feet of any other such establishment, or within 500 feet of any residential areas, did not violate the First Amendment. *See id.* at 62-

Justice Rehnquist held that the applicable standard was whether the ordinance served a substantial governmental interest and allowed for reasonable alternative means of communication.[66] The Court decided that preserving the quality of life was a substantial interest.[67] Furthermore, the Court noted that alternate avenues of communication were available because the ordinance permitted ample locations for adult theaters.[68] The majority concluded that the ordinance was valid because it did not suppress protected speech, but rather, channeled the speech to particular areas of the city.[69]

The Court, in 1989, analyzed the telephone medium in *Sable v. FCC.*[70] The majority determined that this medium, like the print-based media, should enjoy the full protection of the First Amendment.[71] In *Sable*, the Court examined a statute that placed an outright ban on all indecent and obscene speech made over interstate telephone communications.[72] Justice White, writing for the majority,

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63. Although the ordinance differentiated between adult movie theaters and other types of movie theaters, the Court reasoned that the ordinance was meant to prevent secondary effects on the community rather than to prohibit indecent speech. *See id.*

66 *See Playtime Theatres*, 475 U.S. at 50. The Court maintained that this is the standard applied to "content-neutral" time, place, and manner regulations. *See id.* at 49.

67 *See id.* at 50. The Court relied upon *American Mini Theatres* in stating that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" *Id.* (quoting *American Mini Theatres*, 427 U.S. at 71).

68 *See Playtime Theatres*, 475 U.S. at 54. Respondents argued that some of the land zoned for adult theater sites was already occupied and that very little of the unoccupied land was for sale. *See id.* at 53. They contended that the ordinance, in effect, suppressed protected speech. *See id.* at 53-54. Justice Rehnquist responded that the First Amendment does not require adult theaters to "be able to obtain sites at bargain prices." *Id.* at 54. A reasonable opportunity to operate an adult theater in Renton is all that the First Amendment requires, the Justice surmised. *See id.* The Justice added that the ordinance was "narrowly tailored" to affect only adult theaters that produce negative secondary effects. *See id.* at 52.

69 *See id.* at 54-55.

70 492 U.S. 115 (1989).

71 *See id.* at 131; *see also* Kelly, *supra* note 58, at 572 (analogizing the level of review applied to the telephone medium with the level of review applied to the print/common carrier medium). *See generally* George Koroghlian, Note, *Indecent Speech Relating to Commercial Telephone Messages is Constitutionally Protected While Obscene Speech is Not* — Sable v. FCC, 20 SETON HALL L. REV. 547 (1990) (discussing the *Sable* case in detail); Theresa M. Sheehan, Note, *A Post-*Sable *Look at Indecent Speech on the Airwaves and Over the Telephone Lines*, 15 W. NEW ENG. L. REV. 347 (1993) (discussing the history of *Sable* and an examination of post-*Sable* federal courts of appeals cases applying *Sable*).

72 *See Sable*, 492 U.S. at 122-23. The Court noted that the dial-a-porn business was large, with six to seven million calls during a six-month period in 1985. *See id.* at 120 n.3. Prior to the amendment at issue in *Sable*, Congress added a provision to the 1934 CDA that prohibited the use of a telephone to make "obscene or inde-

reiterated the Court's previous position that obscene speech is unprotected speech that may be regulated.[73] Next, the Court articulated that indecent speech may be regulated to promote a compelling interest, such as protecting minors, provided that the regulatory statute is narrowly tailored.[74] Justice White held that the statute in *Sable* was not narrowly tailored and likened its effect to "'burn[ing] the house to roast the pig.'"[75] The Court found the government's analogy to *Pacifica* unpersuasive.[76] Justice White explained that the telephone medium, unlike the radio medium in *Pacifica*, requires affirmative action by the customer.[77] The Justice concluded that Con-

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cent" interstate speech for commercial purposes to minors or to other persons without their consent. *See id.* at 120. Soon thereafter the Court of Appeals for the Second Circuit struck down three different versions of FCC regulations. *See id.* at 121-22. The first version contained a defense for message providers who operated between 9 P.M. and 8 A.M. and operators who required credit card payments. *See id.* at 121. The Second Circuit ruled the time-channeling defense unconstitutional as both overinclusive and underinclusive and instructed the FCC to examine alternatives. *See id.* The second version, which was again set aside, contained an access code defense in place of time restrictions. *See id.* at 121-22. The third version added a message-scrambling defense whereby users would be required to purchase a descrambler in order to hear messages. *See id.* at 122. The Second Circuit held these defenses constitutional, yet held the indecent speech restriction unconstitutional. *See id.* The amendment at issue in *Sable* read in pertinent part:

> "(b)(1) Whoever knowingly—
> "(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
> "(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),
> "shall be fined not more than $50,000 or imprisoned not more than six months, or both . . . ."

