

ELECTRONIC INDECENCY: PROTECTING CHILDREN IN THE WAKE OF THE CABLE AND INTERNET CASES

*Kevin W. Saunders**

TABLE OF CONTENTS

I.	Introduction.....	1
II.	The Legal Background	3
	A. The Case Law Prior to the <i>Denver</i> and <i>Reno</i> Cases	3
	B. Cable Television and the <i>Denver</i> Case	9
	C. The Internet and the Internet Cases	13
III.	Resurrecting the Regulation of Indecency.....	29
	A. General Considerations	29
	1. The Lessons of <i>Denver</i> and <i>Reno</i>	29
	2. Obscenity as to Children	34
	B. Resuscitating Cable Regulation in the Wake of <i>Denver</i>	38
	C. Re-Regulating the Internet	42
	D. Television and Videotapes.....	47
	E. Depictions of Violence.....	48
IV.	Conclusion.....	50

[A]t the confluence of two streams of concern which flow through our polity—our concern for the protection of our First Amendment freedoms and our concern for the protection of our children... we expect to hear a roar rather than a purr.¹

I. INTRODUCTION

In the era when the broadcast media were the cutting edge of information technology, the United States Supreme Court recognized society's interest in protecting children from exposure to indecent material in radio and television programming. In *FCC v. Pacifica Foundation*,² the Supreme Court

* Professor of Law, University of Oklahoma. A.B., 1968, Franklin & Marshall College; M.S., 1970; M.A. 1976, Ph.D., 1978, University of Miami; J.D., 1984, University of Michigan. Professor Saunders is spending the year as the Visiting James Madison Chair and Acting Director of the Constitutional Law Resource Center at Drake University Law School. He wishes to thank Michael Meyerson and Rodney Smolla for their comments on earlier drafts of this Article.

1. *Crawford v. Lungren*, 96 F.3d 380, 389 (9th Cir. 1996) (upholding a ban on the sale of certain sexually explicit material through unsupervised sidewalk vending machines), *cert. denied*, 117 S. Ct. 1249 (1997). For further discussion of the case, see *infra* note 384.

2. *FCC v. Pacifica Found.*, 438 U.S. 726, 750-51 (1978).

held constitutional FCC rules restricting the broadcast of indecent material to hours when children would less likely be in the audience. The channeling of such material into late night hours was the subject of several cases before the United States Court of Appeals for the District of Columbia Circuit. In the last of the cases, *Action for Children's Television v. FCC*,³ the court approved but modified the FCC rules limiting indecent broadcasts to the hours between 10:00 p.m. and 6:00 a.m.⁴ Children are thus protected, at least to a degree, from the effects of indecent material broadcast over the air.

While *Pacifica* may have been a step in the right direction, broadcast television and radio represent only a small part of the potential exposure of children to indecent images. Much of the material viewed on television is not broadcast but is distributed solely over cable television. That material is not subject to the specific regulations approved in *Pacifica*.⁵ Similarly, the distribution of videos is not subject to *Pacifica*.⁶ Furthermore, the television screen is not the only source of electronic indecency. The computer monitor, connected to the Internet, presents similar problems, and is also not covered by the earlier FCC regulations.

Recognizing the problems present in protecting children from indecency in new types of media, Congress has made several attempts to limit that variety of material, especially in the electronic media. Those efforts have been largely unsuccessful. The first attempt, a ban on telephone "dial-a-porn" services, was struck down in *Sable Communications, Inc. v. FCC*.⁷ The Court concluded that a ban on indecent, but not obscene, material could not be justified,⁸ because children's exposure was limited by the fact that the services charged a fee.⁹ Furthermore, the Court noted that a total ban would unconstitutionally limit adult access to such material.¹⁰ It is difficult to quarrel with the *Sable* decision and the telephone indecency issue because the limited minor exposure does not present a major concern.

The next two congressional attempts were more significant, because they addressed media to which children have greater access. The first was the

3. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied sub nom.* *Pacifica Found. v. FCC*, 116 S. Ct. 701 (1996).

4. *Id.* at 670. The FCC regulations had actually established a 12:00 a.m. to 6:00 a.m. safe harbor, with an exception for public television and radio stations that sign off the air prior to midnight. *Id.* at 656. Such stations were allowed to broadcast indecent material after 10:00 p.m. *Id.* While the court found that the shorter safe harbor of 12:00 a.m. to 6:00 a.m. would not have been a constitutional violation, they could find no constitutional basis for the exception for the public broadcasting stations and enlarged the safe harbor for all broadcasters. *Id.* at 669-70.

5. In *Pacifica*, the relevant regulation was 18 U.S.C. § 1464 (1976), which forbid the use of "any obscene, indecent, or profane language by means of radio communications." *FCC v. Pacifica Found.*, 438 U.S. at 731.

6. *See id.*

7. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989).

8. *Id.* at 131.

9. *Id.* at 118.

10. *Id.* at 131.

Cable Television Consumer Protection and Competition Act of 1992 (Cable Television Act),¹¹ which addressed indecent material on cable television. The second was the recently passed Communications Decency Act of 1996,¹² which was contained in the Telecommunications Act of 1996.¹³ The Communications Decency Act addressed indecent material available on the Internet.¹⁴ Parts of the Cable Television Act were held unconstitutional in *Denver Area Educational Telecommunications Consortium v. FCC*,¹⁵ and the protections offered in the Communications Decency Act were held unconstitutional by federal district courts in *ACLU v. Reno*¹⁶ and *Shea v. Reno*.¹⁷ The government appealed *ACLU v. Reno*, and the lower court opinion was affirmed by the United States Supreme Court.¹⁸ Hence, these recent attempts to protect children from indecency have failed.

This Article presents an alternative approach to the protection of children from indecent images in the media. Part II discusses the case law background for the recent legislation, as found primarily in *Pacifica* and *Sable*, the Cable Television Act and the *Denver* decision, and the Communications Decency Act and the *Reno* decisions. Part III suggests an alternative approach. It begins with a discussion of the lessons to be drawn, and not to be drawn, from the recent cases. The background law on the legal basis for this approach and the doctrine of obscenity as to children will be presented. The discussion then turns to the regulation of indecency in cable programming and the regulation of indecent material on the Internet. Part III also briefly addresses the application of the approach to violent images in both media.

II. THE LEGAL BACKGROUND

A. The Case Law Prior to the Denver and Reno Cases

The *FCC v. Pacifica Foundation* case arose out of the radio broadcast of satirist and humorist George Carlin's *Filthy Words* monologue.¹⁹ Pacifica's New York City radio station broadcast the material at 2:00 p.m., as part of a program on contemporary attitudes toward language.²⁰ The broadcast was preceded by a warning to listeners that some might find the

11. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1486 (codified as amended in scattered sections of 47 U.S.C.).

12. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

13. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

14. 47 U.S.C.A. § 223(d)(1)(A)-(B) (West Supp. 1997).

15. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

16. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

17. *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996).

18. *See Reno v. ACLU*, 117 S. Ct. 2329 (1997).

19. *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

20. *Id.*

language in the upcoming program offensive.²¹ The Carlin monologue, a commercially available recording, was based on the premise that there were seven words that you “definitely wouldn’t say, ever” over the air.²² As part of the monologue, the words were repeated, time and again, in various colloquial contexts.²³

After receiving a complaint from an individual asserting that he and his young son had heard the material over his car radio, the FCC determined that the broadcast violated FCC regulations against the broadcast of indecent material.²⁴ The FCC chose not to impose sanctions, opting instead to associate its conclusions with the station’s file, so that the conclusions could be considered in renewal decisions if future complaints were received.²⁵ The FCC did not state that one could never say the words at issue on the radio, but it did conclude that such material should be broadcast only during time periods when children were not likely to be in the audience.²⁶

Pacifica appealed the FCC ruling, challenging whether the FCC had the statutory authority to regulate speech such as Carlin’s and, if so, whether such a statutory grant was constitutional.²⁷ The Court of Appeals for the District of Columbia Circuit reversed the FCC ruling and found the commission’s order invalid.²⁸ When the case reached the United States Supreme Court, the Court first determined that the statutory authority to regulate indecent broadcasts could be found both in federal law prohibiting the use of “any obscene, indecent, or profane language” in any radio transmission,²⁹ and in a more general statute requiring the FCC generally to encourage the “use of radio in the public interest.”³⁰

That left the issue of whether Carlin’s speech was indecent. The FCC did not state that Carlin’s words were *per se* obscene,³¹ and Pacifica argued that the indecency that could be regulated under the statute encompassed only obscene speech.³² The Court rejected Pacifica’s position, concluding that “indecent,” as used in the statute, “merely refers to nonconformance with accepted standards of morality.”³³

21. *Id.* at 730.

