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INDECENT PROPOSALS: REASON, RESTRAINT AND RESPONSIBILITY IN THE REGULATION OF INDECENCY

ALLEN S. HAMMOND, IV*

"You are all confused about what you may have a right to do under the Constitution, and the right thing to do."  

I. INTRODUCTION

In response to a significant outcry from a number of groups within American society, the government is mobilizing to further regulate the transmission of sexual indecency and obscenity in media as part of a proposed massive revision to the Communications Act of 1934. Entitled the Communications Decency Act of 1995,

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2. The concerned public includes various political and advocacy groups of competing political persuasions, as well as parents, educators, members of the medical profession, public officials and clergy.


the Senate's early legislative effort was incorporated into the Senate Telecom Bill. Explained in large part as an effort to assist parents and protect children, this legislation would increase the severity of

As preamble to the current legislative effort, Congress has held hearings on the alleged negative influence of "gangsta" rap music, video games and allegedly indecent or obscene online communication. See Esther Iverem, Negative Black Stereotypes Abound in Rap Lyrics, on Music Videos, in Movies and on Cable - And Blacks Are Among Those Doing the Stereotyping, NEWSDAY, Oct. 24, 1993, at 6; Linda M. Harrington, On Capitol Hill, A Real Rap Session; Mean Lyrics Blamed On The Mean Streets, CHI. TRIB., Feb. 24, 1994, zone: N, at 1; Doug Simmons, Gangsta Rap Reaches Capitol Hill Senate Hearings Ask: Does Reality Shape the Music or Does the Music Shape Reality?, ROCKY MOUNTAIN NEWS, Mar. 9, 1994 at 28A. See also Cheryl Wetzstein, Anti-porn Group Targets On-line Activities, WASH. TIMES, June 8, 1995, pt. A, at A2.

Those who argue that violence in the media is not the cause of society's current ills are partly right as well. The nihilism of the 90s is not an aberrant dream of media moguls. It is the reality of a significant portion of our urban and rural populations beset by deteriorating infrastructure, changing family structures, poverty, drugs and violence at a time of shrinking public concern and dwindling government action. While society has entered the fray to battle for the young, impressionable minds of its future citizens, the question that should be asked is which future citizens' minds is it battling for and to what end? Are the little ones whose reality more closely tracks that presented in the media to be relegated to a darkened or forbidden screen along with the images? And are those whose reality is different, and who are not permitted to see, likely to understand their future fellow citizens?

In addition, at least one presidential candidate has publicly attacked a corporation labelling it one of the worst purveyors of misogyny and indecency in music and movies. See John Corty, Dole and the Depraved, AM. SPECTATOR, Aug. 1995; Elizabeth Kolbert, The Nation: Unpopular Culture; In the Race Against Depravity, N.Y. TIMES, June 4, 1995, § 4, col. 1 at 4. Senator Dole's remarks regarding the sexual content of programming produced or distributed by Time/Warner have generated responsive comments. David Bodney, Shame, Not Censorship; Dole's Plea To Hollywood Is In The Spirit Of Liberty, PHOENIX GAZETTE, June 13, 1995, at B13. They have also prompted members of the current presidential administration to respond with calls for industry self-regulation. See Edmund L. Andrews, Senate Backs Microchip To Let Parents Control TV, N.Y. TIMES, June 14, 1995, col. 5, at B6 [hereinafter Andrews, Senate Backs Microchip]; Jonathan Yardley, Moralizing in America, WASH. POST, July 10, 1995, at D2; David Zurawik, Political Winds Put V-chip on TV Executives Lips, BALTIMORE SUN, July 12, 1995, at 1D.

Time Warner, the corporation criticized by Senator Dole, is now seeking to sell its interest in Interscope Records, the subsidiary which carries the hard-core "gangsta" rap artists whose lyrics have generated significant controversy. A Quick Read on the Money News Today, USA TODAY, Aug. 10, 1995, col. 1, at 1B.

Obscenity has been defined as material which: (a) an average person, applying contemporary community standards, would find as a whole to appeal to the prurient interest; (b) depicts or describes, in a patently offensive manner, sexual conduct as defined by applicable state law; (c) taken as a whole, lacks serious literary, artistic, political or scientific value. Miller v. California, 413 U.S. 93 (1973). Indecent material is defined as that which describes sexual or excretory activities and organs in a patently offensive manner at times of the day when there is a reasonable risk that children will be in the media audience. FCC v. Pacifica Found., 438 U.S. 726 (1978).

punishment imposed for the prohibited transmission of indecent information to children or obscene communication to anyone over telephone lines.\footnote{See Andrews, Senate Approves Bill, supra note 3; Shiver, supra note 3.} Additionally, the Communications Decency Act of 1995 would prohibit the use of telephones, computers and other telecommunications devices to distribute obscenity or provide minors with indecent pornographic material.\footnote{See Ellen Messmer, Senator Dole Backs New Internet Anti-porn Bill, NETWORK WORLD, June 12, 1995, at 12 (discussing legislation proposed by Senators Dole, Grassley, Exon and Coats); Obscenity Amendment Adopted To Senate Telecommunications Bill, DAILY REP. FOR EXEC., June 15, 1995, at A115. See also Brooks Boliek, Senate's Superhighway Patrol, Vote to Shut Down Internet Smut, HOLLYWOOD REP., June 15, 1995; Joan H. Lowenstein, How Free is Speech in Cyberspace?, CHi. TRIB., Mar. 12, 1995, Perspective Section, at 1; Rex Nutting, Senate Votes Against Computer Porn, U.P.I., June 14, 1995; Wetzstein, supra note 3.} Large fines and potential jail terms would be imposed on violators.

Proponents of the legislation stress public health concerns regarding pornography, teenage pregnancy, AIDS and the vulnerable nature of child development.\footnote{One piece of legislation would require cable networks and broadcasters to set up a voluntary system to rate programs and embed the rating code in their signals. It would also require television set manufacturers to include software that will respond to the embedded signals and alert viewers that certain programming contains violence. Andrews, Senate Backs Microchip, supra note 3. See also Boliek, supra.}


and present legislation are needed to protect children who may now acquire greater access to harmful information which is made more accessible by potentially harmful speakers using electronic media.\(^8\)

Opponents and some legal experts argue that the legislation unconstitutionally bans protected speech,\(^9\) which some argue has not been shown to have any demonstrable social harm.\(^10\) Others argue that the legislation constitutes a potential tool for cultural or generational censorship.\(^11\) In addition, with regard to newer forms

8. See Wetzstein, supra note 3 (quoting Donna Rice Hughes, spokeswoman for Enough Is Enough, who stated: "A child with a computer and a modem can download the most vile and perverse, often violent, hard-core pornography ever produced," and Senator James Exon, who stated that "[while computers] offer families and children fantastic opportunities to learn, enrich and enhance their lives . . . very real dangers lurk behind the bright flicker of the computer screens. Some of the most explicit, vile and unnerving sexual images, discussions and stories are open, available and transmitted to children."). See also Barr, supra note 7 (quoting Deen Kaplan of the Religious Alliance Against Pornography (RAAP), who stated that the worldwide computer network known as the Internet "is literally filled with hard-core pornography"); Suzanne Fields, Making Childhood a Protected Zone, WASH. TIMES, June 19, 1995, at A21.

9. Opponents include the television, video and computer industries, the ACLU, Newt Gingrich, the Speaker of the House of Representatives, the Clinton administration and ironically, Senate Majority Leader Bob Dole. See Boliek, supra note 6; Messmer, supra note 6. See also Karen Hosler, Congress Explores Ways to Guard Children From Cyber Pornography, Violence, BALTIMORE SUN, June 15, 1995, at 22A. House Speaker Newt Gingrich (R-Ga.) stated that the Senate bill was "a violation of free speech and . . . a violation of the right of adults to communicate with each other." Scott Lehigh, A Muddy Message on Free Speech; Court Opens a Gate; Congress May Shut Some, BOSTON GLOBE, June 25, 1995, at 73.

10. See NADINE STROSSEN, Free Speech, Sex, and the Fight for Women's Rights, in DEFENDING PORNOGRAPHY (Scribner, 1995). See also Charlie Rose: Two Female Lawyers Talk About Pornography, (EBC, Journal Transcript No. 1295-2) (comments of Nadine Strossen, President of the ACLU) (WNET broadcast, Jan. 19, 1995). It has been argued that banning pornography is likely to be counterproductive to the furtherance of women's rights. See MARCIA PALLY, SEX AND SENSIBILITY (Ecco Press, 1994). According to one recent article:

[A] team of FBI agents conducted extensive interviews with 36 convicted sex murderers between 1979 and 1983 in order to discover what they had in common and used the results to make a composite picture of the typical offender. They found, for example, that nearly half of them had been sexually abused in childhood and most of the rest at a later stage. Seventy percent of them had problems functioning as sexual adults and had to use pornography as a stimulus. They enjoyed watching somebody look terrified, and had a compulsive itch to dominate and control somebody else. Pornography, the FBI concluded, was never the cause of the murder, but the fuel of an unrealized fantasy which might include murder. When inhibiting factors were weak, the fantasy might explode, so it was another characteristic of these men that they had little capacity for self-restraint and poor self-esteem . . . .

