DISSEMINATION OF HARMFUL MATTER TO MINORS OVER THE INTERNET

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I. INTRODUCTION

A perceived danger of the Internet is that predatory adults will expose minors to matter deemed harmful to them.[1] In response to this perceived danger, Congress enacted the Communications Decency Act of 1996 (the CDA)[2] and later the Child Online Protection Act (the COPA),[3] and the legislatures in several states, including California,[4] New York,[5] New Mexico,[6] Michigan[7] and Virginia,[8] enacted penal statutes, all of which criminalized the dissemination of

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[1] Madeleine Mercedes Plasencia, *Internet Sexual Predators: Protecting Children in the Global Community,* 4 J. GENDER RACE & JUST. 15 (2000) (expressing Professor Plasencia's concerns that the Internet accelerates the developmental stages of pedophilia).

[2] Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996).

[3] Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998).

[4] CAL. PENAL CODE § 288.2(b) (West 1999).

[5] N.Y. PENAL LAW §§ 235.21, 235.22 (McKinney 2000).

[6] N.M. STAT. ANN. § 30-37-3.2 (Michie Supp. 2001).

[7] MICH. COMP. LAWS ANN. § 722.675 (West Supp. 2001).

harmful matter to minors over the Internet.[9]

Although the provisions of each statutory prohibition vary, the stated common purpose of each is the protection of minors from harmful influences made available by modern technology and the ubiquitous presence of computers with Internet access.[10] Almost immediately after the enactment of these statutory prohibitions, legal actions challenging their constitutionality were filed. Injunctions were sought in federal courts to prevent implementation of the provisions of the CDA, and later the COPA, and state statutes in New York,[11] New Mexico,[12] Michigan[13] and Virginia.[14] The constitutionality of other statutes in New York[15] and in California[16] was challenged after criminal charges were filed alleging violations or attempted violations of the statutes.[17] To date, the constitutionality of similar statutes in other states, including Alabama,[18] Georgia,[19] Oklahoma[20] and Florida,[21] if challenged, has not been decided in reported court

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[8] VA. CODE ANN. § 18.2-391 (Michie Supp. 2001).

[9] The texts of the CDA, the COPA and relevant state statutes are included in the appendix to this article.

[10] One commentator reports that "the Internet will have in excess of 320 million users by year-end 2000, and . . . 720 million users by year-end 2005 . . . . '48 percent of nine to [twelve]-year-olds are online' and '71 percent of [thirteen-to-seventeen] year olds'" are online. Christopher T. Furlow, *Erogenous Zoning on the Cyber-Frontier* 5 VA. J.L. & TECH. 7, ¶ 1 (2000) *available at* http://www.vjolt.net/vol5/issue2/v5i2a-7-Furlow.html.

[11] N.Y. PENAL LAW § 235.21 (McKinney 2000).

[12] N.M. STAT. ANN. § 30-37-3.2 (Michie Supp. 2001).

[13] MICH. COMP. LAWS ANN. § 722.675 (West Supp. 2001).

[14] VA. CODE ANN. § 18.2-391 (Michie Supp. 2001).

[15] N.Y. PENAL LAW § 235.22 (McKinney 2000).

[16] CAL. PENAL CODE § 288.2(b) (West 1999).

[17] People v. Foley, 94 N.Y.2d 668 (N.Y. 2000); Hatch v. Super. Ct., 80 Cal. App. 4th 170 (Cal. Ct. App. 2000); People v. Hsu, 82 Cal. App. 4th 976 (Cal. Ct. App. 2000).

[18] ALA. CODE § 13A-6-111 (Michie Supp. 2000).

[19] GA. CODE ANN. § 16-12-100.1 (Harrison 1998).

[20] OKLA. STAT. ANN. tit. 21, § 1040.76 (West Supp. 2001).

opinions.

The constitutional challenges to the federal statutes have been based on the freedom of speech protection of the First Amendment to the United States Constitution.[22] The constitutional challenges to the state statutes have been based on the Commerce Clause of the United States Constitution[23] and the freedom of speech protection of the First Amendment to the United States Constitution. To date, challenges to these statutes filed in federal court have been successful, and challenges filed in state courts have been unsuccessful.[24] This article surveys statutes prohibiting the dissemination of harmful matter to minors over the Internet, discusses the constitutional challenges to those statutes and seeks to explain the disparate results of court responses to those challenges. The conclusion of the article is that to uphold the constitutionality of state legislation to solve a perceived problem the state courts, in contrast to the federal courts, have made questionable assumptions about the extent of state court criminal jurisdiction, the scope of the Commerce Clause, the nature of content-based regulation of speech and the characteristics of the Internet. Because of these assumptions, state courts have been reluctant to apply the relevant constitutional principles in their decisions upholding the constitutional validity of the state statutes they have considered.

II. THE INTERNET

Recognition of the nature and characteristics of the Internet is essential to the consideration of the constitutionality of laws criminalizing the dissemination of harmful matter to minors over the Internet.[25] The nature and characteristics of

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[21] FLA. STAT. ANN. § 847.0135 (West 2000).

[22] U.S. CONST., amend. I.

[23] U.S. CONST., art. I, § 8, cl. 3.

[24] *Compare* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997); Reno v. ACLU, 521 U.S. 844, 849-55 (1997); ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000); Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737 (E.D. Mich. 1999); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611 (W.D. Va. 2000) (federal court decisions holding unconstitutional the statutes under consideration); *with Foley*, 94 N.Y.2d 668; *Hatch*, 80 Cal. App. 4th 170; *Hsu*, 82 Cal. App. 4th 976 (state court decisions holding constitutional the statutes under consideration).

[25] The description of the nature and characteristics of the Internet recited in Part II has recently been characterized as the conventional wisdom of first-generation Internet thinkers and is flawed. Jack L. Goldsmith and Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 790 (2001). The Goldsmith and Sykes essay seeks to correct the conventional wisdom and contends that the described nature of the Internet is a func-

the Internet have been described in several reported court decisions, including *American Libraries Association v. Pataki (Pataki)*[26] and *Reno v. American Civil Liberties Union (Reno I)*,[27] and in numerous scholarly journals.[28] California, by statute, has defined the Internet as follows:

> the global information system that is logically linked together by a globally unique address space based on the Internet Protocol (IP), or its subsequent extensions, and that is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite, or its subsequent extensions, or other IP-compatible protocols, and that provides, uses, or makes accessible either publicly or privately, high level services layered on the communications and related infrastructures described in this paragraph.[29]

Although this statutory definition may be technically correct, it is of little assistance in understanding the nature and characteristics of the Internet that are most relevant to the application of Commerce Clause and First Amendment principles to the regulation of Internet communications.

The Internet is a means by which information, including written text, images, sounds and pictures, may be communicated between connected computers.[30] The Internet exists throughout the world, although it does not exist in any identi-

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tion of economic cost, not current technology. Professor Goldsmith is an articulate challenger of conventional wisdom. In 1997, he published his critique of the "modern position" that customary international law has the status of federal common law. Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). Nevertheless, the courts and other scholars continue to evaluate Internet communications based on the conventional wisdom of the nature of the Internet. *See infra* notes 26 and 27 and accompanying text.

[26] *Am. Libraries Ass'n*, 969 F. Supp. at 164-67.

[27] *Reno I*, 521 U.S. 849-55.

[28] For a description of the history and nature of the Internet *see* Ari Lanin, *Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*, 73 S. CAL. L. REV. 1423, 1424-30 (2000); *and* Kelly M. Doherty, *WWW.Obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 260-66 (1999).

[29] CAL. BUS. & PROF. CODE § 17538(e)(6) (West Supp. 2001).

[30] *Reno I*, 521 U.S. at 849.

fiable geographic locale.[31] No organization controls Internet communications and there is no central geographic site at which they may be blocked or edited.[32] Any person with a computer can publish, originate or disseminate information over the Internet and any person with a computer can access that information.[33] However, receipt of Internet communications requires a series of affirmative acts beyond the simple act of lifting a telephone receiver or switching on a radio or television.[34]

Any person with a computer that has Internet access can be the recipient of Internet communications.[35] The identification of the recipient usually consists of a user name, a password and an electronic mail address.[36] The user name is often a pseudonym, permitting anonymity, the password is usually confidential to the user and the address is a series of letters and symbols with no geographic meaning (referred to as a logical address).[37]

Methods of Internet communications include:

(1) one-to-one person (such as "e-mail");

(2) one-to-many persons (such as "listserv" or "mail exploder");

(3) distributed message databases (such as "USENET newsgroups");

(4) real time remote computer utilization (e.g., "Internet Relay Chat");

(5) real time remote computer utilization (such as "telnet");

(6) remote information retrieval (such as "ftp," "gopher" and the Web).[38]

Unless disclosed by an Internet communication sender or recipient, neither the sender nor recipient can generally determine the geographic locale, or the identity, age, gender or other identifying characteristics of the other.[39] The sender usually cannot determine, without response, whether anyone has received the communication, the number of persons that have accessed the communica-

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[31] *Id.* at 851.

[32] *Am. Libraries Ass'n*, 969 F. Supp. at 164.

[33] *Reno I*, 521 U.S. at 854.

[34] *Id.*

[35] *Id.* at 851.

[36] *Am. Libraries Ass'n*, 969 F. Supp. at 165.

[37] *Id.* at 165.

[38] *Id.*

[39] *Id.*

tion, or the locale in which the communication was received.[40]

Because information placed on the Internet is accessible throughout the world, there is no current method to limit its accessibility to within state boundaries or selectively limit its dissemination to any geographic area.[41] Accessibility means that with the proper computer equipment and software, the communication can be received on that equipment and be read or observed.[42]

The Internet has been analogized to a highway or railroad and has often been called the "information superhighway."[43] The *Pataki* court hypothesized, "the phrase 'information superhighway' is more than a mere buzzword."[44] Because the Internet is similar to a highway, which is an instrument of commerce, characterizing the Internet as the information superhighway has legal significance, and the Internet is appropriately considered within a Commerce Clause framework.[45]

However, the *Pataki* court's correlation is incomplete. Unlike the "information superhighway," traditional highways and rail lines follow fixed geographic paths and each point on those paths can be identified in space. In contrast, Internet communications do not follow identifiable paths.[46] Moreover, an Internet communication is accessible everywhere and is not subject to geographic boundaries.[47] Also, it is difficult, if not impossible, with current technology to limit the accessibility of an Internet communication to a particular individual or group of individuals, or to individuals of a particular age or gender.[48] Accord-

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[40] *Id.* at 167.

[41] *Reno I*, 521 U.S. 854.

[42] *Id.* at 853 (noting that "[o]nce a provider posts its content on the Internet, it cannot prevent that content from entering any community") (citing ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

[43] *Am. Libraries Ass'n*, 969 F. Supp. at 161.

[44] *Id.*

[45] *Id.* at 161.

[46] *Reno I*, 521 U.S. at 854.

[47] *Id. See* Kenneth D. Bassinger, Note, *Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 GA. L. REV. 889 (1998), for a detailed discussion of the highway and railroad analogy to the Internet.

[48] *Reno I*, 521 U.S. at 855 (explaining that under current technology, there "'is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms'") (quoting *ACLU*, 929 F. Supp. at 845).

ingly, an Internet communication sent from a computer in California to an e-mail address of a person whose computer is known to be in California or New York travels no identifiable path, and the route it has taken to California or New York cannot be determined.[49]

III. THE STATUTES

A. FEDERAL

Two federal statutes enacted by Congress criminalize the dissemination of harmful matter to minors over the Internet: the CDA and the COPA.

1. THE COMMUNICATIONS DECENCY ACT

The CDA[50] includes two statutory provisions "informally described as the indecent transmission provision and the patently offensive display provision."[51]

The indecent transmission provision criminalizes the interstate transmission by a telecommunications device of obscene or indecent material to a recipient known to be under eighteen years of age.[52] The Supreme Court has interpreted this section to prohibit "the knowing transmission of obscene or indecent messages to any recipient under [eighteen] years of age."[53]

The patently offensive display provision criminalizes the interstate computer display to a person under eighteen years of age of patently offensive sexual mat-

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[49] *See Reno I*, 521 U.S. at 854-55.

[50] 47 U.S.C. § 223 (Supp. II 1996); 47 U.S.C. § 230 (Supp. II 1996).

[51] *Reno I*, 521 U.S. at 858-59. Under the CDA, a person who "(1) in interstate . . . communications . . . (B) by means of a telecommunications device . . . (i) makes, creates or solicits, and (ii) initiates the transmission of any . . . communication which is obscene or indecent, knowing that the recipient . . . is under [eighteen] years of age, . . . shall be fined . . . or imprisoned . . . or both." 47 U.S.C. § 223(a) (Supp. II 1996). The CDA also provides that a person who "(1) in interstate commerce . . . (A) uses an interactive computer service to send to a . . . person . . . under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any . . . communication that . . . depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities . . . shall be fined . . . or imprisoned . . . or both." 47 U.S.C. § 223(d) (Supp. V 1999).

[52] 47 U.S.C. § 223(a) (Supp. II 1996).

[53] *Reno I*, 521 U.S. at 859.

ter as measured by contemporary community standards.[54] The Court explained in *Reno I* that this section prohibits "the knowing sending or displaying of patently offensive messages in a manner that is available to a person under [eighteen] years of age."[55]

2. THE CHILD ONLINE PROTECTION ACT

After the Supreme Court found the CDA unconstitutional in *Reno I*,[56] Congress enacted the COPA based on its finding that the protection of the well-being of minors by shielding them from materials harmful to them that are available on the Internet is a compelling governmental interest.[57] The COPA was adopted "to protect minors from 'harmful material' measured by 'contemporary community standards' knowingly posted on the World Wide Web . . . for commercial purposes."[58] The Act criminalized communications for commercial purposes containing material harmful to minors that are posted on the World Wide Web.[59] Material that is considered "harmful to minors" includes communications that "the average person, applying contemporary community standards," would find to appeal to the prurient interest of minors, describes a sexual act and "taken as a whole lacks serious literary, artistic, political, or scientific value for minors."[60]

B. STATES

Several states have enacted statutes that criminalize the dissemination of

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[54] 47 U.S.C. § 223(d) (Supp. V 1999).

[55] *Reno I*, 521 U.S. at 859.

[56] *Id.* at 854.

[57] Pub. L. No. 105-277, div. C, title XIV, § 1402 (1998).

[58] *Reno II*, 217 F.3d at 165, *certiorari* granted by Ashcroft v. ACLU, 121 S. Ct. 1997 (2001).

[59] 47 U.S.C. § 231(a) (Supp. V 1999). Under the Act, "[a] person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A) (Supp. V. 1999). A person is considered to be "engaged in the business" if that person "devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities . . . ." 47 U.S.C. § 231(e)(2)(B) (Supp. V 1999).

[60] 47 U.S.C. § 231(e)(6) (Supp. V 1999). Under the COPA, a minor is "any person under [seventeen] years of age." 47 U.S.C. § 231(e)(7) (Supp. V 1999).

harmful matter to minors over the Internet.

1. CALIFORNIA

The California Penal Code criminalizes the Internet dissemination of harmful matter to a minor with the intent of arousing sexual desires for the purpose of seducing the minor.[61] Section 313 of the California Penal Code defines harmful matter as that which "to the average person, applying contemporary statewide standards, appeals to the prurient interest" and "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."[62]

2. MICHIGAN

Under Michigan law, the communication of sexually explicit matter to a minor over the Internet is made criminal.[63] A violation occurs if there is a knowing communication of "sexually explicit visual or verbal material" or a sexually explicit "performance."[64] In addition, the material must be "harmful to minors."[65]

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[61] CAL. PENAL CODE § 288.2(b) (West 2001).

[62] CAL. PENAL CODE § 313(a) (West 2001).

[63] MICH. COMP. LAWS ANN. § 722.675(1) (West Supp. 2001).

[64] MICH. COMP. LAWS ANN. § 722.675(5) (West Supp. 2001).

[65] MICH. COMP. LAWS ANN. § 722.675(4) (West Supp. 2001). The Act defines "harmful to minors" as material that:

> [c]onsidered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards;
>
> [i]t is patently offensive to contemporary local community standards of adults as to what is suitable for minors;
>
> [c]onsidered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors.

Id.

3. NEW YORK

The New York Penal Law criminalizes computer communication to a minor depicting sexual conduct that is harmful to minors.[66] Moreover, inviting a minor to engage in sexual conduct through computer dissemination of material that depicts sexual conduct and is harmful to minors is criminal under New York law.[67]

4. NEW MEXICO

Under New Mexico law, "the dissemination of material that is harmful to a minor by computer" is criminal.[68] A violation occurs when there is a knowing communication of harmful material to a person under eighteen years of age.[69]

5. VIRGINIA

Virginia law has criminalized the sale, rental or loan to a juvenile of material that is harmful to minors.[70] An electronic file or message containing image,

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[66] N.Y. PENAL LAW § 235.21(3) (McKinney 2000). The term "harmful to minors" is defined under the Act as a description of sexual conduct that:

> [considered as a whole, appeals to the prurient interest in sex of minors; and
>
> [i]s patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
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> [c]onsidered as a whole. lacks serious literary, artistic, political and scientific value for minors.

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

[67] N.Y. PENAL LAW § 235.22 (McKinney 2000).

[68] N.M. STAT. ANN. § 30-37-3.2 (Michie Supp. 2001).

[69] N.M. STAT. ANN. § 30-37-3.2 (A) (Michie Supp. 2001). "Harmful material" includes material that "in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct." *Id.*

[70] VA. CODE ANN. § 18.2-391(A) (Michie Supp. 2001). Under Virginia law, "harmful to juveniles" is defined as:

words, sound recordings, or any other presentation of material that is harmful to minors is prohibited.[71]

C. SUMMARY OF STATUTES

The two federal statutes and four of the state statutes described in Part III each define a criminal offense the common elements of which are:

(1) the use of the Internet to send a communication

(2) to a minor,

(3) the content of which is harmful to minors.[72]

Two of the state statutes include these three elements but have the additional element of a purpose or intent of luring the minor into sexual conduct.[73]

COPA is limited to the commercial use of the World Wide Web aspect of the Internet, but the other statutes apply to any use of the Internet. The definition of a minor and of the harmful content of the prohibited communication varies among the statutes or is undefined.

IV. THE COMMERCE CLAUSE

A. GENERAL PRINCIPLES

The Commerce Clause[74] of the United States Constitution provides that Con-

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> [t]hat quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominantly appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

VA. CODE ANN. § 18.2-390(6) (Michie 1996).

[71] VA. CODE ANN. § 18.2-391(A)(1) (Michie Supp. 2001).

[72] 47 U.S.C. § 223 (1996); 47 U.S.C. § 231 (1998); MICH. COMP. LAWS ANN. § 722.675(1) (West Supp. 2001); N.Y. PENAL LAW § 235.21(3) (McKinney 2000); N.M. STAT. ANN. § 30-37-3.2 (Michie Supp. 2001); VA. CODE ANN. § 18.2-391(A) (Michie Supp. 2001).

[73] CAL. PENAL CODE § 288.2(b) (West 1999); N.Y. PENAL LAW § 235.22 (McKinney 2000).

