

# THERE IS A NEED TO REGULATE INDECENCY ON THE INTERNET

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## I. INTRODUCTION

The Internet has vast potential for good, but if untamed, it also has potential for great harm. For example, people may use computers to distribute obscenity and child pornography, both of which are not protected by the First Amendment. In 1985, U.S. Senator Paul Trible (R-Va.) introduced a bill to prohibit use of computers in interstate commerce to transmit obscene material or child pornography.<sup>1</sup> The Trible bill did not pass, but in 1988 Congress amended federal child pornography laws to specifically encompass use of computers<sup>2</sup> and also amended a federal law prohibiting interstate distribution of obscenity to encompass use of a “facility or means of interstate commerce for the purpose of transporting obscene material.”<sup>3</sup> As amended, Section 1465 has been successfully applied to the use of computers to transport obscenity in interstate commerce.<sup>4</sup>

People may also use computers to transmit indecent content. While the Supreme Court has said that indecent communications are within the protection of the First Amendment,<sup>5</sup> the Court has also said that such communications are “not entitled to absolute constitutional protection under all circumstances”<sup>6</sup> and has upheld regulation of indecency to pro-

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<sup>1</sup> S. 1305, 99th Cong. (1985).

<sup>2</sup> 18 U.S.C. § 2251 (1988).

<sup>3</sup> 18 U.S.C. § 1465 (1994).

<sup>4</sup> See *Thomas v. United States*, 74 F.3d 701 (6th Cir. 1996), cert. denied, 117 S. Ct. 74 (1996).

<sup>5</sup> See, e.g., *Sable Communications of Cal., Inc., v. FCC*, 492 U.S. 115 (1989). As discussed in Section IX of this Article, it is Morality in Media’s opinion that in contexts where indecent speech amounts to a nuisance, it is unprotected by the First Amendment.

<sup>6</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (plurality opinion).

tect children,<sup>7</sup> adults in the privacy of the home,<sup>8</sup> order and morality,<sup>9</sup> and the integrity of neighborhoods.<sup>10</sup>

As more and more minors gain access to the Internet,<sup>11</sup> the potential for minors being exposed to indecent material is expected to grow.<sup>12</sup> Consequently, pedophiles seek out minors through the Internet with growing frequency.<sup>13</sup> In other instances, minors themselves seek out indecent material. In a September 18, 1996 letter to Morality in Media, Dr. Victor B. Cline, a clinical psychologist and professor emeritus at the University of Utah, had this to say about boys who seek out pornography on the Internet:

I have been concerned about my . . . patients who use the Internet to access pornography to feed their addiction/illness. I even have boys in their early teens getting into that stuff with disastrous consequences. They tell me they actively search for porn on the Internet keying in such words as sex, nudity, pornography, obscenity, etc. Then once they have found how to access it they go back again and again—just like drug addicts.<sup>14</sup>

In response to these problems, Congress enacted the Communications Decency Act of 1996.<sup>15</sup> The Act includes provisions (hereinafter “CDA provisions”) intended to restrict minors’ access to indecent materials on the Internet. The CDA provisions make it unlawful in interstate or foreign communications for a person (1) to “knowingly” use an interactive computer service to send indecent communications to a “specific”

<sup>7</sup> *Id.* at 749-50.

<sup>8</sup> *Id.* at 748-49.

<sup>9</sup> *Barnes v. Glen Theatre*, 501 U.S. 560, 568-69 (1991) (plurality opinion).

<sup>10</sup> *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976). *See also Barnes*, 501 U.S. at 584-85 (1991) (Souter, J., concurring).

<sup>11</sup> See, e.g., Leslie Miller, *Surfing kids share their cyberspace view*, USA TODAY, Oct. 24, 1996, at D4; Leslie Miller, *How many kids are really on line?*, USA TODAY, Oct. 22, 1996, at 1D; and Geraldine Fabrikant, *The Young and Restless Audience: Computers and Videos Cut Into Children’s Time for Watching TV and Ads*, N.Y. TIMES, Apr. 8, 1996, at D1.

<sup>12</sup> See, e.g., Jeffrey Benkoe, *Web ‘Parent Guide’ Finds Half of Reviewed Pages Not Kid Friendly*, Reuters/Variety Entertainment Wire Service, Jan. 10, 1996, available in LEXIS, Nexis Library, Reuters File; Steven Levy, *No Place For Kids?*, NEWSWEEK, July 3, 1995, at 47; Philip Elmer-Dewitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38; Victoria Shannon, *X-Rated Materials Are Easy to Find and Get But Tough to Block*, Wash. Post Wire Service, July 3, 1995, at F16; Peter H. Lewis, *Business as Usual: It’s Hot and Heavy on Cybersex Front*, N.Y. TIMES, Mar. 26, 1995, at D1.

<sup>13</sup> See, e.g., *FBI Investigating On-Line Sexual Solicitations of Teen-Agers*, N.Y. TIMES, June 11, 1995, at 25; Kim Murphy, *Youngsters Falling Prey to Seducers in Computer Web*, L.A. TIMES, June 11, 1995, at A1.

<sup>14</sup> Letter from Dr. Victor B. Cline to Morality in Media (Sept. 18, 1996) (on file with author).

<sup>15</sup> Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133 (1996).

minor or minors or to display indecent communications in a manner available to a minor<sup>16</sup> or (2) to "knowingly" permit a telecommunications facility under their control to be used for a prohibited purpose.<sup>17</sup>

Two federal district courts have issued preliminary injunctions, concluding that the plaintiffs are likely to succeed on the merits of their claims that the CDA provisions interfere with the right of adults to communicate indecently with each other.<sup>18</sup> On December 6, 1996, the United States Supreme Court noted probable jurisdiction in *Reno v. ACLU*.<sup>19</sup> Morality in Media submitted an *amicus curiae* brief to the Supreme Court in this case, and this article avoids whenever possible references to the opinions of either federal district court.

## II. INADEQUACY OF SCREENING TECHNOLOGIES

In order to head off regulation, the communications industry has embarked on a public relations campaign to promote parental use of screening technology to shield children from pornography on the Internet.<sup>20</sup> Past disappointing experiences with campaigns to combat drunk driving,<sup>21</sup> teen drug abuse,<sup>22</sup> smoking<sup>23</sup> and unsafe sex,<sup>24</sup> however, should caution against putting too much reliance on public service advertising campaigns, particularly in the long term.

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<sup>16</sup> 47 U.S.C.S. § 223(d)(1) (Law Co-op. Supp. 1996).

<sup>17</sup> 47 U.S.C.S. § 223(d)(2) (Law Co-op. Supp. 1996).

<sup>18</sup> *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996); *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996).

<sup>19</sup> *Reno v. ACLU*, 117 S. Ct. 554 (1996).