Brian Masters, Mind over Murder, MAIL ON SUNDAY, Sept. 25, 1994, at 39, 40, & 42.

11. When the current criticism of rap music is viewed from the historic vantage point of recurring cultural censorship, the current criticism is not new. For
of communication such as electronic bulletin boards and the Internet, it is argued that the legislation severely inhibits the freedom to engage in electronic speech and association activity which the technology promotes. Moreover, the legislation seeks to regulate an area where substantial protection already exists and where technology is rushing to fill whatever void remains. Furthermore, some argue that the current crop of Congressional legislation constitutes a misplaced political effort to curry favor with voters.

Companion legislation proposed by the House of Representatives would allow computer bulletin board services to exert control over indecent speech transmission without incurring liability for such speech. This legislation also encourages information providers to develop filtering and shielding technologies to protect children from indecent information which is available on the Internet. Unlike the Senate bill, the House version prohibits the
Federal Communications Commission (FCC) from imposing any content restrictions on the Internet.\textsuperscript{17}

Similarly, the courts have disagreed over the constitutionality of the legislation seeking to regulate the transmission and availability of indecent communication over broadcasting, cable and telephone.\textsuperscript{18} While the disagreement has been resolved regarding the telephone,\textsuperscript{19} currently no equivalent resolution exists for broadcast-

\textsuperscript{17}See \textit{Communications Act of 1995}, H.R. Rep. No. 1555, § 104. Online Family Empowerment. The applicable portions read as follows:

Title II of the Communications Act of 1934 (47 U.S.C. § 201 et seq.) is amended by inserting after § 230 (as added by § 103 of this Act) the following new section:

\textbf{Section 231. Protection for Private Blocking and Screening of Offensive Material; FCC Content and Economic Regulation of Computer Services Prohibited.}

(c) Protection for 'Good Samaritan' Blocking and Screening of Offensive Material. No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user of interactive computer services shall be held liable on account of--

(1) any action voluntarily taken in good faith to restrict access to material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(2) any action taken to make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) FCC Regulation of the Internet and Other Interactive Computer Services Prohibited. Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to content or other regulation of the Internet or other interactive computer services.

(e) Effect on Other Laws.

(1) No effect on criminal law. Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute ...

\textit{Id.}


\textit{18} See \textit{Action for Children's Television v. FCC}, 58 F.3d 654 (D.C. Cir. 1995) [hereinafter \textit{ACT III}].

\textit{19} \textit{Id.} See Information Providers Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).
ing or cable. Moreover, the regulation of indecent speech over computer networks will be a case of first impression.²⁰

Parents of those children whom Congress seeks to protect could find themselves torn. On the one hand, according to some members of Congress and the courts, current laws and proposed legislation seek to assist parents’ efforts to nurture, teach and protect their children.²¹ Yet, other members of Congress and the judiciary believe these same laws may undermine efforts to promote and protect opportunities for free expression.²² They contend that these laws may impose additional unnecessary government regulation²³ and undermine, if not usurp, parental choice and control.²⁴

Meanwhile, in the midst of this debate, many are deeply concerned. We are a society gripped by a deadly, sexually transmitted plague in which significant numbers of children increasingly engage in unprotected sex and thereby risk becoming parents before they become adults.²⁵ There exists a small but dangerous minority of individuals who seek to sexually prey on our society’s youth. And, despite the efforts of many to avoid or distance themselves and their children from such behavior, our virtual reality prevents escape. For we live in a push-button, click-on, drive-by, open, media culture replete with ubiquitous allusions to gratuitous sex. In such an environment, how do we nurture our children so that they ma-

²⁰ A case of first impression is defined as a case which marks the “[f]irst presentation of [a] question of law to a court for examination or discussion.” BLACK’S LAW DICTIONARY 635 (6th ed. 1990).

²¹ See ACT III, 58 F.3d 654 (D.C. Cir. 1995); Andrews, supra note 3; Shiver, supra note 3.

²² See ACT III, 58 F.3d 654.

²³ According to law enforcement officials, the proposed laws are not necessary to officials’ efforts to police and prosecute offenders.

²⁴ ACT III, 58 F.3d at 670 (Edwards, C.J., dissenting).

²⁵ AIDS has spread to every part of the population, including teenagers. As many as two and a half million teenagers are infected with sexually transmitted diseases including HIV annually. Meanwhile, teenagers are having sex at younger and younger ages. For instance, it is estimated that the average age of first intercourse for boys and girls is about 16. More than a million teenage girls become pregnant each year. Barbara Vobejda, Breaking Barriers in Sex Education: Instruction Offered to Ease Parent-Child Discussions, WASH. POST, Nov. 27, 1993, at A1. Vobejda states:

Across the country, young people are surrounded by a popular culture laced with ubiquitous sexual references: in the movies, on television, in advertising and rock lyrics. But ironically, all this openness about sex has not translated into open discussion at home. Half the teenagers surveyed in a 1988 study said their parents had not provided enough information about sex, according to the Washington-based Center for Population Options. And 98 percent of parents said they felt they needed help in talking to their teenagers about sex.

Id.
ture into healthy, responsible, empathetic individuals capable of valuing and loving themselves and others? And, how do we protect our children from individuals who acquire electronic access in an effort to harm our children?26 How do we assure that the manner in which we choose to protect and nurture our children does not destroy our right to a relatively unfettered flow of electronic information between all speakers and groups including ourselves, especially where there is disagreement over what constitutes acceptable speech?27

II. THE CURRENT DEBATES IN CONTEXT

A. Sex in the Media

Sex is everywhere in the media.28 Sex is used as a direct marketing device or as the hook of a television or cable program which attracts an audience to sell to the advertiser. It is a primary ingredient in much of popular music, video and film.29 Most recently, sex has become a significant element in interactive and CD ROM computer software.30

26. One parent suggests that the more likely source of sexual molestation is much closer to home. "[B]ut the real danger of molestation, Lanning tells me, is not from strangers. Of the more than 300,000 children who are reported sexually abused each year, the vast majority are molested by family members, friends or acquaintances . . . ." Allen and Barovick, supra note 6.

27. One writer comments:

Controversial issues have not only fractured American history; they have also deeply influenced what it means to be an American. Thus being for or against slavery or Prohibition or Franklin D. Roosevelt established one's civic identity often more clearly than one's religious, ethnic and family groupings.

There is, however, a major difference between the free-speech issue and the other great issues, like slavery, that have traditionally divided the nation. In this case, there is no clear fault line separating us, the "good guys," from them, the "enemy." Splits and alignments on particular free-speech controversies (like pornography and speech codes) defy conventional bifurcations; and being a known advocate of more (or less) free speech has almost no value in predicting general political proclivities (like right versus left or conservative versus liberal).


29. For an excellent discussion of one reporter's view on sex in film and its relationship to adolescence, see Jon Parales, They're Rebels Without a Cause, and Couldn't Care Less, N.Y. TIMES, July 16, 1995, § 2, col. 1, at 1; Robert J. Walker, Teaching About Television in the Classroom, USA TODAY (MAGAZINE), Jan. 1995, at 66.

Public concern about the amount and effect of sex portrayed in popular media is not new. It arises each time a new medium of expression or mode of transmission makes access to new or competing cultural information easier, faster or cheaper. Yet, while some of the currently articulated concerns might fairly be dismissed as the ruminations of nostalgic luddites, there are legitimate, critical societal and public health concerns which prompt many media critics' cries of alarm.

B. Children, the Media and Sex

The extensive use of sex as both a marketing tool and a critical component in much of media entertainment is alleged to have profound negative effects on society and on children in particular. It is believed that such information presents a distorted and increasingly dysfunctional view of human relationships in which casual sex and infidelity are the norm. And, when this informa-


31. According to a recent survey of consumer perceptions about advertising: While most consumers felt that tasteful sex appeals for certain products are acceptable, a majority believed that there is too much sex in current advertising, that nudity is not appropriate for general interest magazines, and that sexy ads play a role in fostering teenage sexuality. This last finding is particularly interesting, given the importance of current problems of teenage sexuality, pregnancy, and sexually transmitted diseases, including AIDS.


32. "The portrayal of sexuality on television is often misleading. Sexual relationships between television characters often develop casually and rapidly. Extramarital sexual activity is portrayed as a common occurrence." Robert J. Walker, Teaching About Television in the Classroom, USA Today (Magazine), Jan. 1995, at 66. Other writers have stated:

Since the 1970s, feminists and other critics have spoken out against the portrayal of women in advertising . . . . Particularly troublesome is the focus on women as sex objects (Boddewyn 1991; Wyckham 1987). 'For at least some of the public, sexual ads represent a challenge to standards of decency and are in a real sense pornographic.' These sexually explicit ads, employed for a myriad of products, negatively portray women solely in terms of one narrow and stereotypically presented aspect of their gender roles: as sex objects . . . . While sex appeals strike some as offensive, others are entertained or attracted by such portrayals. Advertising's defenders assert that, in an open society, everyone is free to ignore an ad or refuse to buy a product that is deemed offensive or unattractive. It is the
tion becomes the predominant cultural currency, it ceases to be a mere reflection of our society and becomes a causal factor as well.\textsuperscript{33} This is especially true for developmentally vulnerable children who often mimic and model what they see in their virtual and actual environments.\textsuperscript{34} Moreover, the sexual imagery in pornography, especially child pornography, is viewed by some in society as a con-

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consumer, say these defenders, who acts as the ultimate arbiter of advertising ethics.