[74] U.S. CONST. art. I, § 8, cl. 3.

gress shall have the power "to regulate Commerce with foreign Nations, and among the several States . . . ." This constitutional grant of power has two aspects: an affirmative grant of authority to Congress to enact laws regulating interstate and foreign commerce and a limitation on the authority of states to enact laws regulating interstate and foreign commerce.[75] The state limitation application of the Commerce Clause is commonly referred to as the Dormant Commerce Clause.[76] The Dormant Commerce Clause limits state power to regulate interstate commerce even without congressional implementation.[77]

Commerce, within the meaning of the Commerce Clause, includes "traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph . . . ."[78] Commerce is not limited to the sale or transport of physical items or to personal travel; "[t]he agitation of radio waves in nonprofit conversations . . . constitutes . . . commerce."[79] A communication transmitted from one state to another is considered interstate commerce.[80]

Furthermore, the Supreme Court has held that "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack."[81] For example, the Court has explained that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation."[82] Therefore, the Dormant Commerce Clause limits state regulation of the same *commerce* that Congress is authorized to regulate under the Commerce Clause.[83]

Four tests have developed to determine whether state regulation of interstate

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[75] Pac. Merch. Shipping Ass'n v. Voss, 907 P.2d 430, 435 (1995).

[76] *See* Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 310 n.9 (1994); *Pac. Merch. Shipping Ass'n*, 907 P.2d at 436.

[77] Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 669 (1981).

[78] Adair v. United States, 208 U.S. 161, 177 (1907).

[79] *See, e.g.*, Cerritos Gun Club v. Hall, 96 F.2d 620, 624 (1938) (concluding that "[t]he agitation of radio waves in nonprofit conversations . . . constitutes interstate commerce") (citing Federal Radio Com'n v. Nelson Bros. B. & M. Co., 289 U.S. 266, 279 (1933)).

[80] *Id.* at 624.

[81] *Id.* at 670.

[82] Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979).

[83] *See* Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 573-75 (1997).

commerce exceeds the permissible limitations of the Dormant Commerce Clause.[84] First, state laws that impose discriminatory restrictions on interstate commerce are per se invalid.[85] The term "discriminatory" means differential treatment of in-state and out-of-state economic interests that benefit the in-state interests and burden the out-of-state interests.[86] Invalid discrimination may result from a state statute that facially discriminates against interstate or foreign commerce, or that is facially neutral but has a discriminatory purpose, or that is facially neutral without a discriminatory purpose but has a discriminatory effect.[87]

Second, state laws that have an extraterritorial effect by regulating activities beyond the state's borders may be invalid; a state may not export its domestic policies into other states, at least if those policies are inconsistent with the other states' domestic policies, and may not regulate activities occurring totally outside its borders.[88]

Third, state laws that regulate activity requiring a national uniform regulatory scheme may be invalid regardless of the purpose of the law.[89] A national regulatory scheme may be required if state regulations impose burdens on an activity that are inconsistent with the burdens imposed on the activity by regulations in other states.[90] State laws have been held to violate the Dormant Commerce

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[84] For a brief history of the development of the Dormant Commerce Clause see James E. Gaylord, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie,* 52 VAND. L. REV. 1095 (1999) (hereinafter Gaylord). Gaylord, *supra*, challenges the concept that four tests exist for considering the validity of state statutes under the Dormant Commerce Clause.

[85] Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994).

[86] *Id.*

[87] SDDS, Inc. v. South Dakota, 47 F.3d 263, 267 (8th Cir. 1995).

[88] Edgar v. MITE Corp., 457 U.S. 624, 641-43 (1982); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521 (1935).

[89] Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 (1945).

[90] *See* Healy v. The Beer Institute, 491 U.S. 324, 333 n.9 (1989); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88-89 (1987); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 767 (1945); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959). Gaylord disputes the separate identity of the national uniform regulation test and considers it to be only a consideration in application of the *Pike* balancing test. (Gaylord, *supra* note 84, at 1116.) Goldsmith and Sykes consider both the extraterritoriality and national uniform regulation tests to be variants of the *Pike* balancing test. (Goldsmith & Sykes, *supra* note 25, at 802-08.)

Clause under the national uniform regulation test in situations in which it is difficult but not impossible to comply with the variant regulations of different states. For example, the State of Iowa prohibited double-trailer trucks longer than 60 feet from transporting commodities on its highways.[91] Adjacent states permitted double trailer trucks longer than 60 feet to use their highways.[92] As a result, a commercial trucking company could comply with Iowa law only by adopting one of several inconvenient but possible alternatives, including using only single trailer trucks in Iowa, or avoiding Iowa highways. Iowa's double trailer truck length statute was held unconstitutional under the Dormant Commerce Clause as an undue burden on interstate commerce.[93]

Fourth, state laws that are valid under the foregoing three tests may be invalid under the Dormant Commerce Clause balancing test articulated by the United States Supreme Court in *Pike v. Bruce Church, Inc.*,[94] referred to as the *Pike* balancing test. Under the *Pike* balancing test, the court balances the state law's burden on interstate commerce against the state law's local benefit; the state law is invalid under the Dormant Commerce Clause if the burden on interstate commerce is excessive compared with the putative local benefit.[95]

B. FEDERAL COURT APPLICATIONS

The federal courts have considered Dormant Commerce Clause challenges to the constitutionality of four state penal statutes that criminalize the dissemination of harmful matter to minors over the Internet. In *Pataki*, the federal district court entertained a challenge to the constitutionality of section 235.21(3) of the New York Penal Law.[96] In *Cyberspace Communications, Inc. v. Engler* (*Engler*),[97] the federal district court entertained a challenge to the constitutionality of section

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[91] *Consolidated Freightways*, 450 U.S. at 665-66.

[92] *Id.* at 665.

[93] *Consolidated Freightways*, 450 U.S. at 662; *see also* Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978).

[94] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); *see also* Campeau Corp. v. Federated Dept. Stores, 679 F. Supp. 735, 738-739 (S.D. Ohio 1988).

[95] *Pike*, 397 U.S. at 142.

[96] *Am. Libraries Ass'n*, 969 F. Supp. at 161.

[97] *Engler*, 55 F. Supp. 2d at 737.

25.254(5)(1) of the Michigan Statutes.[98] In *American Civil Liberties Union v. Johnson* ("*Johnson*"),[99] the federal court of appeals entertained a challenge to the constitutionality of section 30-37-3.2(A) of the New Mexico Statutes. In *PSINet, Inc. v. Chapman (PSINet),*[100] the federal district court entertained a challenge to the constitutionality of section 18.2-391 of the Code of Virginia. In all four cases, enforcement of the state statute was enjoined because each was held unconstitutional under the Dormant Commerce Clause.

The seminal federal court case is *Pataki,* which includes a comprehensive analysis of the application of the Dormant Commerce Clause to state laws regulating Internet communications.[101] *Pataki* first considered whether Internet communications constituted interstate commerce and were subject to Commerce Clause scrutiny.[102] It then considered application of the Dormant Commerce Clause under the extraterritorial effect test, the national uniform regulation test, and the *Pike* balancing test.[103] Neither *Pataki, Johnson, Engler* nor *PSINet* considered the application of the Dormant Commerce Clause under the discrimination test because it was not contended that the state statutes were discriminatory against other states.

1. INTERSTATE COMMERCE.

Whether a state law is subject to Dormant Commerce Clause scrutiny is dependent on two predicate determinations. First, the law must regulate commerce and it must affect interstate rather than only intrastate commerce. Second, it must regulate commerce that concerns more than one state and have a substantial relation to the national interest.[104]

Pataki held that regulation of the Internet is regulation of commerce within

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[98] MICH. STATS. ANN. § 25.254 is referred to hereafter by its current designation, MICH. COMP. LAWS ANN. § 722.675 (West Supp. 2001).

[99] ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999).

[100] PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611 (W.D. Va. 2000).

[101] The Dormant Commerce Clause analysis of *Pataki* is criticized by Gaylord, who concludes *Pataki* in fact used a First Amendment analysis. (Gaylord, *supra* note 84, at 1114-17.)

[102] *Am. Libraries Ass'n,* 969 F. Supp. at 169-73.

[103] *Id.* at 173-83.

[104] Heart of Atlanta Motel v. United States, 379 U.S. 241, 255 (1964).

the meaning of the Commerce Clause.[105] The court analogized the Internet to rail lines and highways, acknowledged instruments of commerce,[106] and concluded that the Internet is not only a conduit for ideas, but also for "digitized goods, including software, data, music, graphics, and videos [that] can be downloaded from the provider's site to the Internet user's computer."[107] The *Pataki* court, relying on *Edwards v. California,*[108] also concluded that the non-profit motive of a substantial number of Internet communications does not mean the communications were not commerce.[109] The conclusion that the Internet is a medium of commerce now appears to be beyond argument in the federal courts. In *Johnson, Engler* and *PSINet,* the conclusion that Internet communications are commerce was uncontested.[110]

Pataki also held that regulation of Internet communications inevitably constitutes regulation of interstate commerce.[111] Considering section 235.21(3) of the New York Penal Law, the court observed that the statute was not limited to totally intrastate conduct: "By its terms, the Act applies to any communication, intrastate or interstate, that fits within the prohibition and over which New York has the capacity to exercise criminal jurisdiction."[112] Furthermore, the court observed that the legislative history of the statute supported the conclusion that it was intended to prohibit Internet communications initiated in other states from being received in New York.[113] Most importantly, the *Pataki* court concluded that apart from the text of the statute and its legislative history, the nature and characteristics of the Internet precluded consideration of Internet communications as being intrastate communications.[114] Because the Internet is "wholly in-

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[105] *Am. Libraries Ass'n*, 969 F. Supp. at 173.

[106] *Id.*

[107] *Id.*

[108] 314 U.S. 160 (1941).

[109] *Id.*

[110] *Johnson*, 194 F.3d at 1161 n.9; *Engler*, 55 F. Supp. 2d at 751; *PSINet*, 108 F. Supp. 2d at 627.

[111] *Am. Libraries Ass'n*, 969 F. Supp. at 173.

[112] *Id.* at 169-70.

[113] *Id.* at 170.

[114] *Id.* at 170-72.

sensitive to geographic distinctions,"[115] an Internet communication originated in New York and ultimately received in New York may well have been routed through numerous other states. Unlike a rail line or highway, the Internet communication has no fixed geographic route. Furthermore, the sender of an Internet communication initiating a message from another state cannot prevent its receipt in New York, regardless of its intended destination. As a consequence of the nature of the Internet, "[t]he New York Act . . . cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist."[116]

Engler, Johnson and *PSINet* followed *Pataki* and established the existing federal court position that the nature of the Internet precludes its regulation as a totally intrastate activity.[117] *Engler* considered section 722.675 of the Michigan Compiled Laws Annotated, which criminalizes the dissemination of harmful matter to minors over the Internet if the communications were initiated or received within Michigan.[118] The *Engler* court noted that:

> Although the Act by its terms regulates speech that 'originates' or 'terminates' in Michigan, virtually all Internet speech is . . . available everywhere[,] including Michigan. A New York speaker must comply with the Act in order to avoid the risk of prosecution in Michigan even though (s)he does not intend his [or her] message to be read in Michigan. A publisher of a web page cannot limit the viewing of his [or her] site to everyone in the country except for those in Michigan. The Internet has no geographic boundaries. The Act is . . . a direct regulation of interstate commerce . . . .[119]

The *Johnson* court also referred to the interstate characteristics of the Internet.

> [T]he nature of the Internet forecloses the argument that a statute such as [New Mexico statute] section 30-37-3.2(A) applies only to intrastate communications. Even if it is limited to one-on-one e-mail communica-

[115] *Id.* at 170.

[116] *Id.* at 171.

[117] *Engler*, 55 F. Supp. 2d at 751; *Johnson*, 194 F.3d at 1161; *PSINet*, 108 F. Supp. 2d at 627.

[118] *Engler*, 55 F. Supp. 2d at 751.

[119] *Id.*

> tions . . . there is no guarantee that a message from one New Mexican to another New Mexican will not travel through other states en route. . . . [S]ection 30-37-3.2(A) represents an attempt to regulate interstate conduct . . . .[120]

The *PSINet* court stated that "[t]he nature of the Internet and the text of [section] 18.2-391 [of the Code of Virginia] itself preclude any interpretation of the statute that it . . . serves to regulate [only] intrastate behavior."[121]

2. EXTRATERRITORIAL APPLICATION OF STATE LAW.

The Commerce Clause of the United States Constitution bans state regulations that have the effect of exporting the state's domestic policies into other states, at least if those policies are inconsistent with the policies of the other states.[122] The *Pataki* court concluded that under the extraterritorial test section 235.21(3) of the New York Penal Law was per se invalid.[123] The *Pataki* court reasoned that:

> The *Edgar/Healy* extraterritoriality analysis rests on the premise that the Commerce Clause has two aspects: it subordinates each state's authority over interstate commerce to the federal power of regulation (a vertical limitation), and it embodies a principal of comity that mandates that one state not expand its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states (a horizontal limitation).[124]

Pataki concluded that the nature of the Internet "makes it impossible to restrict the effects of the [New York] law to conduct occurring within New York;[125] "an Internet user may not intend his messages to be accessible in New York" but cannot prevent New Yorkers from accessing his messages or prevent messages directed to recipients in other states from passing through New York

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[120] *Johnson*, 194 F.3d at 1161.

[121] *PSINet*, 108 F. Supp. 2d at 627.

[122] *See MITE Corp.*, 457 U.S. at 642-43; *see also Healy*, 491 U.S. at 336.

[123] *Am. Libraries Ass'n*, 969 F. Supp. at 177.

[124] *Id.* at 175-76.

[125] *Id.* at 177.

computers.[126] "Thus, conduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy—perhaps favoring freedom of expression over a more protective stance—to New York's local concerns."[127] *Pataki* held that section 235.21(3) of the New York Penal Law's regulation of the Internet had the effect of projecting New York's laws into other states, the laws of which may not be consistent with New York's laws, and was per se invalid under the *Edgar/Healy* extraterritoriality analysis of the Dormant Commerce Clause.[128]

Engler, Johnson and *PSINet* followed the extraterritorial analysis of *Pataki. Engler* held that section 722.675(1) of the Michigan Compiled Laws Annotated projected its law into other states and was therefore per se violative of the Dormant Commerce Clause.[129] *Johnson* held that section 30-37-3.2(A) of the New Mexico Statutes "represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a per se violation of the [C]ommerce [C]lause."[130] *PSINet* held that section 18.2-391 of the Code of Virginia:

> unduly burdens interstate commerce by placing restrictions on electronic commercial materials that impede the communication of said materials in all states, not just Virginia. For example, an Internet website owner in California whose website is visited by a minor in Virginia could be subject to Virginia law. Because there is currently no way to limit access to online materials by geographic location, the California website owner would have to alter his commercial materials in all states in order to comply with the rigors of the Virginia statute. Thus, § 18.2-391 constitutes an undue burden on interstate commerce because it attempts to regulate commercial conduct wholly outside of Virginia's borders.[131]

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[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Engler*, 55 F. Supp. 2d at 751.

[130] *Johnson*, 194 F.3d at 1161.

[131] *PSINet*, 108 F. Supp. 2d at 626-27.

3. NATIONAL UNIFORM REGULATION.

Pataki also concluded that the nature of the Internet requires a national uniform regulation because Internet users would be threatened by inconsistent burdens if each state implemented its own regulation of Internet communications.[132] *Pataki* cited several cases in which laws purporting to regulate only intrastate matters of local concern were held invalid under the Dormant Commerce Clause because they affected a form "'of the national commerce [that], because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.'"[133] *Pataki* reasoned that the Internet, like the rail and highway regulations at issue in *Southern Pacific Co. v. Arizona ex rel Sullivan*[134] and *Bibb v. Navajo Freight Lines, Inc.*,[135] would be severely burdened if users were "lost in a welter of inconsistent laws, imposed by different states with different priorities," and concluded that the Internet "requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations."[136] The potential for inconsistent burdens was increased by the fact that the New York law banned harmful matter using the *Miller v. California*[137] definition, which incorporates a "patently offensive to prevailing standards in the [] community" test.[138] The *Pataki* court noted that because there is no single prevailing community standard in the United States, "even were all 50 states to enact laws that were verbatim copies of the New York Act, Internet users would still be subject to discordant responsibilities"; matter not deemed harmful in the state from which it was sent could be deemed harmful in states in which it was received.[139] Because an Internet communication sender cannot know the geographic location of the message recipient or foreclose access to the message, the sender must (1) comply "with the most stringent standard," or (2) forego communicating matter protected in the sender's state, or (3) risk prosecution based

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[132] *Am. Libraries Ass'n*, 969 F. Supp. at 181-82.

[133] *Id.* at 181-82, (quoting Southern Pac. Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761, 767 (1940)).

[134] 325 U.S. at 767.

[135] 359 U.S. 520 (1959).

[136] *Am. Libraries Ass'n*, 969 F. Supp. at 182.

[137] 413 U.S. 15 (1973).

[138] *Miller*, 413 U.S. at 30.

[139] *Am. Libraries Ass'n*, 969 F. Supp. at 182.

on the geographic fortuity of the unknown recipient.[140] Based on this analysis the *Pataki* court concluded:

> Further development of the Internet requires that users be able to predict the results of their Internet use with some degree of assurance. Haphazard and uncoordinated state regulation can only frustrate the growth of cyberspace. The need for uniformity in this unique sphere of commerce requires that New York's law be stricken as a violation of the Commerce Clause.[141]

Engler, Johnson and *PSINet* followed the national uniform regulation test analysis of *Pataki.* The *Engler* court stated that section 722.675(1) of the Michigan Compiled Laws Annotated, "and other state statutes like it, would subject the Internet to inconsistent regulations across the nation. Information is a commodity and must flow freely. On this basis alone, . . . [section 722.675] may be preliminarily enjoined as a violation of the Commerce Clause."[142] The *Johnson* court stated that "certain types of commerce have been recognized as requiring national regulation,"[143] and that the Internet is that type of commerce.[144] The *PSINet* court stated that section 18.2-391 of the Code of Virginia:

> potentially subjects citizens to inconsistent state regulations, thereby also placing an undue burden on interstate commerce. This potential hazard of inconsistent Internet regulation by individual states begs Congress to declare this area as one of the few that, based on the need for national uniformity, are reserved for regulation by a single authority.[145]

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[140] *Id.* at 183.

[141] *Id.*

[142] *Engler*, 55 F. Supp. 2d at 752.

[143] *Johnson*, 194 F.3d at 1162. *See, e.g.*, Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 at 574 (1886) (noting that "'[c]ommerce with foreign countries and among the [S]tates'" requires "'only one system of rules, applicable alike to the whole country.'"

[144] *Johnson*, 194 F.3d at 1162.

[145] *PSINet,* 108 F. Supp. 2d at 627.

4. THE *PIKE* BALANCING TEST.

Pataki also evaluated section 235.21(3) of the New York Penal Law under the Dormant Commerce Clause *Pike* balancing test. Under the *Pike* balancing test, the *Pataki* court concluded that the section 235.21(3) prohibition against the dissemination of harmful matter to minors over the Internet is an indirect regulation of interstate commerce that excessively burdens interstate commerce in comparison with its local benefits.[146] The *Pataki* court acknowledged that the legitimate state objective of the law was to protect minors from pedophiles.[147] However, the court found the law had minimal effect in fulfilling that objective.[148] The rationale of the *Pataki* court included the following observations: (1) the law has no effect on communications originating outside the United States; (2) the law has little effect on persons outside of New York who are not readily subject to prosecution in New York; (3) other existing laws permitted prosecution of persons engaged in child pornography or child molestation; and (4) the testimony established that no person has been prosecuted under the law (they have been prosecuted under other existing laws).[149] The *Pataki* court found that compared with this minimal local benefit there were significant burdens on interstate commerce in the form of impingement on the sovereignty of sister state jurisdictions and in the form of chilling protected speech.[150] The *Pataki* court concluded that under the *Pike* balancing test, "[t]he severe burden on interstate commerce resulting from the New York statute is not justifiable in light of the attenuated local benefits arising from it."[151]

Engler and *Johnson* followed *Pataki's Pike* balancing test approach. The *PSINet* court did not discuss the *Pike* balancing test. The *Engler* court stated that:

> even if this Court reaches the balancing of burdens on interstate commerce with local interests asserted in [the Michigan statute], the Commerce Clause still requires the injunction .... Assuming *arguendo* the validity of Michigan's interest in the [purpose of the statute, it] will be

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[146] *Am. Libraries Ass'n*, 969 F. Supp. at 177.