Id. at 123 n.4 (quoting Pub. L. No. 100-297, 102 Stat. 424 (1988)).

[73] *See id.* at 124. Sable argued that the amendment "create[d] an impermissible national standard of obscenity, and . . . compell[ed] them to tailor all their messages to the least tolerant community." *Id.* The Court responded that Sable could choose to send or not to send its messages to whichever community it desired. *See id.* at 125.

[74] *See id.* at 126. The Court pointed out that the psychological and physical wellbeing of minors has been recognized as a compelling governmental interest. *See id.*

[75] *Id.* at 131 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

[76] *See id.* at 127-28. Justice White explained that *Pacifica*'s holding was limited to the context of the broadcast medium. *See id.* at 128 (citing FCC v. Pacifica, 438 U.S. 726, 750 (1978)). The "unique attributes" of broadcasting are not present in the telephone context. *See id.* at 127-28 (citations omitted). Furthermore, the Court noted that the statute in *Sable* completely involved banned indecent material, whereas the statute in *Pacifica* merely channeled indecent speech to times when children were least likely to hear it. *See id.* at 127 (citations omitted).

[77] *See id.* at 127-28. The Justice explained that while small children may acciden-

gress must regulate the telephone medium by less restrictive means and cannot merely impose a blanket prohibition.[78]

The Supreme Court examined cable television, the next major medium of mass communication, in *Denver Area Educational Telecommunications Consortium v. FCC*.[79] The Court could not agree on a clear standard of review for cable television because it failed to define the cable television medium and could not analogize cable television to any other media.[80] The provisions of the Cable Television Consumer Protection and Competition Act[81] (CTCPCA) contested in *Denver Area* essentially allowed cable operators[82] to prohibit broadcasting that they believed to describe sexual activities or organs in patently offensive manners.[83] The Court analyzed the first provision of the CTCPCA, which *permitted* cable operators to prohibit patently offensive material on leased access channels,[84] under strict scrutiny.[85]

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tally hear radio broadcasts, people cannot accidentally pick up a phone and dial a number. *See id.*

[78] *See Sable*, 492 U.S. at 130-31. The Court noted that Congress did not research the effectiveness of the FCC regulations concerning dial-a-porn well enough. *See id.* at 130. The FCC regulations containing adult pass code and credit card number defenses may have been effective, possibly allowing few minors access. *See id.* at 130-31. Congress's amendment, however, did not consider these alternatives and, rather, tried to limit all "telephone conversations to that which is suitable for children to hear." *Id.* at 131.

[79] 518 U.S. 727 (1996).

[80] *See Denver Area*, 518 U.S. at 741-42; *see also* James L. Simmons, Note, *The Continuing Struggle to Find a Place for Cable Television in the Pantheon of First Amendment Precedent:* Denver Area Educational Telecommunications Consortium v. FCC, 34 HOUS. L. REV. 1607, 1635-36 (1998) (explaining the difficulties the court had analyzing the cable medium). *See generally* Comment, *Pluralism on the Bench: Understanding* Denver Area Educational Telecommunications Consortium v. FCC, 97 COLUM. L. REV. 1182 (1997) (suggesting that the Court, rather than make a definitive opinion, split into three separate factions).

The Supreme Court had analyzed the cable television medium in the context of must-carry provisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). *Turner* stated that cable television should not be analyzed under the same standard as broadcast television. *See id.* at 637. Though the *Turner* Court clearly applied an intermediate standard of review to the must-carry provisions, the *Turner* Court did not establish what standard of review it would apply to content-based regulations of speech in the cable television medium. *See id.* at 643, 661-62.

[81] Pub. L. No. 102-385, 106 Stat. 1486 (1992) (codified in scattered sections of 47 U.S.C.).

[82] *See Denver Area*, 518 U.S. at 733. "Cable operators" are generally the owners of the actual cable networks. *See id.* A cable network conveys programming over numerous cable channels into subscribers' households. *See id.*

[83] *See id.* at 732 (citing 47 U.S.C. §§ 531, 532(h) (1994)).

[84] *See id.* at 737. Leased access channels are required by federal law to be reserved by cable system operators for commercial lease by third parties. *See id.* at 734. They comprise approximately 10% to 15% of cable channels. *See id.* The first provision stated in pertinent part:

The Court held this provision to be constitutional because of the strong interest in preventing exposure of offensive material to children and because it did not require operators to ban speech.[86] Next, the Court considered the second provision of the CTCPCA, which *required* operators to segregate and block patently offensive material broadcast pursuant to the first provision, unless a subscriber requested access in writing.[87] The Court found this provision to be unconstitutional because it was overbroad.[88] Lastly, the Court examined the third provision of the CTCPCA, which was similar to the first provision but related to public access channels.[89] The Court found this provision to be invalid because it was not necessary to protect children and it was not narrowly tailored.[90] Rather than applying a clear standard of review to the cable television medium, *Denver Area*'s ambiguous decision left the impression that cable television will receive stronger protection than regular television or radio, but somewhat less protection than telephones or print media.[91]

> This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

47 U.S.C. § 532(h) (1994).

[85] *See Denver Area*, 518 U.S. at 743. The Court held that this regulation would be constitutional if it "address[ed] an extremely important problem, without imposing . . . an unnecessarily great restriction on speech." *Id.*

[86] *See id.* at 747.