Treise, et al., \textit{supra} note 31.

\textsuperscript{33} Walker, \textit{supra} note 29.

Children, through television, are exposed to more than 9,000 scenes of suggested sexual intercourse, sexual comments, or innuendos each year. In 1992, a Media Research Center one-week study of the prime-time programming of the three major networks cited 846 sexual references. Multiplying this number by 52 weeks would project 43,992 sexual references a year on just the three major networks . . . . Furthermore, for every scene depicting sexual intercourse between married partners, there are 14 sexual encounters outside of marriage, according to U.S. News & World Report. The American Psychology Association (APA) concluded in 1993 that exposure to sexual inferences depicted on television can be over-stimulating to pre-adolescents, who are struggling to develop proper control over their sexual impulses.

\textit{Id.} \textit{See also} Posch, \textit{supra} note 31.


The dramatic physical changes of adolescence occur very rapidly; this rate of growth is unsurpassed at any point in life, with the exception of the prenatal period and infancy. To this great change within individuals, we must add the changes in social expectations for adolescents, changes in the structure and content of formal education for middle and high school students, and the effect of difficult conditions in our society . . . .

Current social conditions make it generally difficult to become a responsible adult, and developing sexual responsibility is particularly difficult for those making the transition to adulthood. We are plagued with the mysterious and uncontrolled sexually transmitted disease AIDS. In spite of the life-threatening nature of AIDS, the mass media continue to bombard adolescents with sexual stimuli and sexual themes in all genres, from rock videos to product advertisements . . . . As a result, adolescents have few positive role models for adult sexual behavior and lack clear standards for accepting themselves as sexually mature and sexually responsible individuals.

\textit{Id.}

The media bombardment is dangerous because the media's primary function is to sell rather than inform. As such, it necessarily provides children with a distorted perspective on human sexual relations. \textit{See} John Condry, \textit{Thief of Time, Unfaithful Servant: Television and the American Child}, \textit{Daedalus}, Jan. 1993, at 259.


http://digitalcommons.law.villanova.edu/mslj/vol3/iss1/7
tributing factor and by others as a triggering cause of the sexual abuse of children.\textsuperscript{35} Therefore, those citizens who would limit the flow of flickering sexual images in the media say they are most often concerned about the effect such images have on the safety of children.\textsuperscript{36}

The media technologies of broadcasting, cable television, telephone and computers make sex-laden advertising, as well as sex-saturated and violence-saturated entertainment, ubiquitous.\textsuperscript{37} In addition, it is argued that children have gained greater control over access to and manipulation of these technologies at a time when parental ability to monitor and control such access and manipulation is believed to be decreasing.\textsuperscript{38}

\textsuperscript{35} Many in society are increasingly concerned about a link they see between child pornography and child prostitution and sexual abuse. For them, pornography is increasingly identified as a cause of social ills, rather than a manifestation of deeper problems in the way that men and women in society perceive themselves and their sexual relations. See Barr, supra note 7. Some see current American efforts to stem the flow of pornography as largely ineffective. Lorraine Adams, \textit{Abused Children Slip Through D.C.'s Safety Net, Prostitution Case Shows How City's Support Services Are Entangled, Critics Say}, \textit{WASH. POST}, Dec. 4, 1994, at B1. Moreover, the problem is not just domestic; it is international in scope. Mary Banotti, \textit{Biting the Bullet to Oppose Pornography}, \textit{Irish Times}, Aug. 30, 1993, at 10; Johanna Son, \textit{Children: New Tools Needed To Fight Transitional Sex Trade}, \textit{IPS}, Apr. 20, 1995.

According to one prominent social worker, "pornographic material . . . is harmful . . . where [individuals] already have problems, and where it may fuel sexual fantasies." In work which he has done with adolescent abusers and which he presented in a paper given to a Congress on Child Abuse in Chicago, he found that, whereas pornographic material was not the primary cause of the abuse, it certainly contributed to an escalation of it. It made potential offenders highly sexualized at a time when they were immature, thus making them more likely to abuse. Banotti, supra.


\textsuperscript{36} See Banotti, supra note 35; Kestin, supra note 35.

\textsuperscript{37} "From television and films to comic books to computer bulletin boards, children of all ages are bombarded with sexual themes and images." Darryl E. Owens, \textit{Kids Need Realistic Answers on Sex}, \textit{UNION} (Albany, NY), Feb. 2, 1995, at C1.

According to one informal survey, American parents lack sufficient time and technological expertise to monitor and control what their children see on television and cable, hear on their CDs or play and interact with on their computers.\(^\text{39}\) Consequently, it is argued that parents have “lost control over the messages and moral values that inundate their homes . . . .”\(^\text{40}\) There are numerous economic and social reasons for parents’ absence from the home at times when children would require supervision.\(^\text{41}\) Even when some parents are able to be at home, they may prove to be incapable of operating the computers and video games their children use.\(^\text{42}\) Too often, when the issue of human sexuality is raised by children, parents are unprepared or unable to respond in a meaningful fashion.\(^\text{43}\) As a result, parents are often at a loss to determine what

\text{39. Id.}
\text{40. Id.}
\text{41. For some parents, the loss of control is driven by economic imperatives. Over the last five years, real income for the average American family has declined by more than $2,000. Often the only way to maintain the family’s standard of living is to work longer hours, or add extra jobs. One of the first casualties of this worsening market reality is alleged to be family time and parental supervision. Id.}
\text{42. One can legitimately question the efficacy of purchasing or ceding to one’s children the control of technology which the parents do not understand or trust.}
\text{43. While parents may experience difficulty in communicating with their children about sex, “sexuality education provided by parents is believed to have a more beneficial affect on their children’s sexual attitudes and values” than school-based sex education programs. Gay C. Brock and Richard P. Beazley, Using the Health Belief Model to Explain Parents’ Participation in Adolescents’ At-home Sexuality Education Activities, J. SCH. HEALTH, Apr. 1995, at 124 (footnotes omitted). For instance, while as many as 58% to 95% of adolescents know that condoms provide one effective way to avoid HIV, less than half of the sexually active adolescents use them. Id. “Studies suggest adolescents who communicate with their parents about sexuality tend to be less sexually active and more likely to use contraceptives when they do become sexually active.” Id. (footnotes omitted). These observations have been corroborated elsewhere. See Mattern, supra note 41; Owens, supra note 37, at C1; Vobejda, supra note 25.}

James Jaccard, co-author of a recent book on the subject, said he found no evidence that discussing birth control with children increases promiscuity. But it can increase the likelihood that, when teenagers do have sex, they will use contraception.
their children see, hear and interact with\textsuperscript{44} or to address issues of sexuality and morality which the child-media interface may raise.\textsuperscript{45}

Given the rising count of AIDS victims, as well as the continuing problems of teenage pregnancy, child prostitution and sexual abuse of children, it is not surprising that parents, teachers, clergy,\textsuperscript{46} physicians and society at large are fearful and quite concerned for children's safety. Furthermore, it is not surprising that some in society can peer into the electronic mirrors of the media and see a potential source of the problems. Given these growing social problems and attendant public concern, it is not surprising that Congress should ultimately act. The question asked by some is whether Congress' legislative response, especially that of the Senate, is an appropriate one.

III. ACCESS AND AMBIVALENCE: THE CLASH OF ACCESS AND INDECENCY REGULATION

A. Video Indecency and Regulation by Private Surrogate

For more than a decade, as media technologies have increased user access to information and the ability to communicate, Congress has sought to limit the flow of indecent speech. Over this same time period, a new technology-specific regulatory scheme has begun to evolve. Under this new scheme, telephone common carriers are private speakers possessing the right to refuse carriage or

\begin{quote}
Often, what a child sees and hears depicts sex as a fun, cool thing to do; many parents are generally more comfortable discussing sexuality as a means to procreation. As a result, children's questions are often aimed at nailing down a clearer picture. Brock and Beazley, \textit{supra}.

Of course, parents discover teenagers come with a different set of questions and concerns. Playground discussions, PG-13 movies (where the sexual antics often extend beyond a kiss) and raging hormones can inspire discussion. Teens may even quiz parents about oral sex and birth control, or throw around sexually derogatory words such as the "F word" for discussion. Though many parents find fielding these kinds of questions uncomfortable, experts say it is important for Mom and Dad to cloak their discomfort and try to answer in an honest but appropriate way. \textit{Id.}

\textsuperscript{44} Brock and Beazley, \textit{supra} note 43.

\textsuperscript{45} "Instilling values in children is no easy task, especially when they are exposed to more bad influences than ever before, from illegal drugs to sex and violence on television and in the movies." Mattern, \textit{supra} note 41.

billing services to providers of indecent programming. Additionally, cable operators who are required by law to set aside channel capacity for leased and public access may limit or refuse to carry indecent programming on the leased and public access channels. Moreover, broadcasters and trustees of the public spectrum are legally constrained to limit the broadcast hours during which indecent programming may be conducted. While the final constitutional adjudication of this evolving regulatory scheme has not yet occurred, to date, the government has received judicial sanction of its scheme.