22. *Id.* at 729 (quoting Carlin’s monologue).

23. *Id.*

24. *Id.* at 730.

25. *Id.*

26. *Id.* at 733.

27. *Pacifica Found. v. FCC*, 556 F.2d 9, 12 (D.C. Cir. 1977).

28. *Id.* at 18.

29. *FCC v. Pacifica Found.*, 438 U.S. at 731 (quoting 18 U.S.C. § 1464 (1976)).

30. *Id.* (quoting Communications Act of 1934, 47 U.S.C. § 303(g) (1976)).

31. The FCC described Carlin’s words in the monologue as “patently offensive,” though not necessarily obscene.” *Id.*

32. *Id.* at 739.

33. *Id.* at 740. The Court favorably quotes *Webster’s Third New International Dictionary*, which defines “indecent” as “altogether unbefitting: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly

The Court then considered the constitutionality of the FCC's restrictions on the broadcast of indecent language. The Court began by noting that broadcast media enjoy less First Amendment protection than that enjoyed by other media.³⁴ While stating that the reasons for that lower protection are complex, the Court said that "two have relevance to the present case."³⁵ First, less protection was justified, in part, by the uniquely pervasive presence of the broadcast media in American life.³⁶ Broadcast of indecent material confronts the individual not only in public, but in the privacy of his or her own home. The Court said in the home "the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder."³⁷ Beginning the broadcast with a warning does not provide adequate protection to one tuning in after the program has started, and turning the program off after hearing the language was an inadequate remedy.³⁸ The Court also said that "broadcasting is uniquely accessible to children, even those [children] too young to read."³⁹ While other media might simply be required not to make indecent material available to children, channeling indecent material into hours when children were unlikely to be listening seemed the only effective way of protecting children from the broadcast of indecency.⁴⁰

In *Sable Communications, Inc. v. FCC*,⁴¹ a 1988 amendment to the Communications Act of 1934 was challenged.⁴² The amendment imposed a blanket prohibition on indecent and obscene telephone messages.⁴³ Since 1983, Sable Communications had been offering recorded, sexually oriented messages over the telephone.⁴⁴ No credit card was required for the service, but calls were billed at a higher rate with the proceeds being split between

suitable: UNSEEMLY . . . not conforming to generally accepted standards of morality.'" *Id.* at 740 n.14 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1966)).

34. *Id.* at 748.

35. *Id.* (emphasis added).

36. *Id.*

37. *Id.*

38. *Id.* at 748-49.

39. *Id.* at 749.

40. *Id.* at 748-50.

41. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989).

42. *Id.* at 117. The section was declared unconstitutional. See Communications Act Amendment of 1988, 47 U.S.C. § 223(b) (1994) (as amended by Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1990, § 521, Pub. L. No. 101-166, 103 Stat. 1159, 1192).

43. *Sable Communications, Inc. v. FCC*, 492 U.S. at 117. Earlier congressional attempts to limit such material had concentrated on preventing communication with minors by requiring credit cards, access codes, or descramblers that could be sold only to adults. *Id.* at 121. The amendment at issue in *Sable* abandoned such approaches and instead imposed a blanket ban on telephonic indecency for adults, as well as for minors. *Id.*

44. *Id.* at 117-18.

Sable and Pacific Bell Telephone.⁴⁵ Sable sought declaratory and injunctive relief against enforcement of the amendment.⁴⁶

The Court found no fault with the ban on obscene telephone messages, noting that it had repeatedly held that obscene speech does not enjoy the protection of the First Amendment.⁴⁷ Sable did argue that the obscenity portion of the amendment had created a national standard for obscenity and would require them "to tailor . . . messages to the least tolerant community" that could access their recordings.⁴⁸ Nevertheless, the Court did not find any inconsistency with the *Miller v. California*⁴⁹ requirement of community standards of obscenity.⁵⁰ The Court said that the amendment no more imposed a national standard than did laws prohibiting mailing obscene materials.⁵¹ Sable was said to be "free to tailor its messages . . . to the communities it [chose] to serve."⁵²

With respect to the ban on indecent messages, the Court found that part of the amendment was constitutionally flawed.⁵³ Indecent, but nonobscene speech does enjoy First Amendment protection.⁵⁴ Therefore, regulation requires a compelling interest and the restriction must be "the least restrictive means of furthering" that interest.⁵⁵ The Court recognized a compelling interest in the protection of "the physical and psychological well-being" of children that extended to shielding children from indecent material.⁵⁶ Nonetheless, the attempt to shield must be narrowly drawn.⁵⁷

The FCC sought to justify its complete ban, despite the narrowly drawn requirement, on the basis of *Pacifica*.⁵⁸ The Court, however, found the cases easily distinguishable.⁵⁹ First, *Pacifica* had only channeled indecent speech and left adults with late hour access.⁶⁰ Here, because of the total ban on indecent speech, adult access was completely limited to messages considered fit for children.⁶¹ Furthermore, *Pacifica* had relied on the "'unique' attributes" of the broadcast media.⁶² The pervasiveness and the accessibility

45. *Id.* at 118.

46. *Id.*

47. *Id.* at 124.

48. *Id.*

49. *Miller v. California*, 413 U.S. 15 (1973). The *Miller* obscenity test is discussed *infra* at note 340 and accompanying text.

50. Sable Communications, Inc. v. FCC, 492 U.S. at 124.

51. *Id.* at 124-25.

52. *Id.* at 125.

53. *Id.* at 126.

54. *Id.* at 127.

55. *Id.* at 126.

56. *Id.*

57. *Id.*

58. *Id.* at 127.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

to children even too young to read that allowed regulation in those media were not present in dial-a-porn.⁶³ Accessing a telephone recording requires the affirmative act of placing a call.⁶⁴ One making such a call and paying for the service is not surprised by the message, and the message cannot be said to be invasive.⁶⁵ The Court stated that the interest in protecting children could be addressed by the less restrictive means of screening out minors through the requirement of credit cards or other similar means.⁶⁶

Three other cases require mention because they were important to *Sable* or were seen by the court in *Shea v. Reno* as limiting *Pacifica*. The case important to *Sable* and important in any approach to protecting minors from exposure to indecency is *Butler v. Michigan*.⁶⁷ *Butler* was the appeal of a conviction for violating a Michigan statute proscribing the possession, sale, and publication of materials that were obscene or "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."⁶⁸ *Butler* had not been convicted of distributing such material to a minor. Rather, he had made the material available for sale to the general public and had sold a book to a police officer that would, the trial court found, have a potentially deleterious effect on youth.⁶⁹ The Court refused Michigan's attempt to protect its youth by preventing adults from obtaining materials that were not obscene.⁷⁰ The constitutional flaw was that the statute "reduce[d] the adult population of Michigan to reading only what is fit for children."⁷¹

The relevance to *Sable* is obvious. The anti-dial-a-porn statute in *Sable* had sought to protect minors from indecency by restricting the access of everyone to such telephone messages, and thus, the entire population was reduced to hearing only what was fit for children. These cases are relevant to any attempt to limit the access of minors to indecent material on cable television or the Internet. Whatever restrictions are imposed must leave adults with reasonable access to nonobscene material.