<sup>20</sup> See, e.g., Steve Lohr, *Plan to Block Censorship on Internet—Preemptory Effort at Self Regulation*, N.Y. TIMES, Mar. 13, 1996, at D4 (On-line service companies announced "campaign" to educate the public about, *inter alia*, software that allows parents to prevent children from accessing selected Internet sites. Some of the executives recognized that the effort is "partly a defensive step.").

<sup>21</sup> See, e.g., Matthew L. Wald, *A Fading Drumbeat Against Drunken Driving*, N.Y. TIMES, Dec. 15, 1996, §4, at 5; Matthew L. Wald, *Group Says Alcohol-Related Traffic Deaths Are Rising Again*, N.Y. TIMES, Nov. 27, 1996, at A23 (The group Mothers Against Drunk Driving (MADD) says "attention to the problem is waning.").

<sup>22</sup> See, e.g., Nancy Reagan, *Just Say 'Whoa'*, WALL ST. J., Jan. 23, 1996, at A14 ("I'm worried this nation is forgetting how endangered our children are by drugs . . . that the . . . momentum we had against drugs has been lost.").

<sup>23</sup> See, e.g., Jamie Talan, *Good News And Bad News*, NEWSDAY, June 27, 1989, at 7 (After 50,000 studies documenting the hazards of tobacco smoke, people are getting the message, but "29 percent of adult Americans . . . still smoke" and "only 18 percent of smokers said they were 'very concerned' about their health, and 24 percent said they were not concerned at all.").

<sup>24</sup> See, e.g., Jesse Green, *Just Say No?*, N.Y. TIMES MAG., Sept. 15, 1996, at 7 ("Gay men have had more than a decade to get the message [out about "Safe Sex"] . . . By some measures, the effort was amazingly successful . . . But by other measures . . . the effort has failed.").

It should also not be assumed that all parents are interested in their children,<sup>25</sup> are keeping abreast of the latest news,<sup>26</sup> and have overcome their fear of computers.<sup>27</sup> Households with two computers pose additional screening problems.<sup>28</sup> Yet, parental guidance and control are needed to protect children. "Technology is not the solution," said Albert Vezza, a senior research scientist at MIT, who is part of a group developing standards for filtering software. "It's just a tool. The real answer," he added, "is parenting: understanding what your kids are doing online, talking to them about it and guiding them."<sup>29</sup>

Parental failure to use available methods of keeping other sources of pornography out of the home should also caution against putting too much reliance on parental use of computer screening technology. One would think that every parent would know children can access pornography through the mails, telephone, and cable TV and would, therefore, have contacted the Postal Service,<sup>30</sup> phone companies,<sup>31</sup> and cable operators<sup>32</sup> to have it blocked before a problem arises. However, most parents do not act until after they discover a problem.<sup>33</sup>

<sup>25</sup> See, e.g., Mary B.W. Tabor, *Comprehensive Study Finds Parents and Peers Are Most Crucial Influences on Students*, N.Y. TIMES, Aug. 7, 1996, at A15 (The study concluded that at least one in four parents were "basically passive, preoccupied and downright negligent." The study's author said parents have become "seriously disengaged from their children's lives").

<sup>26</sup> See, e.g., *Few Are Interested in Most News Stories, Survey Finds*, LOS ANGELES TIMES, Dec. 30, 1995, at A4 (only one in four people surveyed pays very close attention to most news).

<sup>27</sup> See, e.g., Nicholas Negroponte, *homelessainfo.hwy.net*, N.Y. TIMES, Feb. 11, 1995, at A2 ("Most Americans over 30 . . . have been left out of the digital world . . . [T]he average age of an Internet user is 23 and rapidly dropping."); Stephen Williams, *Technophobia*, N.Y. NEWSDAY, May 21, 1994, at B1.

<sup>28</sup> Joshua Mills, *Rise of the Two-Computer Family*, N.Y. TIMES, June 29, 1995, at C9.

<sup>29</sup> Steve Lohr, *Practicing Safety on the Internet*, N.Y. TIMES, Sept. 21, 1995, at C1. See also Leslie Dickstein, *Cruise Control on the Information Highway*, N.Y. DAILY NEWS, Oct. 31, 1995, at 41 ("The key, say educators and technology experts, is parental guidance."); Elizabeth Corcoran, *Researchers Try to Set Standards; Technology Tackles Way To Block Out Information*, Wash. Post Wire Service, Oct. 30, 1995, at F15 ("Technology is not a substitute for good parenting," said Albert Vezza, associate director of MIT's laboratory for computer science).

<sup>30</sup> Parents can file with the Postal Service a statement that they do not desire to receive sexually oriented advertisements through the mails. 39 U.S.C. § 3010(b) (1997).

<sup>31</sup> See, e.g., *American Info. Enter. v. Thornburgh*, 742 F. Supp. 1255, 1261-62 (S.D.N.Y. 1990) ("any household can have its access to sexually explicit telephone services . . . blocked free of charge by contacting the telephone company").

<sup>32</sup> In order to restrict viewing of programming that is obscene or indecent, a cable operator is required, upon subscriber request, to provide a device by which a subscriber can prohibit viewing of a particular cable service. 47 U.S.C. § 624(d)(2) (1996).

<sup>33</sup> See, e.g., *Information Providers' Coalition v. FCC*, 928 F.2d 866, 873 (9th Cir. 1991) ("A parent often does not request central office blocking until after the minor has consummated a call and the parent has discovered it on the telephone bill . . . from a practical standpoint, central blocking is invoked only after the minor's physical and psychological well-being have been damaged.").

Parents do not act because they do not believe their innocent little cherubs or properly raised teens would be interested in smut. They do not act because they have too many other things to worry about to also be concerned with erecting barriers to protect against indecent material via the mails, telephone, TV, and now computers.<sup>34</sup> They do not act because of financial concerns,<sup>35</sup> language barriers, illnesses, or handicaps. What former FCC Commissioner Andrew Barrett said about the TV "V-chip" is also true when it comes to Internet screening technology: "The truth of the matter is that . . . the V-chip is great for responsible parents, but [it] will [not] have any significant influence with kids whose parents are not responsible."<sup>36</sup>

Even if parents utilize screening technology, they cannot thereafter rest assured that the technology will protect their children. For example, programs which identify specific sites as unsuitable have difficulty keeping up with the exploding number of new and changing sites.<sup>37</sup> Any screening technology that depends totally on voluntary ratings provided by content providers will suffer from noncompliance and poor judgment. Indecent material can also appear in sites intended for children.<sup>38</sup>

Furthermore, if parents or older siblings have unrestricted access to an online service or the Internet, they must be ever-watchful to avoid removing a block while a younger sibling is watching and to promptly restore the block after using a home computer. Otherwise, the protection will be gone. If governments and major companies cannot protect their computers against teen "hackers,"<sup>39</sup> it is hard to imagine how parents and

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<sup>34</sup> See, e.g., Leslie Miller, *Blocking controls let technology do the policing job*, USA TODAY, Aug. 27, 1996, at D6 (Most parents who wrote USA Today said they do not use screening technology, and according to Robin Raskin, editor of *Family PC*, a primary reason is that "it's one more thing you've got to maintain on an already complicated computer.").

