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Comments

INTERNET INDECENCY AND IMPRESSIONABLE MINDS

I. INTRODUCTION

Recently, the debate between the value of robust free speech and protecting the impressionable minds of the nation’s youth has been expanding to cover technological advances in methods of communication. For example, the Communications Decency Act (“CDA”) and ensuing litigation have provided a platform for the controversy surrounding Internet technologies and the impact they may have on children. Despite the controversy between protecting children or allowing them legitimate access to

1. See Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965) (holding that statute relating to detention and destruction of unsealed mail containing communist political propaganda was unconstitutional and “at war with the ‘uninhibited indecency is imprecise. One distinction, however, is that no federal court has defined indecent speech. Similarly, the CDA has not provided any definition of indecent speech. The Federal Communications Commission in, robust, and wide-open’ debate that First Amendment contemplates); see also Stanley v. Georgia, 394 U.S. 557, 564 (1969) (upholding right to privacy in one’s home and noting “right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society”).


3. See 18 U.S.C. § 1460 (1994) (prohibiting “knowingly sell[ing] or posses[ing] with intent to sell an obscene visual depiction, [which is punishable] by a fine in accordance with the provisions of this title or imprison[ment] for not more than [two] years or both”); 47 U.S.C. § 223(b) (Supp. III 1997) (prohibiting transmission of indecent speech). Section 223(b) prohibits:

(1) in interstate or foreign communications—(A) by means of a telecommunications device knowingly—(i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person; (B) by means of a telecommunications device knowingly—(i) makes, creates or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.

Id.; see 47 U.S.C. § 223(d) (Supp. III 1997). Section 223(d) prohibits:

whoever (1) in interstate or foreign communications knowingly—

(745)
necessary information, little attention has been given to the actual impact
indecent speech may have on children. Although political rhetoric sur-
rounding obscenity and indecency blends the two concepts, both the legal
and scientific ramifications of each type of speech are distinct. For in-
stance, the literature on pornography indicates that sexually violent

(A) uses an interactive computer service to send to a specific person
or persons under 18 years of age, or (B) uses any interactive com-
puter service to display in a manner available to a person under 18
years of age, any comment, request, suggestion, proposal, image, or
other communication that, in context, depicts or describes, in terms
patently offensive as measured by contemporary community stan-
dards, sexual or excretory activities or organs, regardless of whether
the user of such service placed the call or initiated the communication.

47 U.S.C. § 223(d); see 47 U.S.C. § 223(e) (Supp. III 1997) (qualifying CDA by
allowing two affirmative defenses, subsection (5)(A), which covers those who take
"good faith, reasonable, effective and appropriate actions to restrict . . . access to
minors," and subsection (5)(B), which covers those who restrict access to covered
materials by requiring proof of age such as verified credit card, adult identification
number or code); Reno, 521 U.S. at 860 (noting protections of affirmative defenses
for good faith restrictions and use of designated restriction mechanisms such as
credit cards or identification numbers).

4. See Protecting Children from Computer Pornography Act: Cyberporn and Children:
Hearings on S. 892 Before Committee on the Judiciary, 104th Cong. 1 (1995) [hereinaf-
ber Cyberporn] (opening statement of Hon. Charles E. Grassley, Iowa) ("Fundamen-
tally, the controversy this committee faces today is about how much protection we
are willing to extend to children."). Senator Grassley discusses how playgrounds
are hunting grounds for child molesters and how, teenage pregnancy and teen
drug use has increased:

Until very recently, parents could breathe a little easier in their own
homes. After all, the home is supposed to be safe and is supposed to be a
barrier between your children and the dark forces which seek to corrupt
and destroy our youth. But enter the internet and other computer net-
works. Suddenly, now not even the home is safe. Now the dark forces
which were once stopped by the front door have found their way into the
home through personal computers.

Id. But see id. at 35 (statement of Hon. Russell D. Feingold, Wisconsin) (noting
that although protecting children is most important challenge Internet poses, Sen-
ator expressed concern that "discussion has become so sensationalized that Con-
gress may 'fail to react appropriately'"); see also ACLU v. Reno, No. 96-CV-963,
Complaint] (presenting examples of organizations that post information benefi-
cial to children). For example, the organization Stop Prisoner Rape alleged that:

[M]inors do access its web site, and believes it is essential to allow this
access to continue. Minors are among the victims of prisoner rape and are
in fact well-known and abundantly described in published literature
on the subject to be particularly singled out as targets for sexual assault
precisely because of their youth.

Id. at *17.

5. See Kelly M. Doherty, WWW.Obscenity.Com: An Analysis of Obscenity and Inde-
cency Regulation on the Internet, 32 AKRON L. Rev. 259, 266 (1999) (stating obscene
language is not subject to constitutional protection but indecent language is con-
stitutionally protected and subject to strict scrutiny).
images and child pornography may be harmful, whereas nudity is not harmful per se.6

Children can and do understand what they perceive in the media.7 But in some instances, sexually explicit information that would be charac-

6. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (stating not all nudity is obscene and citing as examples of non-obscene nudity a bare baby's buttocks and scenes from movies in societies where nudity is indigenous); Ginsberg v. New York, 390 U.S. 629, 634-35 (1968) (stating pictures of nudity are not obscene to adults but are to minors). But see Ginsberg, 390 U.S. at 629 (concluding moral and social well being of minors justify regulation of sexually explicit material). Freedom of speech proponents argue to limit regulation of indecency. See Alliance for Community Media v. FCC, 56 F.3d 105, 149 (D.C. Cir. 1995) (Edwards, C.J., dissenting in part) (noting that Commission’s orders implementing Cable Television Consumer Protection and Competition Act of 1992 governing indecent and obscene programming violated First Amendment liberties and stating that “in focusing on indecency . . . Congress has addressed a 'problem' that has yet to be shown to have any harmful effects,” in comparison with violence in media, which Senator asserts is harmful). In Alliance, television access programers challenged FCC orders implementing the Cable Television Consumer Protection and Competition Act governing indecent and obscene programming. See id. at 105. The United States Court of Appeals for the District of Columbia Circuit held that the Act requiring segregating and blocking indecent programing was the least restrictive means of achieving the government's interest in limiting children's access to indecent programing. See id. at 111 (discussing § 10 of Cable Television Consumer Protection and Competition Act as least restrictive way to implement Congressional intent "to limit the access of children to indecent programing"); see also Cyberporn, supra note 4, at 7 (opening statement of Hon. Patrick J. Leahy, Vermont) (noting that "when the problem of children's access to objectionable online material first came up for a vote . . . the Senate acted without the benefit of hearings or anything approaching the thorough examination of the matter that you have set out"); id. at 11 (prepared statement of Sen. Leahy) (“I am old fashioned enough to remember when we used to hold hearings first and pass legislation after—after we got the facts, had analyzed the problem and had worked with the Administration and the public to craft a legislative solution to the public's legitimate concerns.").

Little empirical information has addressed the effect of pornography on children. See 27 The Report of the Commission on Obscenity and Pornography (1970) [hereinafter Johnson Commission] (“In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults.”). For a further discussion of the findings of the Attorney General's Commission on Pornography, see infra notes 74-169 and accompanying text.

terized as indecent under the CDA or similar state statutes can be helpful to and educational for children. The problem is, most protectionist rhetoric provides examples of obscene speech while arguing to restrict both obscene and indecent speech. Whether children are harmed by indecent speech or benefit from the availability of information that could be labeled indecent has not, however, been systemically evaluated.

Clearly, both children and parents have the right to be free from governmental regulation of speech that is not harmful; therefore, because the CDA also prohibits harmless speech, it is not appropriate. To support this position, Part II of this Comment traces the background of the free speech obscenity debate through the development of the concept of indecent speech, noting the important differences between indecent speech and obscenity and culminating in a discussion of Reno v. ACLU.

Part III discusses the scientific literature on the effects of pornography and demonstrates that governmental limitations on pornography should be ciri-
cumscribed to the two forms that are harmful.\textsuperscript{13} Finally, Part IV discusses parental guidance as an alternative to governmental control.\textsuperscript{14}

II. BACKGROUND

A. Why Free Speech is Important in a Democracy

The First Amendment guarantees freedom of speech, declaring "Congress shall make no law . . . abridging the freedom of speech."\textsuperscript{15} The Framers made such a guarantee, not to protect the popular opinion, but rather to acquiesce people's natural tendency to form factions and to protect the opinions of those not in power.\textsuperscript{16} Rather than governmental authority limiting speech and the ideas of the populace, the marketplace of ideas was viewed as the appropriate method for determining which ideas were worthy of sustained attention.\textsuperscript{17} Not only were unpopular views to be protected, but the Supreme Court later noted that "a principal function of free speech under our system of government [was] to invite dispute. [Free speech] best serve[s] its high purpose when it induces a condition of unrest."\textsuperscript{18}

The First Amendment also protects children.\textsuperscript{19} Although such protection is more limited than for adults, children have affirmative First Amendment rights that the government may not completely abridge.\textsuperscript{20}

\textsuperscript{13} For a discussion of the scientific literature, see \textit{infra} notes 74-169 and accompanying text.

\textsuperscript{14} For a discussion of parental guidance as an alternative to governmental control, see \textit{infra} notes 172-200 and accompanying text.

\textsuperscript{15} U.S. Const. amend. I.

\textsuperscript{16} \textit{See} The Federalist No. 10, at 58 (James A. Madison) (Jacob E. Cooke ed., 1961) (noting "latent causes of faction are thus sown in the nature of man").

\textsuperscript{17} \textit{See} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating "ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

\textsuperscript{18} Texas v. Johnson, 491 U.S. 397, 408 (1989) (discussing flag burning as expressive conduct deserving First Amendment protection).

\textsuperscript{19} \textit{See} Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508-11 (1969) (concluding that students' political speech, which involved wearing black arm bands in protest of Vietnam war, was permissible). The Court held that schools may limit children's freedom of speech because the speech at issue did not substantially disrupt or materially interfere with school activities. \textit{See id.} at 509.

\textsuperscript{20} \textit{See id.} at 505 (holding that speech is entitled to comprehensive protection under First Amendment and "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students").