The remaining two relevant cases are *Bolger v. Young Drug Products Corp.*⁷² and *Turner Broadcasting System, Inc. v. FCC*.⁷³ The *Bolger* case was a challenge to a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives.⁷⁴ The Court held the statute

63. *Id.* at 127-28.

64. *Id.* at 128.

65. *Id.*

66. *Id.*

67. *Butler v. Michigan*, 352 U.S. 380 (1957).

68. *Id.* at 381 (quoting MICH. COMP. LAWS § 750.343 (Supp. 1954)).

69. *Id.*

70. *Id.*

71. *Id.* at 382-83.

72. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

73. *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994).

74. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. at 61 (referring to 39 U.S.C. § 3001 (e)(2) (1982)).

unconstitutional,⁷⁵ and while most of the analysis was with regard to the protection of commercial speech, there is language relevant to the issues in the cable and Internet cases. The *Bolger* Court first characterized *Butler* as leading to the conclusion that “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”⁷⁶ The Court then considered the *Pacifica* case, noting that the case did recognize a governmental interest in protecting youth that “justified special treatment of an afternoon broadcast” heard by both adults and youths.⁷⁷ The *Pacifica* opinion, however, had characterized itself as a narrow holding based on the pervasiveness of the media involved and the unique access of that medium to children.⁷⁸ The *Bolger* Court concluded that the receipt of mail was “far less intrusive and uncontrollable” than the broadcast media, and went on to say, “our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication.”⁷⁹ If it had not already been clear from the *Pacifica* opinion, *Bolger* makes it clear that caution should be exercised in attempting to extend *Pacifica* beyond its own context.

The *Turner* case concerned the regulatory authority of the FCC over the cable television industry.⁸⁰ Specifically, the challenge was to the “must carry” provisions of the Cable Television Act.⁸¹ Those provisions required that cable systems carry local broadcast television stations as a part of their cable offerings.⁸² The lower court granted summary judgment to the FCC, and the United States Supreme Court vacated the judgment, sending the case back for the resolution of issues of fact.⁸³ In doing so, the Court cited the *Bolger* language stating that the government’s power to regulate the broadcast media does not translate easily to other media.⁸⁴ The Court also discussed the scarcity rationale for FCC regulation of the broadcast media.⁸⁵ The public ownership of the airwaves and the limited number of broadcasts that can be allowed on the radio-television spectrum, without interfering with each other,

75. *Id.* at 75.

76. *Id.* at 74.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2452-53 (1994).

81. *Id.* (discussing sections 4 and 5 of the Cable Television Act of 1992, 47 U.S.C. § 534 (h)(1)(A), (C) (1994)).

82. *Id.*

83. *Id.* at 2472. After remand, and after the lower court Internet decisions, the “must carry” issue returned to the Supreme Court. *See Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174 (1997). The Court concluded that the provisions did not violate the First Amendment, because they served important interests in the preservation of local broadcasting, and the multiplicity of voices such broadcasters provide, and were not substantially more burdensome than necessary. *Id.* at 1203.

84. *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. at 2457.

85. *Id.* at 2456-57.

have justified less freedom for broadcasters than for the print media.⁸⁶ The Court, in an earlier opinion, stated that the scarcity rationale does not apply to cable television, because many more channels are available.⁸⁷ Until *Denver Area Educational Telecommunications Consortium v. FCC*,⁸⁸ addressed the indecency issue, the scarcity analysis provided the only hint as to whether the FCC's authority under *Pacifica* would carry over to cable. The Court clearly concluded that there was a difference between the two media, but it was not clear what effect that difference would have. Lack of scarcity certainly undercuts the rationale for fairness and balance rules, such as the FCC regulations at issue in *Red Lion Broadcasting Co. v. FCC*.⁸⁹ In *Pacifica*, however, the Court said that two of the complex reasons for lesser protection of the broadcast media were relevant.⁹⁰ Scarcity was not one of the two, so the lack of scarcity in cable would not have necessitated a conclusion that *Pacifica* did not apply.

B. Cable Television and the Denver Case

The *Denver* case was a challenge to the constitutionality of portions of the Cable Television Act.⁹¹ The relevant portions of the Act addressed the issue of indecent material on cable programming.⁹² While broadcast television was limited by the sort of regulation approved in *Pacifica*, that decision was limited to over-the-air media.⁹³ Material on cable is not covered by the regulations, and cable programming contains material that would be considered indecent under a *Pacifica* definition. Stronger language, more nudity, and more "adult situations," as well as more violence, are found on cable television, especially on premium motion picture channels and channels specifically aimed at an adult audience.

Sections 10(a), 10(b), and 10(c) of the Act addressed potential cable sources of indecency, namely leased access and public, educational, and governmental access channels.⁹⁴ Under federal law, cable operators are required to reserve a portion of their channels for lease to independent programmers, and the operators could not exercise any editorial control over

86. *Id.* Compare *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (discussing television), with *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (involving the newspaper media).

87. See *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. at 2457.

88. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

89. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

90. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (stating the first reason as "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and the second as "broadcasting is uniquely accessible to children, even those too young to read.").

91. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. at 2380.

92. *Id.* at 2382.

93. *FCC v. Pacifica Found.*, 438 U.S. at 750.

94. *Cable Television Consumer Protection and Competition Act of 1992*, 47 U.S.C. §§ 532(h), 532, 531 note (1994).

the content of the programs presented in the leased slots.⁹⁵ Public, educational, and governmental access channels (public access channels) are those provided by cable operators for such purposes, as a part of their franchise agreements with local governments.⁹⁶ Sections 10(a) and 10(c) allowed cable operators to prohibit the broadcast, on leased access and public access channels respectively, of any programming the operator "reasonably believe[d] described or depicted sexual or excretory activities or organs in a patently offensive manner."⁹⁷ Section 10(b) required cable operators that chose not to prohibit such programming to segregate it on a single channel.⁹⁸ That channel was to be blocked, unless a subscriber requested, in writing, that the signal be available.⁹⁹ The operator then had thirty days to unblock the channel, and on a subsequent request to block, would have another thirty days to do so.¹⁰⁰ Programmers would also have to provide thirty days notice to cable operators before presenting a patently offensive program.¹⁰¹

When the case reached the United States Supreme Court, it resulted in six separate opinions.¹⁰² Justice Breyer's lead opinion was only a plurality opinion with regard to sections 10(a) and 10(c). Justice Breyer, joined in that portion of his opinion by Justices Stevens, O'Connor, and Souter, concluded that section 10(a) was constitutional.¹⁰³ Justice Breyer recognized the extremely important government interest at stake in protecting children from being exposed to patently offensive sex-related materials, and that the Court had often found that interest compelling.¹⁰⁴ Furthermore, the right given to cable operators by section 10(a) was one they would already have had, absent Congress's earlier ban on their exercise of editorial discretion.¹⁰⁵ Justice Breyer found the problem Congress addressed to be very similar to the problem presented in *Pacifica* and the balance struck by the section to be similar to that approved in *Pacifica*.¹⁰⁶ He also concluded that the section, because of its permissive nature, was less restrictive than the regulations at issue in *Pacifica*.¹⁰⁷

95. See 47 U.S.C. § 532(b) (1994).

96. See *id.* § 531(b).

97. *Id.* § 532(h).

98. *Id.* § 532(j).

99. *Id.*

100. *Id.*

101. *Id.*

102. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

103. *Id.* at 2381.

104. *Id.* at 2386.