[87] *See id.* at 753. The second provision required the FCC to promulgate regulations

> requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section; requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

47 U.S.C. § 532(j)(1) (1994).

[88] *See Denver Area*, 518 U.S. at 760.

[89] *See id.* Public access channels are channels that carriers are required to put aside for public, educational, or governmental functions, and, in return, operators receive permission to install cables . *See id.* The third provision provided that "a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity." 47 U.S.C. § 531(e) (1994).

[90] *See Denver Area*, 512 U.S. at 766.

[91] *See id.* at 741-42. The Court explained that "no definitive choice among competing analogies . . . allows us to declare a rigid single standard, good for now and for all future media and purposes." *Id. See generally* Kelly, *supra* note 58 (providing a detailed summary of *Denver Area*'s numerous opinions and the different standards

In the recent decision of *Reno v. ACLU*,[92] the Court explored the newest member of the communications world – the Internet.[93] Justice Stevens, writing for the majority, held that although there is an important interest to protect minors from receiving harmful material on the Internet, the two contested provisions of the CDA prohibiting "indecent" and "patently offensive" transmissions on the Internet violated the First Amendment.[94] The Justice first summarized the district court's holding and the undisputed facts, including a thorough description of the Internet, sexually explicit material, and the problem of age verification for users of the Internet.[95]

The majority then turned to an examination of prior Supreme Court cases upon which the government relied.[96] Justice Stevens noted that these cases raised questions as to the CDA's constitutionality.[97] First, the Justice distinguished *Ginsberg* by noting that the statute in *Ginsberg* was narrower than the CDA.[98] Next, the Court focused on *Pacifica* and determined that radio and television broadcasts differ from the Internet because radio and television are uniquely accessible to children and they cannot give effective warnings of upcoming harmful material.[99] Furthermore, Justice Stevens noted that radio broadcasting has traditionally received the least amount of First Amendment protection, due in part to the scarcity of spectrum theory.[100]

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utilized by the Justices).

[92] 117 S. Ct. 2329 (1997).

[93] *See id.*

[94] *See id.* at 2346.

[95] *See id.* at 2334-37. The district court's findings of fact are the most extensive judicial summary of the Internet and will most likely be used in future Internet law. *See* Clifford M. Sloan, *Decisions Reflect Nature of Media*, NAT'L. L.J., Aug. 11, 1997, at B8.

[96] *See Reno*, 117 S. Ct. at 2341-43.

[97] *See id.* at 2341.

[98] *See id.* In distinguishing *Ginsberg*, Justice Stevens first explained that the statute in *Ginsberg* allowed parents to buy harmful material and let their children view it. *See id.* (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968)). In contrast, the CDA did not permit parental consent to the transmission of such material. *See id.* Second, the Justice observed that the New York statute at issue in *Ginsberg* only applied to commercial transactions, whereas the CDA applied to any transaction. *See id.* Third, Justice Stevens noted that the CDA did not define "indecent" or "patently offensive," whereas the statute in *Ginsberg* confined its definition of harmful material with the prerequisite that it be "'utterly without redeeming social importance for minors.'" *Id.* (quoting *Ginsberg*, 390 U.S. 646). Fourth, the Justice wrote that whereas the statute in *Ginsberg* applied to 16-year-old minors and younger, the CDA applied to those that are one year older (17). *See id.*

[99] *See id.* at 2341-42.

[100] *See id.* Scarcity of spectrum is the theory that there are a limited number of channels available on the broadcast media. *See* WALLACE & MANGAN, *supra* note 17,

Justice Stevens then distinguished *Playtime Theatres*.[101] He explained that the time, place, and manner analysis that the Court used in *Playtime Theatres* was not appropriate in this case.[102] While the zoning ordinance in *Playtime Theatres* aimed to prevent the secondary effects of indecent speech and allowed alternative channels of communication, the CDA was aimed directly at the content of "indecent" and "patently offensive" speech, and applied to all of cyberspace.[103] The majority, therefore, concluded that none of the precedents upon which the government relied required the Court to uphold the CDA.[104]