The rights afforded children in \textit{Tinker} were somewhat diminished by the language in \textit{Hazelwood} School District v. Kulmeier, 484 U.S. 260 (1988). In \textit{Hazelwood}, the school district censored articles written by students in the school newspaper. \textit{See id.} at 262. The Court noted that such censorship was permissible because a school newspaper was fairly characterized as part of the school curriculum and the school-sponsored activities were "reasonably related to legitimate pedagogical concerns." \textit{Id.} at 273. Children have been afforded diminished rights to free speech under the theory that their "minds and values are still developing," and therefore should
The government may restrict dissemination of protected materials to children only in narrow and well-defined circumstances. Children retain the right not only to political and other speech, but to experience forms of speech that may be offensive, and or, bordering on obscene.

B. The Evolution of Obscenity

Obscenity law is rooted in the protection afforded in the First Amendment; however, First Amendment protection is not absolute. Certain categories of speech, including obscenity, are outside the scope of judicial protection. In 1972, the Supreme Court set forth the modern test for

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22. See Carey v. Population Serv. Int’l, 431 U.S. 678, 701 (1977) (noting that “fact that protected speech may be offensive to some does not justify its suppression”); Erznoznik, 422 U.S. at 215 (holding that all films containing nudity cannot be deemed obscene as to minors); see also Tinker, 393 U.S. at 512-13 (stating children may express opinions whether in classroom, cafeteria or playing field, “even on controversial subjects”).

23. See U.S. CONST. amend. I (establishing right to free speech); see also Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (noting obscenity cases involve rights derived from First Amendment guarantees of free expression, therefore, Court must make case-by-case analysis to determine whether material in question is constitutionally protected).

24. See R.A.V. v. City of St. Paul, 505 U.S. 377, 388-88 (1992) (stating that “obscenity has no constitutional protection, and government may ban it outright in certain media”); Sable Communications v. FCC, 492 U.S. 115, 124 (1989) (noting Court has “repeatedly held that the protection of the First Amendment does not extend to obscene speech”); FCC v. Pacifica Found., 438 U.S. 726, 751 (1977) (holding that FCC has power to regulate radio broadcast that is indecent, though not obscene); Erznoznik, 422 U.S. at 209 (noting that government may selectively shield public from forms of speech on grounds that speech is offensive, but such censorship is restricted by First Amendment); Paris Adult Theater I v. Slaton, 413 U.S. 49, 57 (1973) (holding that in long stretch of Supreme Court’s history, obscenity laws may be used to enforce “primary requirements of decency”); see also Kaplan v. California, 413 U.S. 115, 119 (1973) (affirming that graphic, explicit written description of sexual contact absent photograph or illustration constituted obscenity, which receives no First Amendment protection); Hamling v. United States, 418 U.S. 87, 118 (1973) (holding that definition of obscenity is legal term of art, giving notice to purveyors of obscene material that their conduct is proscribed by law); Ginsberg v. New York, 390 U.S. 629, 635 (1968) (“Obscenity is not within the area of protected speech. . . .”); Jacobellis v. Ohio, 378 U.S. 184, 188 (1964) (noting that only obscenity is excluded from constitutional protection, therefore, issue of whether French film, “The Lovers,” was obscene was necessarily one of constitutional law); Smith v. California, 361 U.S. 147, 152 (1959) (reiterating that Constitution does not protect obscene speech and materials in suit where Court
determining what constitutes obscenity in *Miller v. California.* This test requires that an:

\[
\text{Average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.}
\]

As a result of the *Miller* test, obscenity law has been applied to books, films, radio, telephone and, most recently, the Internet.

In determining what material is obscene, the Court has concluded, however, that what is obscene for children is not necessarily obscene for adults. For example, in *Ginsberg v. New York,* although appellant was convicted of selling "girlie" magazines to a sixteen-year-old boy, in violation of a New York penal law, he had a constitutional right to sell the material to adults. The New York law constitutionally defined material as obscene for persons under the age of seventeen, however, this same

overturned conviction of bookseller for possession of obscene material because bookseller conceded knowledge that material was obscene); *Roth v. United States,* 354 U.S. 476, 497-98 (1957) (holding obscene materials are not constitutionally protected).

25. *413 U.S. 15 (1973) (setting forth new test for determining if material is obscene).* In *Miller,* the Court firmly established that the community standard component of the obscenity definition, which Judge Learned Hand had previously developed in *United States v. Kennerley,* would remain a part of the modern definition of obscenity. *See United States v. Kennerley,* 209 F. Supp. 119 (S.D.N.Y. 1913) (noting that "to put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy"); *see also Miller,* 413 U.S. at 24. Prior to adopting the *Miller* test, the Court also expressly rejected the "utterly without redeeming social value" standard articulated in *Memoirs v. Massachusetts.* *See Memoirs v. Massachusetts,* 383 U.S. 413, 419 (1966) (plurality opinion) (interpreting social importance test, noting book need not be "unqualifiedly worthless" to be determined to be obscene).


27. *See Reno v. ACLU,* 521 U.S. 844, 844 (1997) (discussing regulation of obscene and indecent speech on Internet); *Sable,* 492 U.S. at 115-116 (discussing regulations of Dial-A-Porn services); *Pacifica,* 438 U.S. at 738-40 (concluding indecent language was used in broadcast); *Erznoznik,* 422 U.S. at 205 (discussing Florida statute prohibiting display of nudity in motion pictures at drive-ins); *Memoirs,* 383 U.S. at 418 (discussing action against book about life of prostitute).

28. *See Ginsberg,* 390 U.S. at 637-43 (discussing rationale for concluding state has power to alter definition of obscenity when applied to minors); *see also Bookcase Inc. v. Broderick,* 218 N.E.2d 668, 671 (N.Y. 1966) ("[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children, . . . the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.").


30. *See id.* at 631 (describing appellant's stationery store/lunch counter that sold magazines, including "some so-called 'girlie' magazines").
material was not deemed obscene for adults. Relying on its parens patriae authority previously articulated in Prince v. Massachusetts, the court held that "the power of the state to control the conduct of children reach[ed] beyond the scope of its authority over adults." Thus, the Court upheld the New York statute in favor of protecting children from harmful material. Making a limited inquiry into whether children needed such protection, the Court found that "while these studies all agree[d] that a causal link [between obscene material and antisocial conduct had] not been demonstrated, they [were] equally agreed that a causal link has not been disproved either." Based on this limited, and now dated, inquiry, Ginsberg continues to be cited as support for the proposition that children must be protected from information available to adults.

31. See id. at 632 (explaining statutory basis for conviction). The statute at issue limited the sale of magazines "which depicted female 'nudity' in a manner defined in subsection 1(b), that is 'the showing of ... female ... buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple ... " and:

(2) that the pictures were 'harmful to minors' in that they had, within the meaning of subsection 1(f) 'that quality of ... representation ... of nudity ... [which] ... (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.

N.Y. PENAL LAW § 245.10 (McKinney 1989). The Court specifically found that the magazines at issue were not obscene for adults. See Ginsberg, 390 U.S. at 654 (holding that the "girlie" magazines were not obscene for adults based on Redrup v. New York, 386 U.S. 767 (1967)).


33. Id. at 170; see Ginsberg, 390 U.S. at 640 (citing concurring opinion of People v. Kahan, 206 N.E.2d 333 (N.Y. 1965), which noted protection of children cannot always be left to parents and guardians, therefore reasonable regulation on sale of pornography to children is proper).

34. See Ginsberg, 390 U.S. at 633 (affirming conviction of vendor who sold "adult" magazine to 15-year-old boy in contravention of state law).

35. Id. at 642-43. The Court cited Dr. Gaylin of the Columbia University Psychoanalytic Clinic who described the potentially harmful impact that pornography may have on the developing ego. See id. at n.10 ("It is in the period of growth [of youth] when these patterns of behavior are laid down ... when sensuality is being defined and fears elaborated, when pressure confronts security and impulse encounters control—it is in this period ... that legalized pornography may conceivably be damaging."). Dr. Gaylin noted that "a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read." Id. The Court further cited Dr. Gaylin as stating that children are currently protected when viewing pornography by the knowledge that it is disapproved of. See id. Dr. Gaylin noted that open permission implies parental approval and even suggests encouragement. See id. (stating to openly permit implies parental and societal approval and "seductive encouragement"). The Court, however, did not note the type of harm that might ensue from such tacit approval. The Court went further to assert that people "do not demand of legislatures 'scientifically certain criteria of legislation.'" Id. at 643 (citation omitted).

36. See id. at 638-43 (explaining need for state to protect children from obscene material). Current research indicates that this view may be flawed. See John-
Although a state may define obscenity more stringently with respect to minors than it does for adults, a state may not prohibit certain forms of speech merely because children may be exposed to them.\textsuperscript{37} For example, in 1975, the Court held that a city ordinance prohibiting the display of films depicting nudity at drive-in theaters was unconstitutional.\textsuperscript{38} Furthermore, the Court could not justify the ordinance under its police power as an attempt to protect children from viewing potentially objectionable material.\textsuperscript{39} The Court held that “all nudity cannot be deemed obscene even as to minors.”\textsuperscript{40} Just because the legislature perceived nudity—a form of speech—as unsuitable for youth, it was not willing to suppress such speech on these grounds.\textsuperscript{41} “In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.”\textsuperscript{42}

Despite the Court’s well-articulated position—to protect the free expression rights of children—the Court has continued to uphold statutes...
restricting speech based on the idea that children may be exposed to offensive speech. In addition to restricting speech determined obscene as to minors, speech that is deemed indecent has also been off limits to minors. In *FCC v. Pacifica Foundation*, George Carlin’s satirical monologue, “Filthy Words,” came under attack as being indecent speech and was restricted on the theory that radio broadcasts are uniquely accessible to children. The Court reiterated the standard set forth in *Ginsberg*, that the “government’s interest in the ‘well-being of its youth’ and in supporting ‘parents’ claim to authority in their own household’ justified regulation of otherwise protected expression.” Because this form of speech was comprehensible to even a first grader, the Court found limiting the availability of such speech to be constitutional.

The Supreme Court faced the issue of whether to protect children from offensive speech over the telephone in *Sable Communications v. FCC*. The issue arose under section 223(b) of the Communications Act of 1934, as amended, which sought to restrict minor’s access to “Dial-A-Porn.” The Court, however, struck down this legislation, noting that less restrictive means short of a total ban were available that could equally protect children from “Dial-A-Porn.” The Court distinguished *Pacifica* because children do not have the same access to commercial telephone communications as they do to radio broadcasting and because indecent telephone

43. *See*, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1977) (discussing limitations of indecent speech in radio broadcasts due to unique accessibility of broadcast to children, even those too young to read).