105. *Id.*

106. *Id.* at 2387. The Court found similarities to *Pacifica* in the facts that, like broadcast television, cable television was available to children, was also pervasive, also confronted the citizen in the privacy of his or her home with little to no prior notice and, as *Pacifica* noted, other sources for indecent materials were available to adults. *Id.*

107. *Id.*

Justice Kennedy, joined by Justice Ginsberg, dissented with regard to the constitutionality of section 10(a).¹⁰⁸ They considered the law setting aside leased access channels to have turned the cable operators into common carriers and concluded that such a requirement serves the same sort of function as the establishment of a public forum.¹⁰⁹ The section would, therefore, have to meet strict scrutiny.¹¹⁰ They recognized the compelling interest in protecting children from indecency but found the section was not sufficiently tailored to that interest.¹¹¹ Children would not be protected, where operators choose not to ban indecent programming, and “[p]artial service of a compelling interest is not narrow tailoring.”¹¹² Furthermore, the approach went too far in protecting children; adults would also be deprived of the programming.¹¹³

The remaining necessary votes for the judgment with regard to section 10(a) were provided by Chief Justice Rehnquist and Justices Scalia and Thomas.¹¹⁴ They focused not on the First Amendment rights of programmers but of cable operators.¹¹⁵ Because the section restored editorial control to the operators, there was no constitutional violation.¹¹⁶

With regard to section 10(c), Justice Breyer, joined by Justices Stevens and Souter, found important differences from section 10(a).¹¹⁷ While Congress restored editorial control in section 10(a), cable operators never had such control over public access channels.¹¹⁸ Public access channels were already subject to supervision by public, private, and mixed nonprofit groups.¹¹⁹ Local accountability provided a way to handle any indecency problems that might arise.¹²⁰ Justice O’Connor did not see the importance of the distinctions offered and would have found section 10(c) constitutional on the same basis as section 10(a).¹²¹ The remaining Justices maintained their section 10(a) positions. A majority concluded that section 10(c) was unconstitutional.¹²² The majority was reached by adding the votes of Justices Kennedy and Ginsberg, who found the flaws of section 10(c) to be similar to those of section 10(a).¹²³ Justices Thomas, Rehnquist, and Scalia, who again

108. *Id.* at 2404.

109. *Id.* at 2411.

110. *Id.* at 2416 (Kennedy, J., concurring in part and dissenting in part).

111. *Id.*

112. *Id.* (citing *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984)).

113. *Id.* at 2416-17.

114. *Id.* at 2419 (Thomas, J., concurring in part and dissenting in part).

115. *Id.*

116. *Id.* at 2424-25.

117. *Id.* at 2394-96.

118. *See id.* at 2408.

119. *Id.* at 2394-95.

120. *Id.* at 2395.

121. *Id.* at 2403.

122. *Id.* at 2397, 2404.

123. *Id.* at 2404.

based their decision on the First Amendment rights of the cable operators, would have held section 10(c) constitutional.¹²⁴

Fortunately, with regard to the section of the Act most important to the issue at hand, section 10(b), the Court issued a majority decision. The majority found fault with the thirty-day unblock and block requirements.¹²⁵ If a subscriber wished to watch a single program on the blocked leased access channel, he or she would have to request thirty days ahead of the program that the channel be unblocked.¹²⁶ Those who select programs one day at a time or "surf" minute by minute, would not have access, unless they accept access all the time or at least four weeks in advance.¹²⁷ The written request requirement for unblocking also raised the possibility that potential viewers would be chilled by the possibility of exposure because they requested the right to view indecent programming.¹²⁸ The Court noted the costs and burdens of the blocking procedures and suggested that operators might be encouraged simply to ban programming they would otherwise have allowed, even if only as late hour programming.¹²⁹

Despite these burdens on the presentation of protected material, the government sought to justify the statute as the least restrictive way of meeting the compelling objective of protecting children's physical and psychological well-being.¹³⁰ While the Court agreed that the government had presented a compelling interest, it held that the segregate and block provisions were not the least restrictive alternative nor sufficiently narrowly tailored.¹³¹ The Court stated that the Telecommunications Act of 1996 contained alternatives that were less restrictive.¹³² While the Court did not determine whether the 1996 provisions were constitutional, it did note the existence of requirements that programming on unleased channels primarily dedicated to sexually explicit programming be scrambled or, if the subscriber requests, blocked.¹³³ The V-chip requirements of the Telecommunications Act were also noted as providing an automatic way to block the display of sexually explicit programs.¹³⁴ If those provisions adequately protected children, it was unclear why more restrictive rules were required for protection from such programming on leased access channels.¹³⁵ The Court could not find justification in the record:

124. *Id.* at 2419.

125. *Id.* at 2391.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 2391.

131. *Id.*

132. *Id.* at 2392.

133. *Id.*

134. For a discussion of the V-chip, see *infra* notes 376-79 and accompanying text.

135. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. at 2392.

[The record] does not explain why, under the new Act, blocking alone—without written access-requests—adequately protects children from exposure to regular sex-dedicated channels, but cannot adequately protect those children from programming on similarly sex-dedicated channels that are leased. It does not explain why a simple subscriber blocking request system, perhaps a phone-call based system, would adequately protect children from “patently offensive” material broadcast on ordinary non-sex-dedicated channels (*i.e.*, almost all channels) but a far more restrictive segregate/block/written-access system is needed to protect children from similar broadcasts on what (in the absence of the segregation requirement) would be non-sex-dedicated channels that are leased.¹³⁶

Congress's willingness to use less restrictive means in a similar setting provided an indication that the more restrictive means were not necessary.¹³⁷

The Court also specifically addressed the possibility of using “lockboxes” to permit parents to lock out programs or channels they did not want their children to see.¹³⁸ The FCC had found lockboxes less effective than the segregate and block provisions.¹³⁹ Parents would have to find out about the existence of such devices, buy and learn to program them, and be sufficiently vigilant to be sure that the programming they wish to block has been, and remains, locked out.¹⁴⁰ While no provision can provide certain protection, the Court would not allow that fact to justify limiting viewing choices of the adult population to what is suitable for children.

Before leaving *Denver*, it is worth reiterating several aspects of the opinion. The Court did recognize a compelling interest in protecting the physical and psychological well-being of children. Furthermore, the Court's analysis indicates that lockboxes or the V-chip provide less restrictive alternatives to that contained in section 10(b). The use of such devices may provide the necessary protection, without limiting the choices of adults.¹⁴¹

C. The Internet and the Internet Cases

The Internet is a large network of computers, each of which may be connected to other smaller networks of computers. Information may be passed to, or retrieved from, computers across the country and around the world using the network. There are over 9,400,000 computers linked together in the Internet, not counting home computers that can access the Internet

136. *Id.*

137. *Id.*

138. *Id.* at 2393.

139. *Id.*

140. *Id.*

141. Constitutional difficulties with the V-chip will be discussed *infra* notes 381-84 and accompanying text. Whatever the outcome of a challenge to the current mandated use of the V-chip, the approach recommended in this Article does not raise the same issues.

through telephone line connections.¹⁴² It is estimated that as many as 40 million people worldwide gain access to the Internet and that by the year 1999, there will be 200 million Internet users.¹⁴³

There are various ways to communicate over the Internet.¹⁴⁴ Electronic mail, or e-mail, allows individuals to place a message in a computer to be later accessed by the intended recipient.¹⁴⁵ Similarly, messages may be sent to the e-mail addresses of all subscribers to a mailing list.¹⁴⁶ In addition to e-mail communications, information may, instead of being sent to designated receivers, simply be stored on a computer accessible to Internet users.¹⁴⁷ USENET newsgroups fit this latter category.¹⁴⁸ Messages are posted, and anyone who is interested may, without having to subscribe to a list, connect to the computer serving the newsgroup and access the information.¹⁴⁹ There are also "chat rooms" in which all those connected to a particular server computer can post messages nearly simultaneously to each other, so rather than back and forth messaging, participants can engage in something more akin to a conversation.¹⁵⁰ The Internet also allows for accessing and controlling other computers, either to engage them in computing or to retrieve information.¹⁵¹

Perhaps the best known use of the Internet, to the point where many think of it as *being* the Internet, is the retrieval of information contained in files on computers throughout the world. The "World Wide Web" (the Web) serves this purpose. Various institutions, organizations, and individuals have established home pages with information about an entity, individual, or other information the publisher wishes to make available to the public. The information may contain material other than text, including still and motion pictures and audio samples. The pages will also often contain "links" to related home pages or to home pages the developer of the original page thinks the reader may also find interesting. Using a computer mouse to click on the highlighted link, the reader transfers directly to the linked document.