<sup>35</sup> Prior to passage of the 1996 Communications Decency Act, federal Law required cable TV operators, upon request of a subscriber, to "provide (by sale or lease) a device with which the subscriber can prohibit viewing." 47 U.S.C. § 624(d)(2) (1996). See also Paul Schreiber, *PSC Vote Rings in Dial-It Services*, N.Y. NEWSDAY, Mar. 31, 1988, at 41 (call-blocking provided free for first 90 days only).

<sup>36</sup> *Parents' Responsibility*, BROADCASTING & CABLE, Aug. 26, 1996, at 24.

<sup>37</sup> See, e.g., Thomas E. Weber, *Entertainment & Technology: Child's Play: Keep Out!*, Dow Jones Wire Service, Mar. 28, 1996 ("Much harder for prospective raters would be keeping up with the exploding number of sites.").

<sup>38</sup> See, e.g., *America Online to Tighten Security to Protect Kids*, Dow Jones Wire Service, Mar. 20, 1996.

<sup>39</sup> See, e.g., Bart Ziegler, *Savvy Hacker Tangles Web For Net Host*, WALL ST. J., Sept. 12, 1996, at B1 (Bell Lab's Mr. Cheswick said, "It could have been a seventh grader who feels slighted . . ."); Sewell Chan, *Electronic Vandals Tamper With Web Pages*, WALL ST. J., June 26, 1996, at B1 (a 14-year-old high school student is quoted as saying, "You do it to brag or to get revenge. I do it kind of as a prank."); Christopher Lehmann-Haupt, *Kids or Conspirators: How Hackers Got Caught*, N.Y. TIMES, Jan. 26, 1995, at 1; Andrew Cohen, *Meet Razor, Shrike & Tommy the Cat: Techno-Hackers at Odds with the Feds*, N.Y. OBSERVER, May 16, 1994, at C1.

screening technology will keep tech-savvy teens away from all indecency.<sup>40</sup>

In *Sable Communications of California, Inc. v. FCC*, the United States Supreme Court struck down a total ban on indecent commercial telephone messages, reasoning in part that technological approaches to restricting dial-a-porn messages to adults who seek them might be very effective, with "only a few of the most enterprising and disobedient young people"<sup>41</sup> managing to secure access to such messages.<sup>42</sup> There is a difference, however, between gaining access to dial-a-porn messages by stealing a credit card or forging an ID and gaining access to Internet indecency by outsmarting screening technology. Stolen credit cards or forged IDs have limited circulation, but computer technology smarts can be transferred to any kid with a computer.<sup>43</sup> Also, because indecent material on the Internet is often free,<sup>44</sup> there are no financial barriers and no home phone bills to alert parents.

Even if all parents used screening technology and all screening technology was 100% effective and 100% tamper-proof, there would still be a big problem. Technology on home computers does not protect minors when they access computers elsewhere—for example, at a friend or relative's home, public school,<sup>45</sup> library,<sup>46</sup> place of employment, business,<sup>47</sup> or "Internet Cafe".<sup>48</sup> Handheld computers that allow e-mail and Internet

<sup>40</sup> See, e.g., Elizabeth Corcoran, *Researchers Try To Set Standards; Technology Tackles Ways To Block Out Information*, Wash. Post Wire Service, Oct. 30, 1995, at F15 ("Even so, such filters will not guarantee that a clever child will not be able to wiggle around the electronic curtains and reach an electronic site that a parent might consider forbidden territory."); Peter H. Lewis, *Helping Children Avoid Mudholes*, N.Y. TIMES, Apr. 4, 1995, at C8 ("Technically, there appears to be no practical way to halt . . . a viewing of sex-related material on the Internet . . . a determined individual, whether adult or child, can also find such material.").

<sup>41</sup> *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989).

<sup>42</sup> *Id.* at 128-31.

<sup>43</sup> See, e.g., John Markoff, *A New Method of Internet Sabotage Is Spreading*, N.Y. TIMES, Sept. 19, 1996, at D2 ("And while the federally financed Computer Emergency Team at the Software Engineering Institute at Carnegie-Mellon University believes the incidents are primarily the work of unsophisticated vandals who are passing around a recipe for this type of break-in, officials concede that there is no easy defense against this attack.").

<sup>44</sup> See, e.g., Jared Sandberg, *Electronic Erotica: Too Much Traffic*, WALL ST. J., Feb. 8, 1995, at B1 ("Users also like the fact that on-line pornography is free.").

<sup>45</sup> See, e.g., Michelle V. Rafter, *Students Told to Abide by Rules of Superhighway*, LOS ANGELES TIMES, Aug. 26, 1996, at D1 (Andy Rogers, L.A. Unified School District's Internet project coordinator said filters were not widespread because "with a community as varied as Los Angeles, what some might find to be objectionable, others might not.").

<sup>46</sup> See, e.g., Rebbecca Vesely, *Library Blocks Porn, and May Block Rights*, WIRED NEWS, Jan. 7, 1997 (American Library Association discourages public libraries from using blocking software).

<sup>47</sup> See, e.g., Laurie Flynn, *Kinko's Adds Internet Services to Its Copying Business*, N.Y. TIMES, Mar. 18, 1996, at D5.

<sup>48</sup> See, e.g., Peter H. Lewis, *The Companies Want to Know: Like a Little Cyber in Your Cafe?*, N.Y. TIMES, Nov. 18, 1996, at D6 ("First, they put computers where we work, then they

browsing will also be readily available soon and provide additional pathways to indecent Internet sites.<sup>49</sup>

### III. DEVELOPMENT OF THE INTERNET WILL NOT BE CRIPPLED

In addition to arguing that the CDA provisions are not needed, opponents have argued that the provisions will cripple development of the Internet.<sup>50</sup> It is by no means clear, however, why a restriction on indecent communications will have such a drastic effect. The Internet began as a national defense project, and just as national self-preservation was and is a powerful motivation to encouraging development of the Internet, so research and education,<sup>51</sup> politics, religion, and financial gain are now also powerful motivations.<sup>52</sup>

Only a small fraction of communications *necessary*<sup>53</sup> to operate government, educate, conduct research, transact business, and communicate about matters of public concern might be indecent. Furthermore, the CDA provisions do not prohibit all use of interactive computer services to transmit indecent content. People only violate the law if they *knowingly* transmit indecent content to specific minors or *knowingly* display such content in a manner available to minors or *knowingly* permit a telecommunications facility under their control to be used for a prohibited purpose.<sup>54</sup> In addition, there are specific "defenses" available to those who do violate the CDA provisions.<sup>55</sup>

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pushed computers where we live. Now, the computer companies are going after us where we eat and drink.").