The Court next distinguished the Internet from all other media and stated that each medium of communication deserves its own First Amendment analysis.[105] Justice Stevens reiterated that the justifications for regulation in other media, such as scarcity of channels,[106] the invasive nature of radio and television,[107] or the long history of regulation,[108] are not present in the Internet context.[109] The Court explained that while the invasive nature of broadcast media allows exposure without warning, the Internet, like the telephone medium, requires individuals to take affirmative steps to reach harmful material.[110] Furthermore, the Justice noted that the Internet is

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at 175. The FCC has the ability to use greater restrictions on the radio and television media because of scarcity of spectrum and the fact that the government assigns the channels to broadcasters. *See id.* However, the Internet bandwidth is unlimited and no governmental permission is required for a server to attach to it. *See id.* Providers on the Internet are considered publishers, rather than broadcasters. *See id.* *See also Press Groups, Feminists, Others Support Effort to Overturn CDA*, 1997 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 24,180 (1997) (discussing a related case wherein the National Association of Broadcasters and ABC, NBC, and CBS argued that the Supreme Court should refrain from holding that the Internet has a scarce number of frequencies because of the rapid progression in telecommunications technology).

[101] *See Reno*, 117 S. Ct. at 2342.

[102] *See id.*

[103] *See id.*

[104] *See id.* at 2343.

[105] *See id.* at 2343-44. The Court relayed that "'[e]ach medium of expression . . . may present its own problems.'" *See id.* at 2343 (alteration in original) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)).

[106] *See* Turner Broadcasting Systems, Inc., v. FCC, 512 U.S. 622, 637-38 (1994).

[107] *See* Sable v. FCC, 492 U.S. 115, 127-28 (1989).

[108] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969).

[109] *See Reno*, 117 S. Ct. at 2343. The Court quoted the district court's finding that affirmative action must be taken to receive harmful material over the Internet and that, unlike television, such material will generally not suddenly appear on the computer screen. *See id.* (citing ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

[110] *See id.* The majority articulated the differences between the telephone me-

not a scarce commodity.[111] Unlike broadcast media, Justice Stevens explained, the Internet constitutes an unlimited, inexpensive means of communication whereby "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."[112] The Court, therefore, concluded that it could not rely on any precedent to determine the standard of review for government regulation of the Internet.[113]

The majority then proceeded to create a level of First Amendment scrutiny for the Internet that would set the stage for future Internet jurisprudence.[114] The Court held the CDA void for vagueness because it failed to define precisely what speech warranted prosecution.[115] The majority noted that while the first provision proscribed indecent speech, the second provision prohibited patently offensive material.[116] Justice Stevens articulated that the linguistic differences in the two provisions would cause uncertainty as to how the provisions related to each other, since neither provision defined its terms.[117] The Justice stressed that the vagueness of a content-based restriction, such as the CDA, raises First Amendment problems.[118]

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dium and the "invasive" radio-television (broadcast) medium discussed in *Sable*. *See id.* (citing *Sable*, 492 U.S. 115, 127-28).

[111] *See id.* at 2344.

[112] *Id.* The Court further observed that an estimated 40 million people use the Internet today and that number may grow to 200 million by 1999. *See id.* (quoting ACLU v. Reno, 929 F. Supp. at 831).

[113] *See id.*

[114] *See id. See generally* Sloan, *supra* note 95, at B8 (describing *Reno v. ACLU* as a landmark decision).

[115] *See Reno*, 117 S. Ct. at 2344. The Court did not reach the question of whether the CDA was vague under the Fifth Amendment's Due Process Clause, since the majority found the statute vague for purposes of the First Amendment. *See id.*

[116] *See id.* (citing 47 U.S.C.A. § 223(a), (d) (West Supp. 1997)).

[117] *See id.* If Congress leaves out language in one section yet includes it in another section, the Court will presume that Congress intended to omit or include that language. *See id.* at 2344 n.36 (quoting Gonzon-Peretz v. United States, 498 U.S. 395, 404 (1991)). The Court posited: "Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our *Pacifica* opinion, or the consequences of prison rape would not violate the CDA?" *Id.* at 2344.

[118] *See id.* Recalling a previous case, the Justice was concerned about the vagueness of the CDA because of its effect on free speech. *See id.* (citing Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048-51 (1991)). In *Gentile*, the petitioner violated a rule that prevented lawyers from making extra-judicial statements to the media that they knew would affect an adjudicative proceeding. *See Gentile*, 501 U.S. at 1033. The lawyer had held a press conference just following his client's indictment on criminal charges. *See id.* The Court held the rule void for vagueness because it failed to give fair notice. *See id.* at 1048, 1057-58. Furthermore, the Court stated that "[t]he prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement . . . ." *Id.* at

Furthermore, the Court noted that the risk of criminal sanctions arising from the CDA would most likely keep people silent.[119]