The greatest difficulty in using the Web is finding the information. If the address, the "uniform resource location" or URL, is known, the Web site may be accessed directly.¹⁵² If the address is unknown, one of several available "search engines" is required. The user of such a program may

142. *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

143. *Id.*

144. *Id.* at 834-38.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 834-35.

150. *Id.* at 835.

151. An example is accessing the computer catalog of a remote library and searching the library for books by a particular author.

152. Not all Web sites are open to all who seek access. The publisher may choose to require the person seeking access to present a password or be denied access.

choose from a listing of categories of sites or may search for sites by entering key words. In either case, the search engine generates a list of possibly relevant Web sites. The list is actually a group of links allowing the user to access the sites.

The Internet contains some sexually explicit material, although the proportion of Internet addresses containing such material is very small.¹⁵³ Furthermore, with the exception that indecent material may be sent to a recipient's e-mail, some action on the part of the recipient is required, before he or she is exposed to indecent material. Most of the time, however, the user needs only to access the Internet address containing the material. The overt act involved does not need to be an intentional search for sexually explicit material. In the proceedings of *Shea v. Reno*,¹⁵⁴ an expert ran a search using the titles of popular children's movies including *Sleeping Beauty*, *Babe*, and *Little Women*.¹⁵⁵ The search produced a small number of links to sexually explicit sites.¹⁵⁶

The concern that children would unintentionally stumble onto, or intentionally search out, indecent material has led to the development of several screening mechanisms. One such approach is the Platform for Internet Content Selection (PICS). PICS is an attempt by a consortium of commercial and public interest entities interested in the Web.¹⁵⁷ Their goal is the development of technical standards that will support the development of equipment to allow parents to screen what their children can access.¹⁵⁸ The intent is to allow publishers and third parties to rate material in various ways and to provide parents a choice among rating services.¹⁵⁹ Until the majority of sites have been rated, PICS will screen out all unrated sites.¹⁶⁰ The difficulty with this approach is that there are over 37 million separate sites on the Web.¹⁶¹ Thus, until something in the neighborhood of 19 million sites have been rated, most will be screened out. The rated sites will most likely be those of commercial providers, and small Web publishers will be denied access to potential readers or viewers.

A second screening approach is the development of screening software, several varieties of which are already on the market.¹⁶² The software can work in several ways. One way is to have it contain a list of sites containing objectionable material and block access to those sites. The difficulty here is again the great number of sites, as well as the regular changes sites may

153. See *Shea v. Reno*, 930 F. Supp. 916, 931 (S.D.N.Y. 1996) (estimating the proportion of sexually explicit material on the Internet to be well less than one-tenth of one percent).

154. *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996).

155. *Id.* at 931.

156. *Id.*

157. *ACLU v. Reno*, 929 F. Supp. 824, 838-39 (E.D. Pa. 1996) *aff'd*, 117 S. Ct. 2329 (1997).

158. *Id.* at 838.

159. *Id.*

160. *Id.* at 839.

161. *Shea v. Reno*, 930 F. Supp. at 931.

162. See *id.* at 932; *ACLU v. Reno*, 929 F. Supp. at 839-42.

undergo and the regular addition of new sites.¹⁶³ Furthermore, the trial expert's searches using "Babe" and "Little Women" as key words both turned up links to sexually explicit sites, even with screening software running.¹⁶⁴ Clearly, those sites were not listed.

The software can also block all sites with URLs containing character strings such as "xxx" or "sex."¹⁶⁵ While software can screen for sexually suggestive words or phrases, such screening may block too little or too much. A program instructed to block sites containing the word "breast" would screen out sites discussing breast cancer. There are very few sexually suggestive terms that do not also have nonsexual uses. The reason George Carlin found only seven terms you definitely could never say on radio was that other candidates for exclusion could be used in contexts that were nonsexual.¹⁶⁶ Additionally, the software can screen only for text, leaving still or moving pictures unblocked.¹⁶⁷

In response to concerns that children would be exposed to Internet indecency, Congress passed the Communications Decency Act of 1996,¹⁶⁸ as a part of the Telecommunications Act of 1996.¹⁶⁹ The Communications Decency Act amended 47 U.S.C. § 223(a), (d).¹⁷⁰ As amended, § 223(a)(1)(B) provides in relevant part that any person who:

- (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;

163. Parents can subscribe to update services for SurfWatch and Cyber Patrol, two of the major software screening programs. *See Shea v. Reno*, 930 F. Supp. at 932. This requires continued action on the part of parents in updating their programs. It may also be questionable whether the updates can keep up with the growth of Web sites, which have been said to be growing by as much as 700 per day.

164. *See id.*

165. *See id.*

166. *Id.* at 934.

167. *See ACLU v. Reno*, 929 F. Supp. at 842.

168. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 47 U.S.C.).

169. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). The Communications Decency Act is Title V of the Telecommunications Act.

170. *Id.* § 502, 110 Stat. at 133.

shall be fined under Title 18, or imprisoned not more than two years, or both.¹⁷¹

Section 223(d)(1) makes it criminal to:

- (A) [use] an interactive computer service to send to a specific person or persons under 18 years of age, or
- (B) [use] any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication . . .¹⁷²

It also became a crime for a person to "knowingly [permit] any telecommunications facility under [his or her] control to be used for any activity prohibited" by §§ 223(a)(1) and 223(d)(1).¹⁷³

The statute also provided a defense:

- (1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.
- ...
- (5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section . . . that a person—
 - (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or
 - (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.¹⁷⁴

171. 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997).

172. *Id.* § 223(d)(1).

173. *Id.* § 223(a)(2), (d)(2). The statute also prohibited sending or receiving information on abortions or abortion-inducing devices or drugs. That section was challenged by the ACLU, and the government did not contest the claim that the provision was unconstitutional. *ACLU v. Reno*, 929 F. Supp. 824, 829 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

Congress recognized the potential for a constitutional challenge to various portions of the Act and provided for expedited review by a three-judge federal district court, with a decision of unconstitutionality appealable, as a matter of right, to the Supreme Court.¹⁷⁵ Challenge was, indeed, quick. The Act was signed by President Clinton on February 8, 1996, and on that very day, the ACLU filed an action in the United States District Court for the Eastern District of Pennsylvania,¹⁷⁶ and Joe Shea, the publisher of an electronic newspaper, filed an action in the United States District Court for the Southern District of New York.¹⁷⁷ Both actions claimed that the statute violated the First Amendment and sought injunctions against its enforcement.¹⁷⁸ The opinion in *ACLU v. Reno*, was handed down on June 11, 1996,¹⁷⁹ and the latter, *Shea v. Reno*, was delivered on July 29, 1996.¹⁸⁰

The *ACLU v. Reno* decision produced three separate opinions, each concluding that the act was unconstitutional on its face and that the injunction should be granted.¹⁸¹ The lead opinion, authored by Chief Circuit Judge Sloviter, began its First Amendment analysis by determining that the statute had to meet strict scrutiny because it restricted nonobscene, indecent material that enjoyed the protection of the First Amendment.¹⁸² Judge Sloviter noted that the Internet seemed more akin to the telephonic communications at issue in *Sable* than to the broadcasts at issue in *Pacifica*, because the Internet user must deliberately retrieve specific information.¹⁸³

Recognizing that it had to meet strict scrutiny, the government offered, as a compelling interest, the physical and psychological well-being of minors,

174. 47 U.S.C.A. § 223(e).

175. 47 U.S.C.A. § 223 note.