44. *See id.* at 750-51 (holding “when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene”); *Sable Communications v. FCC*, 492 U.S. 115, 120 (1989) (noting provision sought to restrict minors from receiving access to “sexually oriented commercial telephone messages”).


46. *See id.* at 729 (referring to satiric humorist George Carlin’s 12 minute monologue entitled ‘Filthy Words’ . . . “the words you couldn’t say on the public . . . airwaves”). The monologue is reprinted in the appendix of the opinion. *See id.* at 751-55.

47. *Id.* at 749.

48. *See id.* (noting “Pacifica’s broadcast could have enlarged a child’s vocabulary in an instant”).

49. *See Sable Communications v. FCC*, 492 U.S. 115 (1989) (noting communications service that offered sexually oriented prerecorded telephone messages to callers brought suit claiming that 47 U.S.C. § 223(b)’s regulation of obscenity and indecency were unconstitutional).

50. *See id.* at 120 (noting relevant provision criminalized transmission of obscene or indecent commercial interstate telephone communications to persons under 18 years of age); *see also Dial Info. Serv. Corp. v. Thornburgh*, 938 F.2d 1535, 1541-43 (2d Cir. 1991) (upholding federal statute prohibiting indecent telephone message services based upon rationale that statute, as drafted, was least restrictive means of achieving limitation on children’s accessibility to indecency).

51. *See Sable*, 492 U.S. at 131 (holding that § 223(b) “is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages”).
communications do not present the problem of surprise present with unwilling listeners.\textsuperscript{52} It should be noted though that both of the previous cases, \textit{Pacifica} and \textit{Sable}, involved indecent speech and not obscenity.\textsuperscript{53}

\textbf{C. Obscenity versus Indecency}

Indecent speech differs from obscene speech, in both definition and constitutional protection, and, as seen in \textit{Pacifica}, also with respect to context and to conduct.\textsuperscript{54} The Code of Federal Regulations defines indecency as focusing on sexual and excretory activities or organs.\textsuperscript{55} Indecent speech is not merely material that "borders on obscenity."\textsuperscript{56} Indecent speech may, however, include all "patently offensive" material that has literary, artistic, scientific or political merit, thus avoiding the reach of \textit{Miller}.\textsuperscript{57} The problem with legislation to restrict offensive speech is that frequently, categories of speech that are both obscene and indecent are restricted by one regulation.\textsuperscript{58} Examples of the most extreme forms of obscene speech are given to justify regulation of both obscene and inde-

\textsuperscript{52} See id. at 127-28 (discussing how purchasers of dial-a-porn need to take affirmative steps to receive service offered and are not taken by surprise by indecent message).

\textsuperscript{53} See FCC v. Pacifica Found., 438 U.S. 726, 732 (1977) (characterizing monologue as indecent due to "exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience") (citation omitted); \textit{Sable}, 492 U.S. at 131 (holding that restriction of adult access to indecent telephone messages "far exceeds that which is necessary to limit access of minors to such messages" and thus does not survive constitutional scrutiny).

\textsuperscript{54} See \textit{Pacifica}, 438 U.S. at 732 n.6 (noting opinion of Commissioners Robinson and Hooks: "[w]e can regulate offensive speech to the extent it constitutes a public nuisance . . . . The governing idea is that 'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct . . . .").

\textsuperscript{55} See 47 C.F.R. § 76.701 (1998) (noting "[a]n indecent program is one that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium").

\textsuperscript{56} Alliance for Community Media v. FCC, 56 F.3d 105, 130 (D.C. Cir. 1995) (Wald, Tatel & Rogers, J., dissenting) (noting that indecent material "includes literarily, artistically, scientifically, and politically meritorious material"). The dissenters concluded that neither the indecency market nor material breaks down neatly. \textit{See id.} at 136 (noting that given free choice in matter, "the mildly curious might well decide to watch an 'unvarnished' documentary on the Mapplethorpe exhibit if it is readily available").

\textsuperscript{57} See \textit{id.} at 130 (noting that if such material lacked merit, it would fall within purview of \textit{Miller} and be labeled obscene). \textit{But see} Action for Children's Television v. FCC, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (noting that work's serious merit does not necessarily imply that material is not indecent).

\textsuperscript{58} See, e.g., Reno v. ACLU, 521 U.S. 844, 848 (1997) (noting that term obscene may remain; however, term indecent must be severed from § 223(a) in order to preserve statute's constitutionality); \textit{Sable}, 492 U.S. at 129 ("There is no doubt Congress enacted a total ban on both obscene and indecent telephone communications.").
cent speech. But in the debate over publications on the Internet, distinctions must be drawn between obscene speech and indecent speech.

D. Reno and the Communications Decency Act

The debate over legislation of morality once again took center stage when the CDA was challenged for its regulation of potentially offensive speech in cyberspace in Reno v. ACLU. The ACLU filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging that the CDA was unconstitutional on its face because it: (1) criminalized expression protected by the First Amendment; (2) was overbroad and vague; and (3) was not the least restrictive way to achieve a compelling government purpose. Particularly, Title 47 of the United States Code, § 223(b), prohibited any verbal or visual communication that was "obscene or indecent" from being knowingly transmitted to any person who was eighteen years or younger. The second challenged provision, § 223(d), prohibited "sending or displaying patently offensive messages in a manner that [was] available to a person under 18 years." The CDA did permit affirmative defenses for those persons who either took "good faith, reasonable, effective, and appropriate actions" to restrict minor's access or who restricted minors access through the use of credit cards or adult identification number. The complainants, however, did not view these protections as adequate and listed examples of protected speech that would be in violation of the CDA.

Such examples of protected speech proscribed by the CDA included safer sex instructions posted by Critical Path, reproductive planning information posted by Planned Parenthood Federation of America, human rights atrocities described by Human Rights Watch and accounts of prison rape posted by Stop Prisoner Rape. Each of these organizations asserted that access to this information would benefit children, but under current

59. See Cyberporn, supra note 3, at 1 (noting various extreme forms of obscene speech and danger of reacting without drawing reasoned distinctions).
60. See Reno, 521 U.S. 844, 844 (1997) ("Plaintiffs filed suit challenging constitutionality of provisions of Communications Decency Act (CDA) provisions seeking to protect minors from harmful material on the Internet.").
61. See Complaint, supra note 4, at *1 (setting forth causes of action).
62. Id. at *5-6 (pleading statutory bases for complaint).
63. 47 U.S.C. § 223(d) (1994) (describing age restrictions); Reno, 521 U.S. at 859 (quoting 47 U.S.C. § 223(d), which prohibits sending or displaying "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the activity.").
64. 47 U.S.C. § 223(e)(5) (a) & (b).
65. See Complaint, supra note 4, at *10-23 (pleading examples of arguably protected speech prohibited by CDA).
66. See id. at *11-19.
The stated purpose of the CDA was to protect children from cyberporn. But, by banning both obscene and indecent speech on the Internet, the CDA also suppressed protected speech. To solve the immediate problem, the Court severed the clause “indecent” from the legislation. The Court did not, however, address whether children indeed required protection from this type of speech. As the following section will demonstrate, children are harmed by two highly specific types of pornography: (1) sexually violent pornography and (2) child pornography, and therefore legislation should be focused on restricting only these forms of harmful obscene expression. Until this fact is clearly addressed, scientifically untenable, protectionist rhetoric will continue to appear.

III. DISCUSSION: THE PROBLEM OF PORNOGRAPHY

Pornography is an emotionally charged term, and a discrepancy exists over its precise meaning. Scientific evidence related to pornography has
been examined and used to advance political objectives. In advancing political opinions, however, the data may have been mischaracterized.

More frequently, empirical statements are made without support. Because of the divergence in opinions in defining pornography, this Comment will use pornography to describe sexually explicit materials designed and intended to produce sexual arousal in the viewer. To properly examine the arguments presented for and against the CDA, the nature of pornography deserves careful discussion. Several objections to pornography have been lodged. These include claims that pornography: (a) causes increased violence, particularly against women; (b) offers negative views of women; (c) creates early eroticization of children; and (d) encourages actions by predatory-sexual offenders. Alternatively, the potential benefits of sexually explicit materials will be explored.

graphic representation is one that combines two features: it has a certain function or intention, to arouse its audience sexually, and also a certain content, explicit representations of sexual material. The Meese Commission notes that "to call something 'pornographic' is plainly . . . to condemn it." U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 228 (1986) [hereinafter MEese COMMISSION] (defining pornography for 1986 study).

75. See generally Meese, supra note 74, at 228 (examining available evidence of effects of pornography and concluding despite lack of empirical evidence that pornography is harmful); see also Johnson, supra note 76, at 3 (examining available evidence of effects of pornography); Brian L. Wilcox, Pornography, Social Science and Politics: When Research and Ideology Collide, 42 AM. PSYCHOL. 941, 941 (1987) (noting criticism of commissioners of Meese Commission for not having background in scientific study of pornography and for being chosen for their ideological views).

76. See Daniel Linz, et al., The Findings and Recommendations of the Attorney General's Commission on Pornography: Do the Psychological "Facts" Fit the Political Fury?, 42 AM. PSYCHOL. 946, 946 (1987) (noting "the authors find several of the commission's findings and recommendations incongruent with available research data"); see also Wilcox, supra note 75, at 941 (noting that conclusions delegates on Meese Commission drew were "based on overgeneralizations from social psychological studies that were largely laboratory based" and that findings were consequently misrepresented).

77. See Stewart Page, The Turnaround on Pornography Research: Some Implications for Psychology and Women, 31 CANADIAN PSYCHOL. 359, 359 (1990) (finding that Meese Commission's conclusions were "fatally flawed" by overgeneralizing results based on laboratory studies).

78. See Meese Commission, supra note 74, at 228-29 (defining pornography as "material [that] is predominantly sexually explicit and intended primarily for the purpose of sexual arousal").