[147] *Id.*

[148] *Id.* at 179.

[149] *Id.* at 177-81.

[150] *Id.* at 177.

[151] *Id.* at 181.

wholly ineffective in achieving the asserted goal because nearly half of all Internet communications originate overseas.[152]

The *Johnson* court held section 30-37-3.2(A) of the New Mexico Statutes invalid under the *Pike* balancing test, concluding that the statute minimally accomplished the goal of protecting minors from harmful matter.[153] *Johnson* relied on the finding that the statute has no effect on Internet communications originating outside of the United States and minimal effect on communications originating within the United States but outside of New Mexico; the remaining effective scope of the statute was found to be so narrow that its local benefits did not justify its burden on interstate commerce.[154]

C. SUMMARY OF FEDERAL COURT APPLICATIONS OF THE DORMANT COMMERCE CLAUSE

The federal court decisions in *Pataki, Engler, Johnson,* and *PSINet* concluded that state laws prohibiting the dissemination of harmful matter to minors over the Internet impermissibly regulate interstate commerce. Those laws violate the Dormant Commerce Clause of the United States Constitution and are invalid because they seek to regulate activities beyond state borders, regulate activities that by their nature require national uniform regulation to avoid inconsistent burdens on those activities, and impose burdens on those activities that are incommensurate with the benefits they may bestow locally on the state. A conclusion of this article is that the federal courts' Dormant Commerce Clause analysis is more persuasive than the contrary analyses of the state court decisions, a description of which follows.[155]

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[152] *Engler*, 55 F. Supp. 2d at 751.

[153] *Johnson*, 194 F.3d at 1162.

[154] *Id.* at 1161-62.

[155] *But see* Jack L. Goldsmith and Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001). Goldsmith and Sykes are critical of and find flawed the Dormant Commerce Clause analysis of the federal courts that have applied the Dormant Commerce Clause to invalidate state regulations of the dissemination of harmful matter to minors over the Internet. However, they do not discuss, and therefore do not express approval of, contrary state court analyses. Goldsmith and Sykes depreciate the federal courts' analyses because, *inter alia*, the analyses are not based on economic balancing of the value of the benefits of the regulation to the regulating state against the cost of the burden of the regulation on a different affected state. (Goldsmith & Sykes, *supra* note 25, at 813-15.) Furthermore, they describe as erroneous the federal courts' assumption that geographical and age identification Internet technologies are currently infeasible. *Id.* at 816. With respect to the first point, they acknowledge the potential difficulty of a traditional economic analysis of a state law that does

D. STATE COURT APPLICATIONS

State courts have considered Commerce Clause challenges to the constitutionality of two state penal statutes that criminalize the dissemination of harmful matter to minors over the Internet. In *People v. Foley* (*Foley*),[156] the New York Court of Appeals considered a Commerce Clause challenge to the constitutionality of section 235.22 of the New York Penal Law. A Commerce Clause challenge to the constitutionality of section 235.22 of the New York Penal Law had previously been made in *People v. Barrows* (*Barrows II*),[157] a decision of the New York Supreme Court. To the extent *Barrows II* held section 235.22 unconstitutional under the Commerce Clause, the decision was reversed by the Appellate Division of the Supreme Court,[158] which relied on *Foley* in reversing the Supreme Court. In *Hatch v. Superior Court* (*Hatch*)[159] and *People v. Hsu* (*Hsu*),[160] courts in two districts of the California Courts of Appeal each reviewed Commerce Clause challenges to the constitutionality of section 288.2(b) of the California Penal Code. In contrast to the federal courts, which in *Pataki, Engler, Johnson* and *PSINet* held similar state statutes unconstitutional under the Dormant Commerce Clause, each of the state courts held that the statute under consideration did not violate the Dormant Commerce Clause.

1. INTERSTATE COMMERCE.

Foley took the unusual and seemingly unsupportable position that because section 235.22 of the New York Penal Law contains a luring element not present

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not regulate the sale and distribution of goods and services but rather imposes criminal sanctions on nonresidents. *Id.* at 817. With respect to the second point, Goldsmith and Sykes, for some reason, equate the dissemination of harmful matter over the Internet exclusively with the Internet web, over which current technology provides some control of the message recipient, rather than with e-mail, over which current technology does not allow identification of the age or geographic location of the message recipient. *Id.* at 818. The state court decisions upholding criminal convictions of the senders of harmful matter over the Internet were based on e-mail, not web page, communications. Goldsmith and Sykes may have the technology correct, but appear to have its application to Internet communications too narrowly categorized.

[156] *Foley*, 94 N.Y.2d at 668.

[157] People v. Barrows, 677 N.Y.S.2d 672 (N.Y. 1998).

[158] People v. Barrows, 709 N.Y.S.2d 573 (N.Y. 2000).

[159] *Hatch*, 80 Cal. App. 4th at 170.

[160] *Hsu*, 82 Cal. App. 4th at 976.

in section 235.21(3) of the New York Penal Law considered in *Pataki*, section 235.22 does not regulate commerce at all.[161] Because of the luring element, the focus of the statute's purpose is to prevent minors from being lured into sexual activity, which is not related to trade or commerce.[162] As a result, the statute is an exercise of the state's traditional general police power to protect the general health, welfare and safety of its residents.[163] The *Foley* court stated that "the conduct sought to be sanctioned by Penal Law [section] 235.22 is of the sort that deserves no 'economic' protection . . . ."[164] *Hatch* considered whether, under the Dormant Commerce Clause, section 288.2(b) of the California Penal Code constituted extraterritorial application of California law and whether the regulated activity required national uniform regulation.[165] Because *Hatch* addressed those two issues it must have assumed that the regulation of Internet communications of harmful matter to minors is a regulation of interstate commerce; otherwise, the discussion of the extraterritorial test and national uniform regulation test under the Dormant Commerce Clause would have been unnecessary. However, *Hatch* enigmatically also seemed to posit that because the California regulation included the element of intent to seduce, it did not regulate commerce at all.[166] The *Hatch* court referred to the dissemination of harmful matter to minors over the Internet with the intent element as "not some form of interstate commerce so much as a localized stalking."[167] Because of the apparent inconsistency in the *Hatch* opinion, it is difficult to ascertain whether *Hatch* considered Internet communications to constitute interstate commerce when made with an illicit intent.

Hsu acknowledged that Internet communications are interstate commerce.[168] The *Hsu* court stated that "[t]he Internet is undeniably an incident of interstate commerce . . . ."[169] *Hsu* then considered whether the regulation of Internet inter-

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[161] *Foley*, 94 N.Y.2d at 684.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Hatch*, 80 Cal. App. 4th at 194-97.

[166] *Id.* at 195.

[167] *Id.* at 195 n.19.

[168] *Hsu*, 82 Cal. App. 4th at 983.

[169] *Id.*

state commerce by section 288.2(b) of the California Penal Code violated the Dormant Commerce Clause under the extraterritorial test, the national uniform regulation test and the *Pike* balancing test.[170] *Hsu*, and possibly *Hatch*, determined that section 288.2(b) regulated interstate commerce even though that section contains an intent to seduce element comparable to the luring element of section 235.22 of the New York Penal Law discussed in *Foley*.[171] *Foley* is the only reported case that unequivocally posits that the dissemination of harmful matter to minors over the Internet, if sent with a luring intent, is not commerce.

2. EXTRATERRITORIAL APPLICATION OF STATE LAW.

The *Foley* court determined that the Internet communications proscribed by section 235.22 of the New York Penal Law were not commerce.[172] It therefore did not consider whether enforcement of the law had extraterritorial effect.

Hatch addressed the issue of whether, under the Dormant Commerce Clause, section 288.2(b) of the California Penal Code exerted an impermissible extraterritorial effect on conduct in other states. It held that the statute applied to Internet communications that were only totally intrastate communications and therefore had no extraterritorial effect.[173] In so holding, *Hatch* assumed that the Internet could be limited to intrastate communications and that California criminal jurisdiction was limited to conduct and effects occurring totally within the State of California; therefore the statute imposed no burden on interstate commerce because it had no extraterritorial effect.[174] *Hsu* acknowledged that a "statute may burden interstate commerce if its effect is to regulate activities beyond the state's borders by exporting the state's domestic policies into other states."[175] The court assumed, however, that the jurisdictional limitation on application of California's criminal law precluded application of section 288.2(b) to "acts done outside its territory"[176] and, therefore, the statute had no extraterritorial effect.

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170 *Id.* at 983-85.

171 *Id.* at 984.

172 *Foley*, 94 N.Y.2d at 684.

173 *Hatch*, 80 Cal App. 4th at 197.

174 *Id.* at 196-97.

175 *Hsu*, 82 Cal. App. 4th at 985.

176 *Id.*

3. NATIONAL UNIFORM REGULATION.

Foley did not consider the need for uniform regulation of Internet communications under the Dormant Commerce Clause because it did not consider the Internet communications regulated by section 235.22 of the New York Penal Law to be commerce.[177]

Although *Hatch* purported to consider whether there is a need for national uniform regulation of Internet communications prohibited by section 288.2(b) of the California Penal Code, it in effect answered this question by stating that the proscribed communications are not commerce subject to the Dormant Commerce Clause.[178] The *Hatch* court stated that "[w]e have found no case [that] gives . . . the communications employed . . . protection under the Dormant Commerce Clause."[179] *Hatch* buttressed its result by stating that the communications were not interstate commerce and that the statute had no effect on interstate commerce.[180] The rationale of the *Hatch* opinion is difficult to ascertain.

Hsu considered the issue of the need for national uniform regulation of Internet communications to avoid inconsistent burdens on interstate commerce.[181] However, it concluded enigmatically that because section 288.2(b) of the California Penal Code was limited in purpose, it "does not burden interstate commerce by subjecting Internet users to inconsistent regulations."[182] *Hsu* also relied on the *Foley* opinion of the Appellate Division of the New York Supreme Court, which held that section 235.22 of the New York Penal Law did not violate the Dormant Commerce Clause.[183] However, the New York Court of Appeals, in *Foley*, determined that Internet communications were not commerce and therefore the need for national uniform regulation was not germane to the court's decision.[184]

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177 *Foley*, 94 N.Y.2d at 684.

178 *Hatch*, 80 Cal. App. 4th at 196 (citing People v. Foley, 257 A.D.2d 243, 253 (N.Y. App. Div. 1999)). *Hatch* was decided before the opinion of the New York Court of Appeals opinion in *Foley* was published.

179 *Id.* at 195.

180 *Id.* at 195-96.

181 *Hsu*, 82 Cal. App. 4th at 984-85.

182 *Id.* at 985.

183 *Id.*

184 *Foley*, 257 A.D.2d at 253.

4. THE *PIKE* BALANCING TEST.

Because *Foley* held that Internet communications consisting of the dissemination of harmful materials to minors were not commerce, it did not address the application of the *Pike* balancing test.[185] *Hatch* did not directly address application of the *Pike* balancing test but impliedly rejected its applicability by assuming that section 288.2(b) of the California Penal Code did not burden any protected right of commerce and is "not likely to significantly, or at all, burden interstate commerce."[186] *Hatch* also did not compare local benefits of the statutory regulation with the regulation's burden on interstate commerce.

Hsu recognized the applicability of the *Pike* balancing test in determining the constitutionality of section 288.2(b) of the California Penal Code under the Dormant Commerce Clause.[187] The *Hsu* court stated that "[t]he test for determining if a state statute violates the Commerce Clause is set forth in *Pike v. Bruce Church, Inc.* . . ."[188] Applying the *Pike* balancing test, the *Hsu* court concluded that the state's interest in preventing harm to minors outweighs the incidental burden on interstate commerce of a prohibition of the dissemination of harmful matter to minors over the Internet.[189]

E. SUMMARY OF STATE COURT APPLICATIONS

The state court decisions in *Foley, Hatch* and *Hsu* concluded that state laws prohibiting the dissemination of harmful matter to minors over the Internet do not violate the Dormant Commerce Clause.[190] These decisions have concluded either that those laws do not regulate commerce (*Foley* and perhaps *Hatch*) or, to the extent they do regulate commerce, they do not regulate interstate commerce because they affect only totally intrastate activity.[191] To the extent the state courts considered the application of the Dormant Commerce Clause, they

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[185] *Foley*, 94 N.Y.2d at 684.

[186] *Hatch*, 80 Cal. App. 4th at 170.

[187] *Hsu*, 82 Cal. App. 4th at 983-84.

[188] *Id.* at 983.

[189] *Id.* at 984.

[190] *Foley*, 94 N.Y.2d at 683-84; *Hatch*, 80 Cal. App. 4th at 193-97; *Hsu*, 82 Cal. App. 4th at 983-85.

[191] *Foley*, 94 N.Y.2d at 684; *Hatch*, 80 Cal. App. 4th at 197.

concluded that the state laws do not impose multiple inconsistent burdens on interstate commerce, or the burden on interstate commerce is incidental to the local benefits of protecting minors.[192] The state court decisions distinguish *Pataki* on the ground that section 235.22 of the New York Penal Law and section 288.2(b) of the California Penal Code have a purpose or intent element of the defined crimes (luring or intent to seduce) that is absent in the criminal statutes considered in *Pataki, Engler* and *Johnson.*[193] According to *Foley*, *Hatch* and *Hsu*, the inclusion of a luring or intent to seduce element in the statutes removes the statutes from the application or violation of the Dormant Commerce Clause.[194]

V. THE FIRST AMENDMENT

A. GENERAL PRINCIPLES

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[195] Freedom of speech is a liberty protected under the due process clause of the Fourteenth Amendment to the United States Constitution and therefore also applies as a limitation on the power of states.[196] The First Amendment formed the basis for constitutional challenges to the congressionally enacted CDA and COPA and a basis for constitutional challenges to the state-enacted prohibitions on the dissemination of harmful matter to minors over the Internet.[197]

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[192] *Hatch*, 80 Cal. App. 4th at 194-97; *Hsu*, 82 Cal. App. 4th at 983-85.

[193] The purpose or intent element is also absent in the Virginia statute, VA. CODE ANN. § 18.2-391 (Michie Supp. 2001), considered by *PSINet*, which was decided after the *Foley, Hatch* and *Hsu* decisions. *PSINet*, 108 F. Supp. 2d at 611.

[194] *Foley*, 94 N.Y.2d at 684; *Hatch*, 80 Cal. App. 4th at 195-97; *Hsu,* 82 Cal. App. 4th at 984-85.

[195] U.S. CONST., amend. I.

[196] Gitlow v. New York, 268 U.S. 652, 666 (1925). "It has long been established that . . . First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States." Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (citing *Gitlow*, 268 U.S. 652; Whitney v. California, 274 U.S. 357 (1927); Stromberg v. California, 283 U.S. 359 (1931); De Jonge v. Oregon, 299 U.S. 353 (1937); Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[197] *Reno I*, 521 U.S. at 864 (1997); *Reno II*, 217 F.3d at 173; *Am. Libraries Ass'n*, 969 F. Supp. at 183; *Engler*, 55 F. Supp. 2d at 747; *Johnson*, 194 F.3d at 1155; *PSINet, Inc.*, 108 F. Supp. 2d at 624; *Hatch*, 80 Cal. App. 4th at 197; *Hsu*, 82 Cal. App. 4th at 985.

A federal or state regulation that abridges speech because of the content of the speech is presumptively invalid[198] and is subject to the strict scrutiny standard of judicial review.[199] To satisfy the requirements of the strict scrutiny standard of review, the regulation must be necessary to accomplish a compelling governmental interest and be narrowly drafted so the means employed to accomplish that interest are the least intrusive available.[200]

A regulation of speech is content-based if the "government has adopted a regulation of speech because of disagreement with the message it conveys. . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[201] A neutral regulation directed at the secondary effects of speech rather than its content is subject to a lesser level of scrutiny than strict scrutiny.[202] However, a regulation that proscribes speech to prevent certain reactions from the listener is a regulation targeting the direct impact of the speech rather than its secondary effects,[203] and is a content-based regulation subject to the highest level of scrutiny.[204]

A regulation that prohibits conduct rather than speech, in contrast to a content-based or neutral regulation of speech, is not generally considered a regulation of speech and is not entitled to First Amendment protection.[205] The United States Supreme Court in *United States v. O'Brien*[206] considered the constitution-

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198 R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); City of Fresno v. Press Communications, Inc., 31 Cal. App. 4th 32, 40 (Cal. Ct. App. 1994).

199 Sebago, Inc. v. City of Alameda, 211 Cal. App. 3d 1372, 1382 (Cal. Ct. App. 1989).

200 Sable Communications of Cal., Inc. v. FCC, 492 U.S. 126 (1989).

201 Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations omitted).

202 *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-50 (1986). In *City of Renton* the court reviewed a municipal ordinance prohibiting adult theaters from certain areas of the city. The purported purpose of the ordinance was not to control the content of adult movies, but to control the secondary effects of the location of adult theaters, which was stated to be the surrounding neighborhood blight caused by the presence of the adult theaters. *Id.* at 49-52.

203 Boos v. Barry, 485 U.S. 312, 319-21 (1988).

204 *See* Crawford v. Lungren, 96 F.3d 380, 384-85 (9th Cir. 1996); *Sebago, Inc.*, 211 Cal. App. 3d at 1384.

205 United States v. O'Brien, 391 U.S. 367, 376 (1968).

206 391 U.S. 367 (1968).

ality of a federal statute criminalizing the destruction or mutilation of a selective service certificate.[207] The defendant burned his draft card in protest of the Vietnam war and the military draft, and was prosecuted under the federal statute.[208] He contended the statute was unconstitutional as applied to him because the First Amendment protects the communication of ideas by conduct.[209]

The Supreme Court in *O'Brien* first noted that on its face the statute had no connection with speech.[210] The court stated that "[a] law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses . . . ."[211] The *O'Brien* court then considered the defendant's argument that his conduct was an expression of speech and stated that when speech and nonspeech elements are within a course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[212] The *O'Brien Court* concluded that Congress had a substantial interest in prohibiting the destruction of draft cards and the statute addressed only the "noncommunicative import of [the] conduct";[213] the statute was therefore constitutional under the First Amendment.[214]

The regulation of sexual expression is generally considered to be content-based regulation of speech. The court in *Sable Communications*[215] stated:

> Sexual expression [that] is indecent but not obscene is protected by the First Amendment . . . . 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. We have recognized that there is a compelling interest in protecting the

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[207] *Id.* at 375.

[208] *Id.* at 369-70.

[209] *Id.* at 376.

[210] *Id.* at 375.

[211] *Id.*

[212] *O'Brien*, 391 U.S. at 376.

[213] *Id.* at 382.

[214] *Id.* at 386.

[215] *Sable Communications*, 492 U.S. at 115.

> physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. [Citations.] The Government may serve this legitimate interest, but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.' [Citations.] It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.[216]

Under *Sable,* Congress and state legislatures may have the constitutional power to enact laws designed to keep harmful matter from minors, a compelling governmental interest, even though the same matter judged by adult standards is entitled to First Amendment protection.[217] However, a valid law must be narrowly drawn to serve that interest without unnecessarily interfering with First Amendment freedoms.[218]

A law is narrowly drawn only if it is necessary, and uses the least intrusive means, to further the compelling governmental interest.[219] The regulation must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy."[220] A statute is invalid for overbreadth when on its face it criminalizes a substantial amount of protected, as well as unprotected, speech[221] and therefore chills First Amendment protected speech.[222] However, "overbreadth . . . must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[223] If the least intrusive means of regulation is unreasonable, then the government may not regulate the protected speech.[224]

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[216] *Id.* at 126.