176. See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

177. See *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996).

178. The action in *ACLU v. Reno* challenged 47 U.S.C.A. § 223(a), (d). *ACLU v. Reno*, 929 F. Supp. at 827. The New York litigation, on the other hand, was directed only at § 223(d). *Shea v. Reno*, 930 F. Supp. at 922. The Pennsylvania court did not distinguish the two sections in its discussion, but there appeared to be a strong argument that could be offered that the two should be treated differently. While the discussion in both cases centered on issues affecting the unconstitutionality of § 223(d), the analysis does not carry over to § 223(a) as easily as the Pennsylvania court's failure to distinguish the two would seem to indicate. The Supreme Court explained why both sections raised similar difficulties. *Reno v. ACLU*, 117 S. Ct. 2329, 2350 (1997); see *infra* note 267 and accompanying text.

179. *ACLU v. Reno*, 929 F. Supp. at 824.

180. *Shea v. Reno*, 930 F. Supp. at 916. The *Shea* court considered the issues, despite the earlier findings and decision by the *ACLU* court. The *Shea* court noted that nonmutual collateral estoppel against the government was not allowed, and that while the question of such estoppel with regard to questions of fact was not as clear, the tentative nature of the factual findings in the *ACLU* decision made estoppel as to factual issues inappropriate. *Id.* at 924.

181. See *ACLU v. Reno*, 929 F. Supp. at 857, 864-65, 883.

182. *Id.* at 849.

183. *Id.* at 851-52.

citing *Sable Communications, Inc. v. FCC*¹⁸⁴ and *Ferber v. New York*.¹⁸⁵ Judge Sloviter distinguished *Sable* and *Ferber* as situations where the harm to children was more evident and in which there was no valuable content, as is found on the Internet.¹⁸⁶ That material could have value even for older minors, and the First Amendment rights of older minors merit protection.¹⁸⁷ While Judge Sloviter lacked confidence in the government's position that there was a compelling interest in regulating the vast range of material on the Internet, she did acknowledge that there was an interest in shielding a substantial number of minors from some of the Internet material Congress had addressed and, therefore, determined not to rest her position on the lack of compelling interest.¹⁸⁸

Even with a compelling interest, Judge Sloviter found the statute unconstitutional because it swept too broadly and chilled the free expression rights of adults.¹⁸⁹ She found clear evidence that many Internet publishers would find it technically or economically impossible to comply with the Communication Decency Act, other than by limiting the posting of material that adults had a constitutional right to access.¹⁹⁰ Newsgroups, listservs, and chat rooms have no way to screen for age, so the level of communication would have to be reduced to that appropriate for minors.¹⁹¹ Judge Sloviter found that even on the Web, noncommercial publishers would find it too expensive and burdensome to verify age in the way the government suggested.¹⁹² Again, publishers would be forced to choose between prosecution under the Act or limiting the material made available to that suitable for minors, thereby affecting the rights of adults to obtain nonobscene material.¹⁹³

Finally, Judge Sloviter addressed the government's contention that the statutory defenses available provided narrow tailoring, thereby saving the statute.¹⁹⁴ Judge Sloviter responded:

[I]t is difficult to characterize a criminal statute that hovers over each content provider, like the proverbial sword of Damocles, as narrow tailoring.

184. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989) (upholding a prohibition on the possession and distribution of child pornography).

185. *Ferber v. New York*, 458 U.S. 747 (1982) (upholding a prohibition on the possession and distribution of child pornography).

186. *ACLU v. Reno*, 929 F. Supp. at 852-53.

187. *Id.* at 853. As examples of valuable material that might be patently offensive in some communities, Judge Sloviter offered the text of the Broadway play *Angels in America*, with its portrayal of homosexuality and AIDS, travel magazine photographs of sculptures of copulating couples from ancient monuments in India, and Francesco Clemente's painting *Labirinth*. *Id.* at 852-53.

188. *Id.* at 853.

189. *Id.* at 854-55.

190. *Id.* at 854-56.

191. *Id.* at 854.

192. *Id.*

193. *Id.* at 855.

194. *Id.*

. . . No provider . . . is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. A successful defense to a criminal prosecution would be small solace indeed.¹⁹⁵

Credit card requirements and adult verification were seen as infeasible, and the defense of "good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" was inadequate, even if "effective" required less than 100% effectiveness, because the necessary technology was not available.¹⁹⁶ The only government suggestion of technology was a tagging scheme, under which a character string would be included in all indecent material.¹⁹⁷ That scheme, however, had not been established and would also depend on the cooperation of third parties to block the material so identified.¹⁹⁸ Lastly, even if the technology develops, the burden on publishers would be significant because they would have to review all material they make available to insure that it would not be considered patently offensive in some community.¹⁹⁹

The second opinion, authored by Judge Buckwalter, primarily addressed vagueness issues.²⁰⁰ Judge Buckwalter expressed concern over the lack of definition for the term "indecent."²⁰¹ While the government argued that it was, for purposes of the statute, synonymous to "patently offensive," he found that to be no help to a publisher attempting to comply with the Communications Decency Act.²⁰² He rejected *Pacifica* and *Sable* as precedent for a conclusion that the terms were not unconstitutionally vague, because neither case ruled on that issue.²⁰³ He did, however, recognize that the Ninth Circuit, in *Information Providers' Coalition v. FCC*,²⁰⁴ read *Pacifica* and *Sable* as implicitly accepting the FCC definition of telephone indecency as "'the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium.'"²⁰⁵ The *Information Providers' Coalition* court had also concluded that such a definition was no more vague than the defini-

195. *Id.* at 855-56.

196. *Id.* at 856.

197. *Id.*

198. *Id.*

199. *Id.* Judge Sloviter also agreed with Judge Buckwalter's argument that "indecent" and "patently offensive" are inherently vague. *Id.* See *infra* notes 200-10 and accompanying text for a discussion of Judge Buckwalter's argument.

200. *ACLU v. Reno*, 929 F. Supp. at 857-64.

201. *Id.* at 858.

202. *Id.*

203. *Id.* at 862.

204. *Information Providers Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

205. *ACLU v. Reno*, 929 F. Supp. at 862 (quoting *Information Providers Coalition v. FCC*, 928 F.2d at 874).

tion of obscenity announced by the Court in *Miller v. California*.²⁰⁶ Judge Buckwalter also acknowledged other opinions upholding the use of the term "indecent" in telephone and television cases.²⁰⁷ He found notable, however, that in the telephone and television cases the FCC had defined "indecent" as patently offensive under community standards for the particular medium.²⁰⁸ The Communications Decency Act provision did not define the applicable community as that of cyberspace.²⁰⁹ While the Conference Report on the Communications Decency Act stated that the Act was intended to establish a national standard, publishers would have difficulty discerning the community standard and would be chilled into not publishing work with serious value.²¹⁰

The third opinion was by Judge Dalzell. He also expressed concern that any regulation of indecency limits access for adults and must be justified under strict scrutiny.²¹¹ With regard to the argument that "indecent" was too vague a term, Judge Dalzell found adequate precedent for the conclusion that the term, as a shorthand for the "patently offensive" provision, was not unconstitutionally vague.²¹² What led him to conclude that the Act was unconstitutional was a "medium specific analysis" of its proscriptions.²¹³ He began by noting the differential treatment afforded the various media, under United States Supreme Court decisions addressing print, broadcast media, cable television, and billboards.²¹⁴

Of the media that the Supreme Court had already considered, the government, in attempting to justify the Communications Decency Act, relied on *Pacifica*.²¹⁵ Judge Dalzell, however, found little guidance in that case, stating that "[t]ime has not been kind to the *Pacifica* decision. Later cases have eroded its reach, and the Supreme Court has repeatedly instructed against overreading the rationale of its holding."²¹⁶ He cited three cases for his conclusion.²¹⁷ The first, *Bolger v. Youngs Drug Products Corp.*,²¹⁸ did indeed

206. *Miller v. California*, 413 U.S. 15, 25 (1973); *see ACLU v. Reno*, 929 F. Supp. at 862.