B. The Regulation of Telephone Indecency

Pursuant to section 223 of the Communications Act of 1934, telephone companies who knowingly permit the use of their facili-

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49. 47 U.S.C. § 223 (1994) provides, in pertinent part, that:

Section 223. Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications.

(a) Prohibited general purpose.

Whoever—

(2) knowingly permits any telephone facility under his control to be used for any purpose prohibited by this section, shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(b) Prohibited acts for commercial purposes; defense to prosecution.
(1) Whoever knowingly—
(A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined in accordance with title 18, United States Code, or imprisoned not more than two years, or both.

(2) Whoever knowingly—
(A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restricted access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5) (A) In addition to the penalties under paragraphs (1), (2), and (5), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either—
(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or
(ii) by the Commission after appropriate administrative proceedings.

(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

(c) Restriction on access to subscribers by common carriers; judicial remedies respecting restrictions.

(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any court or administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of—
ties for the making of obscene or indecent communication to children are subject to a $50,000 fine and six months of imprisonment.\textsuperscript{50} The network provider can avoid liability by declining to provide billing services or acquiring subscriber permission to make the information available. The network provider is absolved of liability if it is not notified that the transmitted information is indecent.\textsuperscript{51} The information provider, as opposed to the network provider,\textsuperscript{52} can avoid liability by offering the service consistent with the FCC's rules which recognize prepayment by credit card, use of an authorization number or message scrambling as appropriate methods of segregating the information.\textsuperscript{53} Subscribing consumers have the option of notifying the network provider that they wish to access such information, thereby taking some control over its availability and receipt. Notification by the subscriber absolves the information provider and the network provider of liability.

Dial-a-porn information providers are allowed to provide message services for which telephone companies do not provide billing. However, the difficulties associated with collections absent the billing assistance of phone companies has rendered many information providers' businesses marginally successful. In Information Providers Coalition for Defense of the First Amendment v. FCC,\textsuperscript{54} the United States Court of Appeals for the Ninth Circuit concluded that telephone companies are private actors which are constitution-

\begin{itemize}
\item[(A)] any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or
\item[(B)] any access permitted—
\begin{itemize}
\item[(i)] in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b), or
\item[(ii)] because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b).
\end{itemize}
\end{itemize}

\textsuperscript{3} Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access.

\textit{Id.}  50. 47 U.S.C. § 223(a)-(c).
54. 928 F.2d 866 (9th Cir. 1991).
ally free to ban dial-a-porn from their networks or refuse to make billing services available to dial-a-porn information providers or any particular group of subscribers. Given the liability attached with telephone transmissions of indecent or obscene information, some telephone companies may avail themselves of their newfound freedom to refuse to do business with potential users.

55. Information Providers, 928 F.2d at 877. Similar conclusions were reached in the other cases. See Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991); Carlin Communications Inc. v. Mountain State Tel. & Tel. Co., 827 F.2d 1291, 1293, 1295, 1297 & n.10 (9th Cir. 1987). At least one scholar has taken issue with the circuit court opinions. Professor Jerome Barron argues that upholding the decisions of telephone common carriers to refuse carriage or the provision of billing services to dial-a-porn providers allows the carriers to exercise an unjustified measure of editorial control over the content of speech transmitted over their facilities. See Barron, The Telco, The Common Carrier Model and the First Amendment — The "Dial-A-Porn" Precedent, 19 Rutgers Computer & Tech. L.J. 371, 385-91 (1993).

The courts have reasoned that because telephone carriers are private companies rather than state actors, they are not obligated by the Constitution to provide transmission and billing services to any particular group of subscribers. See Information Providers, 928 F.2d at 866; Carlin, 827 F.2d at 1291; Dial Info., 938 F.2d at 1291.

In Information Providers, petitioners argued that FCC regulations requiring an individual wishing to receive dial-a-porn messages to notify the carrier in writing, constituted a prior restraint. The court disagreed, concluding that no prior restraint was involved. According to the court, there was no government action to enjoin speech, require advanced governmental approval for speech, censor or license speech. Information Providers, 928 F.2d at 877. Similar conclusions were reached in the other cases. See Carlin, 827 F.2d at 1293, 1295, 1297 & n.10; Dial Info., 938 F.2d at 1543.

Professor Barron has questioned the wisdom of the circuit court opinions. He argues that upholding the decisions of telephone common carriers to refuse carriage or the provision of billing services to dial-a-porn providers allows the carriers to exercise an unjustified measure of editorial control over the content of speech transmitted over their facilities. See Barron, supra.

56. See Dial Info., 938 F.2d at 1291; Information Providers, 928 F.2d at 866; Carlin, 827 F.2d at 1291. The circuit courts' reasoning follows the dicta of Justice Antonin Scalia in Sable Communications. In his concurrence in Sable Communications, Justice Scalia stated, "[W]hile we hold that the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it." Sable Communications, Inc. v. FCC, 492 U.S. 115, 133 (1989) (Scalia, J., concurring). This solution has met with criticism, however.

The thinking behind the shifting of responsibility for regulating information content from entities subject to the First Amendment to private-sector actors who are not is understandable. But the short-term benefits are exceeded by the costs of allowing monopoly LECs the power to determine what is and what is not allowed on the network.


C. The Regulation of Cable Television Indecency

Cable operators now possess editorial control to ban or segregate indecent speech on leased access channels.\textsuperscript{58} Where the cable operator elects to segregate the indecent programming on a single channel, potential subscribers to the channel must notify the cable operator in writing of their desire to receive the programming. Cable operators also may ban the use of public, educational or government (PEG) channels for transmission of programming containing obscene or sexually explicit information or which solicits or promotes unlawful conduct.\textsuperscript{59} Moreover, cable operators have a disincentive to eschew editorial control over leased access and PEG channels due to their recent loss of immunity from civil and criminal liability for the unauthorized transmission of obscene programming on their networks.\textsuperscript{60}

In its most recent opinion on the matter, the United States Court of Appeals for the District of Columbia Circuit held that the applicable provisions of the 1992 Cable Television Consumer Protection and Competition Act, along with FCC implementing regulations, do not involve state action which would warrant First Amendment review.\textsuperscript{61} The court stated that the statute and regulations allowing cable operators to prohibit indecent programs on leased access\textsuperscript{62} or PEG\textsuperscript{63} channels merely return editorial discretion

\textsuperscript{58} Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995), cert. granted, 64 U.S.L.W. 3104 (U.S. Nov. 13, 1995) (No. 95-227) [hereinafter Alliance I].

\textsuperscript{59} Id.

\textsuperscript{60} The requirement that leased access channel programmers inform cable operators of programming which would be deemed indecent under the FCC regulations provides the cable operator some measure of notice. However, failure to provide such notice may not be sufficient to absolve the cable operator of the liability for obscene speech in the manner that telephone networks are absolved of liability for the transmission of indecent information when they have not been notified of the information’s content. See infra note 75.

\textsuperscript{61} Alliance II, 56 F.3d at 119. In the prior case, the panel had concluded that section 10 does encourage the operators to ban indecent speech. Consequently, the operators’ actions to ban speech which were compelled by state legislation constitute state action. Id.

\textsuperscript{62} Under the 1984 CABLE COMMUNICATIONS POLICY ACT, 47 U.S.C. § 532(b) [hereinafter CABLE ACT], cable operators are required to set aside a certain number of leased access channels to be made available for commercial use by programmers unaffiliated with the cable operators.

\textsuperscript{63} Under the 1984 CABLE ACT, 47 U.S.C. § 531, as a condition of franchise award or renewal, local franchising authorities are allowed to require that cable operators set aside a limited number of PEG access channels which are made available for public, educational or governmental use.
regarding such programming decisions\textsuperscript{64} to the cable operators.\textsuperscript{65} The opinion effectively reverses the reasoning of the three judge panel which earlier decided the case of the same name,\textsuperscript{66} thereby

\textsuperscript{64} Under the 1984 \textit{Cable Act}, 47 U.S.C. § 532(c)(2), cable operators were prohibited from exercising any editorial control over programming on the leased access channels except to the extent necessary to establish a reasonable price for use of the channel. In return, Congress exempted the cable operators from any civil or criminal liability which might arise because of programming shown on the leased access channels. 47 U.S.C. § 558 (amended 1992). Also, under the 1984 \textit{Cable Act}, subject to § 544(d)(1) which allowed the franchising authority and cable operator to deny cable transmission for obscene speech, cable operators were prohibited from exercising any editorial control over PEG channel programming. Section 558 of the 1984 \textit{Cable Act} also exempted cable operators from criminal and civil liability for programming carried on PEG channels.