The majority rejected the government's argument that the CDA was no more vague than the obscenity test upheld in *Miller*.[120] The Court noted that while the *Miller* test requires unprotected material to appeal to the prurient interest of the average person; be patently offensive; and lack any "'serious literary, artistic, political, or scientific value,'" the CDA only addressed whether the material was patently offensive.[121] Additionally, Justice Stevens explained that while the *Miller* test requires "patently offensive" material to be defined by state law, the CDA had no such requirement.[122] Moreover, the Court articulated that the *Miller* test sets forth a national "societal value" requirement with which to judge the material, whereas the CDA only set forth a contemporary community standard requirement.[123] The majority determined that this "societal value" requirement would provide courts with a uniform standard regarding prohibited speech.[124] The Court concluded that the CDA could have been drafted more precisely and that its vague form violated the First Amendment.[125]

Next, Justice Stevens examined the overbreadth of the CDA and its inevitable conflicts with the First Amendment.[126] The Justice opined that the CDA repressed speech that adults have a constitu-

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[119] *See Reno*, 117 S. Ct. at 2344-45.

[120] *See id.* at 2345. The Court likened the indecent and the patently offensive provisions of the CDA to the second prong of the *Miller* test. *See id.* The Court reasoned that while *Miller*'s three-prong test was not vague, "it does not follow that one of those limitations, standing by itself, is not vague." *Id.*

[121] *Id.* (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

[122] *See id.* The Court explained that determining what is "prurient interest" or "patently offensive" are questions of fact; the nation is too large to articulate one standard for all 50 states. *See id.* n.39 (quoting *Miller*, 413 U.S. at 30); *see also supra* note 43 for the *Miller* test. The Court exemplified, "Even though the word 'trunk,' standing alone, might 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." *Reno*, 117 S. Ct. at 2345 n.38.

[123] *See id.* at 2345. *See generally* Donald T. Stepka, Note, *Obscenity On-Line: A Transactional Approach to Computer Transfers of Potentially Obscene Material*, 82 CORNELL L. REV. 905, 915-19 (1997) (discussing the different views of which geographical community to use for the *Miller* community standards). Stepka argues that a virtual community standard is inappropriate for the *Miller* test and that courts should use standards of the supplier's/provider's community. *See id.* at 908.

[124] *See Reno*, 117 S. Ct. at 2345.

[125] *See id.* at 2346.

[126] *See id.* at 2346-48.

tional right both to receive and transmit.[127] The First Amendment, the Justice elaborated, protects speech that is indecent, yet not obscene.[128] The majority noted that while preventing children from accessing harmful materials is an important governmental interest, this interest does not justify regulations that prohibit adults from accessing protected speech.[129] The scope of the CDA's coverage was unlike any other restriction that had ever been upheld by the Court, the Justice observed.[130] Justice Stevens explained that the CDA covered both commercial and noncommercial speech, as well as nonpornographic material containing educational value.[131] The majority declared that even though there is an important interest at issue, there must be an inquiry to determine whether Congress has narrowly tailored its statute.[132] Justice Stevens described numerous alternatives to the CDA: "tagging" harmful material;[133] creating exceptions for material with educational or artistic value; allowing tolerance for parental control; and regulating certain areas of the Internet, such as web sites and chat rooms, differently than others.[134] The Justice declared that, in light of Congress's failure to deliberate the potential

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[127] *See id.* at 2346.

[128] *See id.* (quoting Sable v. FCC, 492 U.S. 115, 126 (1989) (standing for the proposition that speech that is indecent, yet not obscene, is protected by the First Amendment)).

[129] *See id.*

[130] *See Reno*, 117 S. Ct. at 2347.

[131] *See id.*

[132] *See id.* at 2346-47 (citing Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727 (1996)). The district court compared the CDA to the restriction on "dial-a-porn" that was invalidated in *Sable*. *See id.* at 2346 (citing ACLU v. Reno, 929 F. Supp. 824, 854 (E.D. Pa. 1996)). Justice Stevens, following *Sable*, remarked that even though there was an important interest in protecting children from harmful material, that did not end the First Amendment inquiry. *See id.* (citing *Sable*, 492 U.S. at 129). The government asserted that since the CDA required knowledge that the recipient is a minor, adult to adult communication would not be hindered. *See id.* at 2347. The Justice declared that this was incorrect. *See id.* The Court explained that if an individual was in a 100-person chat room and knew that one person was a minor, this would certainly burden the communication between adults. *See id.* The majority restated the district court's findings that there will soon be computer programs available that parents may buy to prevent children from accessing harmful material on the Internet. *See id.* (citing *Reno*, 929 F. Supp. at 842).