<sup>49</sup> See, e.g., Julie Schmit, *Handheld computer market about to surge*, USA TODAY, Oct. 28, 1996, at B6.

<sup>50</sup> See, e.g., Steve Lohr, *Plan to Block Censorship On Internet*, N.Y. TIMES, Mar. 13, 1996, at D4 ("If we're not careful, people who don't understand the dynamics of this new market are going to kill it," said Nathan Myhrvold, a group vice-president of Microsoft"); Robert Corn-Revere, *The Great Satan: A Free Cyberspace*, BROADCASTING & CABLE, Mar. 13, 1995, at 48 (If the CDA provisions become law, "the future will take longer to arrive and when it does, it will be less exciting.").

<sup>51</sup> See, e.g., Lawrence M. Fisher, *34 Universities Agree to Set Up Another Internet*, N.Y. TIMES, Oct. 7, 1996, at D5.

<sup>52</sup> See, e.g., Lenita Powers, *Awards Acknowledge Internet Innovation*, USA TODAY, Dec. 4, 1996, at B16 (describing projects that received National Information Infrastructure Awards for demonstrating innovative uses of the Internet to benefit industry and society).

<sup>53</sup> As noted in FCC v. Pacifica Foundation, a "requirement that indecent language be avoided will have its primary effect on the form, rather than the content of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. 726, 743 n.18 (1978).

<sup>54</sup> 47 U.S.C.S. § 223(d)(1)&(2) (Law Co-op. Supp. 1996).

<sup>55</sup> 47 U.S.C.S. § 223(e) (Law Co-op. Supp. 1996).

#### IV. ONLINE SERVICES SHOULD BE RESPONSIBLE

Online services say that complying with the CDA provisions would force them to terminate or sharply curtail services.<sup>56</sup> The CDA provisions, however, do not require omniscience. Persons violate the law only by knowingly permitting a system under their control to be used for a prohibited activity with the intent that it be used for such activity.<sup>57</sup> If online services can cancel accounts after discovering violations of their own terms of service or house rules<sup>58</sup> or of obscenity,<sup>59</sup> child pornography,<sup>60</sup> or copyright laws,<sup>61</sup> or for posting libelous materials, they can also cancel accounts after discovering violations of the CDA provisions. Further, if online services can provide screening technology to block children's access to sites that contain indecent communications, common sense says they could instead block the same sites to everyone, providing access only to subscribers who request it and provide proof of age.<sup>62</sup>

<sup>56</sup> See, e.g., George Mannes, *Net result, boon to biz*, N.Y. DAILY NEWS, June 13, 1996, at 40 ("If the law had not been overturned, 'it probably would have shut a lot of us down,' said Paul Sagan, president and editor of new media at Time, Inc."); Leslie Miller, *New law may silence on-line chat, AOL says*, USA TODAY, Apr. 2, 1996, at D6; *Interactive Services Association Says Telecom Law is Good News, Bad News for Consumers and Providers*, PR Newswire, Feb. 2, 1996 (Robert L. Smith, Jr., Executive Director, Interactive Services Association, said "inclusion of a new criminal indecency standard in the CDA provisions may inhibit the growth of the Internet"); Denise Caruso, *The Prospect of Internet Censorship Raises Troubling Issues for Business*, N.Y. TIMES, Dec. 18, 1995, at D3 ("Such a law would significantly diminish what we could offer . . . You couldn't even call it the Internet anymore," said Scott Kurnit, president and chief executive of MCI/News Corporation Internet Ventures).

<sup>57</sup> 47 U.S.C.S. § 223(d)(2) (Law Co-op. Supp. 1996).

<sup>58</sup> See, e.g., David Cay Johnston, *The Fine Print of Cyberspace*, N.Y. TIMES, Aug. 11, 1996, §4, at 5 ("Speech is regulated . . . under terms of contract that people agree to when they gain access to the Internet through such services as America Online, AT&T Worldnet, Compuserve and Microsoft Network."); Peter Eisler, *Alert Center Keeps Prodigy Users in Line*, USA TODAY, Sept. 5, 1995, at A1; *Sound Bytes*, N.Y. NATIVE, June 19, 1995, at 46 (In its "Opening Statement" for its America Online site [transmitted 5/22/95], the ACLU states that its service on America Online "is also subject to America Online's Rules of the Road regarding scrolling, impersonation of America Online staff, chain letters, advertising and solicitation."); *Rock Star's Forum Grows Too Raucous For On-Line Service*, N.Y. TIMES, Apr. 12, 1995, at A1 (fans of Courtney Love "repeatedly broke the computer network's rules").

<sup>59</sup> See, e.g., *Message Screening At Issue*, Dow Jones Wire Service, May 26, 1995 ("The only computerized screening Prodigy does now is for obscenity"); John Markoff, *The Latest Technology Fuels the Oldest of Drives*, N.Y. TIMES, Mar. 22, 1992, §4, at 3 (America Online said it prohibits messages that are obscene).

<sup>60</sup> See, e.g., Kathleen Day, *Service Calls FBI on Child Pornography*, WASH. POST, Jan. 10, 1995, at D4.

<sup>61</sup> See, e.g., Constance Johnson, *Courts Struggle With Definition of Cyberspace*, WALL ST. J., July 27, 1995, at B1 (Some of the on-line services routinely delete copyrighted materials from their bulletin boards).

<sup>62</sup> See, e.g., Leslie Miller, *System to Help Net Ratings Catches On*, USA TODAY, Mar. 14, 1996, at D5 ("By early summer, any parent, using any popular Web browser or major on-line commercial service, will have their choice of rating systems and software tools," says Albert Vezza of MIT's Laboratory of Computer Science). To my knowledge, Microsoft

Online services and access providers argued successfully that it would be unfair to hold them responsible for providing access to and from the Internet since phone companies are not responsible for those who use their facilities for unlawful purposes.<sup>63</sup> Online services and access providers, however, are not common carriers like phone companies.<sup>64</sup> Furthermore, if a phone company provides billing services, it must, to the extent technically feasible, block access to indecent commercial communications unless subscribers request in writing that the carrier provide access.<sup>65</sup>

## V. SPEECH THAT IS INDECENT BUT NOT OBSCENE CAN HARM CHILDREN

During the last two years, I have often debated opponents of the CDA provisions on television and radio and at various panel discussions. One of the most common arguments that I have faced is that the indecency definition is too broad, encompassing content that is neither obscene nor pornographic. Related to this argument is the assertion that the government does not have a compelling interest in restricting minors' access to content that is "indecent" but not obscene or pornographic.<sup>66</sup>

Since Congress made the CDA provisions applicable only to indecent content that is transmitted or made available to minors, by implication its immediate concern was protecting children.<sup>67</sup> However, it utilized a legal standard (i.e., "indecency" or "patent offensiveness") that in significant measure grew out of the adult obscenity test<sup>68</sup> and that historically has been utilized in laws aimed not at protecting just children

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Network (MSN) automatically provides screening for sexual sites when initially subscribing and then allows an adult credit card holder to disable any or all of the screening levels.