\textsuperscript{65} In § 10 of the 1992 \textit{Cable Television Consumer Protection and Competition Act}, Congress altered its statutory scheme for regulation of leased and PEG access channels. Section 10(a) allowed cable operators to refuse carriage to leased access programming an operator “reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.” In order to limit children’s access to indecent programming, § 10(b) tasked the FCC with establishing rules to require cable operators electing to carry indecent programming on leased access channels to segregate the programs on a separate, single channel and block the channel until a subscriber requests access in writing. Programmers are required to inform the cable operators of programming which might be deemed indecent as defined by FCC regulations. In § 10(c), Congress directed the FCC to establish regulations empowering cable operators to prohibit usage of PEG channels for “any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.” In § 10(d), Congress removed cable operators’ immunity from criminal and civil liability for programming transmitted on leased and PEG access channels.

\textsuperscript{66} Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993), vacated upon the granting of request for reh’g, 15 F.3d 186 (D.C. Cir. 1994), rev’d, 56 F.3d 105 (D.C. Cir. 1995) [hereinafter \textit{Alliance I}].

In \textit{Alliance I}, the D.C. Circuit considered, among other issues, the constitutionality of the FCC’s regulations requiring cable operators to prohibit or segregate any programming on their leased access channels they believe to be indecent and prohibit obscene or indecent programming as well as programming which solicits unlawful conduct. The government argued that the cable operators operating under the regulations are not state actors, but the court nevertheless concluded that the government statute compelled the operators to ban indecent speech and thus constituted state action. \textit{Id.} The court then found the total ban unconstitutional because it was not the least restrictive means for achieving the government’s goal of regulating access to indecent programming by children. The circuit court did not rule on the blocking provision.

The earlier circuit court panel, in \textit{Alliance I}, reached its conclusion regarding the presence of state action subsequent to applying the test set forth in \textit{Reitman v. Mulkey}, 387 U.S. 369 (1967) to § 10 of the Cable Competition and Consumer Protection Act of 1992. Under the \textit{Reitman} test, the immediate objective, historical context and ultimate effect of the cable statute was examined. \textit{Id.} at 117. The circuit court determined that: (a) the immediate objective of the statute was to suppress indecent information by limiting its transmission on access channels; (b) the historical context in which the statute was promulgated strongly supported a conclusion that the government sought to use the statute to strip cable operators of editorial power over the content of information on leased and public access channels and then require the cable operator in identify and prohibit only inde-
contradicting earlier precedent. The Supreme Court recently granted the petition for certiorari on the case.

D. The Regulation of Broadcast Indecency: ACT III

Pursuant to statute, the FCC promulgated regulations requiring commercial broadcast licensees to limit the transmission of indecent programming to the hours between midnight and six o'clock a.m. Noncommercial broadcasters were required to limit their transmission of indecent programming to the hours between ten o'clock p.m. and six o'clock a.m. if they ceased broadcast at

In 1976, the United States Court of Appeals for the District of Columbia Circuit refused to uphold an FCC requirement that cable operators exercise control over the presentation of obscene programming on access channels. Midwest Video v. FCC, 571 F.2d 1025 (D.C. Cir. 1978). The court that found the FCC's requirement was a veiled attempt to mandate that cable operators engage in prior restraint of access channel programmers. Accordingly, the attempt "to transfer to cable operators the very censorship power statutorily forbidden to the Commission in § 326 of the act . . . [was] ill founded . . . ." Id. at 1059.

See Alliance II, 56 F.3d 105 (D.C. Cir.) (en banc), cert. granted, 64 U.S.L.W. 3070 (U.S. Nov. 13, 1995) (No. 95-124); See also COMMUNICATIONS DAILY, July 12, 1995, at 7.

The relevant statutory provisions provide as follows: "Section 1464. Broadcasting obscene language. Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1994).

Further, Section 303. Regulations relating to broadcasting of indecent programming. Act Aug. 26, 1992, P.L. 102-356, § 16(a), 106 Stat. 954 (effective on enactment as provided by § 22 of such Act, which appears as 47 U.S.C.S. § 396), provides: The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

These time restrictions were known as the "safe harbor" provisions.

In the most recent opinion on challenges to the safe harbor provisions, a majority of the Court of Appeals for the District of Columbia Circuit, sitting en banc, held that the provisions are constitutional. The majority found that the government has compelling interests in protecting children under the age of eighteen from indecent broadcasts. The first interest is to support parental supervision of what children view and listen to on the public airwaves. The second is a concern for the physical and emotional well being of society's youth. The majority also found that the statute's channeling of indecent broadcast programming between the hours of ten o'clock p.m. and six o'clock a.m. would not unduly burden adult viewers' access to indecent broadcast programming.

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70. 47 U.S.C. § 303 (1994) (regulations relating to broadcasting of indecent programming), Act Aug. 26, 1992, P.L. 102-356, § 16(a), 106 Stat. 954 (effective on enactment as provided by § 22 of such Act, which appears as 47 U.S.C.S. § 396), provides: "The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming— (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight." Id.

71. Action for Children's Television v. FCC, 58 F.3d 654, 655-59 (D.C. Cir. 1995) (en banc) [hereinafter ACT II].

72. Id.

73. Id. at 660-61.

74. Id. at 661.

75. The majority actually found that the more restrictive "safe harbor" of six o'clock a.m. to midnight passed constitutional muster. However, it found that Congress and the FCC failed to provide sufficient justification for allowing the more lenient six o'clock a.m. to ten o'clock p.m. harbor for public broadcast stations that cease broadcast at midnight while imposing the more restrictive safe harbor of six o'clock a.m. to midnight. According to the majority, "the preferential safe harbor has the effect of undermining both the argument for prohibiting the broadcasting of indecent speech before . . . [10 p.m.] and the constitutional viability of the more restrictive safe harbor which appears to have been congress' principal objective in enacting the section 16(a)." Id. at 668. Consequently, the majority directed the FCC to implement the less restrictive requirements for all broadcasters. Id. at 668-69.

The dissent in ACT III criticized the majority's holding, arguing that by effectively banning all indecent programming within a particular period of time, the law preempts parents' right to supervise the media consumption of their children. Id. at 670 (Edwards, C.J., dissenting). Moreover, there was no evidence that exposure of children to indecent broadcasts is harmful to children. Id.
E. The Communications Decency Act

The Senate's most recent foray into the regulation of indecent speech is the Communications Decency Act of 1995. If enacted as


Section 402. Obscene or Harassing Use of Telecommunications Facilities Under the Communications Act of 1934.

(a) OFFENSES. Section 223 (47 U.S.C. 223) is amended in part by adding:

(d) Whoever-

(1) knowingly within the United States or in foreign communications with the United States by means of telecommunications device makes or makes available any obscene communication in any form including any comment, request, suggestion, proposal, or image regardless of whether the maker of such communication placed the call or initiated the communications; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by subsection (d) (1) with the intent that it be used for such activity; shall be fined not more than $100,000 or imprisoned not more than two years, or both.

(e) Whoever-

(1) knowingly within the United States or in foreign communications with the United States by means of telecommunications device makes or makes available any indecent communication in any form including any comment, request, suggestion, proposal, image to any person under 18 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 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 not more than $100,000 or imprisoned not more than two years, or both.

(f) Defenses to the subsections . . . (d), and (e), restrictions on access, judicial remedies respecting restrictions for persons providing information services and access to information services-

(1) No person shall be held to have violated subsections . . . (d), or (e) solely for providing access or connection to or from a facility, system, or network over which that person has no control, including related capabilities which are incidental to providing access or connection. This subsection shall not be applicable to a person who is owned or controlled by, or a conspirator with, an entity actively involved in the creation, editing or knowing distribution of communications which violate this section.

(2) No employer shall be held liable under this section 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 has knowledge of, authorizes, or ratifies the employee's or agent's conduct.

(3) It is a defense to prosecution under subsection (d) (2), or (e) that a person has taken reasonable, effective and appropriate actions in good faith to restrict or prevent the transmission of, or access to a communication specified in such subsections, or complied with procedures as the Commission may prescribe in furtherance of this section. Until such regulations become effective, it is a defense to prosecution that the person has complied with the procedures prescribed by regulation pursuant to subsection (b) (3). Nothing in this subsection shall be construed to treat enhanced information services as common carriage.

http://digitalcommons.law.villanova.edu/mslj/vol3/iss1/7
written, the bill would ban the sending of obscene material to anyone, including indecent material to minors, when conducted over electronic bulletin boards and computer networks.\textsuperscript{77} It would also increase the maximum penalty for unlawful transmission of such materials via telephone to $100,000 or two years in prison or both.\textsuperscript{78} The legislation does not define "obscene" or "indecent." The goal of the provision is to ensure that children roaming through the Internet computer networks would not be exposed to indecency or sexual harassment and to further deter the transmission of such information over traditional media.\textsuperscript{79} The legislation has encountered significant criticism and opposition.\textsuperscript{80}

F. The New Scheme

Based on recent case law, a new indecency regulatory scheme includes placing substantial control over the flow of sexually indecent information in the hands of network operators who no longer

\begin{itemize}
\item[(4)] No cause of action may be brought in any court or administrative agency against any person on account of any activity which is not in violation of any law punishable by criminal or civil penalty, which activity the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.
\item[(g)] No State or local government may impose any liability for commercial activities or actions by commercial entities in connection with an activity or action which constitutes a violation described in subsection . . . (d) (2), or (e) (2) that is inconsistent with the treatment of those activities or actions under this section: Provided, however, that nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.
\item[(h)] Nothing in subsection (d), (e), or (f) or in the defenses to prosecution under (d), or (e) shall be construed to affect or limit the application or enforcement of any other Federal law.
\item[(i)] The use of the term 'telecommunications device' in this section shall not impose new obligations on (one-way) broadcast radio or (one-way) broadcast television operators licensed by the Commission or (one-way) cable service registered with the Federal Communications Commission and covered by obscenity and indecency provisions elsewhere in this Act.
\end{itemize}

\textit{Id.}

\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} "In trying to protect children, you cut off the rights of adults," said Jerry Berman, executive director of the Center for Democracy and Technology, a high-tech civil liberties organization. Lehigh, \textit{supra} note 7. \textit{See also} Rose, \textit{supra} note 12.
receive immunity from criminal or civil prosecution for obscene speech.\textsuperscript{81} It also includes limiting the flow of indecent programming on broadcasting by circumscribing the broadcasters' editorial control.