207. *ACLU v. Reno*, 929 F. Supp. at 862 (citing *Dial Info. Servs. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991)).

208. *Id.*

209. *Id.* at 862-63.

210. *Id.* at 863 (referencing S. CONF. REP. NO. 104-230, at 191 (1996)).

211. *Id.* at 866.

212. *Id.* at 868-70.

213. *Id.* at 872.

214. *Id.* at 873-74 (citing *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994) (regarding cable television); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (regarding billboards); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (regarding print media); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (regarding broadcast radio and television)).

215. *Id.* at 874.

216. *Id.* at 875.

217. *Id.* at 875-76.

218. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

note the narrowness of the *Pacifica* holding in refusing to extend the interest in protecting children from indecent material to justify a ban on the mailing of unsolicited advertisements for contraceptives.²¹⁹ But as noted earlier, the distinction between *Pacifica* and *Bolger* was in the lesser intrusiveness and greater control over exposure to the content of mail.²²⁰ The second case, *Sable Communications, Inc. v. FCC*,²²¹ also refused to rely on *Pacifica*, but again, the difference between the media was in intrusiveness and assault on the unsuspecting and unwilling listener.²²² The third case, *Turner Broadcasting System, Inc. v. FCC*,²²³ also limited *Pacifica*.²²⁴ In *Turner*, the distinction was not based on intrusiveness but on the lack of the scarcity that justified certain broadcast regulations.²²⁵ Judge Dalzell took *Turner* as "confirm[ing] beyond doubt that the holding in *Pacifica* arose out of the scarcity rationale unique to the underlying technology of broadcasting," because cable is no less intrusive or more uniquely accessible to children than broadcast television.²²⁶ The lack of scarcity distinction in *Turner*, however, did not speak to the basis for *Pacifica* but rather to the fairness issues of *Red Lion*.²²⁷ It is a mistake to conclude that, because of *Turner*, *Pacifica* is inapposite.²²⁸ It would also be a mistake to conclude that *Pacifica* automatically dictates the result in a consideration of the Communications Decency Act. Thus, while *Turner* does not deserve the effect Judge Danzell gave it, he is right in looking to a media specific analysis.

Continuing on that analytic path, Judge Danzell found four characteristics of the Internet that have "transcendent importance" to holding that the Communications Decency Act is unconstitutional:²²⁹

First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.²³⁰

219. *Id.* at 73.

220. See *supra* notes 77-80 and accompanying text.

221. *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989).

222. *Id.* at 128.

223. *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994).

224. *ACLU v. Reno*, 929 F. Supp. 824, 876 (E.D. Pa. 1996) (citing *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. at 2457), *aff'd*, 117 S. Ct. 2329 (1997).

225. *Id.*

226. *Id.*

227. See *supra* notes 85-91 and accompanying text.

228. The majority portion of *Denver* mentioned *Pacifica* but declined to determine the extent to which *Pacifica* does or does not apply a lower standard of review to indecent speech. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2391 (1996). The issue of *Pacifica*'s application outside of the broadcast media was left open. Furthermore, in its analysis of section 10(a), the plurality in *Denver* drew guidance from *Pacifica* in its analysis of cable indecency. See *id.* at 2386-87.

229. *ACLU v. Reno*, 929 F. Supp. at 877.

230. *Id.*

With regard to those characteristics, the Act was seen as undermining the speech enhancing effects of the Internet and skewing the parity among speakers that exists on the Internet.²³¹ While Judge Danzell was willing to accept the protection of minors from pornography as a compelling governmental interest, the Act would lead to the intolerable result of reducing the speech on the Internet available to adults. Furthermore, this result would occur, without accomplishing the government's goal in shielding children because a significant portion of Internet communications originate outside the United States.²³²

In contrast to *ACLU v. Reno*, *Shea v. Reno* produced a single opinion. The *Shea* court began by addressing the vagueness issue. The court took *Pacifica*'s determination that the broadcast at issue was indecent under essentially the same definition as used in the Communications Decency Act, indicating that the definition of "indecent" was not unconstitutionally vague and noted that other courts had so read *Pacifica*.²³³ The court also concluded that the "patently offensive" standard was not unconstitutionally vague, thereby disagreeing with two of the judges in the *ACLU v. Reno* decision.²³⁴ While the statute does call for an assessment of the offensiveness of the material in context, context has always been a component of indecency analysis, and the phrase "in context" simply follows the approach of *Pacifica*. The court said, "We cannot see how importing certain language that has been used by various courts considering challenges to the definition of indecency renders the Communications Decency Act unconstitutionally vague."²³⁵

The failure to identify the community in which the material would be found patently offensive also did not make the statute unconstitutionally vague. The court said that "in light of the fact that modern communications have long transcended community borders, this problem is not a novel one."²³⁶ The court went on to quote *Sable* for the proposition, "If [the provider's] audience is comprised of different communities with different local standards, [the provider] ultimately bears the burden of complying with the prohibition of obscene messages."²³⁷ The plaintiffs sought to distinguish *Sable*, however, on two bases: First, while commercial entities may have the staff to monitor FCC pronouncements on offensiveness in communities across the country, small Internet providers would lack that capacity.²³⁸ Additionally, while telephone communication might be limited to communities that the provider chooses to serve, Internet providers cannot limit the geographic

231. *Id.* at 878.

232. *Id.* at 882.

233. *Shea v. Reno*, 930 F. Supp. 916, 935-36 (S.D.N.Y. 1996).

234. *Id.* at 936.

235. *Id.*

236. *Id.*

237. *Id.* at 937 (quoting *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 125-26 (1989)).

238. *Id.*

area from which an audience can gain access.²³⁹ The court was not persuaded by the first point, stating "We have no basis for concluding that Internet content providers are any less capable than those subject to obscenity laws or other indecency restrictions to acquire a general familiarity with the relevant standards"²⁴⁰ On the second point by the plaintiffs—the claim that inability to control the community in which messages would be received would require that content be geared toward the least tolerant community—the court concluded that the issue raised was one of overbreadth rather than vagueness and proceeded to consider that issue.²⁴¹

The court first determined that any overbreadth would have to meet strict scrutiny.²⁴² The plaintiff offered two overbreadth arguments. The first argument was that the Communications Decency Act reached a significant amount of material with serious literary, artistic, political, or scientific value.²⁴³ Secondly, the statute is not narrowly tailored because it limits the ability of adults to engage in protected communication by effectively banning all indecent communication on the Internet.²⁴⁴ Because the court agreed with the second argument, it did not address the first.²⁴⁵

The court began by noting that, if the statutory proscription stood alone, it would be unconstitutional.²⁴⁶ Because Internet users do not know that the content they provide will not reach minors, they will be chilled in their expression and will only offer material suitable for minors.²⁴⁷ The statute, however, provides two defenses. First, the restriction of access by requiring the use of a credit card or access code.²⁴⁸ Second, taking "good faith, reasonable, effective, and appropriate actions under the circumstances" to prevent access by minors, including any method feasible under available technology.²⁴⁹ If the

239. *Id.*

240. *Id.*

241. *Id.* at 938. The court failed to find any significance in the fact relied on by two of the judges in the *ACLU v. Reno* case that the statute did not rest on the community standards for the particular medium. *Id.* It found that no courts had focused on any of the references in other statutes or regulations to community standards for a particular medium, therefore basis did not exist for a claim that *Pacifica* or its progeny required such a reference. *Id.*

242. *Id.* at 940. While the plurality in *Denver* had not explicitly applied strict scrutiny to the regulations at issue, the *Shea* court concluded that the reason for *Denver*'s choice of standard had been the pervasive and intrusive nature of cable television and the lack of adequate warning of the content being broadcast. *Id.* In contrast, Internet reception requires affirmative steps, like the telephonic communications in *Sable*, and does not assault the listener without notice. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 941.

247. *Id.*

248. *Id.* at 942-43 (citing 47 U.S.C.A. § 223(e)(5)(B) (West Supp. 1997)); *see also supra* note 174 and accompanying text.