<sup>63</sup> See e.g., Edmund L. Andrews, *Senate Supports Severe Penalties on Computer Smut*, N.Y. TIMES, June 15, 1995, at A1 (The CDA provisions offer a "long series of protections" for on-line services that act "merely as carriers" for messages of others. "The legal concept would be similar to the current practice of not holding telephone companies accountable for people who use the phone network to break the law.").

<sup>64</sup> 47 U.S.C.S. § 223(e)(6) (Law Co-op. Supp. 1996).

<sup>65</sup> 47 U.S.C.S. § 223(c)(1) (Law Co-op. Supp. 1996). In Morality in Media's opinion, it was a mistake for Congress to only require phone companies to restrict minors' access to dial-a-porn services when the companies provide billing services. Phone companies profit from these services irrespective of whether they provide billing services. For the phone company to call a publicly advertised dial-a-porn number after receiving a complaint so as to confirm that it is available to minors without restriction does not violate anyone's privacy.

<sup>66</sup> ACLU v. Reno, 929 F. Supp. 824, 852-53 (E.D. Pa. 1996).

<sup>67</sup> 47 U.S.C.S. § 223(d)(1) (Law Co-op. Supp. 1996).

<sup>68</sup> In FCC v. Pacifica Foundation, the Supreme Court noted that in an earlier obscenity case, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), Justice Harlan used the term "indecency" as a "shorthand term" for "patent offensiveness," a usage the Supreme Court found "strikingly similar" to the FCC's definition of indecency at issue in *Pacifica*. 438 U.S. 726, 740 n.15 (1978).

but in furthering the social interest in order and morality.<sup>69</sup> The origin and meaning of “patent offensiveness” are described in the *Obscenity Law Reporter*:

In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), Justices Harlan and Stewart, in a plurality opinion, added a new element to the . . . test for obscenity by requiring that the material . . . also be “patently offensive” before it can be labeled “obscene.” They stated, “These magazines cannot be deemed so offensive on their face as to affront community standards of decency—a quality that we shall hereafter refer to as “patent offensiveness” or “indecency.” The two justices also noted that the American Law Institute’s draft of a Model Penal Code took the position that . . . for a thing to be obscene, it must go substantially beyond the limits of candor in description or representation of such matters . . . Justices Harlan and Stewart indicated that . . . obscenity connotes something that is portrayed in a manner so offensive as to make it “unacceptable under community mores,” and is aimed at “obnoxiously debasing portrayals of sex” . . . It is also to be observed that the . . . Supreme Court in *Hamling v. United States*, 418 U.S. 87 (1974) treated *Manual Enterprises* as a binding precedent.<sup>70</sup>

While it cannot be established to a scientific certainty that minors are harmed by exposure to sex or excretory speech that is “patently offensive” (as defined above), the Supreme Court in *FCC v. Pacifica Foundation* upheld an FCC order prohibiting the broadcast of a radio monologue which was not obscene or pornographic but which was “‘vulgar,’ ‘offensive,’ and ‘shocking,’”<sup>71</sup> in part because of the ease with which children were able to access to it.<sup>72</sup> In *Bethel School District No. 403 v. Fraser*,<sup>73</sup> the Supreme Court also upheld the right of a school board to punish a high school student for using “sexual innuendo” in a speech at a school assembly. While not obscene or pornographic, the

<sup>69</sup> See, e.g., *Barnes v. Glen Theatre*, 501 U.S. 560, 568-69 (1991) (plurality opinion of Rehnquist, C.J.) (“This and other public indecency laws were designed to protect morals and public order.”); *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 61 (1973) (legislature can prohibit obscenity “to protect the social interest in order and morality”).

<sup>70</sup> NATIONAL OBSCENITY LAW CENTER, 1 OBSCENITY LAW REPORTER 7002-03 (1986).

<sup>71</sup> *Pacifica*, 438 U.S. at 747.

<sup>72</sup> *Id.* at 749-50.

<sup>73</sup> 478 U.S. 675 (1986).

speech was offensively lewd and indecent, and the Court recognized it could be "seriously damaging" to a less mature audience.<sup>74</sup>

It is also clear to this writer that just because sexual or excretory speech may have value for adults does not mean that it cannot harm minors. For example, in debating opponents of the CDA provisions, I have often found myself defending the provisions against charges that it would suppress content aimed at preventing AIDS.<sup>75</sup> Materials purportedly aimed at preventing AIDS include biology-course descriptions of how AIDS is transmitted; clinical descriptions of safer sex; depictions or descriptions of sexual activities or organs<sup>76</sup> replete with vulgar, obscene language; and hardcore sex films in which the performers utilize safe sex techniques.<sup>77</sup>

Another type of material opponents appear particularly concerned about are reports, located in the databases of human rights groups, which use graphic language to describe sexual abuse of prisoners.<sup>78</sup> Evidence that children could be harmed by exposure to such content, however, is found in a newspaper report of students brought to a courtroom to learn about the legal system but inadvertently exposed to a graphic videotaped confession of an alleged serial rapist:

Many of the children, all dressed in neatly pressed outfits, sat wide-eyed. Others snickered, and some appeared uncomfortable, looking down at the floor . . . The father of one 13 year-old boy said, "The boys at 13 are certainly impressionable and certainly interested in hear-

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<sup>74</sup> *Id.* at 683.

<sup>75</sup> See, e.g., Leslie Miller, *On-line case focuses on 'decency,'* USA TODAY, Apr. 16, 1996, at D1 (provisions may "outlaw . . . a protected speech, such as sexually explicit images showing how to prevent AIDS").

<sup>76</sup> Liz Willen, *This Isn't Kid Stuff*, N.Y. NEWSDAY, Mar. 23, 1994, at A6 (In 1994, explicit "safe sex" literature, prepared for adults by the Gay Men's Health Crisis, was distributed at a high school conference, cosponsored by the New York City Board of Education. In the uproar that followed, New York Schools Chancellor Ramon Cortines said the literature "dealt with sexual practices, contained language that was totally inappropriate and possessed no educational value.").