Placing aside the significant difficulty in establishing a workable definition of indecent and obscene programming, if the new scheme were implemented today, parents seeking assistance in the control of the flow of indecent information into their homes would have the following mass media options. There would be no indecent programming on broadcasting or basic cable channels before ten o'clock p.m. In addition, indecent programming would be blocked on PEG and some leased channels. Furthermore, where such programming was not blocked on leased access channels, some form of reverse blocking would be in place for both leased and premium cable channels.

Where telephone carriers elected to do business with information providers offering indecent information, the programming would continue to be available on a twenty-four hour basis, subject to reverse blocking and other access restrictions and safeguards. It is not clear what effect the law would have on indecent information transmitted via on-line services and the Internet.\textsuperscript{82} Should the Sen-

\textsuperscript{81} See supra notes 47, 48 & 70 and accompanying text.

\textsuperscript{82} Given the fluid nature of the negotiation process during the House/Senate legislative conference on the Telecommunications Bill, it is not possible to predict the likely form of any final legislation regulating the provision of indecent or obscene programming on the internet or computer on-line services. Recently the House and Senate versions mentioned earlier in this article have been merged in conference. The merged version incorporates the definition of indecency currently use in broadcasting, cable and telephone. It includes the House's version of the "Good Samaritan" defense to prosecution for on-line providers and users who make good faith efforts to block children's access to information which may be obscene or indecent. The merged version also allows the FCC to establish the standard of what constitutes good faith - i.e. "reasonable, effective" measures, but prohibits the FCC from enforcing the standard. See Draft Conference Comm. Rewrite of Telecommunications Legislation S. 652, version dated Dec. 17, §§ 502, 507 and 509, Daily Rep. for Executives, Dec. 20, 1995.

This version of the "Communications Decency Act," which is not finalized, still faces significant opposition from liberal and conservative constituencies. The definition of indecency remains a concern for the on-line computer industry. Moreover, the legislation has not come to the floor of either chamber of Congress for a vote, and it is not clear whether the omnibus legislation of which the "Decency Act" is part, would be signed by the President were it to be passed by Congress. See Proxy Vote Crucial: Telecom Conference Panel Votes for Strict Cyberporn Proposal, Communications Daily, Dec. 7, 1995, at p.2; Nathaniel Sheppard, Jr., Congress Weighs Telecommunications Reform; Key Issue: Defining Indecency, Chicago Trib., Dec. 22, 1995, at p.4; Benjamin Wittes, Taming Cyberspace, The Recorder, Dec. 29, 1995, at p.1.

With the foregoing caveats, assuming the new version of the "Decency Act" survives in tact, parents could anticipate significant assistance from on-line providers to limit the exposure of children to indecent programming. Some speech
ate provision become law, it is likely that some system-operators and service providers would decline to carry such information or possibly seek a declaratory ruling as to the information’s content status. This option, however, seems likely until the FCC’s regulations are promulgated. In the event the House version is adopted, no such FCC regulations would be forthcoming. Additionally, transmission provider efforts to manage or assist others in managing the flow of indecent speech would not give rise to potential liability. Until such time as Congress succeeds in passing some form of legislation, all that may be truly said is that the scope of transmission providers’ responsibility and liability remains murky.

The new scheme would differ from the current scheme in the following ways. First, due to the safe harbor regulations, indecent programming would not be available on broadcasting and basic cable from eight o'clock p.m. to late in the evening. Second, children’s access to indecent information via online services would be prohibited. Third, there would be an increased severity in the penalties for unlawful transmission of indecent or obscene programming. The last difference would be one of degree, but otherwise no different from the current law.

Parents and others seeking access to indecent programming or information would find their access constrained. Roughly forty percent of broadcast viewers who do not subscribe to cable television would receive such programming only between the hours of ten o'clock p.m. and six o'clock a.m. Those subscribing to cable, who receive only basic cable service, would have the same experience as their broadcast viewing counterparts. Ultimately, indecent infor-

would certainly be chilled as individuals who remain unsure about what constitutes indecency or obscenity in a particular jurisdiction seek to avoid liability. See, e.g., Steve Alexander, The Content of Cyberspace, STAR TRIB., Jan. 5, 1996, at 3B.

Regardless of recent judicial determinations of the constitutionality of the indecency standard, its definition remains an enigma whether it is consulted for the identification of actionable content or a distinction between what is indecent and what is obscene. See Jeremy Harris Lipschultz, Conceptual Problems of Broadcast Indecency Policy and Application, COMMUNICATIONS & THE LAW, June 1992, at 3-29. The lack of specificity is rendered more problematic by the fact that various jurisdictions have varying views on where to draw the line between what is indecent and what is obscene. The net result may be that the jurisdiction with the most limited definition of what is indecent and the most expansive definition of what is obscene may set the standard for the nation (or for significant portions of the world). In the process it will seriously hamper the ability of users in other jurisdictions to acquire or receive information. See CompuServe Blocks Subscribers Access to Sex-Oriented Groups, BALTIMORE SUN, Dec. 30, 1995, at 6A; Michael Drayer, A First Amendment Obscenity Commentary, BROADCASTING, Jan. 21, 1991, at 18; Michael Meyer, The Nation; The Internet; How to Put Borders on a Borderless Technology, L.A. TIMES, Jan. 14, 1996, at p.2; Len L. Munsil, Cybersex Isn’t OK; It’s Illegal, ARIZONA REPUBLIC, Dec. 18, 1994, at F1; Worldwide Net, Worldwide Trouble, WASH. POST, Jan. 5, 1996, at A20.
Information is likely to be banned on PEG channels and subject to reverse blocking schemes on leased and premium channels.

1. The Constitutionality of the New Scheme

In the debates regarding applicable legislation and resulting litigation, several issues have been addressed. The major issue is the constitutionality of government efforts to ban or limit the access of consenting adults to indecent programming in order to assist parents and pursue the government's interest in protecting children.83

The government's interest in protecting children is significant.84 The government is viewed as having a compelling interest in "helping parents exercise their primary responsibility for [their] children's well-being" with laws designed to assist parents in discharging their responsibility.85 This interest includes supporting parental authority in households through regulation of otherwise protected expression.86 Moreover, the government has an interest in safeguarding the physical and emotional health of future citizens.87 The range of acceptable "least restrictive alternatives" which may be imposed on access to indecent programming includes time of day restrictions (broadcasting), incentives to deny access or segregate channel access (cable), reverse blocking (cable and telephone), credit cards, authorization numbers, message scrambling and denial of access to carrier billing services (telephone).

A second important issue concerns where the government is allowed to place liability for the failure to preclude children's access to indecent communication or for engaging in indecent speech deemed harmful to children. For, when the transmission provider is made to share liability with the actual speakers, the provider acquires an incentive to limit the free flow of information.88


86. Id. at 18 (citing Ginsberg, 390 U.S. at 639; FCC v. Pacifica Found., 438 U.S. 726, 749 (1978)).

87. Id. at 19.

88. In concurring with the majority's decision to overturn Congress' ban on indecent telephone speech, Justice Scalia stated, "while we hold that the Constitution prevents Congress from banning indecent speech in this fashion, we do not
In each case, regardless of technology, the statutes impose some liability for obscene or indecent speech on transmission providers. Where the transmission provider is not the speaker, limited editorial control, for the sole purpose of controlling indecent speech, is “returned” to the provider (cable), or imposed on the provider (telephone). In either scenario, the provider becomes responsible for blocking or restricting access.

A third issue implicit in the cases is the constitutionality of the government’s calculus of the balance to be struck between competing compelling interests in access and diversity on the one hand and in assisting parents and protecting children from the potential harm of indecency on the other. Where government policy facilitates the expansion of access and diversity which creates or exacerbates opportunities for potential harm to children, to what extent may the government change its policies to limit access and diversity in order to extend protection to children? The answer appears to be that the government may limit access and diversity provided it does not legislate an outright ban on indecent speech.

hold that the Constitution requires public utilities to carry it." Bruce Fein, Cable Discretion and the First Amendment, WASH. TIMES, Dec. 2, 1992, at G1 (citing Carlin Communications v. The Mountain States Tel. & Tel. Co., 827 F.2d 1291 (1987) (regarding cable network owner control of indecent speech)).