[217] Kash Enter., Inc. v. City of Los Angeles, 19 Cal. 3d 294, 302 (1977); *Sebago*, 211 Cal. App. 3d at 1381.

[218] *Sable Communications*, 492 U.S. at 126.

[219] *Id.*

[220] Frisby v. Schultz, 487 U.S. 474, 485 (1988).

[221] People v. Antoine, 48 Cal. App. 4th 489, 495 (Cal. Ct. App. 1996).

[222] Bailey v. City of National City, 226 Cal. App. 3d 1319, 1331 (Cal. Ct. App. 1991); New York v. Ferber, 458 U.S. 747, 768-69 (1982).

[223] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[224] Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir. 1988).

B. FEDERAL COURT APPLICATIONS

The federal courts have considered First Amendment challenges to the constitutionality of two congressional statutes and three state penal statutes that criminalize the dissemination of harmful matter to minors over the Internet. In *Reno I* the United States Supreme Court entertained a First Amendment challenge to the constitutionality of the CDA, and in *Reno II* the United States court of appeals entertained a First Amendment challenge to the constitutionality of the COPA.[225] In *Engler*, the federal district court entertained a First Amendment challenge to the constitutionality of section 722.675(1) of the Michigan Compiled Laws Annotated.[226] In *Johnson,* the United States court of appeals entertained a First Amendment challenge to the constitutionality of section 30-37-3.2(A) of the New Mexico Statutes.[227] In *PSINet,* the federal district court entertained a First Amendment challenge to the constitutionality of section 18.2-391 of the Code of Virginia.[228] At the time the *Pataki* court was considering the constitutionality of section 235.21(3) of the New York Penal Law, *Reno I* was pending before the United States Supreme Court.[229] The *Pataki* court declined to consider the First Amendment challenge to section 235.21(3) of the New York Penal Law pending the decision of the United States Supreme Court in *Reno I*.[230]

However, Gaylord, in his 1999 law review article analyzing the application of the Dormant Commerce Clause to the Internet, considered the *Pataki* Commerce Clause analysis using the *Pike* balancing test to be a disguised First Amendment analysis.[231] He characterized *Pataki's Pike* balancing test as comparing the local benefits of the New York law prohibiting the dissemination of harmful matter to minors over the Internet with the chilling effect the law would have on Internet communications.[232] Gaylord considered the concept of a chilling effect on communications to be a First Amendment concept, especially because *Pataki*

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225 *Reno I*, 521 U.S. at 858-59; *Reno II*, 217 F.3d at 165.

226 *Engler*, 55 F. Supp. 2d at 747-51.

227 *Johnson*, 194 F.3d at 1155-60.

228 *PSINet, Inc.*, 108 F. Supp. 2d at 624-26.

229 *Am. Libraries Ass'n*, 969 F. Supp. at 183.

230 *Id.*

231 Gaylord, *supra* note 84 at 1116.

232 *Id.* at 1116.

cited First Amendment cases to support its position.[233]

Gaylord's conclusion may be somewhat dramatic. Using the *Pike* balancing test under the Dormant Commerce Clause necessarily requires comparison of the purpose of the state regulation, and the extent to which it furthers the purpose, with the burden it places on interstate commerce.[234] The burden on interstate commerce in regulating the Internet will usually be a burden on communication because the Internet is a mode of communication. The *Pike* balancing test inevitably overlaps with a strict scrutiny First Amendment analysis in which the issues include the necessity of the regulation to accomplish the compelling governmental interest and whether the regulation is limited to the least intrusive method of accomplishing its purpose. The overlap between the *Pike* balancing test under the Dormant Commerce Clause and strict scrutiny review under the First Amendment does not diminish the importance of the former merely because both consider the burden on interstate commerce imposed by the state regulation.

1. THE CONGRESSIONAL ENACTMENTS (THE CDA AND THE COPA).

Reno I evaluated the Communications Decency Act (the CDA), which criminalized knowingly communicating to persons under the age of eighteen years *indecent* or *patently offensive* speech by any telecommunications device, including the Internet.[235] *Reno I* characterized the CDA as a "content-based regulation of speech."[236] Under the strict scrutiny standard of judicial review, the court examined the governmental interest the CDA addressed, i.e., whether it was necessary to further that interest and whether less intrusive provisions would be as effective as the CDA prohibitions in implementing that interest.[237]

Reno I recognized that although the government has an interest in protecting

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[233] *Id.*

[234] *Pike*, 397 U.S. at 142.

[235] *Reno I*, 521 U.S. at 859-61.

[236] *Id.* at 871.

[237] At least one commentator argues that Internet communications are more akin to the broadcast media than to the print media and therefore statutes regulating Internet communications should be reviewed under a First Amendment intermediate scrutiny standard rather than under a strict scrutiny standard. Rebecca L. Covell, *Problems With Government Regulations of the Internet: Adjusting the Court's Level of First Amendment Scrutiny*, 42 ARIZ. L. REV. 777, 789-93, 800 (2000). Courts that have reviewed statutes seeking to regulate the content of Internet communications do not appear to have adopted the intermediate scrutiny review standard urged by Ms. Covell.

children from harmful matter, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults";[238] *Reno I* reaffirmed that "'regardless of the strength of the government's interest' in protecting children, '[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'"[239] *Reno I* concluded that because of the nature of the Internet, substantial amounts of protected speech could be subjected to criminal prosecution under the CDA and portions of the CDA were therefore invalid for overbreadth under the First Amendment.[240] *Reno I* expressed two principal reasons for concluding the CDA was overbroad. First, the CDA banned matter that was *indecent* or *patently offensive* without incorporating the additional elements under *Miller* that the matter "appeal to the prurient interest" and "lack serious literary, artistic, political or scientific value;"[241] the CDA therefore facially banned communications of large amounts of protected matter with serious educational or other value.[242] Second, by defining the banned content of speech based on whether it offended community standards, a sender of an Internet message incurs criminal liability under the CDA for a transmission of protected speech that his home community deems neither indecent nor patently offensive if the community in which it is received thinks otherwise.[243]

Reno I rejected the government's argument that the requirement of knowledge of the recipient's age insulates the innocent adult from criminal prosecution.[244] *Reno I* recognized that most Internet communications are open to anyone

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[238] *Reno I*, 521 U.S. at 875.

[239] *Id.* (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983)).

[240] *Id.* at 877-79.

[241] *Miller*, 413 U.S. at 15.

[242] *Id.*

[243] *Id.* The *Reno I* Court addressed its opinion in *Sable Communications*, where the Court distinguished FCC v. Pacifica Foundation, 438 U.S. 726 (1978), in which it upheld the regulation of the content of speech in the broadcast media, on the basis that the broadcast media is subject to FCC regulatory supervision through licenses that are a scarce commodity, and the media is invasive. *Reno I*, 521 U.S. at 870-71 (citing *Sable Communications*, 492 U.S. at 127-28). The Court considered the Internet not to have those characteristics of the broadcast media and the distinguishing characteristics required different First Amendment consideration. *Id.* at 870. A distinguished law professor in response has commented that "[t]he distinctions the Court drew [in *Reno I*] between the Internet medium and the cable and broadcast media are very artificial . . . ." Glen O. Robinson, *Regulating the Internet*, *at* http://www.legalessays.com (1999).

[244] *Reno I*, 521 U.S. at 880.

and expressed concern for the possible heckler's veto by which an opponent of a protected message "might simply log on and inform the would-be discoursers" of the presence of a minor, thereby chilling any further communication among adult participants.[245] The potential of the heckler's veto, together with the chilling effect of the penal aspect of the CDA, could "cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[246] *Reno I* held the CDA unconstitutional under the First Amendment.[247]

In response to *Reno I*'s invalidation of the CDA, Congress enacted the Child Online Protection Act (the COPA), the constitutionality of which was examined in *Reno II.*[248] *Reno II* characterized the COPA as "a statute designed to protect minors from 'harmful material' measured by 'contemporary community standards' knowingly posted on the World Wide Web . . . for commercial purposes."[249] *Reno II* initially noted "that the District Court correctly determined that as a content-based restriction on speech, [the] COPA is 'both presumptively invalid and subject to strict scrutiny analysis.'"[250] *Reno II* acknowledged that "the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards."[251] The court then applied the strict scrutiny standard of review to determine if the COPA was a "constitutionally permissible means to achieve [that] objective without curtailing the protected free speech rights of adults."[252]

Reno II focused on the COPA's definition of harmful material by reference to contemporary community standards.[253] It held that the use of contemporary community standards to define harmful material made the statute unconstitution-

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[245] *Id.*

[246] *Id.* at 872.

[247] *Reno I*, 521 U.S. at 885.

[248] *Reno II*, 217 F.3d at 165. The COPA was enacted in October of 1998 and is codified at 47 U.S.C. § 231. *Id.*

[249] *Reno II*, 217 F.3d at 165.

[250] *Id.* at 173.

[251] *Id.*

[252] *Id.*

[253] *Id.* at 177.

ally overbroad.[254] The crucial attribute of the Internet is that the publisher has no control over the geographic location in which the material can be received; it can be received throughout the world.[255] This attribute makes the Internet different from all other forms of communication in which the location of the recipient of the message can be controlled by the publisher.[256] This attribute distinguishes Internet communications from mail,[257] telephone[258] and even an electronic bulletin board.[259] Because the Internet publisher cannot control the geographic locale of the recipient of the message, the varying community standards throughout the United States force the publisher to "abide by the most restrictive community's standards."[260] As a result, the dissemination of material that would not offend community standards to either adults or minors in any geographic locale requires that, under threat of criminal sanctions, the content of the message be self-censored by the sender of the message to satisfy the most restrictive standard.[261] "Thus, this result imposes an overreaching burden and restriction on constitutionally protected speech."[262] *Reno II* concluded, therefore, that the COPA is unconstitutional under the First Amendment.[263]

2. STATE STATUTES.

Engler held that section 722.675(1) of the Michigan Compiled Laws Annotated is a content-based regulation of speech and therefore subject to the strict scrutiny standard of review.[264] It considered whether the statute addressed a

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[254] *Reno II*, 217 F.3d at 177.

[255] *Id.* at 175.

[256] *Id.* at 175-76.

[257] Hamling v. United States, 418 U.S. 87, 106 (1974).

[258] *Sable Communications*, 492 U.S. at 125-26.

[259] *See* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996).

[260] *Reno I*, 521 U.S. at 175.

[261] *Id.* at 177.

[262] *Id.*

[263] *Id.* at 166.

[264] *Engler*, 55 F. Supp. 2d at 748.

compelling state interest, whether the statute was necessary to further that interest, and whether the statute was narrowly drawn to have the least intrusive effect on speech.[265] The court first concluded, at least for purposes of its opinion, that "there is arguably a compelling state interest to shelter our children from sexually explicit material until maturity."[266] It then concluded that the statute was neither necessary nor narrowly drawn to achieve that interest.[267] The court noted the criminalization of the communications would inhibit the dissemination of information to minors about rape, birth control and sexually transmitted diseases that might well contain language some would deem harmful to minors.[268] It also noted that less intrusive means are available to achieve this purpose, including available software and parental control.[269]

Johnson held section 30-37-3.2(A) of the New Mexico Statutes is a content-based regulation of speech subject to a strict scrutiny standard of judicial review.[270] Relying primarily on *Reno I*, the court held the New Mexico statute unconstitutionally overbroad in violation of the First Amendment because it inevitably "burdens otherwise protected adult communication on the Internet."[271]

PSINet held that section 18.2-391 of the Code of Virginia is a content-based regulation of speech subject to a strict scrutiny standard of judicial review.[272] Applying that standard, the court assumed that protecting minors from harmful matter was a compelling governmental interest.[273] However, the court concluded that the statutory prohibition was invalid under the First Amendment because the statute was not effective to accomplish the governmental interest, was not narrowly drawn as the least intrusive means to accomplish that interest, and was therefore substantially overbroad in its effect.[274]

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[265] *Id.* at 748-50.

[266] *Id.* at 749.

[267] *Id.* at 749-50.

[268] *Id.*

[269] *Johnson*, 194 F.3d at 1156.

[270] *Id.* at 1160.

[271] *Id.*

[272] *PSINet, Inc.*, 108 F. Supp. 2d at 624.

[273] *Id.* at 624-26.

[274] *Id.* at 625.

First, the *PSINet* court stated that:

> [u]nder strict, or even intermediate[] scrutiny, a law 'may not be sustained if it provides only ineffective or remote support for the government's purpose.' [Citation.] In the present case, [the statute] does not provide the most effective means of preventing juveniles from viewing . . . harmful materials because, in the context of the Internet, material posted on a computer in another state or overseas is just as available to juveniles and adults as information posted next door.[275]

Second, the *PSINet* court stated that less intrusive means, including software and parental control, are available to accomplish the goal of protecting minors from harmful material.[276]

Third, the court found the statute is overbroad because the statute "provides no way for Internet speakers to prevent their communications from reaching minors without also denying adults access to the material."[277] As a result, the statute prohibits or inhibits constitutionally protected speech in its attempt to prohibit speech that is not entitled to First Amendment protection.[278]

C. SUMMARY OF FEDERAL COURT APPLICATIONS OF THE FIRST AMENDMENT

The federal court decisions in *Reno I, Reno II, Engler, Johnson* and *PSINet* concluded that federal and state laws prohibiting the dissemination of harmful matter to minors over the Internet violate the free speech protection of the First Amendment to the United States Constitution. In reaching this conclusion, the federal courts have held that the regulations of Internet communications are content-based regulations of speech subject to the strict scrutiny standard of judicial review. Applying the strict scrutiny standard of review, the federal courts have held that although the government may have a compelling interest in preventing minors from the receipt of harmful matter over the Internet, the statutes considered may not be necessary to serve that interest and do not contain the least intrusive means of achieving that interest. Because of the nature of the Internet, the statutes inhibit otherwise constitutionally protected communications to adults, an effect exacerbated by a reference to national community standards.

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[275] *Id.*

[276] *Id.* at 625-26.

[277] *Id.* at 627.

[278] *See infra* Part IV, D.

Consequently, they are therefore overbroad.

D. STATE COURT APPLICATIONS

The state courts in *Foley, Hatch* and *Hsu* considered First Amendment challenges to the constitutionality of the same state penal statutes the constitutionality of which they considered under the Dormant Commerce Clause.[279] Again, in contrast to the federal courts in *Reno I, Reno II, Engler, Johnson* and *PSINet*, which held similar statutes unconstitutional under the First Amendment to the United States Constitution, each of the state courts held the state statute under consideration to be constitutional under the First Amendment to the United States Constitution.

Foley held that, because section 235.22 of the New York Penal Law contains a luring element not present in the CDA, section 235.22 is not a content-based regulation of speech, and, therefore, it is not subject to the strict scrutiny standard of judicial review.[280] The *Foley* court did not characterize the statute as a neutral regulation affecting speech indirectly, but rather as a regulation of "acts of communication . . . [and] forms of conduct."[281] As a result of *Foley's* characterization of section 235.22 as a regulation of conduct rather than speech, it held that the statute is presumed to be valid,[282] and within the scope of criminal laws reflecting legitimate state interests.[283] Enigmatically, the *Foley* court also stated that the "speech-conduct" prohibited by section 235.22, "does not merit First Amendment protection," but "[w]e nevertheless hold that [it] survives First Amendment strict scrutiny, because . . . it curtails the use of speech in a way [that] does not merit First Amendment protection and is a carefully tailored means of serving a compelling [s]tate interest [citations omitted]."[284] A First Amendment challenge to the constitutionality of section 235.22 of the New York Penal Law was also made in *Barrows II*, which concluded that under *Reno I*, section 235.22 was "unconstitutionally vague and overbroad in violation of the First Amendment to the United States Constitution."[285] *Barrows II* was reversed by

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[279] *Foley*, 94 N.Y.2d at 678.

[280] *Id.*

[281] *Id.* at 677.

[282] *Id.* at 678.

[283] *Id.* at 682-83.

[284] *Barrows I*, 677 N.Y.S.2d at 686.

[285] *Barrow II*, 709 N.Y.S.2d at 574.

the Appellate Division of the Supreme Court in *People v. Barrows*,[286] under the authority of *Foley*. The Appellate Division stated that the "'luring' element [of section 235.22] narrows the statute because it prosecutes conduct, not speech [citation omitted]."[287] The *Foley* court acknowledged that the lower court in *Barrows II* described the luring element of section 235.22 as "speech in its purest form."[288] *Foley* disagreed with that characterization.[289]

Hatch considered the constitutionality of section 288.2(b) of the California Penal Code under the First Amendment and, similar to *Foley*, determined that because of the intent to seduce element, the statute regulated conduct rather than speech.[290] The *Hatch* court stated that "[b]ecause it is primarily conduct rather than speech [that] is subjected to regulation, the statute does not infringe upon the First Amendment."[291] The *Hatch* court considered section 288.2(b) of the California Penal Code to be similar to statutes regulating the time, place and manner of the public solicitations of funds, which have been held to be regulation of conduct rather than of speech and not subject to strict scrutiny judicial review.[292] The *Hsu* opinion assumed that a penal statute prohibiting the dissemination of harmful matter to minors over the Internet, even if it contains an intent or purpose element of luring or seduction, is a regulation that "proscribes speech, not merely conduct, and is subject to the highest level of scrutiny."[293] As a result, the *Hsu* opinion, unlike *Foley* and *Hatch*, undertook a traditional strict scrutiny analysis to determine whether the statute is necessary to serve a compelling governmental interest and whether it is narrowly drawn to use the least intrusive

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[286] *Id.* at 575.

[287] *Id.*

[288] *Foley*, 94 N.Y.2d at 678 n.2.

[289] *Id.*

[290] *Hatch*, 80 Cal. App. 4th at 203.

[291] *Id.* at 203-04.

[292] *Id.* at 202 (citing Los Angeles Alliance for Survival v. City of Los Angeles, 22 Cal. 4th 352, 357 (2000)). *Reno II* rejected application of the "brick and mortar outlet" concept to the geographically borderless Internet. *Reno II*, 217 F.3d at 175.

[293] *Hsu*, 82 Cal. App. 4th at 988. The *Barrows II* opinion also assumed that a statute prohibiting the dissemination of harmful matter to minors over the Internet and containing an intent or purpose element of luring or seduction is a regulation that proscribes speech, not merely conduct. *Barrows II*, 677 N.Y.S.2d at 732.

means to serve that interest.[294] The *Hsu* court noted its disagreement with the *Hatch* majority opinion assumption that section 288.2(b) was a regulation of conduct rather than a content-based regulation of speech.[295]

The *Hsu* court found the protection of minors from harmful matter to be a compelling governmental interest.[296] The court then concluded that section 288.2(b) of the California Penal Code satisfied the strict scrutiny test because it is narrowly drawn, using the least intrusive means to meet its objective.[297] The *Hsu* court stated that the statute is not overbroad because it "does not impermissibly infringe on the rights of adults to transmit and receive constitutionally protected material via the Internet."[298] The court stated:

> Before . . . [section 288.2(b)] can be violated, the sender must know the recipient is a minor, know the transmitted matter is harmful, intend to arouse the minor's sexual desires, and, most specifically, intend to seduce the minor. . . . There is no violation . . . when an adult disseminates the matter to another adult or to a minor without the intent of seducing the minor recipient.[299]

Hsu distinguished *Reno I* and *Engler* on the basis that the statutes in those cases did not require the "double intent of arousing the minor's sexual desire and seducing the minor, thereby insuring that adult-to-adult communication was undeterred."[300] Because otherwise permissible adult speech is not proscribed, the statute was narrowly drawn and satisfied the least intrusive means test required by the strict scrutiny judicial review standard.[301]

Hsu also referred to the affirmative defenses available to a person charged with a violation of section 288.2(b) of the California Penal Code as a basis for distinguishing section 288.2(b) from the CDA, which did not contain those de-

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[294] *Hsu*, 82 Cal. App. 4th at 988-94.