<sup>77</sup> In *Rees v. Texas*, 909 S.W.2d 264 (Tex. Ct. App. 1995), *cert. denied*, 117 S. Ct. 169 (1996), two men were convicted of promoting obscenity for showing a "sexually explicit" film on a public access cable TV program. On appeal they argued unsuccessfully that the purpose of the after-midnight program, "Infosex," was to promote "safe sex techniques," and that the film *Midnight Snack* had "educational value." As described in the indictment, the film depicted "a man with the penis of another man in his mouth, a man placing his finger in the anus of another, a man with his tongue licking the anus of another and two men masturbating each other."

<sup>78</sup> See, e.g., Greg Lefevre, *Dissidents and Rebels Turn to the Internet*, CNN Interactive, Dec. 25, 1996 (Amnesty International says some of its files on some governments' torture tactics are "so graphic" that they may violate the CDA provisions).

ing about sex. I'm not sure this is the right forum for them to hear it."<sup>79</sup>

## VI. PROPERLY UNDERSTOOD, THE INDECENCY DEFINITION IS NOT UNCONSTITUTIONALLY OVERBROAD

Opponents argue that the CDA provisions burden much speech that is protected by the First Amendment. Undoubtedly, in reaching content that is indecent but not obscene, the CDA provisions do reach content that is protected by the First Amendment, at least for consenting adults.<sup>80</sup> The Supreme Court, however, has also said that presumptively nonobscene but "sexually explicit"<sup>81</sup> speech and "patently offensive sexual and excretory speech"<sup>82</sup> are "at the periphery of First Amendment concern"<sup>83</sup> and that a restriction on indecent speech "will have its primary effect on the form, rather than the content, of serious communication."<sup>84</sup>

Furthermore, it is not every depiction or description of sexual or excretory activities or organs that is indecent. The test is not whether such a depiction or description is offensive to some citizens in the community but rather whether it is "patently offensive" under "contemporary community standards."<sup>85</sup> Offensiveness alone is not sufficient.<sup>86</sup>

In determining whether a depiction or description is "patently offensive," one must consider its context.<sup>87</sup> If the content of a broadcast program in which vulgarity is used can affect the composition of the audience,<sup>88</sup> common sense would say that so, too, can the content of an online service or Internet site. Audience composition affects "patent offensiveness" because minors should be considered part of the "community" to the extent they are likely to be recipients.<sup>89</sup>

<sup>79</sup> Pete Donohue, *School Kids Get a Lurid Lesson*, N.Y. DAILY NEWS, Sept. 27, 1996, at 7.

<sup>80</sup> In *Pacifica*, the Supreme Court recognized a valid governmental interest in protecting unwilling adults from exposure to patently offensive, indecent broadcast material. FCC v. *Pacifica Found.*, 438 U.S. 726, 748-49 (1978). See also *Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2386-87 (1996).

<sup>81</sup> *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976).

<sup>82</sup> *Pacifica*, 438 U.S. at 743.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 743 n.18.

<sup>85</sup> 47 U.S.C.S. § 223(d)(1)(B) (Law Co-op. Supp. 1996). The relevant community is normally that embraced within the territory comprising the jurisdiction of the federal district court. See, e.g., *Thomas v. United States*, 74 F.3d 701 (6th Cir. 1996); *Sable Communications v. FCC*, 492 U.S. 115 (1989); and *Hamling v. United States*, 418 U.S. 87 (1974). While some districts may be more conservative than others, I do not believe that any are as hyper-sensitive as portrayed by opponents of the CDA provisions.

<sup>86</sup> *Pacifica*, 438 U.S. at 745-46.

<sup>87</sup> 47 U.S.C.S. § 223(d)(1)(B) (Law Co-op. Supp. 1996).

<sup>88</sup> *Pacifica*, 438 U.S. at 750.

<sup>89</sup> Cf. *Pinkus v. United States*, 436 U.S. 293 (1978).

Other aspects of context which must be considered include the time of day when the content is transmitted or made available;<sup>90</sup> whether the content "appeals to the prurient interest"<sup>91</sup> or is pandered for its "prurient appeal;"<sup>92</sup> whether the content confronts viewers without warning;<sup>93</sup> and whether the content has "serious value."<sup>94</sup> If a communication has serious artistic, literary, political, or scientific value, appellate review will also be probing.<sup>95</sup> As noted in *Pacifica*:

Some uses of even the most offensive words are unquestionably protected . . . Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual or excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value" . . . vary with the circumstances. Words that are commonplace in one setting are shocking in another . . . [I]t is undisputed that the content of *Pacifica's* broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible (citations omitted).<sup>96</sup>

In *Pacifica*, the Supreme Court also specifically rejected an overbreadth challenge to the FCC's definition of indecency:

[*Pacifica*] argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required . . . The danger dismissed so summarily in *Red Lion* . . . was that broadcasters would respond to the vagueness of the regulations by refusing to present pro-

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<sup>90</sup> In *Pacifica*, the Supreme Court noted that the FCC's decision had "rested entirely on a nuisance rationale under which context is important" and that one variable was "time of day." 438 U.S. at 750. While not all indecent communications in cyberspace can be time channeled, many, particularly live communications, can be time channeled.

<sup>91</sup> While content can be "indecent" without appealing to the prurient interest (*see Pacifica*, 438 U.S. at 741), content that is patently offensive will usually carry the requisite prurient interest.

<sup>92</sup> Cf. *Ginzburg v. United States*, 383 U.S. 463, 467-72 (1966), *reh'g denied*, 384 U.S. 934 (1966).

<sup>93</sup> *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127-28 (1989).

<sup>94</sup> While content with serious value can still be indecent, serious value is an important variable to be considered in determining whether material is indecent. Cf. *Pacifica*, 438 U.S. at 732, 746-47; *Action for Children's TV v. FCC*, 852 F.2d 1332, 1339-40 (D.C. Cir. 1988).

<sup>95</sup> Cf. *Smith v. United States*, 431 U.S. 291, 305 (1977).

<sup>96</sup> *Pacifica*, 438 U.S. at 746-48.

grams dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort . . . We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech (citations omitted).<sup>97</sup>

## VII. THE CDA PROVISIONS DO NOT ERECT UNACCEPTABLE "ENTRY BARRIERS"

I have often heard opponents argue that the CDA provisions would impede progress of the Internet by erecting unacceptable "entry barriers" to Americans who wish to send or make available indecent content. It is not clear, however, why Americans linked to the Internet should have greater First Amendment rights to distribute indecency than broadcasters, program providers for cable TV access channels, and dial-it services.