79. See Cyberporn, supra note 4, at 115 (statement of Dee Jepsen, Executive Director, Enough is Enough campaign) (noting that pornography is harmful in several ways). Ms. Jepsen states:

[Pornography] plays a major role in the molestation of children, serving as an instruction manual for these crimes; it exposes children at an impressionable age to attitudes and behaviors that warp and twist their view of human dignity and sexuality; it shapes negative, degrading attitudes about women, eroticizing inequality; it encourages rape and the rape myth, that women say "no" but mean "yes" and they like violence; it eroticizes violence and then fuels sexual violence; it holds an addictive and fatal attraction for many men and teenage boys, it invades their thoughts.
A. Violence Against Women

Three governmental commissions have examined the behavioral effects pornography has on sexual violence; however, each commission has reached a different conclusion.\(^80\) These differing opinions, however, do not represent significant differences in the evidence at three different points in time, but rather different methods of analyzing the available research.\(^81\) The first two opinions found that pornography could not be causally linked to antisocial behavior.\(^82\) The opinion most damning of pornography, that of the Meese Commission, concluded that there was a causal relationship between exposure to many forms of pornography and antisocial effects, particularly violence against women.\(^83\) Several of the conclusions of the Meese Commission's report, however, are inconsistent with available empirical data.\(^84\)

The Meese Commission came to the conclusion that viewing all sexually explicit materials, or all pornographic materials, "as one undifferentiated whole is unjustified by common sense, unwarranted on the evidence, and an altogether oversimplifying way of looking at a complex phenomenon that manipulates their behavior; it encourages the transmission of STD's . . . and it lowers community standards, which has a denigrating affect upon our entire culture."

\(^{Id.}\) The statement of Ms. Jepsen offers neither support nor citation for any of the above assertions.

\(^{80.}\) Compare Johnson Commission, supra note 76, at 27 ("[E]mpirical research designed to clarify the question has found no evidence . . . that exposure to explicit sexual material plays a significant role in the causation of delinquent or criminal behaviors. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crimes or sex delinquency."). with Williams Committee, supra note 74, at 80 ("It is not possible, in our view, to reach well-based conclusions about what in this county has been the influence of pornography on sexual crime."); and Meese Commission, supra note 74, at 326 ("[W]e have reached the conclusion, unanimously and confidently, that the available evidence strongly supports the hypothesis that substantial exposure to sexually violent materials as described here bear a causal relationship to antisocial acts of sexual violence, and for some subgroups possible to unlawful acts of sexual violence.").

\(^{81.}\) See Hawkins & Zimring, supra note 74, at 77-76 ("No new statistical studies of either the incidence of sex crimes in the general population areas or the behavior of sex offenders led to the Meese Commission's rejection of the Johnson Commission's conclusions . . . . The anecdotal evidence cited by the Meese Commission in 1986 was in abundant supply when the two earlier bodies took evidence.").

\(^{82.}\) See Johnson Committee, supra note 74, at 27 ("In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults."); see also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973) (noting there is "no conclusive proof of a connection between antisocial behavior and obscene material").

\(^{83.}\) See Meese Commission, supra note 74, at 325-26 (concluding that because there is causal relationship between exposure to sexually violent materials and increase in aggressive behavior towards women, there is also causal relationship between sexually violent materials and antisocial acts of sexual violence).

\(^{84.}\) See Linz, supra note 76, at 946 (finding "several of the commission's findings and recommendations [are] incongruent with available research data").
non." Thus, the Commission evaluated the harm of pornography by dividing pornography into four categories: (1) sexually violent material, (2) nonviolent materials depicting degradation, domination, subordination or humiliation, (3) nonviolent and nondegrading materials, and (4) nudity.

The conclusion that pornography is related to antisocial acts is based on literature noting the relationship between sexually violent pornography and unfavorable behavior, not the relationship of the broad spectrum of pornographic material and antisocial behavior. The relationship between sexually violent pornography and the increase in sexual violence is more likely due to exposure to violent materials than to the sexual explicitness of the material in question. The conclusion of the Meese Commission is flawed because it adopts a causal attribution between pornography and violence and it confounds the constructs of violence and explicitness.

Exposure to sexually violent material has been shown to increase male but not female acceptance of interpersonal violence and to increase the acceptance of rape myths. In a group of studies designed specifically to disentangle the effects of sexual explicitness and violence, researchers

85. Meese Commission, supra note 74, at 320-21 (presenting rationale for subdividing pornography into four categories). The Commission goes on to note that the subdivision of pornography for purposes of analysis was one of the most important conclusions the commission reached. See id. (finding viewing sexually explicit material "as one undifferentiated whole is unjustified by common sense, unwarranted on the evidence, and an altogether oversimplifying way of looking at a complex phenomenon. In many respects we consider this one of our most important conclusions.").

86. See id. at 321 (denoting four subtypes of pornography and analyzing harm associated with each); see also Linz, supra note 76, at 947-52 (reviewing four categories of pornography in Meese report).

87. See Meese Commission, supra note 74, at 324 ("In both clinical and experimental settings, exposure to sexually violent materials has indicated an increase in the likelihood of aggression . . . . [This research] shows a causal relationship between exposure to material of this type and aggressive behavior towards women.").

88. Compare Linz, supra note 76, at 952 (noting that "[i]t has now been fairly well documented that violent material, whether sexually explicit or not, has the potential to promote violent behavior following exposure."), with Meese Commission, supra note 74, at 328 (concluding that adverse consequences such as support of 'rape myth' "do not vary with the extent of sexual explicitness so long as the violence is presented in an undeniably sexual context"). The Commission does note, however, that "it is unclear whether sexually violent material makes a substantially greater casual contribution to sexual violence itself than does material containing violence alone." Id. at 328.

89. See Linz, supra note 76, at 949-50 (noting that "much of the evidence for stating that sexually violent pornography is harmful is based on studies that have used materials that either confounded sexual explicitness and violence or materials that were not sexually explicit") (citations omitted).

90. See Edward Donnerstein et al., The Question of Pornography: Research Findings and Policy Implications 109-10 (1987) (noting that important to this analysis is fact that materials were not X-rated films, but programs suitable for prime time television).
concluded that sexually violent media materials correlated with the highest rate of violent responses. 91 Materials that were violent but devoid of sexual explicitness correlated with the second highest rate of violent responses. 92 Finally, materials that were sexually explicit, but non-violent, were least correlated with violent responses of the three groups. 93 Additionally, research with individuals prone to callous attitudes toward violence against women has demonstrated that exposure to non-sexually explicit images of rape were sexually arousing. 94

Violence in the media has been linked to aggressive behavior both in adults and in children. 95 Both children and adults seem to imitate behav-

91. See Edward Donnerstein et al., Role of Aggressive and Sexual Images in Violent Pornography (unpublished manuscript) (1986) cited in DONNERSTEIN, supra note 90, at 100 [hereinafter Donnerstein, Manuscript] (noting that men who viewed violent pornography displayed highest level of aggression against female confederates whereas men who viewed aggression-only film were more aggressive than men who viewed sex-only film condition).

92. See generally Daniel G. Linz et al., Effects of Long-Term Exposure to Violent and Sexually Degrading Depictions of Women, 55 J. PERSONALITY & SOC. PSYCHOL. 758, 758-59 (1988) (examining effects of emotional desensitization to films of violence against women, sexually degrading explicit films and non-explicit films on beliefs against women).

Researchers concluded that subjects who viewed violent film did not demonstrate a decline in empathic responses to re-enactment of sexual assault trial, contrary to hypotheses based on previous research. See id. at 765-66 (“The results failed to support the hypotheses derived from Zillman and Bryant’s previous studies... that long-term exposure to degrading images of women either in the form of X-rated, nonviolent sexually explicit films or R-rated sexually nonexplicit films will affect the subsequent beliefs and attitudes about women.”). Longer exposure to violent material was necessary to affect empathy in previous research. See id. at 759 (citing Zillman and Bryant studies that noted that long-term exposure to sexually degrading pornography affected subject empathy, however, these results were not confirmed in present study).

93. See id. at 765-66 (finding no difference between sexually explicit and non-violent films). The study found:

No statistically significant main effects or interactions for the film type, film dosage, of acquaintance or non-acquaintance trial independent variables on either the pretrial questionnaire scales assessing rape myth acceptance, belief in women as sexual objects, endorsement of force in sexual relations, conservative sex roles, and rape myth acceptance or the posttrial assessments of the victim, defendant, verdict, or sentence.

Id.

94. See DONNERSTEIN ET AL., supra note 91, at 111 (citing Abel et al., The Components of Rapists’ Sexual Arousal, 34 ARCHIVES GEN. PSYCHIATRY 395 (1977) (noting rapists were aroused by non-sexually explicit images of women being raped)); Neil Malamuth et al., Sexual Arousal in Response to Aggression: Ideological, Aggressive, and Sexual Correlates, 50 J. PERSONALITY & SOC. PSYCHOL. 330, 340 (1986) (demonstrating that “depiction of a woman as a victim of aggression devoid of sexual content can stimulate sexual arousal”).

95. See generally Linda Heath, Effects of Media Violence on Children: A Review of the Literature, 46 ARCHIVES GEN. PSYCHIATRY 376, 376-77 (1989) (explaining mimicry of aggression). The study found:

Anyone who looks at the accumulated research into the consequences of observed violence must be impressed by the consistency of the findings. The overwhelming majority of published reports in this area indicate that
ior of models, including modeled acts of aggression. Exposure to media violence has also been demonstrated to increase the accessibility of violent constructs in memory, known as priming. The priming influence increases the degree to which persons think violent thoughts and view violent behavior as acceptable. Viewing violent behavior in the media has

at least some people seeing aggression on the television or movie screen, or even on the printed page, are more likely to act aggressively sooner afterward than they otherwise would have.

Id. at 376; see Wendy Wood et al., Effects of Media Violence on Viewers’ Aggression in Unconstrained Social Interaction, 109 Psychol. Bull. 371, 378 (1991) (finding through meta-analysis that exposure to media violence increases viewer’s aggression in adolescents and children).

96. See Albert Bandura et al., Vicarious Reinforcement and Imitative Learning, 67 J. Abnormal & Soc. Psychol. 601, 601 (1963) (finding that consequences to model affected imitative learning of aggression in preschool children); see also Jerome L. Singer & Dorothy G. Singer, Television, Imagination, and Aggression: A Study of Preschoolers 99-101 (1981) (describing how aggressive behavior in children may be facilitated by exposure to modeled aggression on television especially for those children already predisposed to acts of aggression). The Singer’s study at Yale University concluded that “there is indeed a strong and stable relationship between television-viewing and patterns of aggressive behavior in preschool children.” Id. at 109.