[295] *Id.* at 988 n.8.

[296] *Id.* at 988.

[297] *Id.* at 989-90.

[298] *Id.* at 988.

[299] *Hsu*, 82 Cal. App. 4th at 988.

[300] *Id.*

[301] *Id.* at 989, 990.

fenses.[302] These affirmative defenses, stated the *Hsu* court, buttress its conclusion that the statute is narrowly drawn and not overbroad.[303] Reliance by the *Hsu* court on the affirmative defenses to charged violations of section 288.2(b) appears to be rather awkward. Violation of the statute requires that the Internet message sender have the intent to seduce the minor.[304] The affirmative defenses include exceptions for parents and guardians who violate the statute in aid of legitimate sex education, for any person who violates the statute for legitimate scientific or educational purposes, and for any telephone corporation, cable television company, Internet service provider or commercial online service provider transmitting the message.[305] It is difficult to imagine a situation in which any of these defenses would be available to the sender of communications that otherwise violate section 288.2(b), which requires an intent to seduce.

The *Hsu* court distinguished *Reno II* on the basis that section 288.2(b) defined harmful matter by contemporary California statewide standards rather than by the impermissible contemporary national standards of the COPA.[306] The court stated that "[b]y restricting the measurement of 'harmful matter' to a contemporary California standard, section 288.2[](b) passes constitutional muster."[307]

E. SUMMARY OF STATE COURT APPLICATIONS

The state court decisions in *Foley, Hatch* and *Hsu* concluded that state laws prohibiting the dissemination of harmful matter to minors over the Internet do not violate the First Amendment.[308] However, the rationales of the state court decisions are not consistent. The state courts have concluded either that those laws are not content-based regulations of speech, but rather are regulations directed to conduct (*Foley* and *Hatch*) or that, to the extent they are content-based speech regulations, they satisfy the strict scrutiny standard of judicial review be-

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302 *Id.* at 989.

303 *Id.*

304 CAL. PENAL CODE § 288.2(b) (West 1999).

305 CAL. PENAL CODE § 288.2(c), (d), (e) (West 1999).

306 *Hsu,* 82 Cal. App. 4th at 991.

307 *Id.*

308 *Foley*, 94 N.Y.2d at 683; *Hatch*, 80 Cal. App. 4th at 204; *Hsu*, 82 Cal. App. 4th at 988-94.

cause they do not inhibit otherwise permissible adult speech (*Hsu*).[309] The state court decisions distinguish *Reno I* and *Engler* on the ground that both the New York and California statutes have a purpose or intent element of luring or intent to seduce that are absent from the CDA considered in *Reno I* and the Michigan statute considered in *Engler*. *Hsu* distinguished *Reno II* on the ground that the California statute defined harmful matter by reference to contemporary California state standards in contrast to the COPA, which defined harmful matter by reference to a nonexistent contemporary national standard.[310]

VI. DISCUSSION

A. GENERAL

The conclusions of federal court decisions examining Dormant Commerce Clause and First Amendment challenges to the constitutionality of laws criminalizing the dissemination of harmful matter to minors over the Internet appear irreconcilable with the conclusions of state court decisions examining the same issues. Comparing the disparate conclusions between state and federal court decisions, one is reminded of the aphorism of ships passing in the night; they are so close, but unaware of the presence of the other. The difference between federal and state court decisions appears to result from each making different assumptions that underlie the analysis and application of the Dormant Commerce Clause and the First Amendment.

B. DORMANT COMMERCE CLAUSE

In considering the Dormant Commerce Clause, the fundamental state court assumptions are:

1. The intent with which the Internet communication is made determines whether the communication is commerce[311] and, if commerce, whether it is interstate commerce.[312]
2. State criminal jurisdiction is geographically limited and does not extend to

[309] *Foley*, 94 N.Y.2d at 679; *Hatch*, 80 Cal. App. 4th at 202; *Hsu*, 82 Cal. App. 4th at 988.

[310] *Hsu*, 82 Cal. App. 4th at 990-91.

[311] *Foley*, 94 N.Y.2d at 683-84; *Hatch*, 80 Cal. App. 4th at 194-97; *Hsu*, 82 Cal. App. 4th at 983-84.

[312] *Foley*, 94 N.Y.2d at 683; *Hatch*, 80 Cal. App. 4th at 194-97.

acts committed outside the state's boundaries or to acts committed within the state's boundaries, the effects of which occur outside the state's boundaries; the state prohibition against the dissemination of harmful matter to a minor over the Internet is therefore limited to transmissions sent and received within the state, and the prohibiting regulations as so limited do not burden interstate commerce.[313]

Based on these assumptions, the state court decisions conclude that the laws criminalizing the dissemination of harmful matter to minors over the Internet have no or minimal effect on interstate commerce, and no extraterritorial effect. Therefore, there is no need for national uniform regulation to prevent inconsistent burdens on Internet users, and there is no burden on interstate commerce to balance against benefits to the states.

The federal court decisions uniformly assume that Internet communications constitute interstate commerce regardless of the intent with which the communication is sent, and do not narrowly interpret the extent of state criminal jurisdiction. They assume each state has jurisdiction to prosecute Internet communications disseminating harmful matter to minors that are sent from, or received within, the state. Because Internet communications are accessible everywhere, the state statutes regulating Internet communications unavoidably affect interstate commerce.[314]

It is the position of this article that the assumptions of the state court decisions with respect to interstate commerce do not withstand examination. Without those assumptions, the conclusions of the state courts are unsupported in logic and are inconsistent with the persuasive authority of *Pataki, Engler, Johnson* and *PSINet.*

1. THE INTENT OF INTERNET COMMUNICATIONS AND INTERSTATE COMMERCE.

All reported court decisions except *Foley,* and perhaps *Hatch,* that have con-

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[313] *Hatch,* 80 Cal. App. 4th at 196-97; *Hsu,* 82 Cal. App. 4th at 983-84.

[314] The state courts' reluctance to apply the Dormant Commerce Clause may in part be influenced by the procedural posture of the state court cases. The state court decisions arise from specific charges or appeals of convictions under the respective state statutes. Although challenges to the state statutes under the Dormant Commerce Clause included facial challenges, the state courts have tended to examine the specific facts of the case and decide the constitutional issues on an as-applied rather than a facial basis. The facts in *Foley, Hatch, Hsu* and *Barrows II* appear to involve only intrastate activity (the Internet communications were sent from and received in the same state), and those decisions found no or minimal effect on interstate commerce. Each of the federal court decisions arose from an application for an injunction against the enforcement of the respective federal and state laws and the challenges were presented and determined as facial challenges without regard to the facts of a particular Internet communication.

sidered the issue have assumed that regardless of the intent with which the Internet communications are sent, Internet communications disseminating harmful matter to minors are commerce within the meaning of the Commerce Clause of the United States Constitution.[315] The same courts have also assumed that Internet communications sent from one state and received in another state are interstate commerce.[316] Furthermore, federal courts have concluded that because of the borderless nature of the Internet, it is impossible to limit an Internet communication to an intrastate communication and therefore all Internet communications are interstate commerce.[317]

The *Foley* court determined that the dissemination of harmful matter to minors over the Internet sent with a particular unsavory intent is not commerce subject to Dormant Commerce Clause review.[318] Section 235.22 of the New York Penal Law considered by *Foley* prohibits the sending of a communication over the Internet with the intent to importune, invite or induce a minor to engage in sexual activity, which is the luring element of the offense referred to in *Foley*.[319] Because of the luring element in section 235.22, *Foley* assumed the statute does not regulate commerce.[320] *Hatch* also considered a criminal statute with a luring element, the intent to seduce.[321] In contrast to *Foley*, however, the *Hatch* court seems to have assumed that even with the luring element, the statute affected interstate commerce,[322] but concluded that because of the intent to seduce element, the regulation was not an invalid state regulation of interstate commerce under the Dormant Commerce Clause.[323]

The *Foley* and *Hatch* assumption that the intent with which the Internet

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[315] *Hsu*, 82 Cal. App. 4th at 983; *Am. Libraries Ass'n*i, 969 F. Supp. at 167; *Engler*, 55 F. Supp. 2d at 751; *Johnson*, 194 F.3d at 1161; *PSINet, Inc.*, 108 F. Supp. 2d at 627.

[316] *Hsu*, 82 Cal. App. at 983; *Am. Libraries Ass'n*, 969 F. Supp. at 167; *Engler*, 55 F. Supp. 2d at 751; *Johnson*, 194 F.3d at 1161; *PSINet*, 108 F. Supp. 2d at 627.

[317] *See, e.g., PSINet*, 108 F. Supp. 2d at 627.

[318] *Foley*, 94 N.Y.2d at 683-84.

[319] *Id.* at 679.

[320] *Id.* at 684.

[321] Section 288.2(b) of the California Penal Code criminalizes the dissemination of harmful matter to minors over the Internet with the intent to seduce the minor.

[322] *But see* inconsistent statements in *Hatch*, 80 Cal. App. 4th at 195 n.20.

[323] *Hatch*, 80 Cal. App. 4th at 196.

communication is sent determines whether the communication is commerce subject to Dormant Commerce Clause review seems untenable. The assumption means that commerce does not include Internet communications sent with criminal intent. In the context of the solicitation to engage in prostitution or other illegal acts, Congress has legislated and the courts have held to the contrary.[324] Federal statute 18 U.S.C. § 2422(b) provides in part that anyone "using any facility or means of interstate . . . commerce . . . knowingly persuades, induces, entices or coerces any individual who has not attained the age of [eighteen] years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so" shall be guilty of a criminal offense.[325] In *United States v. Powell*[326] and *United States v. Kufrovich*,[327] the defendants were charged with violations of 18 U.S.C. § 2422(b) by using the Internet to induce or entice the alleged illegal conduct. The court in each case upheld the convictions, which necessarily required the finding that Internet communications made with the requisite criminal intent constituted interstate commerce for purposes of congressional regulation.[328] The scope of the Dormant Commerce Clause limiting state regulation is the same as the scope of the Commerce Clause authorizing congressional regulation.[329]

Considering the issue of the interstate commerce character of Internet communications, the *Powell* and *Kufrovich* cases are indistinguishable from *Foley* and *Hatch*. The conclusions of *Foley* and *Hatch* that Internet communications consisting of the dissemination of harmful matter to minors made with the intent to lure or seduce minors into sexual activity are not commerce, and therefore state regulations prohibiting those communications are not subject to the Dormant Commerce Clause, appear to be unsupportable under current authority. Under *Kufrovich* and *Powell*, the intent of the communication prohibited by the governmental regulation does not remove the communication from its status as commerce.

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[324] United States v. Powell, 1 F. Supp. 2d 1419 (N.D. Ala. 1998); United States v. Kufrovich, 997 F. Supp. 246 (D. Conn. 1997).

[325] 18 U.S.C. § 2422(b) (Supp. V 1999).

[326] *Powell*, 1 F. Supp. 2d at 1419.

[327] *Kufrovich*, 997 F. Supp. at 246.

[328] *See also* United States v. Kelly, No. 99-10100-01, 2000 WL 433093 (D. Kan. Mar. 2, 2000); United States v. Bailey, 228 F.3d 637 (6th Cir. 2000) (upholding federal criminal jurisdiction to prosecute crimes based on Internet communications made with criminal intent).

[329] *See supra* notes 82-83 and accompanying text.

2. EXTENT OF STATE CRIMINAL JURISDICTION AND INTERSTATE COMMERCE.

Both *Hatch* and *Hsu* assumed that section 288.2(b) of the California Penal Code, which criminalized the dissemination of harmful matter to minors over the Internet, is limited in jurisdictional scope to intrastate activity.[330] A violation of the statute is therefore limited to Internet communications sent and received in California.[331] Because the statute affects only totally intrastate activity, it does not violate the Dormant Commerce Clause. The statute has minimal or no effect on activity in other states, and, therefore, little or no effect on interstate commerce.[332] The *Edgar/Healy* extraterritorial test for per se invalidity under the Dormant Commerce Clause is inapplicable. There is no need for national uniform regulation to avoid inconsistent burdens, and it is unnecessary to compare the effect on interstate commerce with the compelling state interest in the protection of minors.[333] *Foley* did not discuss these issues because it did not consider the Internet communications under consideration to be commerce.

The narrow scope of criminal jurisdiction assumed by *Hatch* and *Hsu* is neither required by the United States Constitution nor consistent with existing California or other states' laws. In the 1911 case of *Strassheim v. Daily,*[334] the United States Supreme Court held that "the usage of the civilized world" permits a state to criminalize and punish acts done outside the state that are intended to produce and do produce detrimental effects within the state in the same manner as if the actor had been in the state at the time of the effect of the act.[335] As a corollary, a state may criminalize and punish acts done within the state that are material steps in the commission of a crime even though the crime is completed by acts done outside the state.[336] The *Strassheim* Court stated that:

> [w]e think it plain that the criminal need not do within the state every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and

[330] *Hatch*, 80 Cal. App. 4th at 196-97; *Hsu*, 82 Cal. App. 4th at 985.

[331] *Hatch*, 80 Cal. App. 4th at 196-97; *Hsu*, 82 Cal. App. 4th at 985.

[332] *Hatch*, 80 Cal. App. 4th at 196-97; *Hsu*, 82 Cal. App. 4th at 985.

[333] *Hatch*, 80 Cal. App. 4th at 196-97; *Hsu*, 82 Cal. App. 4th at 985.

[334] 221 U.S. 280 (1911).

[335] *Strassheim*, 221 U.S. at 284-85.

[336] *Id.* at 285.

then absents himself from the state and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete . . . .[337]

Under *Strassheim,* state criminal jurisdiction constitutionally extends to an Internet communication sent from one state and received in another state, and an Internet communication received in one state but sent from another state.[338]

Hatch and *Hsu* relied on California law to reach a narrow interpretation of state criminal jurisdiction.[339] However, they appear to have misperceived that law. By statute, California provides that a person who commits, in whole or in part, any crime within the state is subject to state criminal liability.[340] This statutory imposition of criminal jurisdiction has been interpreted to mean that a person who commits, in California, part of a crime, that is sufficient to constitute an attempt to commit the crime, may be prosecuted in California for the completed crime even though completion of the crime occurs in another state.[341] For exam-

[337] *Id.*

[338] *Strassheim* has been consistently followed and cited with approval since its publication in 1911. *See, e.g.,* People v. Blume, 505 N.W.2d 843, 845 (1993) (Michigan); State v. Darroch, 287 S.E.2d 856, 860 (1982) (North Carolina). *PSINet* relied on *Strassheim* as authority to find standing for non-Virginia residents to challenge section 18.2-391 of the Code of Virginia prohibiting the dissemination of harmful matter to minors over the Internet. *PSINet* states Virginia has adopted the criminal jurisdiction approach of *Strassheim.* For a discussion of *Strassheim* and the application of its holding in the context of Internet communications between states *see* Terrence Berg, *State Criminal Jurisdiction in Cyberspace: Is There a Sheriff on the Electronic Frontier?* 79 MICH. BUS. L.J. 659 (2000). Berg contains a survey of state statutes and case law relating to state criminal jurisdiction over interstate Internet communications. See also the extensive discussion of state criminal jurisdiction over Internet communications in Sean M. Thornton, *State Criminal Laws in Cyberspace: Reconciling Freedom for Users with Effective Law Enforcement* 4 RICH. J.L. & TECH. 5 (1997) and in Terrence Berg, *www.Wildwest.Gov: The Impact of the Internet on State Power to Enforce the Law,* 2000 B.Y.U. L. REV. 1305 (2000).

[339] *Hatch,* 80 Cal. App. 4th at 196-97; *Hsu,* 82 Cal. App. 4th at 985.

[340] Section 27 of the California Penal Code provides that "(a) The following persons are liable to punishment under the law of this state: [¶] (1) All persons who commit, in whole or in part, any crime within the state." CAL. PENAL CODE § 27 (West 1999). Section 778a of the California Penal Code provides: "(a) Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state." CAL. PENAL CODE § 778a (West 1985).

[341] People v. Morante, 20 Cal. 4th 403 (Cal. 1999) (holding that exceptions are conspiracy and aiding and abetting, which are not here relevant). *See also* People v. Buffum, 40 Cal. 2d 709 (Cal. 1953); People v. Burt, 45 Cal. 2d 311 (Cal. 1955). *See generally* 4 B. E. WITKIN

ple, in *People v. Botkin*,[342] the defendant in California sent a box of poisoned candy to the victim in Delaware, who died after eating the candy in Delaware.[343] The court held that the defendant could be prosecuted in California for murder under California criminal statutes.[344] The court stated that:

> The acts of defendant constituted murder, and a part of those acts were done by her in this state. Preparing and sending the poisoned candy to [the victim], coupled with a murderous intent, constituted an attempt to commit murder, and defendant could have been prosecuted in this state for that crime, if, for any reason, the candy had failed to fulfill its deadly mission. That being so,—those acts being sufficient, standing alone, to constitute a crime, and those acts resulting in the death of the person sought to be killed,—nothing is plainer than that the crime of murder was in part committed within this state.[345]

An attempt to commit a crime is itself a crime,[346] and consists of intent to commit the target crime together with a direct, but ineffectual act in furtherance of its commission.[347] An attempt is committed even though completion of the crime may be impossible.[348]

AND NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW §§ 20-24, at 30-36 (3d ed. 2000).

[342] People v. Botkin, 132 Cal. 231 (Cal. 1901).

[343] *Id.*

[344] *Id.*

[345] *Botkin,* 132 Cal. at 233. *See also* People v. Chapman, 55 Cal. App. 192 (Cal. Ct. App. 1921) and People v. Anderson, 55 Cal. 2d 655 (Cal. 1961).

[346] *See* CAL. PENAL CODE § 664 (West 1999).

[347] People v. Ross, 205 Cal. App. 3d 1548, 1554 (Cal. Ct. App. 1988).

[348] The court stated:

> The courts of this state have not concerned themselves with the niceties of distinction between physical and legal impossibility, but have focused their attention on the question of the specific intent to commit the substantive offense. The hypothesis of the rule established in this state is that the defendant must have the specific intent to commit the substantive offense, and that under the circumstances, as he reasonably sees them, he does the acts necessary to consummate the substantive offense; but because of circumstances unknown to him, essential elements of the substantive crime are lacking. (Citations omitted.) It is only when the results intended by the actor, if they happened

The transmission of harmful matter over the Internet from California to another state may be an attempt to commit the crime proscribed by California Penal Code section 288.2(b), even if completion of the substantive crime is impossible.[349] In fact, *Hatch, Hsu* and *Foley* all held that by permitting prosecution, or affirming convictions, of attempts to violate section 288.2(b) and section 235.22 of the New York Penal Code even though completion of the crimes was impossible because the Internet transmissions were not received by minors,[350] the Internet transmission itself is an attempt, and, therefore, a state has jurisdiction to prosecute the complete crime, even if the Internet transmission is directed to and received in another state.[351] For purposes of criminal jurisdiction, the transmission of an Internet communication from one state to another seems indistinguishable from sending a box of poisoned candy from one state to another. It therefore appears that California criminal jurisdiction permits prosecution of a person who sends an Internet communication from California to another state.

California also provides by statute for criminal jurisdiction to prosecute a defendant who commences out of state the commission of a crime that is completed within the state.[352] In *Ex Parte Hedley*,[353] the California Supreme Court upheld the embezzlement conviction in California under California law of the defendant, who in Nevada drew checks on his employer's account and sent them

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> as envisaged by him, would still not be a crime, then and only then, can he not be guilty of an attempt.

People v. Meyers, 213 Cal. App. 2d 518, 523 (Cal. Ct. App. 1963).