The broadcasting industry, comprised of licensees of the most influential means of communication in this century, has been prohibited from airing such material since 1927, and the impossibility of shielding youth from indecent broadcasting without restricting expression at its source was part of the justification for upholding the law, not a reason to invalidate it.<sup>98</sup> Programmers for cable television leased access channels can also be prohibited from providing indecent programming,<sup>99</sup> and while the Supreme Court invalidated the statutory provision allowing cable operators to ban indecent programming on public access channels, the plurality opinion indicated that "public/nonprofit programming control systems . . . would normally avoid, minimize, or eliminate any child-related problems concerning patently offensive programming."<sup>100</sup>

Indecent dial-it services must also take steps to restrict minors' access to their services.<sup>101</sup> The federal "dial-a-porn" law only applies to commercial providers.<sup>102</sup> With the Internet, however, a great deal of indecent content is free, and free content is often offered without restriction.<sup>103</sup>

Americans with computers linked to the Internet also have access to the same alternative sources of communications to which broadcast and

<sup>97</sup> *Id.* at 742-43.

<sup>98</sup> *Id.* at 749.

<sup>99</sup> *But see Denver Area Educational Telecommunications Consortium v. FCC*, 116 S. Ct. 2374 (1996) (holding that programmers for cable television leased access channels cannot be prohibited from providing indecent programming).

<sup>100</sup> *Id.* at 2395-96.

<sup>101</sup> 47 U.S.C.S. § 223(b)(3) (Law Co-op. Supp. 1996).

<sup>102</sup> 47 U.S.C.S. § 223(b)(1)(A) (Law Co-op Supp. 1996).

<sup>103</sup> See, e.g., Sandberg, *supra* note 44.

cable TV viewers have access.<sup>104</sup> In fact, they have additional, inexpensive ways to obtain or send communications by using their own computers—for example, one-on-one e-mail, computer bulletin boards, and telephones linked to home computers.

Adults can also negotiate with others to bring forms of Internet communication into compliance with the CDA provisions or set up their own forms of Internet communication which comply. While *Renton v. Playtime Theaters*<sup>105</sup> involved availability of real estate sites, the reasoning should apply to Internet sites:

That respondents must fend for themselves . . . on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.<sup>106</sup>

### VIII. THE INTERNATIONAL DIMENSION OF THE INTERNET DOES NOT MEAN CDA PROVISIONS ARE UNENFORCEABLE

I have also heard opponents argue that the CDA provisions cannot effectively restrict children's access to indecent content on the Internet because such content is also available internationally. To some extent this is true, and for this reason Morality in Media urged Congress to place some responsibility on Internet-access providers to block or restrict access to international sites that violate the CDA provisions.

That some content providers will circumvent the CDA provisions, however, does not mean the law will not deter others, particularly U.S. citizens, from doing so.<sup>107</sup> It is also difficult to understand how opponents can argue, on the one hand, that the implementation of the CDA provisions will devastate the Internet, but, on the other hand, will not affect minors' ability to access indecent content.

Furthermore, as the Internet grows and illegal activity grows along with it, law enforcement efforts to curb abuses can be expected to in-

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<sup>104</sup> See, e.g., FCC v. Pacifica Found., 438 U.S. 726, 750 n.28 (1978).

<sup>105</sup> 475 U.S. 41 (1986).

<sup>106</sup> *Id.* at 932.

<sup>107</sup> See, e.g., Daniel E. Troy & David J. Goldstone, *Foreign Entities Whose Web Sites Violate U.S. Laws Relating to Drug Advertising, Securities Offerings or Obscenity May Subject American Affiliates to Prosecution*, NAT'L L.J., Nov. 18, 1996, at B9.

crease dramatically, as will international pressure.<sup>108</sup> For example, "anonymous remailers"<sup>109</sup> can make it difficult to track down criminals, but one of the world's largest international remailers was recently closed after accusations it was used for child pornography.<sup>110</sup> The Coalition Against Prostitution and Child Abuse in Thailand (CAPCAT) also claimed success in forcing a U.S.-based company to remove advertisements offering teenage commercial sex from its Web site.<sup>111</sup>

Law enforcement agencies are also having difficulty enforcing other laws, including those pertaining to copyright, theft, fraud, libel, harassment, gambling, child abuse, invasions of privacy, and terrorism.<sup>112</sup> That "Internet outlaws" may now be winning is not a reason to repeal these laws or to declare them unconstitutional. The international dimension of the dial-a-porn industry has also created problems enforcing 47 U.S.C. 223(b),<sup>113</sup> but to my knowledge, no one has argued that Section 223(b) is, therefore, unconstitutional.

## IX. STRICT SCRUTINY DOES NOT APPLY

It appears that opponents of the CDA provisions rely in significant manner on *Sable* for their assertion that the CDA provisions are unconstitutional. The *Sable* Court held that a total ban on indecent commercial

<sup>108</sup> See, e.g., Janet McEvoy, *Euro-Commission to tackle porn on Internet*, Reuters Financial Report, Sept. 24, 1996; Grant Buckler, *Canadian Government to Study Internet Content Liability*, COMTEX Newswire, Sept. 13, 1996; Natasha Wanckek, *Nations Consider Internet Regulation*, UPI US & World Wire Service, May 3, 1996; Valerie Lee, *Asia tackles dark side of cyberspace*, Reuters World Report, Mar. 14, 1996.

<sup>109</sup> An "anonymous remailer" is a computer which receives a message conveyed as electronic mail over the global Internet, removes markings that could identify the sender's identity and sends the message to its intended destination, "signed anonymously." See also Joshua Quittner, *Stamp Electronic Mail With Name?*, N.Y. NEWSDAY, Jan. 4, 1994, at 53.

<sup>110</sup> Martyn Williams, *Finnish Anonymous Internet Remailer Closed*, COMTEX Newswire, Sept. 3, 1996.

<sup>111</sup> *Asia: Internet Ads Promote Teenage Sex*, COMTEX Newswire, Oct. 10, 1996.

<sup>112</sup> See, e.g., Mike Snider, *Unwanted E-mail Sends Shockwave: Mass-message Slurs May be Unstoppable*, USA TODAY, Oct. 23, 1996, at D1; Jared Sandberg, *Hacker Introduces The Sound of Silence to Noisy Internet*, WALL ST. J., Sept. 27, 1996, at A13 ("The large-scale destruction of messages underscores the persistent vulnerabilities and resulting vandalism that still plague the global computer network."); Neil Monro, *White House Privacy Plan Due Next Month*, COMTEX Newswire, Aug. 29, 1996 ("Privacy has the potential of being the next pornography"); Markoff, *supra* note 43; Vic Sussman, *Policing Cyberspace*, U.S. NEWS & WORLD REPORT, Jan. 23, 1995, at 55 ("crime involving high technology is going to go off the boards, predicts FBI Special Agent William Tafoya, '... It won't be long before the bad guys outstrip our ability to keep up with them.' Crimes that worry authorities the most are: white-collar crime, theft, stolen services, smuggling, terrorism and child pornography.").