97. See Brad J. Bushman, Priming Effects of Media Violence on the Accessibility of Aggressive Constructs in Memory, 24 Personality & Soc. Psychol. Bull. 537, 538 (1998) [hereinafter Bushman, Priming] (explaining priming). The “pre-exposure strength of a mental construct relevant to the environmental input has been referred to as its accessibility. The more accessible a construct, the more likely it is to be used to process and interpret social information.” Id. (citations omitted). The temporary increase in accessibility of construct due to repeated or recent exposure is known as priming. See id.; see also Clifford et al., supra note 7, at 208 (explaining two theories of priming). The first theory posits a cognitive pathway model where activation of one semantic memory links it to memories representing relations between constructs. See id. (noting memory is interlinked network consisting of nodes representing constructs and links between those nodes). Repeated activation strengthens associations and ease with which memory is recalled to given stimulus. See id. (noting more frequently particular attribute is activated, more likely it is to be accessed from semantic memory in future). The second theory posits a storage bin model. See id. In this construct, most recent memory is on top of a storage bin, so it is first accessed in processing new information. See id.

98. See Brad J. Bushman & Russell G. Geen, Role of Cognitive-Emotional Mediators and Individual Differences in the Effects of Media Violence on Aggression, 58 J. Personality & Soc. Psychol. 156, 158-59 (1990) (finding that undergraduate subjects were more likely to record thoughts with violent content after viewing a video segment with violence and that tendency toward violent thoughts is somewhat mediated by personality variables of hostility and irritability); Brad J. Bushman, Moderating Role of Trait Aggressiveness in the Effects of Violent Media on Aggression, 69 J. of Personality & Soc. Psychol. 950, 950 (1995) (finding that videotape violence was more likely to increase aggression in highly trait aggressive individuals); Bushman, supra note 97, at 538 (finding that undergraduate subjects were more likely to record violent associations to word association task after viewing segment of violent video than after viewing non-violent video segment); see also Travis Langley et al., Aggression-Consistent, -Inconsistent, and -Irrelevant Priming Effects on Selective Exposure to Media Violence, 18 Aggressive Behav. 349, 354 (1992) (discussing how priming can also work in reverse, subjects who were aggressively primed were more likely to select violent video material to view).
also been shown to increase children’s toleration of violence in others.99 Therefore, violent media materials appear to be associated with more adverse effects on behavior than sexually explicit media materials.

It is possible that sexual explicitness paired with aggression can enhance aggressive responses.100 The Meese Commission, however, went one step further and linked the increase in aggression with the increase in sexual violence toward women.101 Where the scientific evidence left off, the Meese Commission relied on “common sense” to draw inferences that sexually violent pornography would lead to increases not only in aggression, but also in sexual violence.102 More commonly, violence against women is present in contexts that are not sexually explicit and therefore not obscene.103 “Slasher” films present much more violence against women than do sexually explicit films.104 Such films are not usually viewed by small children; though, television itself provides children with access to a...
large number of violent acts. Additionally, the non-violent forms of pornography as defined by the Meese Commission cannot be causally related to increases in antisocial acts. Consequently, it appears that violence, but not sexual explicitness per se, is harmful, and deserving of government proscription.

B. Offering Negative Views of Women

Scholars portray the negative depiction of women as sexual objects as one of pornography's primary harms. Depicting women as sexual objects, existing for the pleasure of men, enjoying pain, bondage or torture, or as subservient to the interests of the alpha male, have been argued to have a deleterious effect on the perception of women and implicitly related to violence against women. The scholarly discussion of pornography as a perceived harm and the scientific proof of pornography's negative depiction of women as a measurable adversity, however, are distinctly different topics.

Feminist scholarship on pornography emphasizes the use of pornography in a power dynamic whereby men, in the dominant position, maintain women in a subservient position for men's benefit. Pornography depicts women as sexual objects, to be acted upon, viewing the act as one
Women are maintained in a subservient position by force. But much of the scholarship in this area is distorted by the previously articulated explicitness-violence confound. Examples of women bound, hurt or physically dominated, set in a sexualized setting, may indeed promote harm to women, as the previous discussion of sexually violent pornography indicates; the bulk of empirical evidence, however, does not support the assertion that sexually explicit material, per se, harms women.

The Meese Commission concluded that substantial exposure to degrading but non-violent pornography may lead individuals to view rape as less serious, encourage individuals to view rape victims as more responsible for their plight, and increase the likelihood that men will say they would force women into sexual practice. These conclusions appear unwarranted; available data does not indicate that harmful thoughts or behaviors are associated with viewing non-violent pornography.

Feminist critiques of obscenity laws, however, do cut to the essence of the explicitness/violence issue, although from a different perspective. Obscenity doctrine focuses on sexual morality. "The feminist view of por-

110. See id. (noting male supremacy is said to depend "on the ability of the men to view women as sexual objects"); see also CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 130 (1987) (noting "pornographic meaning that the woman is defined as to be acted upon, a sexual object, a sexual thing—the viewing is an act, an act of male supremacy").

111. See JOHN STUART MILL, ON LIBERTY, THE SUBJECTION OF WOMEN 261-348 (John M. Robson ed., 1984) (noting that if women may not choose to assume subservient, caretaking role without threat of compulsion from men).

112. For a further discussion of the scientific evidence on pornography, see supra notes 74-106 and accompanying text.

113. See DONNERSTEIN, supra note 90, at 171 (noting that evidence "supporting the contention that so-called degrading pornographic materials, as long as they are not violent, are harmful is sparse and inconsistent. The few studies that have been done on these materials, including our own, have yielded contradictory findings."); see also HAWKINS & ZIMRING, supra note 74, at 166 (questioning findings that violent pornography harms women due to fact that studies asserting this result have all taken place in artificial surroundings of laboratory).

114. See MEES, supra note 74, at 332 (finding that substantial exposure to degrading, non-violent material is likely to increase extent to which those exposed view rape as less serious, victims as more responsible and offenders as less responsible).

115. See Linz, supra note 76, at 951 (comparing study results with those of previous researchers). Zillman & Bryant found that exposure to these materials changed an individual's perception of the rape victim, but later studies have not replicated these findings. See Linz, supra note 92, at 760, 766 (noting findings of Zillman and failure to replicate findings in present study). Additionally, Zillman's study relied on excerpts from an X-rated film, whereas the disconfirming studies used full feature presentations. See id. at 760 (describing methods).

116. See Roth v. United States, 354 U.S. 476, 485 (1957) (noting obscenity's "slight social value" that is "clearly outweighed by the social interest in order and morality"); William K. Layman, Note, Violent Pornography and the Obscenity Doctrine: The Road Not Taken, 75 GEO. L.J. 1475, 1477 (1987) ("[T]he Court has assumed that regulation of obscene materials is justified to prevent harm to society's morals
nography, in contrast, 'focuses on the woman depicted and on whether the depiction encourages men to believe that the woman experiences sexual pleasure through brutalization or degradation.'

By focusing on the violent aspect of pornography rather than the depiction of sexual explicitness and morality, feminist critics are also focusing their attack on those forms of pornography that have been scientifically proven to have a demonstrably negative impact.

C. Early Eroticization

Pornography is said to contribute to the premature sexualization of children. Due to the ethical restraints prohibiting experimental research on children, there is little scientific information on pornography's effects on children. The Johnson Commission study indicated that retrospective reports indicate that adult males had extensive experience with erotica as adolescents. The most common source of such exposure was sharing of sexually explicit magazines or books from a friend about the same age, where materials were passed about in a social, rather than predominantly sexual, situation.

Children are sexual beings from birth. The issue of early eroticization raises the question of what can be considered "normal" development...
of erotic interests. In cultures where sexual activities are supported and valued, children are exposed to sexual activities throughout their lives. In non-restrictive environments, children often seek out age-mates for sexual interaction, and most have had non-coercive genital intercourse by age five or six. Within American culture, prior to the Industrial Revolution, people routinely married and gave birth in their teenage years. Some argue that not only are children sexual beings, but children also have an affirmative right to sexual development. Similarly, although society values sexually proficient spouses, current culture does not take affirmative steps to encourage adolescents to develop both the values and the skills necessary for a satisfactory marriage.

In addition, the sexual rights of children are rarely taken seriously. Children, and especially adolescents, are naturally curious about sexual

five, children are capable of autoerotic stimulation. See id. at 25 (noting children capable of self-stimulation to point of orgasm and stating that more than half of all boys could achieve orgasm by age three or four).


124. See Bennett M. Berger, *Liberating Child Sexuality: Commune Experiences*, in *Children and Sex: New Findings, New Perspectives* 247, 250 (Larry L. Constantine & Floyd M. Martinson eds., 1981) (noting that in two of four communes, "most children had participated in genital intercourse by age 5 or 6."). Currently, the national average for age of first intercourse among women is around sixteen years old. See Gail Elizabeth Wyatt, *Stolen Women: Reclaiming Our Sexuality, Taking Back Our Lives* 123 (1997) (discussing female sexuality); see also Floyd M. Martinson, *The Sexual Life of Children* 14 (1994) (noting that children should be allowed normal process of eroticization, whereby child would learn "some of the attitudes and responses that will allow him or her to function appropriately as an adolescent and adult"). Martinson also notes that children can be eroticized too early. See id. at 16 (noting that children can be overeroticized for their age and may be harmed by defining themselves in sexual terms too early in life). Martinson does, however, note that "[t]o care for infants and children in the tender, loving way regarded as appropriate for our society today is impossible without sexually eroticizing the child to some extent." Id. at 17.

125. See Rebekah Levine Coley & P. Lindsay Chase-Lansdale, *Adolescent Pregnancy and Parenthood: Recent Evidence and Future Directions*, 53 AM. PSYCHOL. 152, 152 (1998) (noting that age of marriage has increased and "the rate of births to teenagers is much lower now than it has been throughout much of the 20th century").

126. See Dennis Lazure, *The Child: His Development as a Sexual Being*, in *Childhood and Sexuality: Proceedings of the International Symposium* 16 (Jean-Marc Samson ed., 1979) ("Every child has a fundamental right to sexual development, in the same way that he has a fundamental right to life, to proper food, and to education.").

127. See Currier, *supra* note 122, at 15 (noting "[e]veryone wants a spouse who is sexually proficient, but no one wants a child who is learning how to be sexually proficient").