89. 47 U.S.C. § 223(c) (1994). Subsection (c) provides that:

(2) Except as provided in paragraph (3), no cause of action may be brought in any court or administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of—

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or

(B) any access permitted—

(i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b), or

(ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b).

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access.

Id.
2. The Causal Disconnect

The more fundamental issue, addressed in the ACT III decision and raised by implication in Alliance and Sable, is whether there is any evidence that indecent programming causes any demonstrable harm to children. 90 Labelling the dissent's argument as "begging the question," the majority in ACT III argued that a "scientific demonstration of psychological harm" is not required to establish the constitutionality of Congress' and the FCC's safe harbor rules. 91 The majority held that the failure to establish the absence of a causal nexus and the "obvious concern on the part of parents and [other responsible officials] to protect children from exposure to sexually explicit, indecent, or lewd speech" is sufficient. 92

In contrast, the dissents of Chief Judge Edwards and Judge Wald emphasize that neither Congress nor the FCC had succeeded in presenting any evidence of a link between exposure to indecent broadcast communication and harm to children. 93 Even if the government's compelling interest in the protection of children is conceded, the government must establish an actual threat to its interest. 94 Furthermore, the failure to establish a causal nexus between indecent broadcast speech and harm to children is a failure to establish the existence of a threat to the government's interest. 95

The majority does not directly address the arguments of the dissent. However, given the extent of public concern and the force of public assertion and certitude regarding the impact of indecent information on children and teenagers, 96 one would reasonably have expected more than the argumentative slight of hand by which the majority seeks to shift the burden of proof. The prob-

91. Id. at 661.
92. Id. at 662-64 (citing Ginsberg v. New York, 390 U.S. 629, 641-42 (1968); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)).
93. Id. at 669-83 (Edwards, C.J., dissenting) and 683-88 (Wald, J., dissenting).
94. Id.
95. Chief Judge Edwards noted that the FCC was unable to cite any studies establishing a causal connection between exposure and harm during oral argument. Id. And, the studies relied on by the government, which actually addressed indecency, discussed indecent materials but did not account for harm. Id. at 671 (Edwards, C.J. dissenting). Judge Wald noted that in the more than six years during which the safe harbor rules have been in force, the FCC produced "no concrete evidence of any real or even potential harm suffered by the exposure of children to indecent material, [nor] 'a scintilla of evidence' as to how many allegedly indecent programs have been either aired or seen or heard by children inside or outside the safe harbor." Id. at 686 (Wald, J., dissenting).
96. See Treise et al., supra note 31; Hillem, supra note 31; Posch, supra note 31.
lem, in fact, may be what the dissent says it is. There simply was no credible evidence adduced because the harm was presumed.97

Evidentiary argumentation in the literature regarding the psychological impact of broadcast indecency on children takes many forms. Some of the evidence is quantitative in substance. It suggests that the sheer frequency and number of exposures to which children are subject creates the opportunity for harm or is the harm itself.98 Those preferring quantitative evidence regard statistics that the average American child will have spent more time in front of a television than in school classrooms by the time the child reaches maturity as dispositive.99

Qualitative evidence is offered to suggest that what children see on video channels regarding sexual relationships is distorted and causes harm by virtue of children's tendency to emulate what they see.100 Some of it is based on analogies to other areas of research, such as violence or the impact of advertising. For instance, it is argued that the harm children suffer from the portrayal of violence in the media, or the success of media advertising in motivating consumer activity, supports a similar finding of a causal relationship between harm and children's exposure to indecency.101 Finally, some of the evidence is based on surveys of children themselves.102 These surveys typically elicit statements from

97. In response to challengers' assertions that the underlying rationale for restricting broadcast indecency is suspect because no evidence exists that such programming is harmful to children, the Commission cited congressional findings later discounted by the dissent in ACT III, but it also stated: "[A]s we noted in our 1990 Report, it is well established that harm to children from exposure to such material may be presumed as a matter of law." Citing 5 F.C.C.R. at 5300 (citing FCC v. Pacifica Found., 438 U.S. 726, 757-58 (Powell, J., concurring) and Ginsberg v. New York, 390 U.S. 629, 641-43 (1968)); accord Sable Communications v. FCC, 492 U.S. 115, 126-27 (1989). See Report and Order In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, 8 F.C.C.R. 704, 17 & 18, nn.35, 36 & 37 (1993).
98. See Walker, supra note 29.
99. Id.
100. See id.; Posch, supra note 31; Scott-Jones, supra note 34.
101. See Posch, supra note 31.
102. See Creno and Hicks, supra note 34. See also "TV Feedback," The MacNeil/Lehrer NewsHour, Aug. 29, 1995, Transcript No. 5303.

In New York: Robert MacNeil; In Washington: Elizabeth Farnsworth; GUESTS: Reed Hundt, Chairman, FCC; Betty Ann Bowser.

MS. BOWSER: Let's shift gears a little bit, if we can. The other issue besides violence is sex, and sex on television. How much of what you know about sex did you learn from watching television?

MALE TEEN: Probably a lot.

JESSIE JENSEN: I think sex is so casual on TV. There's too much sex, and they don't show the sex, but they show the intentions and-

MALE TEENAGER: Yeah. You can see what's gonna happen.
children about their assessment of the programming's impact on themselves and others. While they are informative and illustrative of the children's understanding of the issues, the surveys are not based on social, scientific or clinical research.

Ultimately, the evidence regarding the frequency of the average child's exposure to media may say little about how individual children are actually affected. Identifying the amount of time an audience is exposed to television is a useful but gross measure.\textsuperscript{103} Aside from frequency, in order to determine what, if any, harm attends the viewing of television containing sexual content, we also need knowledge of the amount and nature of attention children devote to television. Beyond exposure time and attention, we also need some way of discerning the sexual content of video programming and estimating its actual effect on children of various developmental ages.\textsuperscript{104} This research would have to be conducted in a way

\begin{quote}
FEMALE TEEN: That offends me more than violence on TV.
MS. BOWSER: The sex is more offensive?
UNIDENTIFIED MALE TEENAGER: Same here.
JESSIE JENSEN: Parents play a big role, because they're there to show you what's right and wrong.
MS. BOWSER: Whose job is it to regulate, to oversee what little kids watch on television? Is the government's job?
MALE TEEN: It's not the government's job.
MS. BOWSER: It's parents. It's almost unanimous.
JESSIE JENSEN: Education also.
ERIN BLACK: But parents can't be there all the time, every day.
UNIDENTIFIED FEMALE TEENAGER: But it's their responsibility.

MS. BOWSER: In the final analysis, how many of you—you can raise your hands—how many of you would like to see less violence on television? [two hands go up] How about less sex? [more hands go up] You don't like the violence you see on television; you're offended by the sex you see on television; but you don't want a V-chip in every TV set. What can be done about it?

ALICIA MULLEN: A lot of the problem is people, there's like all these major problems, and everyone wants some easy solution and they're like, oh, well, we'll put a V-chip in the TV's and then everything will be okay, and that's—I mean, instead of focusing on like, well, there's problems with gangs and there's a problem with kids knowing how serious sex is, they don't like try to educate—they're just like, oh, well, we'll put a V-chip in the TV set.

MALE TEEN: They want to take the easier way out.

MS. BOWSER: On that note, I think we're going to end. Thank you very much for being with us.
\end{quote}

\textsuperscript{103} Gina Pazzaglia-Sylvester et al., \textit{Children's Television and Nutrition: Friends or Foes?}, \textit{Nutrition Today}, Feb. 1995, at 6. For instance, it is rightly argued that the issue of sexuality in advertising is "too complicated to be addressed merely by controlling or regulating the frequency of sexual appeals used." Stephen J. Gould, \textit{Sexuality and Ethics in Advertising}, J. of Advertising, Sept. 1994, at 73.

\textsuperscript{104} Research into how children respond to TV's content is necessary to determine its effects. It is suggested that there are at least four general classes of
that does not do harm to children. An effort of such magnitude has already been undertaken with regard to the study of the influence media violence has on society. A similar effort regarding media's sexual portrayals would seem to be equally justified.

IV. THE IMPACT OF GOVERNMENT POLICY ON ELECTRONIC SPEECH: ACCESS AND ELECTRONIC SPEECH

Electronic communication by telephone, cable, broadcast or computer network technology is constitutionally protected speech. Cable television, PEG and leased access rules afford measurable effects: (1) physiological, (2) cognitive, (3) attitudinal and (4) behavioral. See Pazzaglia-Sylvester, supra note 103. Cognitive effects are changes in what a person knows or thinks. It is suggested that cognitive effects could be measured by changes in knowledge, recall, retention and comprehension. Attitudinal effects have intellectual and emotional components. They are comprised of what one may think or feel about the sexual content of messages one may receive from television. Behavioral effects are any changes in children's behavior. Id. Given these definitions, it is reasonable to suggest that the vast majority of criticism concerning the portrayals of sex on television imply or assert that harm occurs in children's cognitive, attitudinal and behavioral development. Research concerning the impact on children's cognitive, attitudinal and behavioral development as a result of viewing various amounts of video programming containing sexual content is certainly needed. Id.