[349] *See* People v. Reed, 53 Cal. App. 4th 389 (Cal. Ct. App. 1996).

[350] *Hatch*, 80 Cal. App. 4th at 185-87; *Hsu*, 82 Cal. App. 4th at 981; *Foley*, 94 N.Y.2d at 675.

[351] *See Am. Libraries Ass'n*, 969 F. Supp. at 169-72.

[352] Section 778 provides:

> When the commission of a public offense, commenced without the State, is consummated within its boundaries by a defendant, himself outside the State, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable to punishment, therefore, in this State in any competent court within the jurisdictional territory of which the offense is consummated.

CAL. PENAL CODE § 778 (West 1985).

[353] *Ex parte* Hedley, 31 Cal. 108 (Cal. 1866).

to California to be cashed.[354] In *People v. Sansom*,[355] the California court upheld the forgery (uttering) conviction in California under California law of the defendant, who forged a check in Mexico and sent it to his agent in California for deposit in an Arizona bank.[356] Receipt in California of an Internet communication sent from another state seems indistinguishable from receipt in California of a forged check sent from another state. It therefore appears that California criminal jurisdiction permits prosecution in California under section 288.2(b) of the California Penal Code of a person who sends an Internet communication from another state that is received in California, and otherwise satisfies the elements of the statute.[357]

Under New York law, New York criminal jurisdiction appears at least as extensive as California criminal jurisdiction.[358] By statute, New York asserts jurisdiction if an element of the crime is committed within the state or if the effect of the offense is within the state.[359] With regard to computers, a New York statute provides that "[a] person who causes by any means the use of a computer . . . in one jurisdiction from another jurisdiction is deemed to have personally used the computer . . . in each jurisdiction."[360]

The legislative history of section 288.2(b) of the California Penal Code supports the conclusion that penal laws criminalizing the dissemination of harmful matter to minors over the Internet are intended to affect interstate commerce and

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[354] *Id.*

[355] People v. Sansom, 37 Cal. App. 435 (Cal. Ct. App. 1918).

[356] *Id.*

[357] The *Hatch* court stated: "Thus there is no reason at all to assume California prosecutors will attempt to stifle interstate commerce by filing charges for acts committed in other jurisdictions . . . ." *Hatch*, 80 Cal. App. 4th at 197. Shortly after the *Hatch* opinion was filed the San Diego District Attorney charged John Davis, a resident of Idaho, with violations of section 288.2(b) of the California Penal Code based on Internet communications sent from Idaho to California. J. Harry Jones, *Former Army Officer Jailed in Net Sex Sting*, SAN DIEGO UNION-TRIB., April 5, 2000, at B2. California law enforcement officers apparently are unaware of *Hatch's* interpretation of California's limited criminal jurisdiction.

[358] *See* N.Y. CRIM. PROC. LAW § 20.20(1)(a), (2)(b) (McKinney Supp. 2001).

[359] *Id.*

[360] N.Y. CRIM. PROC. LAW § 20.60(3) (McKinney 1992). *See also* Laura Ann Forbes, *A More Convenient Crime: Why States Must Regulate Internet-Related Criminal Activity Under the Dormant Commerce Clause*, 20 PACE L. REV. 189, 211-13 (1999).

to apply their proscriptions to conduct in other states.[361] One of the perceived evils prompting enactment of section 288.2(b) was the alleged use of the Internet by sexual predators in other states to lure minors in California into crossing state boundaries to engage in prohibited liaisons.[362] The legislative history of section 235.21(3) of the New York Penal Law is similar. The *Pataki* court stated that "the legislative history of the [New York] Act clearly evidences the legislator's understanding and intent that the Act would apply to communications between New Yorkers and parties outside the State . . . ."[363]

The assumptions of *Hatch* and *Hsu* that state regulations prohibiting the dissemination of harmful matter to minors over the Internet impose no criminal liability for acts or effects outside the state appear to be unfounded. State criminal jurisdiction extends to the sender of the Internet communication that disseminates harmful matter to a minor if the transmission originates or is received in the state.[364] *Hatch* and *Hsu* relied on an assumption that appears to be a fiction; the state regulations do affect conduct beyond the borders of the state and therefore affect interstate commerce.[365]

3. RESULT OF ASSUMPTIONS OF INTENT AND EXTENT OF CRIMINAL JURISDICTION ON INTERSTATE COMMERCE.

The state court decisions in *Foley* and perhaps *Hatch* assumed that the intent of an Internet communication determines its status as interstate commerce, and in *Hsu* and *Hatch* that state court criminal jurisdiction is limited to wholly intra-

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[361] *See* SEN. COMM. ON PUB. SAFETY, ANALYSIS OF ASSEMBLY BILL NO. 181 (1997-1998 Cal. Reg. Sess.) *as amended* Apr. 8, 1997, COMMENT ¶ 2, *available at* http://www.leginfo.ca.gov/bilinfo.html.

[362] *Id.*

[363] *Am. Libraries Ass'n*, 969 F. Supp. at 170.

[364] *Id.*

[365] Goldsmith and Sykes acknowledge that criminal regulations of one state may apply to an Internet communication sender in another state, but minimize the impact of the criminalization of the sender. Goldsmith & Sykes, *supra* note 25, at 815. Again, for no apparent reason, they limit their analysis to websites, ignoring the fact that e-mail transmissions have been the basis for state prosecutions of dissemination of harmful matter to minors over the Internet. More surprisingly, they assert the burden of the criminalization is slight because extradition from the sender's state to the receiving state is difficult. *Id.* at 815. Apart from the fact that extradition may not be as difficult as assumed by Goldsmith and Sykes, it is doubtful that a person subject to an outstanding felony arrest warrant would consider the burden to be slight.

state activity.[366] Elimination of those assumptions undermines the foundation of the conclusions of *Foley, Hatch* and *Hsu* that the state laws criminalizing the dissemination of harmful matter over the Internet do not violate the Dormant Commerce Clause. Without those assumptions, *Pataki, Engler, Johnson* and *PSI-Net*[367] are not distinguishable, and a Dormant Commerce Clause analysis seems to compel results different from the results in *Foley, Hatch* and *Hsu*.

a. Extraterritorial Effect.

Each state statute criminalizing the dissemination of harmful matter to a minor over the Internet has the practical effect of exporting its domestic policies into other states that may have domestic policies different from the exporting state. The exportation of inconsistent state policies is impermissible under *Edgar v. MITE Corp.*[368] and *Healy v. The Beer Institute.*[369]

Conduct lawful in a sister state may, because of the nature of the Internet, subject an Internet communication sender to criminal liability in another state even if the sender did not intend the message to be read in the other state.[370] The sender can neither prevent the resident of any state from accessing the messages nor prevent messages directed to recipients in a particular state from passing through computers in all other states.[371] Criminal liability may be imposed because a state's criminal jurisdiction is not limited to intrastate communications.[372]

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[366] *See Foley*, 94 N.Y.2d at 684; *Hatch*, 80 Cal. App. 4th at 170; *Hsu*, 82 Cal. App. 4th at 976.

[367] *See Am. Libraries Ass'n*, 969 F. Supp. at 160; *Engler*, 55 F. Supp. 2d at 737; *Johnson*, 194 F.3d at 1149; *PSINet, Inc.*, 108 F. Supp. 2d at 6111.

[368] *MITE Corp.*, 457 U.S. at 643.

[369] *The Beer Institute*, 491 U.S. at 336.

[370] *See Am. Libraries Ass'n* 969 F. Supp. at 169-72.

[371] *Id.*

[372] The conclusion that state laws criminalizing the dissemination of harmful matter to minors over the Internet are unconstitutional violations of the Dormant Commerce Clause because they export a state's domestic policies into other states that may have different domestic policies is superficially inconsistent with *Strassheim v. Daily*. *Strassheim* held constitutional state criminal jurisdiction to include acts committed in a state the effects of which occur in another state. *See supra* note 335. However, the cases that permit a state exercise of criminal jurisdiction over crimes committed only partially within the state do not export domestic policies inconsistent with the domestic policies of another state. For example, prosecutions for

Furthermore, the domestic policies of states differ. For example, in many states a nineteen-year-old male may have sexual relations with a sixteen-year-old female without violating any law, and there appears to be no impediment to the use of e-mail to send salacious matter intending to seduce or lure into sexual activity, even though he knew her to be sixteen years old.[373] The hypothetical nineteen-year-old to sixteen-year-old e-mail apparently violates no Alabama law.[374] Moreover, a recent comprehensive survey of the laws in varying states demonstrates the diversity of age of consent laws throughout the country.[375] There is no criminal liability for sexual conduct with children fourteen or older in Hawaii or for sexual conduct with children fifteen years old or older in Colorado.[376]

Many states distinguish between penetration offenses and sexual contact offenses.[377] For the so-called penetration offenses, only twelve states set eighteen years as the threshold age for consensual activity.[378] For the so-called sexual contact offenses, only seven states set eighteen years as the threshold age for consensual activity.[379] In other states, consensual sexual contact is permitted between an adult and person who is seventeen years old (four states), or sixteen years old (twenty-two states), or fifteen years old (four states) or fourteen years old (nine states) or thirteen years old (four states).[380] For example, it appears that if the defendant in *Hatch* engaged in consensual sexual contact with the purported minor not involving penetration, he would have committed no crime in

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murder, People v. Botkin, 132 Cal. 231 (Cal. 1901), embezzlement, Ex Parte Hedley, 31 Cal. 108 (Cal. 1866), and forgery, People v. Sansom, 37 Cal. App. 435 (Cal. Ct. App. 1918) partially committed within the state do not export inconsistent state policies because those crimes are crimes in all states; the domestic policies of the states are consistent.

[373] ALA. CODE § 13A-6-110 (Michie Supp. 2000).

[374] *Id.*

[375] Charles A. Phipps, *Children, Adults, Sex And The Criminal Law: In Search Of Reason,* 22 SETON HALL LEGIS. J. 1 (1997).

[376] *Id.* at 61 n.243.

[377] *Id.* at 55-66.

[378] *Id.* at 60.

[379] *Id.*

[380] *Id.* at 60-62.

New Hampshire,[381] or in Tennessee,[382] and some forms of sexual contact between the *Hatch* defendant and the purported minor would not be criminal in Virginia.[383] However, if unknown to the sender, a female to whom he sent the matter was a California domiciliary or a visitor to California who used a remote retrieval method to open the offending transmission at a California cybercafe, the sender's conduct, lawful under the domestic policies of his home state, subjects him to criminal prosecution in California.[384]

As the *Pataki* court observed, modified to fit the California context, under section 288.2(b) of the California Penal Code, "conduct that may be legal in the state in which the user acts can subject the user to prosecution in [California] and thus subordinate the user's home state's policy—perhaps favoring freedom of expression over a more protective stance—to [California's] local concerns."[385] This extraterritoriality aspect of each state statute criminalizing the dissemination of harmful matter to minors over the Internet makes it per se invalid under the *Edgar/Healy* extraterritoriality analysis of the Dormant Commerce Clause.[386]

b. *National Uniform Regulation.*

Under state statutes criminalizing the dissemination of harmful matter to minors over the Internet, users of the Internet are threatened by inconsistent burdens as each state implements separate Internet statutes. The nature of the Internet requires a national uniform regulation because of the potential for inconsistent burdens imposed by disparate state regulation. One inconsistent

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[381] Charles A. Phipps, *supra* note 375, at 60-62.

[382] TENN. CODE ANN. § 39-13-504 (1997).

[383] VA. CODE ANN. § 18.2-67.3 (Michie Supp. 2001) and § 18.2-63 (Michie 1996).

[384] CAL. PENAL CODE § 288.2(b) (West 1999).

[385] *Am. Libraries Ass'n*, 969 F. Supp. at 177.

[386] The extraterritorial impact of a state regulatory statute may also raise First Amendment issues. The United States Supreme Court considered a First Amendment challenge to a state statute criminalizing the publication or advertisement for procuring of an abortion. Bigelow v. Virginia, 421 U.S. 809 (1975). The defendant newspaper publisher printed an advertisement in its Virginia newspaper that included information about the availability of abortion facilities in New York and he was convicted of violating the Virginia statute. The Supreme Court reversed the conviction, holding the statute unconstitutional in violation of the First Amendment. The court stated that a state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Bigelow*, 421 U.S. at 824-25.

burden results from different age proscriptions in different states.[387] In Alabama, it is a crime to use the Internet to seduce only when the user is nineteen years or older and the recipient is under age sixteen.[388] In Florida, the crime is committed only if the child resides or is believed by the perpetrator to reside in Florida.[389] In two states, furnishing indecent matter over the Internet to a person whom the sender knew or should have known was a minor violates the statute.[390] In Indiana, it is a crime to use the Internet to solicit sexual conduct with a child under the age of fourteen.[391] In Virginia, the law bans use of the Internet to promote, produce or market "sexually explicit visual material" involving children under eighteen or to entice such children to perform in or be a subject of sexually explicit visual material.[392] Absent national uniform regulation, users will be "lost in a welter of inconsistent laws, imposed by different states with different priorities," and users will be unable to reasonably determine their obligations.[393] Furthermore, different states may conclude that a person capable of consent at an age younger than that designated in another state should be entitled to view matter deemed harmful under California's concept of minority.[394]

Another inconsistent burden results from different definitions of harmful matter.[395] For example, section 288.2(b) of the California Penal Code defines the type of communications outlawed by reference to the standards articulated in *Miller* and incorporates contemporary statewide standards to determine whether the matter appeals to prurient interests and is patently offensive.[396] However, there is no single prevailing community standard in the United States or in Cali-

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[387] *See* Phipps *supra*, note 375, at 62-66

[388] ALA. CODE § 13A-6-110 (Michie Supp. 2000).

[389] FLA. STAT. ANN. § 847.0135 (West 2000).

[390] GA. CODE ANN. § 16-12-100.1 (Harrison 1998); N.M. STAT. ANN. § 30-37-3.2(A) (Michie Supp. 2001).

[391] IND. CODE ANN. § 35-42-4-6. (West 1998).

[392] VA. CODE ANN. § 18.2-374.3 (Michie Supp. 2001).

[393] *Am. Libraries Ass'n*, 969 F. Supp. at 182.

[394] *See Johnson*, 194 F.3d at 1162.

[395] *See Am. Libraries Ass'n*, 969 F. Supp. at 182. *Compare* CAL. PENAL CODE § 313 (West 1999) *with* N.Y. CRIM. PROC. LAW § 235.20 (6) (McKinney 2000).

[396] CAL. PENAL CODE § 313 (West 1999); Miller v. California, 413 U.S. 15 (1973).

fornia, which therefore subjects Internet users to discordant responsibilities: i.e. matter not deemed harmful in the state from which it was sent could be deemed harmful under California standards or standards in some parts of California.[397] Because an Internet sender cannot know the geographic location of the recipient or prevent access to the message, the sender must comply with the California's standards, or forgo communicating matter protected in the sender's state but not in California, or risk prosecution based on the geographic fortuity that his recipient might be in California.[398]

Although the protection of minors from harmful matter may be an important state interest, the nature of the Internet compels the conclusion that state statutory attempts to criminalize a certain category of Internet transmissions based on age and content are unconstitutional under the Dormant Commerce Clause because of the need for national uniform regulation to avoid inconsistent burdens on interstate Internet communications.

c. *The* Pike *Balancing Test.*

The *Pike* balancing test for permissible state regulation of interstate commerce requires a comparison of the burdens the regulation places on interstate commerce with the benefits the regulation confers on the state.[399]

The burdens imposed on interstate commerce by state regulations prohibiting the dissemination of harmful matter to minors over the Internet were extensively articulated in *Pataki*.[400] The burdens included the exportation of the state's policies to other states and the impingement on otherwise legal communications between adults.[401] The *Hsu* court concluded that section 288.2(b) of the California Penal Code had at most an incidental effect on interstate commerce.[402] The court reasoned that criminal laws are traditionally within the province of state legislation and that state laws criminalizing the dissemination of harmful matter to minors for the purpose of seduction cannot burden "legitimate commerce."[403] However, *Hsu* does not acknowledge either that the California law affects con-

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[397] *See Am. Libraries Ass'n*, 969 F. Supp. at 174.

[398] *Id.* at 177.

[399] *Pike*, 397 U.S. at 137.

[400] *Am. Libraries Ass'n*, 969 F. Supp. 160 (S.D.N.Y. 1997).

[401] The latter consideration overlaps with the First Amendment overbreadth issue.

[402] *Hsu*, 82 Cal. App. 4th at 983-84.

[403] *Id.*

duct in other states that may not share California's view of harmful matter or that is not illegal in other states.

Pataki also articulated the minimal benefits that inured to the state.[404] Although the protection of minors from presumably deleterious effects of the receipt of harmful matter may be a laudable goal, the regulatory prohibitions on Internet communication have had little effect on realization of that goal. The regulations do not inhibit communications from foreign countries, other laws are available to deal with predatory pedophilia, and the use of the Internet to induce minors into sexual activity may be minimal. The prosecutions under laws criminalizing the dissemination of harmful matter to minors over the Internet are almost all sting operations instigated by law enforcement officers or investigative reporters with little or no harmful matter actually being received by minors.[405] These laws appear to provide minimal benefits compared with the burdens those laws impose on interstate commerce.[406] Although the *Hsu* court considered the state's interest in the protection of minors from being seduced into sexual activity to be compelling, it did so by a general statement without any articulated detail.[407] *Hsu* did not consider either the extent of the problem or the existence of other laws that would accomplish the same purpose without affecting otherwise legal conduct in other states.[408]

C. THE FIRST AMENDMENT

In considering the First Amendment, the fundamental state court assumptions are:

1. Regulations prohibiting the dissemination of harmful matter to minors over the Internet made with an intent to lure or seduce minors into sexual activity are regulations of conduct and not content-based regulations of speech; they are therefore not subject to strict scrutiny First Amendment review.[409]

2. Even if the regulations of the Internet communications are content-based, because the communications further the exploitation of minors they are not enti-

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404 *Am. Libraries Ass'n*, 969 F. Supp. at 178-79.

405 No minors were subjected to harmful matter in *Foley*, *Hatch* or *Hsu*. *See infra* note 407 and accompanying text.

406 *See Am. Libraries Ass'n*, 969 F. Supp. at 177-82.

407 *Hsu*, 82 Cal. App. 4th at 984.

408 *Id.* at 983-85.

409 *Foley*, 94 N.Y.2d at 679; *Hatch*, 80 Cal. App. 4th at 203-04.

tled to First Amendment protection.[410]

3. Regulations criminalizing the dissemination of harmful matter to minors over the Internet are necessary to serve a compelling state interest of protecting minors and are not overbroad because they do not inhibit otherwise permissible communications between adults.[411]

The federal courts have uniformly assumed that regulations of Internet communications that disseminate harmful matter to minors are content-based regulations of speech and are presumptively invalid under the First Amendment.[412] Furthermore, those laws may not be necessary and are overbroad because they inevitably inhibit otherwise permissible communication between adults.[413]

It is the position of this article that the assumptions of the state court decisions with respect to the First Amendment are unfounded. Without those assumptions, the state court decisions are inconsistent with the controlling authority of *Reno I* and the persuasive authority of *Reno II, Engler, Johnson* and *PSINet.*

1. THE INTENT OF INTERNET COMMUNICATIONS.

All court decisions, except *Foley* and *Hatch*, that have considered the issue have assumed that regardless of the intent with which the Internet communications are sent, regulations of Internet communications consisting of the dissemination of harmful matter to minors over the Internet are content-based regulations of speech.[414] The constitutionality of content-based regulations of speech is subject to the strict scrutiny standard of judicial review.[415]

Foley assumed that because of its luring element, section 235.22 of the New York Penal Law did not regulate commerce.[416] It also assumed that because of

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410 *Foley*, 94 N.Y.2d at 682-83.