<sup>113</sup> See, e.g., Shenai Raif, *Phone Bills Rocket As Sex Lines Go Global*, PA News Wire Service, June 12, 1996 ("The challenges of regulating adult services which have moved offshore have focused attention on the need for cross-border cooperation."); *U.S. Mulls Ways To Block Global 'Dial-A-Porn'*, Reuters/Variety Entertainment Wire Service, Apr. 3, 1995 ("Federal Communications Commission officials said it is a complicated task and asked for help from U.S. telephone companies to find ways to do it.").

telephone communications was not narrowly tailored to serve the compelling interest of shielding minors from such communications.<sup>114</sup>

The CDA provisions, however, are not a ban, and in contexts where indecent communications assault unwilling adults in the privacy of the home and are readily accessible to children, the Supreme Court has upheld regulation of indecent material based on a "nuisance rationale."<sup>115</sup> It is Morality in Media's opinion that in contexts where indecent speech amounts to a "nuisance," it is unprotected by the First Amendment, and strict scrutiny would therefore not apply.

In my opinion, the provisions can also be viewed as a "content neutral" time, place, and manner restriction, in that they do not "distinguish favored speech from disfavored speech on the basis of ideas or views"<sup>116</sup> and are "justified without reference to the content of the regulated speech."<sup>117</sup> The justifications are the protection of children,<sup>118</sup> the privacy of the home,<sup>119</sup> and what Chief Justice Earl Warren described as "the right of the Nation . . . to maintain a decent society."<sup>120</sup> Strict scrutiny would therefore not apply under this analysis as well.<sup>121</sup>

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<sup>114</sup> Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 130-31 (1989).

<sup>115</sup> FCC v. Pacifica Found., 438 U.S. 726, 750 (1978). *See also* Hess v. Indiana, 414 U.S. 105, 107-08 (1973); Rosenfeld v. New Jersey, 408 U.S. 901, 905-06 (1972) (dissenting opinion); and Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (citing ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 149-50 (1941)).

<sup>116</sup> Turner Broadcasting Sys. v. FCC, 14 S. Ct. 2445 (1994). *See also* *Pacifica*, 438 U.S. at 745-46:

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content . . . [I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required. But that is simply not this case. These words offend for the same reason obscenity offends . . . "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

<sup>117</sup> City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986).

<sup>118</sup> *See, e.g.*, Denver Area Educational Telecommunications Consortium v. FCC, 116 S. Ct. 2374, 2399 (1996) (Stevens, J., concurring) (protecting children from indecent material is both "viewpoint-neutral and legitimate").

<sup>119</sup> *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 484-85 (1988).

<sup>120</sup> Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting) (quoted in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59-60 (1973)).

<sup>121</sup> *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989).

## X. CONCLUSIONS

Given the complexities of the Internet and First Amendment limitations, it is this writer's opinion that neither the law alone nor voluntary use of screening technologies alone can ensure that only consenting adults will be exposed to indecent material on the Internet. Both the law and screening technology are needed, and the question which the Supreme Court and, ultimately, the American people must answer is whether the right to live and raise children in a decent society outweighs the claimed right to disseminate, without restriction or burden, patently offensive sexual and excretory speech.

While the Supreme Court has held that indecent communications are protected by the First Amendment,<sup>122</sup> it has also held that where unwilling adults are assaulted by indecent material in the privacy of the home and where children have ready access to it, indecent material can be restricted, and restricted at its source.<sup>123</sup> The CDA provisions do not ban consenting adults from using the Internet to communicate indecently with each other. They do protect "rights and interests," other than those of the [indecency] advocates.'e'<sup>124</sup>

In Morality in Media's opinion, Congress should now amend the CDA provisions to make Internet access providers responsible if they *knowingly* permit a telecommunications system under their control to be used to violate the CDA provisions.<sup>125</sup> These access providers may be the only persons now able to immediately block or restrict access to some foreign sites where indecency is available without restriction.

In Morality in Media's opinion, Congress should also have included unwilling adults in the mix when it drafted the CDA provisions, just as it included unwilling adults under the protection of the dial-a-porn statute.<sup>126</sup> While it may be true that most indecent content on the Internet must now be sought out, not all of it must be sought out.<sup>127</sup> As the

<sup>122</sup> See, e.g., *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

<sup>123</sup> *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1989).

<sup>124</sup> *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 58 (1973) (quoting from *Breard v. Alexandria*, 341 U.S. 622, 642 (1951)).

<sup>125</sup> According to one source, software already exists to allow on-line service providers to tailor their on-line content to a single country:

A single InCharge form, "News Access Policy," enables a provider (or anyone else managing an Internet server) to control access to any set of newsgroups from any set of hosts—just point and click. For example, a provider can specify "No Access" to any of the offending newsgroups for all hosts in the German domain.

*InCharge for the Internet Solves Pornography Control Dilemma*, PR Newswire, Jan. 17, 1996.

<sup>126</sup> 47 U.S.C.S. § 223(b)(2)(A) (Law Co-op Supp.1996) ("or to any other person without that person's consent").

<sup>127</sup> See, e.g., David S. Bennahum, *The Internet's Private Side*, N.Y. TIMES, Mar. 2, 1996, §1, at 19:

Internet takes on more and more of the qualities of broadcasting,<sup>128</sup> it is this writer's opinion that adults and children alike will increasingly be taken by surprise by indecent content.

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During a jaunt through the World Wide Web, I came across a seemingly innocuous invitation, "This is a HOT link." I clicked on the glowing words, which connected me with another computer that generated a picture of a nude woman with the tag line "Slut for Rent" . . . This phone sex service . . . just an accidental mouse click away, shows how easily browsers can stumble across pornography on computer networks.

<sup>128</sup> Joan Vann Tassel, *Multicasting Promoted to Improve Webcasts*, BROADCASTING & CABLE, Jan. 27, 1997, at 64 ("developing technology should give radio broadcasters improved access to distant audiences via the World Wide Web"); Edward Rothstein, *Making the Internet Come to You, Through 'push' Technology*, N.Y. TIMES, Jan. 20, 1997, at D5 ("The idea behind push technology is that the viewer becomes more passive . . . It is more like home delivery than browsing, more like TV than PC."); Amy Dunkin, *PC Meets TV: The Plot Thickens*, Bus. Wk., Dec. 23, 1996, at 94 (pages similar in look to Web pages broadcast to PC); David Bank, *How Net Is Becoming More Like Television To Draw Advertisers*, WALL ST. J., Dec. 13, 1996, at A1 (Web "surfers" who sift through data giving way to Web "viewers" who have information "pushed" directly to PCs); Chris McConnell, *Way paved for PCTVs*, BROADCASTING & CABLE, Dec. 2, 1996, at 4 (TV "channel surfers" trading in remote controls for a mouse and keyboard); Peter H. Lewis, *TV Screen Opens Onto Internet*, N.Y. TIMES, Oct. 22, 1996, at C8 (computer network transformed into something "strikingly like a TV network").