128. See Larry L. Constantine, *The Sexual Rights of Children: Implications of a Radical Perspective*, in *Children and Sex*, *supra* note 122, at 255 (noting that "rarely have the sexual rights of children been seriously considered").
matters and seek information on this subject. The position that sexually explicit information is harmful to children has not been well documented in the scientific literature. Until documentation of harm to children exists, the argument that the government is justified in restricting sexually explicit material to protect children is unsupported; therefore, it is an unreasonable basis upon which to restrict free speech.

D. Predatory Sexual Offenses

Senator Grassley opened the Senate hearing on Children and Cyberporn with comments about the increasing dangers to children of abduction and sexual assault, analogizing these dangers with the dangers of materials on the Internet. Witnesses testified to the disturbing examples of child pornography available on the Internet. Graphic images of bestiality, photos promoting incest or sexual displays of children for gratification purposes would meet the criteria for obscenity. Child pornography receives the most attention as legislators seek to protect children from such material and to quell the actions of perpetrators of child sexual

129. See Johnson Commission, supra note 76, at 29 (noting sex educators find adolescents are interested in sexually explicit materials due to natural curiosity).

130. See Meese Commission, supra note 74, at 350 (finding that “[t]here needs to be more research . . . about the effects of exposure to pornographic material on children”); Constantine, supra note 127, at 259 (noting “[t]here simply are no adequate research studies on the effects of pornography on children”); see also Johnson Commission, supra note 76, at 139 (concluding that empirical research “has found no reliable evidence to date that exposure to explicit sexual material plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults”). But see Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1555 (2d Cir. 1991) (noting that psychiatrist Park Dietz testified at preliminary injunction hearing that even minimal exposure to indecent messages can have damaging psychological effects on children).

131. For a further discussion of the scientific evaluation of pornography, see supra notes 74-106 and accompanying text.

132. See Cyberporn, supra note 4, at 1 (noting dark forces that seek to destroy innocence of youth are no longer stopped at door to home, but seek entry through Internet); see also id. at 56 (statement of Barry F. Crimmins, investigative journalist) (noting that child pornography is easily accessed). "Working both under my own name and undercover, often with a profile that clearly stated I was 12 years old, I have been sent over 1,000 pornographic photographs of children." Id.; see id. at 115 (statement of Dee Jepsen) (describing child pornography on Internet).

133. See 141 Cong. Rec. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon) ("It is not an exaggeration to say that . . . repulsive pornography is only a few clicks away from any child with a computer. I am not talking just about Playboy and Penthouse magazines . . . those magazines pale in offensiveness with the other things that are readily available."); Cyberporn, supra note 4, at 55 (statement of Barry F. Crimmins) (describing chat rooms promoting child sexual abuse, incest, bestiality and rape); see also Osborne v. Ohio, 495 U.S. 103, 111 (1990) (noting that "evidence suggests that pedophiles use child pornography to seduce other children into sexual activity") (citing The Attorney General's Commission on Pornography, Final Report 649).
offenses. Sexual offenders may use child pornography to entice children in to participating in illicit, sexual activities. Protecting children from sexual abuse is a serious and virtuous cause worthy of Congressional attention; the problem is, however, not without other remedies. Such images are currently prohibited by criminal laws, and the Court has specifically defined these images as obscenity.

The Ferber Court set forth specific reasons why child pornography should not receive First Amendment protection. The primary harm of child pornography was the child's sexual performance recorded in the pornography. Eliciting sexual behavior from children by adults is criminalized in every state through a combination of state and federal law, thus further regulation of this form of speech is consistent with criminal law.

One commentator has written a scathing critique of the Meese Commission's findings and argued that the Meese Commission exploited the notion of harm to children through child pornography without evidence. See Philip Nobile & Eric Nadler, United States of America vs. Sex 193 (1986) (stating that although police were invited to testify about “their best kiddie-porn busts,” police admitted that “tough laws had already forced the hideous product off the open market”). The commentator also noted that “FBI Director William Webster told the commission that his bureau did not require any new laws.” Id.

134. See 141 Cong. Rec. S8330 (daily ed. June 14, 1995) (statement of Sen. Exon) (describing Exon-Coats refinement of CDA, the purpose of which was to make information superhighway “a little bit safer for families and children to travel . . . . Delay only serves those who would endanger the Nation’s children”).

135. See Meese Commission, supra note 74, at 411 (“There is substantial evidence that photographs of children engaged in sexual activity are used as tools for further molestation of other children.”).


138. See Ferber, 458 U.S. at 764 (setting forth reasons for limitations on First Amendment protection of child pornography).

139. See id. at 759 (describing first harm of child pornography is initial sex act performed by or with child who is filmed, thus creating pornographic image).

140. See id. at 758 (noting presence of statutes criminalizing child pornography); see also United States v. X-Citement Video, Inc., 513 U.S. 64, 64 (1994) (find-
child occurs when those images are circulated and cause the child further embarrassment. The Court reasoned that the economic incentives in the production of child pornography encouraged violation of the criminal law and produced a product whose value as free speech was modest; therefore restriction of child pornography was appropriate. The Court expanded its restriction of child pornography in 1990 when it upheld an Ohio statute prohibiting the possession of child pornography in the home. This case overruled a prior case that protected the right to possess adult pornography within the privacy of one’s home. Thus, the issue of child pornography has been resolved; it is considered obscenity and receives no protection from the First Amendment. Allowing children unrestricted access to indecent speech does not diminish the restrictions on child pornography implemented by the Court or by federal or state legislatures. The rhetoric of the CDA confounds child pornography, which has been judicially determined to have cognizable harm, with sexually explicit material in general.

141. See Ferber, 458 U.S. at 759 (noting second harm of child pornography is circulation of image, which may cause embarrassment for child in future); see also Osborne, 495 U.S. at 111 ("The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come."). The Court notes that passing laws, such as Ohio's, that prohibit possession of child pornography encourages the destruction of these materials, thus decreasing continuing harm to child victims. See id. (noting deterrent value of prohibiting child pornography).

142. See Ferber, 458 U.S. at 762 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimus."); see also Osborne, 495 U.S. at 109 (noting Ohio statute at issue was enacted "in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children").

143. See Osborne, 495 U.S. at 111 (holding that "[g]iven the gravity of the State's interest... we find that Ohio may constitutionally proscribe the possession and viewing of child pornography"). For a further discussion of privacy rights involved, see generally John Quigley, Child Pornography and the Right to Privacy, 43 FLA. L. REV. 347 (1991) (discussing intersection of Osborne and Stanley v. Georgia, 394 U.S. 557 (1969)).

144. See Stanley, 394 U.S. at 565 ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.").

145. See Osborne, 495 U.S. at 125 (finding defendant Osborne's First Amendment arguments unpersuasive); Ferber, 458 U.S. at 765 (noting that prohibition of child pornography did not violate First Amendment liberties).

146. See Ferber, 458 U.S. at 759 (discussing harm of child pornography); Linz, supra note 92, at 766-67 (finding no harmful effects from sexually explicit, non-violent pornography).
E. Potential Benefits of Availability of Sexually Explicit Information

Sexually explicit speech may not only not be harmful to children, but there are occasions where freedom of expression may actually serve children’s best interests. One of the most obvious and frequently cited examples is that of education.\textsuperscript{147} Children need to be educated about their bodies in their entirety, including their genitalia, or “private parts.”\textsuperscript{148} If discussion of private parts are excluded from general discussions and education, children may develop negative feelings about their bodies, which could inhibit the development of healthy sexuality in adulthood.\textsuperscript{149} In fact, current treatment and prevention programs for child sexual abuse—the evil Congress would seek to quell by its actions—promote the use of “doctors names” for private parts, anatomically correct drawings and frank discussions with children to promote children’s abilities to openly discuss their sexuality with adults.\textsuperscript{150} These actions are taken under the theory that if children have both the vocabulary and knowledge that their caretakers are interested in hearing about all parts of their bodies, it will be easier for children to “tell” if ever they are touched in a sexually inappro-

\textsuperscript{147.} See Reno v. ACLU, 521 U.S. 844, 878 (1997) (discussing how, under CDA, parents could not email their college student relevant information on birth control); Miller v. California, 413 U.S. 15, 26 (1972) (providing example of medical education as permissible and constitutionally protected use of sexually explicit material); see also Complaint, supra note 4, at *18-19 (describing how CDA would proscribe Critical Path’s safer sex instructions written deliberately in “street language” to facilitate understanding by adolescents).

\textsuperscript{148.} See Ether Deblinger & Anne Hope Heflin, TREATING SEXUALLY ABUSED CHILDREN AND THEIR NON-OFFENDING PARENTS: A COGNITIVE BEHAVIORAL APPROACH 151 (1996) (noting that “[a]ge-appropriate sex education is important for all children”). The authors discuss problems of sexually transmitted diseases and teen pregnancy as issues that may be better addressed with sex education and open parent-child communication. See id.. Children need to have the necessary vocabulary to discuss and disclose sexual abuse, therefore, it is important for children to learn words for all their body parts, including sex organs. See id. at 107; see also Anne Welbourne-Moglia, Sex Education, in THE MEES P COMMISSION EXPOSED 12-13 (National Coalition Against Censorship ed., 1986) (recalling her testimony before Commission on Pornography, advocating that “real clear and present danger is ignorance” of bodies, and confusion about sexuality).

\textsuperscript{149.} See Joseph H. Beitchman et al., A Review of the Long-Term Effects of Child Sexual Abuse, 16 CHILD ABUSE & NEGLECT 101, 115 (1992) (noting that women with history of untreated CSA [child sexual abuse] demonstrate more evidence of sexual disturbance or dysfunction); see also Ferber, 458 U.S. at 758 n.9 (noting “sexually exploited children are unable to develop healthy affectionate relationships in later life [and] have sexual dysfunctions”).