411 *Id.* at 683; *Hatch*, 80 Cal. App. 4th at 201-02; *Hsu*, 82 Cal. App. 4th at 989-90.

412 *Reno I*, 521 U.S. at 871, 879; *Reno II*, 217 F.3d at 173; *Engler*, 55 F. Supp. 2d at 748; *Johnson*, 194 F.3d at 1156; *PSINet, Inc.*, 108 F. Supp. 2d at 624.

413 *Reno I*, 521 U.S. at 874; *Reno II*, 217 F.3d at 178; *Engler*, 55 F. Supp. 2d at 749-50; *Johnson*, 194 F.3d at 1160; *PSINet*, 108 F. Supp. 2d at 626.

414 *See e.g., Hsu*, 82 Cal. App 4th at 988.

415 *Id.*

416 *Foley*, 94 N.Y.2d at 684.

the luring element, it did not regulate speech but rather regulated conduct.[417] *Hatch* followed *Foley* and assumed that because violation of section 288.2(b) of the California Penal Code required the Internet communication to be made with the intent to seduce, the statute regulated conduct, not speech, and the communication was not entitled to First Amendment protection.[418] *Hsu,* on the contrary, disagreed with *Hatch* and agreed with federal court decisions, holding that the regulation of the dissemination of harmful matter to minors over the Internet is a content-based regulation of speech regardless of the intent with which the communication is sent.[419]

The assumption of *Foley* and *Hatch*, that regulation of Internet communications made with the intent to induce a reaction in the recipient is regulation of conduct rather than content-based regulation of speech, appears unsupportable. Both section 235.22 of the New York Penal Law and section 288.2(b) of the California Penal Code are content-based proscriptions against speech because they each impose criminal liability based on the communication of harmful matter, which is the content of the Internet communication.[420] A regulation of speech is content-based if the regulation is adopted because of disagreement with the message the speech conveys.[421] If the regulation serves purposes unrelated to the content of the speech it is deemed neutral, even if it has an incidental effect on some speakers or messages.[422] *Foley* and *Hatch* assume the statutes are not directed at the content of the speech but, because they seek to prevent the seduction of minors, are instead directed at the *secondary effects* of the speech, which subjects them to no scrutiny or a lesser level of scrutiny.[423] However, a law that proscribes the content of speech to prevent certain reactions from the listener is a law targeting the direct impact of the speech rather than its secondary effects,[424] and is a content-based regulation subject to the highest level of

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[417] *Id.* at 679.

[418] *Hatch*, 80 Cal. App 4th at 203.

[419] *Hsu*, 82 Cal. App. 4th at 988 n.8.

[420] *Cf.* Berry v. City of Santa Barbara, 40 Cal. App. 4th 1075, 1084 (Cal. Ct. App. 1995) (holding that the statute that regulates harmful matter under section 313 of the California Penal Code is a content-based regulation).

[421] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[422] *Id.*

[423] *See City of Renton*, 475 U.S. at 47-50.

[424] *Boos*, 485 U.S. at 319-21.

scrutiny.[425] Statutes designed to prevent the listener from becoming seduced by the content of the speech are content-based proscriptions.[426]

A content-based regulation of speech is presumptively invalid,[427] and is subject to strict scrutiny judicial review, i.e. the people must demonstrate that the regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that interest.[428]

The assumption of *Foley* and *Hatch*—that statutes criminalizing the dissemination of harmful matter to minors over the Internet, if sent with the intent to lure or seduce, regulate conduct and not speech and are therefore not entitled to First Amendment protection—is not supported by current authority.

2. ENTITLEMENT TO FIRST AMENDMENT PROTECTION.

Although *Foley* purports to review the First Amendment challenge to section 235.22 of the New York Penal Law that criminalizes the dissemination of harmful matter to minors over the Internet with the intent to lure them into proscribed activity under a modified strict scrutiny standard, the basic assumption of the decision is that the speech the statute prohibits is not entitled to First Amendment protection.[429] The *Foley* court stated that "[t]he speech-conduct sought to be prohibited by Penal Law [section] 235.22—the endangerment of children through the dissemination of sexually graphic material over the Internet—does not merit First Amendment protection."[430] The *Foley* court characterizes the speech prohibited by the statute as speech "used to further the sexual exploitation of children"[431] and, under *Kufrovich* and *Powell,* "does not enjoy constitutional protection."[432]

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425 *See* Crawford v. Lungren, 96 F.3d 380, 384-86 (9th Cir. 1996); *Sebago*, 211 Cal. App. 3d at 1382.

426 *Hsu*, 82 Cal. App. 4th at 987.

427 *R.A.V.*, 505 U.S. at 382; City of Fresno v. Press Communications, Inc., 31 Cal. App. 4th 32, 40 (Cal. Ct. App. 1994).

428 *Sebago,* 211 Cal. App. 3d at 1382.

429 *Foley*, 94 N.Y.2d at 683.

430 *Id.*

431 *Id.*

432 *Kufrovich*, 997 F. Supp. at 252; *Powell*, 1 F. Supp. 2d at 1420.

Both *Kufrovich* and *Powell* considered First Amendment challenges to the constitutionality of 18 U.S.C. § 2422(b), which provides:

> whoever, using any facility or means of interstate or foreign commerce, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of [eighteen] years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than [ten] years, or both.[433]

Kufrovich rejected a First Amendment challenge to the constitutionality of the statute based on *Reno I*.[434] *Kufrovich* characterized the statutory prohibition as one to control conduct that may incidentally involve speech, in contrast to the CDA, which purported to control the content of the speech and was held unconstitutional in *Reno I*.[435] *Powell* rejected the First Amendment challenge to the statute because the statute prohibited the conduct of enticing a minor to engage in a sexual act that itself is illegal and not the content of any speech.[436]

Foley's reliance on *Kufrovich* and *Powell* is not persuasive. First, 18 U.S.C. § 2422(b), unlike section 235.22 of the New York Penal Law and section 288.2(b) of the California Penal Code, does not purport to identify or define the speech that is prohibited by the statute.[437] To the contrary, the statute is directed solely to conduct (persuasion, inducement, enticement, coercion) that may or may not involve speech.[438] In contrast, the statutes that regulate the dissemination of harmful matter to minors over the Internet define the content of the regulated speech by reference to harmful matter.[439] Second, 18 U.S.C. § 2422(b) is applicable solely to encouraging conduct for which any person may be criminally prosecuted; it is a statute directed at the solicitation of an activity that is criminal if performed by any person.[440] In contrast, the statutes regulating the

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433 *Kufrovich*, 997 F. Supp. at 252; *Powell*, 1 F. Supp. 2d at 1420.

434 *Kufrovich*, 997 F. Supp. at 253-54.

435 *Id.* at 254.

436 *Powell*, 1 F. Supp. 2d at 1422.

437 *See* 18 U.S.C. § 2422(b) (Supp. V 1999).

438 *Id.*

439 *See e.g.*, CAL. PENAL CODE §§ 288.2 (b) (West 1999), 313 (West 1999).

440 *Kufrovich*, 997 F. Supp. at 254; *Powell*, 1 F. Supp. 2d at 1422.

content of Internet communications disseminating harmful matter to minors, even with an intent to seduce or lure, themselves create criminal liability regardless of whether the resulting conduct of the sender or recipient is a criminal offense, and in many cases the resulting seduction, for example, would not be a criminal offense.[441] It is the content of the message of the communication that the dissemination statutes address and prohibit.[442] Federal statute 18 U.S.C. § 2422(b) does not address or prohibit the content of any message.[443] *Kufrovich* and *Powell* do not address the First Amendment issues raised by the statutes prohibiting the dissemination of harmful matter to minors over the Internet.

The assumption of the *Foley* court that statutes criminalizing the dissemination of harmful matter to minors over the Internet, if sent with the intent to lure or seduce, are not content-based regulations of speech is not supported by its cited authority.

3. NECESSITY AND OVERBREADTH.

Hsu acknowledged that regulation of the dissemination of harmful matter to minors over the Internet, even with the intent to seduce requirement, is a content-based regulation of speech and its constitutionality is subject to judicial review under the strict scrutiny standard.[444] However, using that standard of review, *Hsu* assumed the regulation is necessary to serve a compelling state governmental interest, and is narrowly drawn and not overbroad because it does not inhibit otherwise permissible communications between adults.[445] *Hsu*'s assumptions are questionable because they are based on a misperception of the nature of the Internet.

Internet communications made criminal by statutes prohibiting the dissemination of harmful matter to minors enjoy First Amendment protection if transmitted to adults.[446] As the court explained in *Sable Communications of California,*

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[441] For example, if the recipient of the Internet communication was known by the sender to be an adult.

[442] *See e.g.*, CAL. PENAL CODE §§ 288.2 (b) (West 1999), 313 (2001) (West 1999).

[443] *Kufrovich*, 997 F. Supp. at 254; *Powell*, 1 F. Supp. 2d at 1422.

[444] *Hsu*, 82 Cal. App. 4th at 988.

[445] *Id.*

[446] Berry v. City of Santa Barbara, 40 Cal. App. 4th 1075, 1083-85 (Cal. Ct. App. 1995). Section 288.2(b) defines the prohibited harmful matter as matter defined by section 313 of the California Penal Code. Matter deemed harmful to minors under section 313 is not necessarily obscene when viewed by adults. *Id.* at 1081-83. If section 288.2(b) is facially overbroad un-

Inc. v. FCC:

> Sexual expression [that] is indecent but not obscene is protected by the First Amendment . . . . 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. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. [Citations.] The Government may serve this legitimate interest, but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms[']. [Citations.] It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.[447]

Under *Sable*, the state legislatures have the constitutional power to enact laws designed to keep harmful matter from minors, even though the same matter judged by adult standards is entitled to First Amendment protection.[448] However, a valid law must be necessary and narrowly drawn to serve that interest without unnecessarily interfering with First Amendment freedoms.[449]

Application of strict scrutiny review involves the following three-part analysis: (1) does the restriction on speech serve a compelling state interest; (2) is it necessary to serve that interest; and (3) is it narrowly drawn to achieve only that

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der the First Amendment because the banned content is defined by reference to section 313's *harmful to minors* standard, its constitutionality could be upheld by construing it to apply only when the transmitter sends obscene matter; obscene matter enjoys no First Amendment protection. *Id.* This construction eliminates much of the overbreadth problem, and when possible a statute is construed to make it constitutional. Public Citizen v. Department of Justice, 491 U.S. 440, 465-66 (1989). However, a court may not under the guise of interpretation wholly rewrite a law to preserve its constitutionality. City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 272 (Cal. 1970). Matter indecent to minors but not to adults is defined in section 313, and matter obscene to all persons is defined in section 311. CAL. PENAL CODE §§ 311, 313 (West 1999). To apply the regulation solely to obscene matter requires the excision from section 288.2(b) of the reference to section 313 and insertion of section 311 in its place.

[447] *Sable Communications*, 492 U.S. at 126.

[448] Kash Enter., Inc. v. City of Los Angeles, 19 Cal. 3d 294, 302 (Cal. 1977); *Sebago*, 211 Cal. App. 3d at 1381.

[449] *Reno I*, 521 U.S. at 874.

interest.[450] States are said to have a compelling interest in protecting the welfare of minors and in preventing minors from gaining access to matter deemed harmful to them.[451] However, it is doubtful the regulations criminalizing the dissemination of harmful matter to minors over the Internet are necessary or narrowly drawn to serve only that interest.

a. Necessity.

Hsu assumes without discussion that a statute's criminalization of the dissemination of harmful matter to minors over the Internet with an unsavory intent is a necessary regulation within the strict scrutiny standard for judging the First Amendment validity of the statute.[452] The necessity element of a First Amendment strict scrutiny review is similar to the benefit to the state element in a *Pike* balancing test evaluation of the validity of the statute under the Dormant Commerce Clause.[453]

The legislative history of section 288.2(b) of the California Penal Code cites few concrete examples of Internet child stalking, with only a single example involving a California perpetrator.[454] A casual review of newspaper articles reporting Internet communications potentially violative of section 288.2(b) shows there may be many perpetrators but few victims.[455] The *victims* appear overwhelmingly to be either adult investigative reporters or police officers. Except for sting operations, there may be few completed crimes. When a statute imposes substantial burdens on First Amendment rights and produces minimal benefits, the courts have recognized that "'the [s]tate may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable

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[450] *See Engler,* 55 F. Supp. 2d at 748 (citing Mainstream Loudoun v. Board of Trustees of Loudon County Library, 24 F. Supp. 2d 552, 564-65 (E.D. Va. 1998)).

[451] *Sable Communications*, 492 U.S. at 126; FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978).

[452] *Hsu,* 82 Cal. App. 4th at 988.

[453] *See* Part VI.B.3.c., *infra.*

[454] *See* SEN. COMM. ON PUBLIC SAFETY, ANALYSIS OF ASSEM. BILL NO. 181 (1997-1998 Cal. Reg. Sess.), *as amended* Apr. 8, 1997, COMMENT ¶ 2, *available at* http://www.leginfo.ca.gov/bilinfo.html.

[455] *See, e.g., Vigilante Sets Traps to Catch Pedophiles on the Net,* SAN DIEGO UNION-TRIB., July 30, 2000, at A1; *Former Teacher Given Probation in Internet Pornography Sting,* SAN DIEGO UNION-TRIB., January 27, 2001, at B3; *Cops Prowl Web to Trap Pedophiles,* SAN DIEGO UNION-TRIB., October 3, 1999, at A1.

when its limitations on freedom of speech are balanced against the benefits gained from those limitations.'"[456]

None of the reported decisions involving prosecutions of persons charged with violation of statutes prohibiting the dissemination of harmful matter to minors over the Internet are based on receipt by a minor of the communication.[457] All of the reported prosecutions, including *Foley, Hatch, Hsu* and *Barrows II*, are based on sting operations—the purported victims have all been adult law enforcement officers or investigative reporters.[458] As a result, the convictions reviewed in *Foley, Hatch, Hsu* and *Barrows II* were not for violations of the statutes but rather for attempts to violate the statutes.[459] Even *Powell* resulted from a sting operation.[460] If there are few minors being subjected to harmful matter over the Internet, there may not be a compelling necessity for the statutes.

b. Overbreadth - Narrowly Drawn.

A law is narrowly drawn only if it contains the "least restrictive means to further the articulated interest."[461] The regulation must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy."[462] A statute is invalid for overbreadth when on its face it criminalizes a substantial amount of protected, as well as unprotected, speech[463] and therefore chills First Amendment protected speech.[464]

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[456] Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir. 1988) (citations omitted).

[457] *Foley*, 94 N.Y.2d at 668; *Barrows I*, 667 N.Y.S.2d at 672; *Hatch*, 80 Cal. App. 4th at 170; *Hsu*, 82 Cal. App. 4th at 976.

[458] *Id.*

[459] *Id.*

[460] *Powell*, 1 F. Supp. 2d at 1420.

[461] *Sable Communications*, 492 U.S. at 126.

[462] *Frisby*, 487 U.S. at 485.

[463] *Antoine*, 48 Cal. App. 4th at 495.

[464] Bailey v. City of National City, 226 Cal. App. 3d 1319, 1331 (Cal. Ct. App. 1991); New York v. Ferber, 458 U.S. 747, 768-769 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (stating "[O]verbreadth . . . must be real substantial, judged in relation to the statute's plainly legitimate sweep.").

Hsu is the only state court decision that considers the overbreadth issue under the First Amendment of a statute prohibiting the dissemination of harmful matter to minors over the Internet.[465] *Hsu* assumed that section 288.2(b) of the California Penal Code was not overbroad under the First Amendment because it does not criminalize protected communications between adults.[466] This assumption appears unwarranted.

Because of the borderless nature of the Internet, the sender of a message not subject to criminal liability in the state from which the message is sent may be subject to criminal liability in the state in which the message is received.[467] Similarly, the sender of a message subject to criminal liability in the originating state may not be subject to criminal liability in the state in which the message is received.[468] In this context, the overbreadth issue under the First Amendment is similar to the exportation of a state's domestic policies under the Dormant Commerce Clause.[469] First, in numerous states an eighteen-year-old man can seek sexual liaisons with females he knows to be sixteen and seventeen years old; there is presumably no bar against exchanging indecent matter with these consenting persons to induce that liaison, which matter may even be sent with the intent to seduce.[470] Although this speech is protected in those states, the message sender faces criminal liability in California under section 288.2(b) if the offending message is transmitted from California, is remotely retrieved in California, or is electronically routed through a computer in California.[471] Because an Internet correspondent's e-mail address is a logical rather than geographic construct, it is ordinarily impossible for the sender to know the physical location of his correspondent.

Hsu's assumption that the criminalization of communications disseminating harmful matter to minors over the Internet does not criminalize otherwise protected speech between adults appears unsupportable. It results in a First Amendment overbreadth position that ignores the nature of the Internet and

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[465] *Hsu*, 82 Cal. App. 4th at 989.

[466] *Id.*

[467] *See Am. Libraries Ass'n*, 969 F. Supp. at 170-72.

[468] *Id.*

[469] Gaylord, *supra* note 84.

[470] *See, e.g.*, ALA. CODE § 13A-6-110 (Michie Supp. 2000); IND. CODE ANN. § 35-42-4-6 (West 1998); N.M. STAT. ANN. § 30-37-3.2 (Michie Supp. 2001).

[471] *See supra* Part VI, B 3.a.

seems to permit state imposition of unrestricted content regulations on Internet communications.

4. RESULT OF ASSUMPTIONS.

The state court decisions assumed that the intent of an Internet communication determines whether the regulation is a content-based regulation of speech, that the regulations are not entitled to First Amendment protection because they are designed to prohibit the exploitation of minors, and that the regulations are necessary and not overbroad because they do not inhibit otherwise protected speech.[472] Elimination of those assumptions undermines the foundation of the conclusions in *Foley, Hatch* and *Hsu* that laws criminalizing the dissemination of harmful matter to minors over the Internet are not invalid under the First Amendment. Without those assumptions, *Reno I, Reno II, Engler, Johnson* and *PSINet* are not distinguishable and the First Amendment compels different results from those reached in *Foley, Hatch* and *Hsu.*

Shorn of the assumptions made by the state courts, laws criminalizing the dissemination of harmful matter to minors over the Internet are content-based regulations of speech subject to First Amendment strict scrutiny review.[473] Apart from the strict scrutiny requirement of a compelling state interest and necessity to fulfill that interest, both of which have been discussed at length in this article, a constitutional regulation of speech cannot be overbroad.[474]

Under the First Amendment, a statute is overbroad if it chills Internet users from engaging in constitutionally protected speech by threatening them with criminal sanctions.[475] *Reno I* evaluated the CDA, which criminalized knowingly communicating to persons under the age of eighteen years indecent or patently offensive speech.[476] *Reno I* recognized that although the government has an interest in protecting children from harmful matter, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults."[477] *Reno I* concluded that because of the nature of the Internet, substantial amounts of protected speech could be subjected to criminal prosecution under the CDA and por-

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[472] *See supra* Part VI C.

[473] *See Hsu*, 82 Cal. App. 4th at 988.

[474] *Id.* at 988-91.

[475] *Reno I*, 521 U.S. at 859-61.