[133] *See* Spiliopoulos, *supra* note 43, at 350. Tagging is a method whereby a provider could place a tag on the contents page of indecent or patently offensive material so that client software or a server will recognize the tag and either allow or deny access. *See id.*

[134] *See Reno*, 117 S. Ct. at 2348.

problems of the CDA and any possible alternatives,[135] the CDA was not narrowly tailored.[136]

The majority then examined the three arguments the government made to advance the notion that the CDA was not overbroad.[137] First, Justice Stevens dismissed the idea that there were "alternative channels" of communication; the Justice explained that the "time, place and manner" inquiry is inapplicable when a statute regulates speech based on its content.[138] Second, the Justice declared that the "knowledge" requirement and the "specific child" element[139] did not rescue the CDA from overbreadth.[140] The majority supported this conclusion by noting that the Internet is open to everyone and that the proposed requirements would instill powers of censorship upon opponents of indecent speech.[141] Lastly, the Justice rejected the government's contention that educational, scientific, or other valuable material would always fall outside the "indecent" and "patently offensive" provisions of the CDA.[142]

The Court next focused on the government's remaining arguments that the safe harbor defenses[143] provided in the CDA re-

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[135] *See id.* at 2346-47 n.41. The Court noted a similar lack of congressional inquiry into the *Sable* statute. *See id.* *Compare Sable*, 492 U.S. at 130 ("No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages."), *with Reno*, 117 S. Ct. at 2338 n.24. (stating that the CDA provisions that became law were not subject to any hearings).

[136] *See Reno*, 117 S. Ct. at 2348.

[137] *See id.* The three arguments were:

> (1) that the CDA is constitutional because it leaves open ample "alternative channels" of communication; (2) that the plain meaning of the Act's "knowledge" and "specific person" requirement significantly restricts its permissible applications; and (3) that the Act's prohibitions are "almost always" limited to material lacking redeeming social value.

Id.

[138] *See id.* (citing Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980)). The Court stated that "[t]he Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." *Id.* at 2348-49.

[139] *See* 47 U.S.C. § 223(a), (d) (1996) (stating that the "specific child" element and the "knowledge" requirement attempt to prohibit indecent material only to persons known to be under 18 years of age).

[140] *See Reno*, 117 S. Ct. at 2349.

[141] *See id.* The Justice recognized that an opponent of indecent speech might simply log on to a chat room and inform everyone that his 17-year-old child was present. *See id.* The Court referred to this power as a "heckler's veto." *See id.*

[142] *See id.*

[143] 47 U.S.C. § 223(e)(5) (1996). The safe harbor defenses provide in full:

> It is a defense to a prosecution under subsection (a)(1)(B) or (d) of

deemed the Act.[144] First, although the CDA provided immunity to people who tagged their harmful material, the Justice declared the provision illusory due to the requirement that the efforts to tag the material be "effective."[145] Next, the majority explained that safe harbor provisions for adult identification and verified credit cards were not economically practicable for most noncommercial orators.[146] The Justice concluded that the CDA defenses did not create the type of "narrow tailoring" that would save an otherwise unconstitutional provision, and noted that the CDA was even more menacing than the restriction rejected in *Sable*, where the restraint "amounted to 'burn[ing] the house to roast the pig.'"[147]

Lastly, Justice Stevens examined whether the invalid provisions of the CDA should be severed, leaving the remainder of the CDA intact.[148] The Court held that the severability clause was applicable in only one respect.[149] Obscene speech, the Justice remarked, has been consistently viewed as unprotected speech.[150] Therefore, the Justice concluded, the word "indecent" should be severed from the CDA, leaving the rest of the first provision standing to prohibit the transmission of obscene speech.[151] Accordingly, the majority affirmed the

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> this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section 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.

Id.

[144] *See Reno*, 117 S. Ct. at 2349. For a summary of the CDA defenses, see Spiliopoulos, *supra* note 43, at 349-51.

[145] *Reno*, 117 S. Ct. at 2349. The Court recognized that the software necessary to allow all recipients to screen harmful material is not currently available and thus could not be "effective." *See id.*

[146] *See id.* The Court noted the possibility that commercial entities posting obscene material might be immune from the CDA whereas noncommercial speakers sending indecent material with artistic value would not receive any benefit. *See id.* at 2349 n.47.

[147] *Id.* at 2350 (quoting Sable v. FCC, 492 U.S. 115, 127 (1989)).

[148] *See id.*

[149] *See id.*

[150] *See id; see also supra* note 8 and accompanying text (explaining that obscene speech is categorically unprotected).