\textsuperscript{150.} See generally Deblinger & Heflin, supra note 148 (providing rationale for sexual education in treatment of sexually abused children); see also Lori Stauffer, CENTER FOR CHILDREN’S SUPPORT CHILDREN’S GROUP MANUAL Session 5, 21 (noting “[t]he purposes of tonight’s activities are to help children learn the proper names for their body parts—both private and public—and to help children feel more comfortable talking about their private parts and sexual issues in general”). Sexually explicit material is similarly used in treatment of adults with sexual dysfunction. See Maurice Yaffe, Therapeutic Uses of Sexually Explicit Material, in THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOR 119-50 (Maurice Yaffe & Edward C. Nelson, eds. 1982) (discussing use of sexually explicit information in treatment).
Alerting a caretaker of inappropriate sexual touching facilitates the caretaker's ability to provide protection and guidance. Thus, sexual explicitness is necessary for sexual education. The Meese Commission has stated that portrayals of sexuality outside of sex and marriage has a corruptive influence. This argument has been used to justify the suppression of certain sexual education information. This argument, however, is flawed, as it has been demonstrated that exposure to sex education can have positive effects on children.

151. See Deblinger & Heflin, supra note 148, at 151 (noting four reasons why sex education is especially important for sexually abused children: it corrects misconceptions about sex that may have resulted from their abusive experiences, it may reduce child’s vulnerability to further abuse, premature sexual activity or adult sexual dysfunction, it provides gradual exposure as treatment intervention, and through sex education, adults can model for children how sexual issues can be addressed calmly and without excessive embarrassment). Children may not tell that they are being abused if “[t]hey do not have the language to do so.” Id. at 132.

152. See id. at 110 (noting that alerting caretakers permits caretakers to take protective action).

153. See Complaint, supra note 4, at *21 (describing Planned Parenthood Federation of America’s effort toward educating minors on subjects such as “abortion, contraception, prevention of sexually transmitted infections, and sexuality”). PPFA notes that it responds with “complete information.” Id. The site specifically utilizes vernacular terminology so that information will be accessible to minors who seek it. See id. (noting that PPFA uses terms like “cum” for ejaculation so that minors will be able to comprehend material).

154. See Meese Commission, supra note 74, at 339 (noting that “it is far from implausible to hypothesize that materials depicting sexual activity without marriage, love, commitment, or affection bear some causal relationship to sexual activity without marriage, love, commitment, or affection”).

to information on sexual education and birth control does not increase teenage sexual activity nor teenage pregnancy. Finally, the Court has reasoned that the right to free speech necessarily includes the right to receive information, and that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”

If these materials promoting healthy sexuality are made available to children in print, they should also be available on-line. The Internet is a vast resource of information, and some children, especially older adolescents, may seek out sexually explicit material both out of normal curiosity and a quest for knowledge. The Internet is also an exceptional resource in that it is widely available to persons of diverse income levels and is available to both private subscribers and through public institutions. Because discussions of sexuality are taboo in American culture, they


156. See DEBLINGER & HEFLIN, supra note 148, at 155 (“Open parent communication about sexuality does not appear to be associated with either increased or decreased adolescent sexual activity. However, among sexually active teenagers, those who communicate openly with parents are more likely to use contraception, thereby decreasing their risk of experiencing unintentional pregnancy and/or suffering sexually transmitted diseases.”) (citations omitted); see also Coley & Chase-Lansdale, supra note 125, at 161 (noting that one of most successful programs incorporated comprehensive medical care and contraceptive services, social services, and parenting education . . . . This program postponed the age of sexual onset; increased contraception use; reduced the frequency of sex; and . . . reduced the [teen] pregnancy rate by 30%”).


158. See 141 CONG. REC. S8335 (daily ed. June 14, 1995) (statement of Sen. Feingold) (noting material proscribed by CDA with “the same material, the same message would be perfectly legal, and fully protected by the Constitution, in a bookstore, or a library”).

159. See JOHNSON COMMISSION, supra note 76, at 29 (noting that “[a] large majority of sex educators and counselors are of the opinion that most educators are interested in explicit sexual materials, and that this interest is a product of natural curiosity about sex.”); see also Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 507 (1985) (invalidating Washington statute that prohibited material inciting lust). The Court in Brockett noted that material that arouses normal sexual responses is “not without constitutional protection.” Id. at 501; see Mary C. Dunlap, Sexual Speech and the State: Putting Pornography in its Place, 17 GOLDEN GATE U. L. REV. 359, 361 (1987) (arguing sexual speech, including sexual education for minors on issues of child abuse, pregnancy, heterosexuality and alternatives, AIDS and contraception, deserves greater protection than provided by Supreme Court in Miller).

160. See Reno v. ACLU, 521 U.S. 844, 850 (1997) (“Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods.”). Access is widely available through colleges, corporations, community libraries and commercial computer coffee shops. See id. at 2334-35.

161. See MARTINSON, supra note 124, at 13 (noting inhibitory, punitive and moralistic attitudes of parents contribute to sexual dysfunction in their children).
flourish under more taboo forms of expression, such as indecency and obscenity. 162 The Internet provides a more anonymous format for exchange of information. 163 This anonymity may encourage persons who are embarrassed about sexual matters to seek information they would not otherwise have access to. 164 Thus, the Internet may be an ideal outlet for both adults and children to receive information on sexuality and has been utilized for this purpose by Planned Parenthood and Critical Path. 165

The difficulty in discussing matters of sexuality arises as a result of differing value judgments within our culture. As the Court in Miller aptly stated, a national standard for obscenity cannot be drawn, nor can it be set as a matter of law. 166 This question has been delegated to the jury as a question of fact. 167 Some material on the Internet is undoubtedly not suitable viewing material for young children; however, if it does not meet the criteria for obscenity and consequently, regulation, the government should not be permitted to suppress it. 168 Parents are the most suitable


162. See JOHNSON COMMISSION, supra note 76, at 29 (finding that sex educators feel "if adolescents had access to adequate information regarding sex, through appropriate sex education, their interest in pornography would be reduced. There is mounting evidence of dissatisfaction with existing sources of sex information.").

163. See, e.g., Complaint, supra note 4, at *17 (describing availability of information on Internet in anonymous format).

164. See JOHNSON COMMISSION, supra note 76, at 30 (finding that children are dissatisfied with sex education at home or at school and noting that parents are frequently "embarrassed or uninformed and most do not talk openly and honestly about sex").

165. See Complaint, supra note 4, at *17 (describing AEGIS's concern that information it publishes on HIV and AIDS be available anonymously). It stated: Many people, including people who fear that they may be infected with HIV/AIDS, use AEGIS to get information about the disease because they can do so anonymously. AEGIS does not want to screen to prevent minors from gaining access to its resources because such screening would infringe upon the privacy and anonymity of all users of the system. Id.; see William Adams, But Do You Have to Tell My Parents? The Dilemma for Minors Seeking HIV Testing and Treatment, 27 J. MARSHALL L. REV. 493, 494 (1994) (describing prevalence of HIV in adolescent population and arguing for need of facilitated availability of testing and treatment).

166. See Miller v. California, 413 U.S. 15, 30 (1972) ("[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such [obscenity] standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.").

167. See id. at 30 (holding that determinations of what appeals to prurient interest or is patent offensive are essentially questions of fact); see also Reno v. ACLU, 521 U.S. 844, 873 (1997) (noting that Courts would be unable to give legal limitation to CDA because of Miller's rationale that such judgments are "essentially ones of fact").

168. See U.S. CONST. amend. I (setting forth right to free speech); Reno, 521 U.S. at 873 (protecting right to indecent speech on Internet); Miller, 413 U.S. at
persons to determine what is appropriate viewing material for their children, and parents have a fundamental liberty interest in providing this guidance, absent governmental interference. 169

IV. ALTERNATIVES TO GOVERNMENT CONTROL OF CHILDREN’S FREE SPEECH ON-LINE

Governmental regulation is not necessary to limit children’s exposure to indecent speech on-line. The most obvious alternative to governmental interference is allowing parents the right to parent their children. A second option is utilizing Internet-blocking technology.

A. Substantive Due Process Parental Child Rearing Authority

The Court has long recognized a parent’s right to raise his or her child without undue governmental interference. 170 The Reno Court reiterated this right in distinguishing the constitutional protection of Ginsberg from the unconstitutional overreach of the CDA. 171 This right necessarily extends to the right of parents to select what their child views on the Internet. 172

The level of sexually explicit material to which children are exposed and the age at which they are exposed is viewed as an arena not for governmental proscription, but for parental guidance. 173 Absent a conclusive demonstration of harm from exposure to sexually explicit materials, par-

169. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“[C]are and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

170. See Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (holding that compulsory public school attendance policy infringed on parental rights to opt for private education for their children); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (invalidating state statute that prohibited teaching German language in public schools because statute unconstitutionally interfered with parents rights to raise their children without state interference).

171. See Reno, 521 U.S. at 866 (noting that Ginsberg did not bar parents from purchasing obscene materials for their children if they so desired and that “[u]nder the CDA, by contrast, neither the parents’ consent—nor even their participation—in the communication would avoid the application of the statute”).

172. See id. at 864 (assigning determination of what child views on Internet to responsibility of parents); see also Dawn L. Johnson, It’s 1996: Do You Know Where Your Cyber Kids Are? Captive Audiences and Content Regulation on the Internet, 15 J. MARSHALL. J. COMPUTER & INFO. L. 51, 97 (1996) (arguing that parents should block offensive content on Internet utilizing blocking technology and governmental regulation is inappropriate).

173. See Alliance for Community Media v. FCC, 56 F.3d 105, 130 (D.C. Cir. 1995) (Wald, Tatel & Rogers, J., dissenting) (“While we accept that the government may have a compelling interest in protecting children from indecent programming, we agree with Judge Edwards that interest must be pursued in the context of helping parents to make viewing choices for their children as to the programming they watch inside the home.”).
ents should not be pre-empted from determining what is most suitable for their children and can be charged with determining the fine line between what is to be considered a legitimate educational, artistic or other objective, and what should be screened from children’s experience.174

The state has reserved its interference with the substantive due process and privacy rights inherent in parenting and family life to only those issues that pose a compelling interest.175 The Court determined that inculcating the value of nationalism was not significant enough to permit governmental interference in the parental right to determine suitable education for their children.176 Ensuring a child’s physical safety, however, is a sufficiently compelling interest to permit state intervention and interference.177

The Court has also upheld parental child rearing authority when it coincides with other fundamental rights, such as freedom of religion.178 The instant example is directly analogous, permitting parents to provide supervision and guidance for children’s Internet use involves two fundamental rights, parental child rearing authority and freedom of speech.179

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174. See Ginsberg v. New York, 390 U.S. 629, 639 (1967) (noting that statute at issue “expressly recognizes the parental role in assessing sex-related material harmful to minors . . . . Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children”); see also Alliance, 56 F.3d at 127 (noting section 10b of Cable Television Consumer Protection Act “does what petitioners say, but it does so for a particular, and for a constitutionally permissible reason—to protect children and to enhance the ability of parents to shield their children from the influence of ‘adult’ programming”). The court in Alliance stated that:

In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my cable television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming.