[476] *Id.*

[477] *Id.* at 875.

tions of the CDA were therefore invalid for overbreadth.[478] *Reno I* expressed two principal reasons for concluding the CDA was overbroad.[479] First, the CDA banned matter that was indecent or patently offensive without incorporating the additional elements under *Miller* that the matter appeal to the prurient interest and lack serious literary, artistic, political or scientific value.[480] The CDA therefore facially banned communications of large amounts of protected matter with serious educational or other value.[481] Second, allowing the legislature to define the banned matter based on whether it offended community standards, a sender would incur criminal liability under the CDA for a transmission of protected speech that his home community deemed neither indecent nor patently offensive, if the community in which it was received thought otherwise.[482]

Both section 288.2(b) of the California Penal Code and section 235.22 of the New York Penal Law define the prohibited content of the harmful to minors communication using the *Miller* standards,[483] and require the matter be sent with the intent to induce the minor to engage in sexual conduct.[484]

Under *Reno I*, the New York and California statutes criminalizing the dissemination of harmful matter to minors are invalid under the First Amendment for vagueness and overbreadth. Although incorporation of the *Miller* standards into the New York and California statutes may eliminate one of *Reno I's* overbreadth concerns, a second basis of *Reno I*'s overbreadth analysis remains applicable: the borderless nature of the Internet prohibits a clear and predictable definition of what content would be patently offensive to prevailing community standards.[485]

Furthermore, *Reno I* rejected the argument that the requirement of knowledge

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[478] *Id.* at 877-79.

[479] *Id.*

[480] *See* Miller v. California, 413 U.S. 15 (1973).

[481] *Reno I*, 521 U.S. at 877-79.

[482] *Id.* at 859-61.

[483] *Compare* section 235.20(6) of the New York Penal Law *and* section 313 of the California Penal Code *with Miller*, 413 U.S. at 15.

[484] CAL. PENAL CODE § 288.2(b) (West 1999); N.Y. PENAL LAW § 235.22 (McKinney 2000).

[485] *Barrows I*, 677 N.Y.S.2d at 683.

of the recipient's age insulates the innocent adult from criminal prosecution.[486] *Reno I* recognized that most Internet communications are open to anyone and expressed concern of the possible heckler's veto by which an opponent of a protected message "might simply log on and inform the would-be discoursers" of the presence of a minor, thereby chilling any further communication among adult participants.[487] The potential of the heckler's veto, together with the chilling effect of the penal aspect of the CDA, could "cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[488] Although the goals of the statute may be laudable, a statute is invalid for overbreadth if it chills protected speech by threatening to attach criminal liability to persons engaged in protected speech.[489]

The variability among community standards, implicit in the regulatory statutes, also threatens to chill protected speech.[490] Because of the nature of the Internet, a sender could transmit matter protected in his or her domicile (because not deemed harmful under the community standards prevailing there), without knowing the recipient was downloading that matter in another state, and be subject to more stringent community standards for matter deemed appropriate for minors.[491] In *United States v. Thomas*, the danger of conflicting community standards creating criminal liability for cyberspace activity became reality.[492] In *Thomas*, a couple in California posted matter on their website that was not deemed obscene in California.[493] However, that matter was downloaded in Tennessee and formed the basis for prosecuting the couple under federal law using Tennessee community standards; the matter was deemed obscene under Tennes-

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[486] *Reno I*, 521 U.S. at 880.

[487] *Id.*

[488] *Id.* at 872.

[489] *Id.*

[490] The commentators have recognized the problems presented in applying the *Miller* "community standard" test to matter transmitted over the Internet. *See, e.g.*, Debra D. Burke, *Cybersmut And The First Amendment: A Call For A New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 108-13 (1996) (hereinafter Burke); Mark C. Alexander, *Jurisdiction And The Miller Obscenity Standard*, 8 SETON HALL CONST. L.J. 675, 677-80 (1998).

[491] United States v. Thomas, 74 F.3d 701, 710-16 (6th Cir. 1996).

[492] *Id.* at 705, 710-11.

[493] Burke, *supra* note 446, 9 HARV. J.L. & TECH. at 116-17.

see's more stringent standards.[494]

Although the *Thomas* court concluded that the application of Tennessee's standards posed no danger of chilling speech protected under the First Amendment, the court's rejection of the First Amendment challenge turned on the fact that the defendants allowed a person they knew to be a Tennessee citizen to access their matter in Tennessee.[495] Access to the defendants' website bulletin board was limited to those who had made applications and been granted membership, and to whom passwords had been issued.[496] Because defendants screened and controlled access to their Internet communications, *Thomas* reasoned that

> [d]efendants' First Amendment issue . . . is not implicated . . . . This is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing. . . . [D]efendants had in place methods to limit user access in jurisdictions where the risk of a finding of obscenity was greater than that in California. . . . If Defendants did not wish to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused [access to persons] in those districts, thus precluding the risk of liability.[497]

The *Thomas* court was therefore presented with a situation in which the Internet sender had the technical ability to designate not only the locale at which its website could be viewed and actual knowledge that it was viewed at that locale, but also the identity of the viewer to whom the password had been issued.[498]

Unlike application of the Tennessee community standards in *Thomas*, section 288.2(b) of the California Penal Code and section 235.22 of the New York Penal Law do not predicate criminal liability on the defendant's knowledge of the identity of the recipient and that the recipient is a California or New York domiciliary to whom California's or New York's community standards will be applied.[499] Because of the nature of the Internet a sender, even though he or she

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[494] *Thomas*, 74 F.3d at 710-11.

[495] *Id.* at 711.

[496] *Id.* at 711-12.

[497] *Id.* at 711.

[498] *Id.*

[499] *See* CAL. PEN. CODE § 288.2 (b) (West 1999); §313 (West 1999); and N.Y. PENAL

knows the recipient is a minor and has the requisite intent and purpose, cannot know the geographic locale of the recipient and whether matter acceptable in the sender's domicile might be harmful matter in the recipient's domicile.[500] The sender must therefore self-censor for fear that speech otherwise protected in his or her state might enter another state and trigger criminal liability.[501] For example, the *Pataki* court noted that the Broadway play "Angels in America," which concerned homosexuality and AIDS and received two Tony Awards and a Pulitzer prize, was acceptable in New York but condemned in North Carolina.[502] *Reno I* expressed similar concerns that the variability of community standards could chill protected speech.[503]

The statutes criminalizing the dissemination of harmful matter to minors over the Internet appear to suffer from substantial facial overbreadth by criminalizing potentially protected speech.[504] Even assuming the statute is necessary to serve a substantial state interest, the state interest can be advanced by less intrusive means, including receiver-based controls or filters, as discussed in *Shea v. Reno*,[505] that impose less onerous burdens on protected speech.[506]

VII. CONCLUSION

The United States Congress and the legislatures of several states perceived that minors are being exposed to harmful matter by Internet transmissions sent by predatory adults. To combat this perceived danger and protect the country's minors from contamination and exploitation, Congress and some state legislatures passed laws criminalizing the dissemination of harmful matter to minors

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LAW § 235.22 (McKinney 2000).

[500] *RenoI*, 521 U.S. at 878.

[501] *Id.*

[502] *Am. Libraries Ass'n*, 969 F. Supp. at 182.

[503] *Reno I*, 521 U.S. at 878.

[504] *Id.*

[505] Shea v. Reno, 930 F. Supp. 916, 931-34 (S.D.N.Y. 1996), *Johnson*, 194 F.3d at 1157; and *Reno I*, 521 U.S. at 854-55.

[506] *See* Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 753-60 (1996) (invalidating regulation as overbroad when recipient-based controls available); *Engler*, 55 F. Supp. 2d at 750-51.

over the Internet. Some of the laws criminalize the mere transmission of the harmful matter and some criminalize the transmission of the harmful matter only if sent with the intent to lure or seduce the minor into sexual activity. Harmful matter is variously defined, often with reference to various community standards. Furthermore, the age of minority varies among the states.

The borderless nature of the Internet has challenged Congress and state legislatures in their attempts to formulate criminal prohibitions of Internet communications. Internet transmissions cannot be restricted to receipt by adults or in certain geographic areas. Therefore, the prohibiting regulations directed to protecting minors inevitably affect adult or otherwise legal communication and face challenges of violation of First Amendment speech protections.

State legislatures face an additional problem resulting from the nature of the Internet. It is currently impossible to limit Internet communications to intrastate commerce. The state regulations of Internet communications inevitably affect interstate commerce and face not only First Amendment challenges but also Dormant Commerce Clause challenges.

To date, the federal courts have recognized the issues raised by the nature of the Internet, and have held the federal and state efforts to criminalize the dissemination of harmful matter to minors over the Internet to be unconstitutional. State courts, to the contrary, have reviewed the constitutional issues of the legislation without acknowledged recognition of the nature of the Internet. The state courts have made unsupportable assumptions that Internet communications and state criminal jurisdiction can be limited to intrastate conduct and that no protected adult speech is inhibited. Therefore, regulations prohibiting the dissemination of harmful matter to minors over the Internet are not subject to the restrictions of the Dormant Commerce Clause and the communications are not entitled to the protection of the First Amendment.

The dichotomy of results between state and federal courts cannot endure because the constitutional issues arise under the Federal Constitution. It appears the state court decisions are inconsistent with the United States Supreme Court decision in *Reno I*, which they are not authorized to disregard. The state courts' attempts to distinguish the First Amendment principles set forth in *Reno I* are unpersuasive. In addition, the United States Supreme Court will at some time decide the federal Dormant Commerce Clause question.[507] In the meantime, state courts may continue to ignore the reality of cyberspace and uphold laws intended to solve a perceived problem that has not persuasively been shown to exist.

Furthermore, it appears states cannot, by regulating the content of Internet communications, constitutionally solve the perceived problem. Because of the

[507] The United States Supreme Court declined to review *Foley* by denying a petition for writ of certiorari. Foley v. New York, 531 U.S. 875 (2000).

borderless nature of the Internet, it is inherently a mode of interstate commerce, and regulations of the content of Internet communications are subject to the limitations of the Dormant Commerce Clause. As the Internet currently exists and as long as different states have different community standards for the definition of harmful matter and different ages for the definition of a minor, state penal regulations of Internet content disseminated to minors will inevitably export the states' domestic policies into states with different domestic policies and impose inconsistent burdens on Internet users in violation of the Dormant Commerce Clause. It is also doubtful that any prohibition of the dissemination of harmful matter to minors over the Internet can be drafted to withstand Dormant Commerce Clause invalidation under the *Pike* balancing test. The local benefits of the regulation have not been established to offset the burdens on interstate commerce that are considered in both the Dormant Commerce Clause extraterritoriality and national uniform regulation tests.

It is also doubtful that Congress or the states can, by regulating the content of interstate communications, constitutionally proscribe the dissemination of harmful matter to minors over the Internet under the First Amendment. Under strict scrutiny review the regulations must be necessary and not overbroad by prohibiting otherwise protected adult speech. As with the Dormant Commerce Clause consideration of local benefit, it has not been established that under strict scrutiny analysis the prohibition is necessary to further the government's interest of protecting minors. Furthermore, because of the nature of the Internet, prohibition of Internet communications harmful to minors cannot currently be implemented without also inhibiting otherwise legal communications between adults. Congress and the states may be limited to regulating conduct rather than speech, as Congress has done in 18 U.S.C. § 2422(b) and some states have done in conduct-based rather than content-based regulations.[508] There is scant evidence these enactments have been insufficient to address the need for the protection of minors from the receipt of harmful matter over the Internet.

The Commerce Clause and the First Amendment have been important aspects of the United States Constitution since the ratification of the Constitution and Bill of Rights by the original states. The Commerce Clause of the Constitution

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[508] *See, e.g.*, N.M. STAT. ANN. § 30-37-3.2(B)(Michie Supp. 2001), which provides that child luring consists of a person knowingly and intentionally inducing a child under sixteen years of age, by means of a computer, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least three years older than the child - whoever commits child luring is guilty of a fourth-degree felony. §30-37-3.2(B) was not challenged in *Johnson*. The statute appears to require completion of the sexual conduct and is not directed to the content of an Internet message. Of course, state conduct rather than speech proscriptions are still vulnerable to Dormant Commerce Clause challenge if the effect of the proscription is to export the states' domestic policies into other states that have different domestic policies.

has sought to minimize the exportation of a state's parochial interests into other states and a state's interference with commerce, including communications, among the states. The Commerce Clause is an important aspect of the allocation of political authority in our country. The First Amendment to the Constitution has sought to maximize the freedom of communications between individuals in all states by limiting the state and federal governments' attempts to control the content of those communications.

The Internet is a new form of communication that was impossible for the ratifiers of the Constitution and the Bill of Rights to anticipate. Nevertheless, the principles of the Commerce Clause and First Amendment remain relevant and may be applied to this new medium, at least in the context of the dissemination of harmful matter to minors over the Internet. The federal courts have recognized the application of constitutional principles to guide the evaluation of the effects of Internet communications. To date, the state courts have displayed the parochialism I suggest the Constitution and Bill of Rights were designed to minimize. It is hoped that in the future all courts will have the confidence in the continued applicability of constitutional principles and trust the guidance of those principles in the evaluation of regulation of Internet communications. By the application of those principles the allocation of political authority among the states and individual freedom of expression will best be preserved.

APPENDIX

SELECTED TEXTS OF STATUTES CRIMINALIZING THE DISSEMINATION OF HARMFUL MATTER TO MINORS OVER THE INTERNET.

A. FEDERAL

CDA. The Communications Decency Act of 1996, codified in 47 U.S.C. § 223, provides:

(a) Whoever—

(1) in interstate or foreign communications— [¶] . . . [¶]

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, [¶] any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient . . . is under [eighteen] years of age, regardless of whether the maker of such communication placed the call or initiated the communication; [or] [¶] . . .[¶]

(2) knowingly permits any telecommunications facility under his [or her] control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined . . . or imprisoned . . . or both.

47 U.S.C. § 223(d) provides:

(d) Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

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

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined . . . or imprisoned . . . or both.

COPA. The Child Online Protection Act, codified in 47 U.S.C. § 231, provides:

> [(a)](1) Prohibited Conduct [¶] 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 . . . [or] imprisoned . . . or both.

Material harmful to minors is defined in 47 U.S.C. § 231(e)(6) as

> 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.

A minor is a person under seventeen years of age (§ 231(e)(7)). The term "commercial purposes" is defined in section 231(e)(2)(A) and (B).

B. STATES

1. California.

Section 288.2(b) of the California Penal Code provides:

> Every person who, with knowledge that a person is a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by electronic mail, the Internet, as defined in Section 17538 of the

> Business and Professions Code, or a commercial online service, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent, or for the purpose of seducing a minor, is guilty of a public offense . . . .

The term "harmful matter" is defined in section 313 of the California Penal Code:

> (a) "Harmful matter" means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

The California statute provides three defenses to a charge of violation of section 288.2(b):

> It shall be a defense to any prosecution under this section that a parent or guardian committed the act charged in aid of legitimate sex education. (§ 288.2(c).)

> It shall be a defense in any prosecution under this section that the act charged was committed in aid of legitimate scientific or educational purposes. (§ 288.2(d).)

> It does not constitute a violation of this section for a telephone corporation, . . . a cable television company . . . , an Internet service provider, or commercial online service provider, to carry, broadcast, or transmit messages described in this section . . . . (§ 288.2(e).)

2. Michigan.

Section 722.675 of the Michigan Compiled Laws Annotated provides that:

> (1) A person is guilty of disseminating sexually explicit matter to a minor if that person does either of the following:

(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.

(b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors.

(2) A person knowingly disseminates sexually explicit matter to a minor if the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.

(3) Except as provided in subsection (6), a person knows the nature of matter if the person either is aware of its character and content or recklessly disregards circumstances suggesting its character and content.

(4) Except as provided in subsection (6), a person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age.

(5) Disseminating sexually explicit matter to a minor is a felony punishable by imprisonment for not more than 2 years or a fine of not more than $10,000.00, or both. In imposing the fine, the court shall consider the scope of the defendant's commercial activity in disseminating sexually explicit matter to minors.

(6) Subsections (3) and (4) do not apply to an internet or computer network service provider who in good faith, and without knowledge of the nature of a sexually explicit matter or the status of a minor, provides the medium for disseminating a sexually explicit matter to the minor.

(7) This section does not apply if a person disseminates sexually explicit matter to a minor by means of the [I]nternet or a computer network unless 1 or both of the following apply:

(a) The matter is obscene as that term is defined in section 2 of *1984 PA 343*, MCL 752.362.

(b) The prosecuting attorney proves that the person disseminated the matter to 1 or more specific minors and knew his or her status as a minor.

(8) A violation or attempted violation of this section involving the [I]nternet or a computer, computer program, computer system, or computer network occurs if the violation originates, terminates, or both originates and terminates in this state.

(9) A violation or attempted violation of this section involving the [I]nternet or a computer, computer program, computer system, or computer network may be prosecuted in any jurisdiction in which the violation originated or terminated."

3. New York.

Section 235.21(3) of the New York Penal Law provides that it is a crime for a person,

> 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 . . . to initiate or engage in such communication with a person who is a minor.

Section 235.22 of the New York Penal Law provides that:

> A person is guilty of disseminating indecent material to minors . . . when:
>
> 1. 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, he intentionally uses any computer communication system . . . to initiate or engage in such communication with a person who is a minor; and
>
> 2. by means of such communication he importunes, invites or induces a

> minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

The term "harmful to minors" is defined in section 235.20(6) of the New York Penal Law as:

> that 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, lack serious literary, artistic, political and scientific value for minors.

4. New Mexico.

Section 30-37-3.2 of the New Mexico Statutes provides:

> A. 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. Whoever commits dissemination of material that is harmful to a minor by computer is guilty of a misdemeanor.
>
> . . .
>
> C. In a prosecution for dissemination of material that is harmful to a minor

by computer, it is a defense that the defendant has:

(1) in good faith taken reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to indecent materials on computer, including any method that is feasible with available technology;

(2) restricted access to indecent materials by requiring the use of a verified credit card, debit account, adult access code or adult personal identification number; or

(3) in good faith established a mechanism such as labeling, segregation or other means that enables the indecent material to be automatically blocked or screened by software or other capability reasonably available to persons who wish to effect such blocking or screening and the defendant has not otherwise solicited a minor not subject to such screening or blocking capabilities to access the indecent material or to circumvent the screening or blocking.

D. In a prosecution for dissemination of material that is harmful to a minor by computer, a person shall not be held to have violated the provisions of this section solely for providing access or connection to or from a facility, system or network not under the person's control, including transmission, downloading, intermediate storage, access software or other related capabilities that are incidental to providing access or connection and that do not include the creation of the content of the communication.

E. The limitations provided by Subsection D of this section shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing dissemination of indecent material by computer or who knowingly advertises the availability of indecent material by computer. The limitations provided by Subsection D of this section shall not be applicable to a person who provides access or connection to a facility, system or network that disseminates indecent material by computer that is owned or controlled by him.

F. No employer shall be held liable for the actions of an employee or

agent unless the employee's or agent's conduct is within the scope of his employment or agency and the employer, having knowledge of such conduct, authorizes or ratifies the conduct or recklessly disregards the conduct.

5. *Virginia.*

Section 18.2-391 of the Code of Virginia provides:

> A. It shall be unlawful for any person knowingly to sell, rent or loan to a juvenile, knowing or having reason to know that such person is a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:
>
> 1. Any picture, photography, drawing, sculpture, motion picture film, in any format or medium, electronic file or message containing an image, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles, or
>
> 2. Any book, pamphlet, magazine, printed matter however reproduced, electronic file or message containing words, or sound recording which contains any matter enumerated in subdivision 1 of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

Section 18.2-390 of the Code of Virginia defines "juvenile," "harmful to juveniles" and "knowingly" as follows:

> (1) "Juvenile" means a person less than eighteen years of age.
>
> . . .
>
> (6) "Harmful to juveniles" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it (a) predominantly appeals to the prurient, shameful or morbid interest of juveniles, (b) is patently offensive to

prevailing standards in the adult community as a whole with respect to what is suitable material for juveniles, and (c) is, when taken as a whole, lacking in serious literary, artistic, political or scientific value for juveniles.

(7) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both (a) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (b) the age of the juvenile, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such juvenile.