[151] *See Reno* 117 S. Ct. at 2350.

district court's holding and concluded that there is a greater interest in promoting freedom of expression than in any theoretical benefits of censorship.[152]

Justice O'Connor, joined by Chief Justice Renquist, wrote a separate opinion, concurring in part and dissenting in part.[153] Justice O'Connor argued that what the majority referred to as the "patently offensive" provision was in reality two separate provisions: the "specific person" provision,[154] and the "display" provision.[155] Next, Justice O'Connor stated that the CDA was an effort to create "adult zones" within the Internet.[156] Zoning laws, the Justice noted, are valid so long as they do not overly constrict adults' access to the material and minors have no right to view or read the banned material.[157] Justice O'Connor articulated that adult zones are easy to create in the physical world because geography and people's identities are clear.[158] In contrast, the Justice noted, it is difficult to delineate adult zones in the cyberworld, where people's identities are masked.[159] Justice O'Connor maintained that, although there are some semblances of geography on the Internet such as chat rooms, at the present time cyberspace is still unzoned.[160] For this reason, the Justice concurred with the majority that the "display" provision is unconstitutional.[161]

However, Justice O'Connor opposed the majority's contention that the "indecent" and "specific person" provisions are unconstitu-

[152] *See id.* at 2351.

[153] *See id.* (O'Connor, J., concurring in part and dissenting in part).

[154] *See id.* at 2352 (O'Connor, J., concurring in part and dissenting in part). The Justice noted that it is an offense knowingly to send patently offensive material to a specific person under the age of eighteen. *See id.* (citing 47 U.S.C. § 223(d)(1)(A)).

[155] *See id.* The Justice explained that it is an offense to display patently offensive material, "'in a[ny] manner available' to minors." *Id.* (quoting 47 U.S.C. § 223(d)(1)(B)).

[156] *See id.*

[157] *See Reno*, 117 S. Ct. at 2353 (O'Connor, J., concurring in part and dissenting in part).

[158] *See id.*

[159] *See id.*

[160] *See id.* at 2353-54 (O'Connor, J., concurring in part and dissenting in part). The Justice also explained that user-based zoning is mostly non-existent today because the majority of people do not have their web pages "tagged" nor do they have the software to recognize these "tags." *See id.* at 2354 (O'Connor, J., concurring in part and dissenting in part); *cf.* Stepka, *supra* note 123, at 928 (recognizing that the Internet is so diverse that no single paradigm can adequately define its parameters).

[161] *See Reno*, 117 S. Ct. at 2354 (O'Connor, J., concurring in part and dissenting in part).

tional.[162] These provisions, Justice O'Connor declared, could be constitutional if they were applied to situations in which one adult conversed with one or more minors.[163] The Justice explained that if another adult were to enter the conversation, however, the provisions would be invalid because they would obstruct protected speech between adults.[164] Therefore, Justice O'Connor opined that the "indecent" and "specific person" provisions were valid to the extent that they applied to Internet communications where it was known to the sender that the recipients were minors.[165] Lastly, though the majority did not rule on the issue, Justice O'Connor concluded that the CDA did not interfere with minors' First Amendment rights.[166]

By rejecting the application of standards used for other media of mass communication, the Court recognized that the Internet is its own medium entitled to full First Amendment protection. Although the Internet embodies characteristics of other media, it is unique in that it provides access to a virtually limitless amount of information, it enables users to communicate in a variety of ways, and it allows for the free dissemination of ideas and data.

The government's interest in protecting children from exposure to harmful material is concededly important, if not compelling. However, the Court correctly held that the interest in preserving adults' constitutional rights to protected speech is more important. *Reno v. ACLU* is monumental to the extent that it eliminates content-based regulation of speech on the Internet.

New technological developments may one day emerge to change the present structure of the Internet, and these developments may provide Congress with the means to regulate the Internet. Perhaps one day the Internet may be channeled through two separate zones — one for minors and one for adults. In this event, zoning laws regulating the Internet, similar to the regulations upheld in *Playtime Theatres*, would most likely pass constitutional mus-

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[162] *See id.*

[163] *See id.* at 2355 (O'Connor, J., concurring in part and dissenting in part). The Justice gave examples such as an adult sending an indecent e-mail to a person known to be a minor or an adult in a chat room with only persons known to be minors. *See id.*

[164] *See id.*

[165] *See id.* at 2356 (O'Connor, J., concurring in part and dissenting in part).

[166] *See Reno*, 117 S. Ct. at 2356 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor based this conclusion on *Ginsberg*'s holding that material indecent as to adults may be considered obscene as to minors. *See id.* (citing Ginsberg v. New York, 390 U.S. 629, 633 (1968)).

ter.[167] It is also possible that the Internet will merge with other media such as the telephone or cable television media. If the Internet were to merge with the telephone medium, the Court would probably continue to apply strict scrutiny to content-based restrictions on speech, given that both the telephone and Internet media currently receive strong First Amendment protection. On the other hand, a cable television-Internet merger would most likely prompt the Court to permit some content-based speech regulations, owing to the fact that cable television is a less-protected medium than the Internet or the telephone medium.