In addition, we should engage in research to determine just what children perceive and understand when they view programming with sexual content. For instance, one scholar has suggested the use of cultivation analysis pioneered by Dr. George Gerbner at the Annenberg School of Communications at the University of Pennsylvania. See Gould, supra note 103.

We might ask who watches [programming] and ads with sexual appeals with what understandings and what impacts, and how these understandings and impacts interact with those of the surrounding editorial or program content. Both qualitative and quantitative research is needed, especially qualitative research that reveals the meanings and understandings . . . [children] obtain from ads.

Id.

[Another] analytic technique would be [to] allow children to . . . provide their own meanings, interpretations, and contexts for evaluating the programming and ads. Such [child] . . . driven perspectives might be linked to how children relate sexuality in [programming and] advertising to the rest of their lives and how their experience with it changes over time.

Id.

"Quantitative confirmatory research could be done to translate the subjective meanings [children] . . . assign to . . . [sexual content in programming and] advertising into scalable questions and see whether those questions are supported." Id.


106. The information communicated may be work-related, scientific, educational, political, personal or illicit in nature. See Bill Duryea and Brad Snyder, They Preach Hate of Public Access TV, St. PETERSBURG TIMES, July 12, 1993, at 1A (addressing difficulties raised by use of cable public access channel to promote ideas of Nazis and Ku Klux Klan); Bill Duryea, Cable TV Obscenity Issue Flares, St. PETERSBURG TIMES, July 17, 1993, at 1A.
tronic speech opportunities to programmers, groups and individuals other than those affiliated with the cable television network owner. In this way, the channel availability increases the diversity of speakers and information available to the audience subscribing to cable television.

Individuals using telephones and computer network services engage in electronic speech as well as assembly and association in order to share information. In the process, they become speakers and publishers.

The confluence of technological transitions creates important opportunities for the increased exercise of electronic speech and related assembly and association activities by network owners and

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107. Through the use of electronic mail services, on-line computer bulletin boards, computer conferencing services, host computer facilities and digital libraries, network users are able to interact with one or many other interconnected users by voice, text and video.

108. Users may electronically assemble in real time via on-line computer bulletin board services or conferencing services (voice, video, text or multi-media) to share information.

109. Users may electronically associate together on a deferred or real-time basis in ephemeral or formal electronic communities or groups to share information.

110. The current range of speech and related processes encompasses everything from the creation, receipt and editing of information, to interactive communication between two or many persons. The information communicated includes that of a work-related, scientific, educational, political, personal or illicit nature.

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http://digitalcommons.law.villanova.edu/mslj/vol3/iss1/7
users. Access to networks is increased while control over the creation, manipulation and movement of information is decentralized.

Paradoxically, the government's regulatory efforts have also created occasions for the loss of electronic speech rights. Judicial decisions holding that cable and local telephone network owners possess relatively unbounded speech rights will increase the concentration of private control over electronic speech and its related activities. Similarly, the implementation of indecency restriction schemes which cede control over problematic but protected speech to network owners, increases the private concentration of control over electronic speech and its related activities as the owners seek to limit their liability, their competition or communication which they consider distasteful, troublesome, dangerous or just plain wrong.

V. CONCLUSION: REASON, RESTRAINT AND RESPONSIBILITY

In the final analysis, Congress appears to be acting with understandable haste but not enough thought. First, the causal nexus could and should be better established. Arguments that a statistical significance exists between rising rates and hours of television viewing and rising rates of sexual problems in society are seductive. However, they ignore or fail to discount the existence and potential inter-relationship of other likely causes. Reversing the burden of proof or deferring to Congress, as the D.C. Circuit does in ACT III, does not provide any better solution. It is the proponents of regulation who argue that a problem exists. It is they who would reduce the rights of others in order to protect children. And, while the ills of our current society provide ample reasons for concerns and beliefs about the impact of sex in the media, opinions - no matter how firmly held, concerns - no matter how legitimate and beliefs - no matter how heartfelt, do not constitute proof of adverse impact. Given the goal of controlling the flow of protected speech, more than concern, belief or argumentative slight of hand is necessary. History is replete with many instances of firmly held opinions, legitimate concerns and heartfelt beliefs generating antisocial and repressive policies. Evidence of harm is all the more necessary here because such proof can and should be developed.111

Second, while Congress uses the policies to assist parents, it does not do so in a way that assists them in addressing the issue of sex with their children. Instead, it seeks to remove the lewd gadfly out of sight in the belief that this will place sex out of mind. This is

111. See Testimony of Dr. Edward Donnerstein, supra note 104.
simply not realistic, nor is it practical. Given many parents' reluctance to discuss sexual mores with their children, a policy of silence is particularly bad. Children naturally have questions about sex. No one is able to shut off all avenues of possible discourse on sex in any event. Additionally, most experts find that informed and communicative parents are critical to society's efforts to reduce the spread of sexually transmitted diseases, stem the tide of teenage pregnancies and reduce sexual abuse. If some parents, educators and children are to be believed, more and better education is needed regarding sexuality and the dangers inherent in an open society, much of which comes from parents.

Third, the policies constrain parents' authority to choose and shape their children's development by banning or reducing the availability of sexually oriented programming. While this argument may prove less sympathetic to some, it is true that not all parents think alike on this issue. Moreover, the decision to facilitate a ban of the material rather than assisting parents in becoming more informed and competent is patronizing and cynical at best, while dangerous to democracy at worst. Government assistance in making information available and allowing citizens to make an informed choice facilitates responsible citizenship. Government decisions to remove information and solve the problem by executive fiat removes opportunities to exercise meaningful maturity, autonomy and control and thus damages democracy.

Fourth, the parents who buy much of the technology to which their children gain access find such technology difficult to manipulate or understand. This fact argues for parental education at a minimum, as well as the exercise of restraint in purchasing potentially problematic technology until one is satisfied that one is competent to use it. The government's legislation to control or ban indecent content could easily be read as embodying an implicit decision to support uninformed, unchecked consumerism by making it less necessary for parents to be aware of what they provide to their children.

Nevertheless, the media is not without significant blame. The networks' collective decisions to increase the sexual and violent content of network programming and expand the hours of the day during which such programming is shown may make competitive

112. See Owens, supra note 37.

sense. It may also have constitutional protection, but they are at
times not responsible as they relate to the welfare of children. On
this point, a substantial portion of society has spoken. If the media
eschews government regulation, they must aggressively take respon-
sibility themselves.

Finally, even when many of the allegations of the media's ad-
verse impact on children are proved - and I believe it is likely that
they will be — we should not overreact and create an indecency
regulatory scheme which unnecessarily constrains the access of
adults to information enjoying First Amendment protection. As the
House has acknowledged, the restrictions of indecent information
on the Internet envisioned by the Senate are likely to prove far less
necessary given the development of software capable of locking out
children's access to sexual chat rooms and binary files on the
Internet.

114. See Kiesewetter, The Passing of TV's Family Hour: Adult Themes Take
Over 8 p.m. Time Slot, USA WEEKEND, Aug. 20, 1995, at G1; Dan Olmsted and Gigi

Sex, and what your mother called vulgar language, now play nightly on
the four major networks - for laughs, shock value, sizzle and ratings, and
because producers say viewers want verisimilitude, and this is how reality
looks and sounds in 1990s America. But such programming may turn off
a sizable number of viewers - including 97 percent, or 63,000, of the
65,142 readers who took part in USA WEEKEND's survey on TV violence
and vulgarity. The key finding: Many viewers want to wash out TV's
mouth with something stronger than fabric softener . . . . Sexual content
tops the list of troublesome programming, with violence second. The re-
results are not scientific, but they're overwhelming . . . .

Olmsted and Anders, supra. See also Tom Feran, Pilot Is Blue, But Bochco Says It Flies,
PLAIN DEALER, July 27, 1993, at 11C; Drew Jubera, Bochco Seeks to 'Paint With Same
Colors' as R-Rated Cable-TV Movies, STAR TRIB., Aug. 22, 1993, at 3F; Ron Miller,
Networks Want to Keep Control of Sex and Violence, CHI. TRIB., Aug. 20, 1993, at 3; Cal
Thomas, Leading the Unwary Into TV's Sewer, SAN DIEGO UNION-TRIB., Aug. 1, 1993,
at G-2; Cal Thomas, 'NYPD Blue' Is New Low In TV Fare, ST. LOUIS POST-DISPATCH,
Aug. 1, 1993, at 3B.

115. To date, the difficulty in establishing proof seems to be less one of the
absence of a nexus between viewing certain forms of indecent programming and
harm to children and more one of an absence of credible research having been
conducted. See supra, notes 95 & 97. Given the significant numbers of child sex
offenders now beginning to be treated, there are opportunities to conduct some
forms of research which do not expose children to the harm which many fear may
result from exposure, but document the existence of harm these children and
their victims have suffered as a result of exposure. See Banotti, supra note 35;
Decwikiel-Kan, supra note 35; Kestin, supra note 35; O'Crowley, supra note 35.

116. See supra notes 6-17 and accompanying text.