Id. at 145-46 (Edwards, J., dissenting).

175. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding right to “establish a home and bring up children” is fundamental liberty interest, which can be overriden only by compelling state interest).

176. See id. at 401 (noting purpose of legislation at issue was to “promote civic development . . . . [T]he State may do much . . . to improve the quality of its citizens . . . but the individual has certain fundamental rights which must be respected”).

177. See generally Adoption and Safe Families Act of 1997, amending Federal Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 1305 (1994) (noting that children may be removed from parent’s care for abuse or neglect); see also In re Green, 292 A.2d 387, 393 (1972) (noting that State may intervene to provide medical care, in this case, blood transfusion, to child absent consent of parent if child’s life is threatened).


179. See Reno v. ACLU, 521 U.S. 844, 874 (1997) (protecting fundamental right to free speech); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding parents have fundamental right to raise their children); Meyer, 262 U.S. at 399 (finding parental right to raise children without undue governmental interference
Therefore, the state's interest must withstand strict scrutiny to surmount and supersede these two fundamental constitutional rights.\textsuperscript{180} The state's interest in suppressing potentially objectionable speech to protect children, although well-intentioned, simply does not rise to the level of scrutiny to justify sweeping restrictions such as the CDA.\textsuperscript{181}

\textbf{B. Internet Blocking Technology}

The CDA offers a safe haven for persons who used reasonably effective methods to restrict children's access to obscene and indecent speech on-line.\textsuperscript{182} The legislative history also indicates a reliance on Internet-blocking technology to restrict appropriately children's access to indecent speech on-line without unduly circumscribing constitutionally permissible speech for adults.\textsuperscript{183} Although such software is desirable and is encouraged by marketplace demand, the state of the art in Internet-blocking technology is not sufficiently advanced to support the regulation of a fundamental right.\textsuperscript{184}

The use of blocking technology with television is analogous to the usefulness of this technology on the Internet. The merits of such blocking technology with television, known as the V-chip or C-chip, have been debated in prior legislation and ensuing litigation on control of violence and sexual explicitness on cable television.\textsuperscript{185} Although this technology exists, neither the Court nor the legislature have critically analyzed the effectiveness of this option.\textsuperscript{186} Such technology is not currently widespread

\textsuperscript{180.} See \textit{Yoder}, 406 U.S. at 233 (holding that "interests of parenthood \ldots combined with a free exercise claim" are sufficient to defeat State interest in compulsory education).

\textsuperscript{181.} See \textit{Reno}, 521 U.S. at 882 (noting that "CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of 'narrow tailoring' necessary to justify restricting fundamental rights under strict scrutiny analysis").

\textsuperscript{182.} See 47 U.S.C. § 223(e) (1994) (allowing affirmative defenses for those who take "good faith, reasonable, effective and appropriate actions" to restrict access to minors, and those who restrict access to covered materials by requiring proof of age such as verified credit card, adult identification number or code).

\textsuperscript{183.} See 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Leahy) (arguing for parental guidance through use of software "that can allow parents to know what their children see on the Internet").

\textsuperscript{184.} See \textit{Reno}, 521 U.S. at 882 (noting "the District Court correctly refused to rely on unproven future technology to save the statute").

\textsuperscript{185.} See \textit{Alliance for Community Media v. FCC}, 56 F.3d 105, 120 (D.C. Cir. 1995) (describing cable operator's option of installing lockboxes, which could be unblocked, giving access to indecent programming, at viewer's request).

\textsuperscript{186.} See id. at 138 (Rogers, J., dissenting) (noting ineffectiveness of lockbox has never been demonstrated). "[T]he government has notably failed to build any record that parental control of children's television viewing is not reliable by itself..."
in use, nor does it possess a sufficient level of precision to justify balancing First Amendment rights upon technology.187  

Blocking technology on the Internet is presently available, and the market for it is fueling development of new software.188  Internet-blocking technology is similar to the V-chip, although it is still developing and thus not sufficiently advanced to justify balancing First Amendment rights based upon it.189  Technology is available to screen out predetermined sites or certain suggestive words, however, it cannot screen sexually explicit images.190  In fact, the United States District Court for the District of New Mexico found as a fact that “[t]here are no good faith, reasonable, effective and appropriate actions available to restrict or prevent access by minors to communications by speakers [using the internet] . . . .”191  Due to the imprecision in the screening technology, blocking technology may screen out sites that are not obscene, indecent or even offensive, thus suppressing protected and non-harmful speech.192  

and must be supplemented or even overidden by a government censor.”  Id.; see id. at 140 (Rogers, J., dissenting) (discussing potential advantages of use of lock boxes for those who wish to self-limit their own exposure to indecent speech); Sable Communications v. FCC, 492 U.S. 115, 150 (1989) (discussing implementation of technologically-based regulations regarding blocks for Dial-A-Porn on telephones).  The Court in *Sable* noted that:  

[T]he congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be . . . . No Congressman or Senator purported to present a considered judgement with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages.  

Id.  

187.  See generally Diana M. Zuckerman, *Media Violence, Gun Control, and Public Policy*, 66 Am. J. Orthopsychiatry 388 (1996) (arguing that due to expense and rarity, "technologies such as the C-chip would probably take years to have a substantial impact nationwide").  

188.  See *Cyberporn*, supra note 4, at 11 (prepared remarks of Sen. Patrick J. Leahy, Vermont) (“We are finding that software entrepreneurs and the vibrant forces of the free market are providing tools that can empower parents to restrict their children's access to offensive material. We can address the problem of online pornography by empowering parents, not the government, to screen children's computer activities."); see also *Reno*, 521 U.S. at 855 (discussing available forms of Internet-blocking technology and indicating that some forms block sites and some forms block text); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 937 (1996) (noting Supreme Court has assigned value development of children as properly within purview of their parents).  

189.  See *Reno*, 521 U.S. at 881-82 (noting that presently available technology does not permit reliance or “narrowly tailored” restrictions on fundamental right of free speech).  

190.  See id. at 854 (citing findings of fact by district court).  


192.  See Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 F. Supp. 2d 783, 787 (E.D. Va. 1998) (noting that use of “X-Stop” software at public library blocked access “to protected speech such as the Quaker Home Page, the Zero Population Growth website, and the site for the American Association of University Women-Maryland”).

http://digitalcommons.law.villanova.edu/vlr/vol44/iss4/6
Although Internet-blocking technology is not sufficiently advanced to justify the restriction of fundamental rights, the private use of this technology can enhance parental supervision over children’s use of the Internet, and it is consistent with the fundamental right of parents to parent their children.193 Parents may block access to all chat rooms or bulletin boards.194 Parents may opt to screen sites based on content areas such as violence, nudity, racism, drug-culture, gambling and alcohol.195 Reasonably effective methods of screening materials parents believe to be inappropriate will soon be available.196 Individually tailored blocking technology may better assist parents in screening content objectionable within their particular value systems and may better tailor a program for the needs of the particular child.197 Some parents may be more concerned about the empirically proven deleterious effects of violence than nudity. These categories, however, may receive First Amendment protection, therefore providing guidance to children in the form of blocking the Internet is best left to parents.198

V. Conclusion

Freedom of speech is important in all modes of communication and is protected for both adults and children.199 Although politicians often speak of the need to protect children from sexually explicit material, such

193. See Parham v. J.R., 442 U.S. 584, 602 (1979) (upholding parental right to admit child to hospital, provided minimal due process rights afforded to child and stating, “[o]ur jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children”); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding parental right to raise children without undue governmental interference is fundamental liberty interest); see also Robert B. Keiter, Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court’s Approach, 66 MINN. L. REV. 459, 490-98 (1982) (reviewing constitutional protections afforded to parents and children and family privacy and arguing “intrusion is only justified under extremely exigent circumstances”).


195. See id. at 840 (describing CyberNOT product user tailored option of blocking user selected categories); see also Johnson, supra note 172, at 97 (“First, blanket content regulation is unnecessary. Existing federal and state statutes are sufficient to prosecute crime on the Internet, and existing technology allows parents to block access to offensive content.”).

196. See Reno, 929 F. Supp. at 842 (describing finding of fact number 73).

197. See id. at 840 (describing product’s option enabling parents to select particular types of Internet information to block).


as the images of indecency and pornography on-line, there does not ap-
pear to be a solid body of scientific evidence upon which to base this argu-
ment. Sexually violent pornography and child pornography have been
proven harmful. Thus, these forms of expression are rightfully prohibited
by existing statutes.200 The broad sweep of the CDA, and similarly pro-
posed legislation designed to protect children, however, sometimes chills
speech that is constitutionally permissible, is not harmful and may be ben-
eficial. Children take from the media what they bring to it.201 Children
should not be foreclosed from avenues of expression that are: (1) constitu-
tionally permissible and (2) available through other media, such as books
or magazines.202 Consequently, Internet indecency should be permitted
without further governmental regulation.

Parents should be able to select appropriate educational and recrea-
tional experiences for their children without governmental interfer-
ence.203 Parental supervision, including use of restrictive Internet-
blocking software, can provide guidance for children in forming judg-
ments about the information they receive. By preserving the accessibility
of free speech, the government is serving substantive due process objec-
tives and is in synchrony with scientific evidence.

Gretchen Witte

Exploitation Act of 1977 as amended) (criminalizing child pornography); 18
or reproduction of visual depictions of minors engaged in sexually explicit
conduct).

201. See Clifford et al., supra note 7, at 226 ("We have most strongly rein-
forced the idea that the general knowledge that a young viewer brings to the view-
ing situation is crucial in predicting what he or she will take away from it.").

Feingold) (expressing concern that CDA "will establish different standards for ma-
terial which appears in print and on the computer screen").

203. See Reno, 521 U.S. at 867 (noting that Court has been consistent in recog-
nition of principle that "parents' claim to authority in their own household to
direct the rearing of their children is basic to the structure of our society"). See
generally John Dayton, Free Speech, the Internet, and Educational Institutions: An Anal-
over content children are exposed to on Internet).