Today, however, Congress does not have many viable ways to regulate the Internet. Nonetheless, in the near future, it is apparent that Congress will seek to regulate the Internet to some extent.[168] Congress may attempt to impose a self-rating system on Internet users. This idea, however, would be analogous to requiring every magazine or newspaper article to have a rating. Such a requirement would probably be unconstitutional due to its chilling effect on speech. The best solution to protect children on the Internet seems to be through the use of Internet screening software, which would enable parents to censor materials.[169] A law requiring Internet serv-

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[167] *See* April Mara Major, *Internet Red Light Districts: A Domain Name Proposal for Regulatory Zoning of Obscene Content*, 16 J. MARSHALL J. COMPUTER & INFO. L. 21, 22-23 (1997) (stating the proposition that today, certain types of zoning regulations of the Internet might be constitutional).

[168] Numerous bills relating to the Internet have been introduced in the past year; none, however, attempt to regulate speech. An amendment to the Communications Act of 1934 would prohibit Internet servers from opening an account for sexually violent predators. *See* S. 1356, 105th Cong. (1997). The "Safe Schools Internet Act of 1998" would require a system to filter or block Internet material on computers in schools and libraries. *See* Safe Schools Internet Act of 1998, H.R. 3177, 105th Cong. (1998). The "Internet Freedom and Child Protection Act of 1997," an amendment to the Communications Act of 1934, would force Internet-access providers to offer screening software to customers. *See* Internet Freedom and Child Protection Act of 1997, H.R. 774, 105th Cong. (1997). The "Family-Friendly Internet Access Act of 1997," an amendment to the Communications Act of 1934, would require Internet servers to provide screening software to parents. *See* Family-Friendly Internet Access Act of 1997, H.R. 1180, 105th Cong. (1997). The "Internet Protection Act of 1997" would ensure that the future development of the Internet and interactive computer services are unencumbered by federal and state regulation. *See* Internet Protection Act of 1997, H.R. 2372, 105th Cong. (1997).

[169] Examples of these software programs are CyberPatrol and SurfWatch, which both filter out harmful material by looking for key words that may signify indecent or obscene material. *See Reno*, 117 S. Ct. at 2354 (O'Connor, J., concurring in part and dissenting in part). Recently, a group of engineers agreed on a technical standard to filter the World Wide Web. *See* Amy Harmon, *Technology to Let Engineers Filter the Web and Judge Content*, N.Y. TIMES, Jan. 19, 1998, at D1. The standard is known as PICS (Platform for Internet Content Selection). *See id.* The PICS technology has

ers to provide this option to parents would most likely be found constitutional.[170]

Every medium of mass communication poses dangers to children. However, all too often society blames youths' problems on communication media. As compelling as society's interest in protecting children is, those advocating censorship fail to realize that the benefits of free expression through mass media outweigh the possible threats. The Internet has opened new doors to communicate, and the value of free speech compels the government to refrain from forcing them shut through censorship. Although Congress will undoubtedly draft new bills in the upcoming years further addressing this dynamic medium, *Reno* stands as recognition of the Internet as a valuable tool of communication, and it preserves one of the most precious ideals for which our country stands: free speech.

Walter J. Dorgan III

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already been incorporated by several Internet servers in order to define precisely which parts of the web should be filtered. *See id.* Numerous free speech advocates, however, fear that this technology could be used by the government to block constitutionally protected speech. *See id.*

[170] An additional possibility that Congress should consider is legislation directed at individuals who transmit indecent material to minors and then lure them to meet in person. *See* N.Y. Penal Law § 235.22 (McKinney Supp. 1997) (making it illegal knowingly to send sexually oriented material to a minor and then by the use of such communication induce or invite such minor to engage in sexual conduct). A New York state court has already found that this type of law does not threaten freedom of speech. *See* People v. Barrows, 664 N.Y.S.2d 410 (Sup. Ct. 1997). In *Barrows*, the government set up a sting operation whereby an undercover officer in a chat room on America Online pretended to be a minor. *See id.* at 411. The defendant, while under the belief that the agent was a 13-year-old female, transmitted sexually oriented speech to the agent through e-mails and through conversations in chat rooms. *See id.* at 411-12. The defendant then asked the agent to meet with him in person. *See id.* at 412. The government arrested the defendant after he approached a minor female he believed to be the person he talked with. *See id.* The New York trial court held the statute constitutional because it required the Internet user to meet with the minor in person. *See id.* at 413. This problem is a growing concern as the population of the cyberspace community continues to expand every year. *See* Debra Lynn Vial & Mary Jane Fine, *Making Students Net-Wise*, THE RECORD (OF HACKENSACK), Mar. 16, 1998, at A1. Schools and local police are making efforts to educate children of these dangers. *See id.*