249. *Shea v. Reno*, 930 F. Supp. at 943-47 (citing 47 U.S.C.A. § 223(e)(5)(A) (West Supp. 1997)).

defenses would allow adult-to-adult communication of indecent material without facing criminal liability, the statute as a whole would be narrowly tailored to the government's compelling interest in restricting access by minors to patently offensive material and would not be unconstitutionally overbroad.²⁵⁰

The court first considered the defense that the provider had required a verified credit card or adult access code. With regard to e-mail type communication, including listservs, the court saw no way for the sender to insure that the recipient was an adult.²⁵¹ Senders of e-mail are often individuals with no means to verify a credit card number. Similarly, newsgroup servers and chat room services may wish to allow anonymous access to files and conversations. Even if anonymity were not important, newsgroups, listservs, and chat room hosts do not have profits from which to pay for credit card verification. The Web is the one context in which credit card information is required with any regularity. Some commercial providers of Web content do charge for their services by requiring a credit card number before allowing access to their material. The court found, however, the category of commercial provider elusive and it was not clear that all publishers that might be considered commercial providers could absorb the costs of requiring and verifying credit cards.²⁵²

The good faith defense fared no better. While the Conference Report on the Communications Decency Act indicated that "effective," as it relates to the prevention of access by minors, did not mean 100% effective,²⁵³ the court concluded that the defense was unavailable unless there existed reasonably effective means of blocking access.²⁵⁴ "[The statute] does not by its terms allow content providers to escape liability if there is no feasible and reasonably effective way of limiting minors' access to those communications."²⁵⁵ The only two means suggested by the government were both lacking in availability and effectiveness.²⁵⁶

The first suggestion was "tagging" the name or address of sites containing indecent content.²⁵⁷ The government contended that evidence of tagging, "coupled with evidence that the tag would be screened by the marketplace of browsers and blocking software," would meet the requirements of the defense.²⁵⁸ Simply placing a tag in the address or title, however, would itself accomplish nothing because there is no generally accepted tag requirement that browsers or blocking software manufacturers may use to block

250. *Id.* at 942. The court had already assumed that the interest in preventing minors from being exposed to indecent material was compelling.

251. *Id.*

252. *Id.* at 943.

253. S. CONF. REP. NO. 104-230, at 190 (1996).

254. *Shea v. Reno*, 930 F. Supp. at 943.

255. *Id.*

256. *Id.* at 942-50.

257. *Id.* at 944.

258. *Id.* (quoting a letter written and filed with the court by John C. Keeney, Acting Assistant Attorney General of the Criminal Division of the Department of Justice).

sites.²⁵⁹ Providers might include a label, such as "xxx" or "sex," which already trigger blocking software; however, such a step might not satisfy the statute, because blocking software is not widely used.²⁶⁰ Although the government introduced evidence that there are browsers capable of recognizing certain tags, other browsers are not so capable, and tagging cannot, therefore, be considered reasonably effective.²⁶¹

The government's other suggestion was that providers of indecent content place their material in directories blocked by screening software.²⁶² This suggestion suffered similar infirmities. Here, too, there was no evidence that products that would block such directories have a significant market share.²⁶³ The government suggested that adults wishing to engage in indecent communication could do so in fora with limited access, but the court again noted that there was no way for the manager of such a limited forum to be sure of the age of a subscriber.²⁶⁴ While possession of a credit card might be required as an indication of age, the cost of verifying the credit card number would be too high for non commercial providers.²⁶⁵ Because current technology did not make the statutory defenses feasible, the defenses were unavailing and the statute failed to be narrowly tailored.²⁶⁶

When the *ACLU v. Reno* case reached the United States Supreme Court, the Court had little difficulty agreeing, in a relatively short opinion, that the Communications Decency Act was unconstitutional.²⁶⁷ The Court adopted the undisputed facts agreed on by the participants in the Pennsylvania action and then went on to consider the following three cases relied on by the government:²⁶⁸ *Ginsberg v. New York*,²⁶⁹ *FCC v. Pacifica Foundation*,²⁷⁰ and *Renton v. Playtime Theatres, Inc.*²⁷¹ The Court saw the actions behind all three cases as significantly different from and significantly more narrow than the actions at issue in the Communications Decency Act.²⁷² With regard to *Ginsberg*, the Court noted that, although the statute at issue had limited the exposure of minors to certain sexual materials,²⁷³ the statute did not bar parents from exposing their own children to such material, applied only to commercial transactions, did not address material that had value for minors,

259. *Id.* at 945.

260. *Id.*

261. *Id.*

262. *Id.* at 946.

263. *Id.* at 947.

264. *Id.*

265. *Id.* at 943.

266. *Id.* at 949-50.

267. *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997).

268. *Id.* at 2341.

269. *Ginsberg v. New York*, 390 U.S. 629 (1968).

270. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

271. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

272. *Reno v. ACLU*, 117 S. Ct. at 2341-42.

273. *Ginsberg* and its "obscene as to children" doctrine will be discussed *infra* notes 346-68 and accompanying text.

and applied to minors under seventeen, rather than the eighteen years provided for in the Communications Decency Act.²⁷⁴

As for *Pacifica*, the Court noted that it had targeted a specific, nontraditional program to determine only when, rather than if, it was permissible to air such material; that is, it concerned channeling rather than a ban.²⁷⁵ The Court also saw the action in *Pacifica* as a declaratory order rather than a punitive action.²⁷⁶ Lastly, the Court noted that the medium that had been the subject of regulation in *Pacifica* was one that had been afforded the most limited First Amendment protection.²⁷⁷

With regard to *Renton*, a case that upheld zoning regulations limiting the location of adult movie theaters, the Court noted that the ordinance had addressed the secondary effects of such theaters, rather than the content of the films.²⁷⁸ While the Government tried to characterize the Communications Decency Act as "cyberzoning," the Court said that the Act applies to all of cyberspace, rather than only to certain neighborhoods.²⁷⁹ Furthermore, since the purpose behind the Act was the protection of children from the primary effects of indecency, the Act was content based.²⁸⁰ The precedents relied on by the government, therefore, failed to support the Act.²⁸¹

The Court then addressed concerns over ambiguities in the Act.²⁸² One part of the Act addressed "indecent" material, while another section addressed material that depicts or describes sexual or excretory activities or organs in a way that is "patently offensive as measured by contemporary community standards."²⁸³ The lack of a statutory definition for either the term or the phrase, combined with the different language used in the two sections, was seen likely to lead to uncertainty among potential speakers as to how the standards relate to each other and what they mean.²⁸⁴ Such vagueness in a content-based regulation, with criminal sanctions, was said to be unacceptable because of the chilling effect it would have on protected speech.²⁸⁵

In addition to vagueness concerns, the Court concluded that the Act would have the effect of suppressing a great deal of speech that adults have

274. *Reno v. ACLU*, 117 S. Ct. at 2341.

275. *Id.* at 2342.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 2347.

280. *Id.* at 2342.

281. *Id.* at 2343.

282. *Id.* at 2344.

283. *Id.*

284. *Id.*

285. *Id.* The government claimed that the statute was no more vague than the obscenity standard presented in *Miller v. California*, but the Court responded that *Miller* requires that the depiction of acts subject to sanction be specifically defined by statute. *Id.* at 2345 (citing *Miller v. California*, 413 U.S. 15, 25 (1973)).

the constitutional right to send to and to receive from other adults.²⁸⁶ Such an effect is unacceptable, where there are less restrictive alternatives, even accepting the governmental interest in protecting children from harmful materials.²⁸⁷ Even the prohibitions on sending indecent material, knowing the recipient to be a minor, would have an unacceptable effect because if one member of a chat room is a minor, the conversation of all the adult participants would be limited.²⁸⁸ The Court was also troubled by the community standards aspect of the regulation and the effect it would have of limiting the content of the Internet to that acceptable in the least tolerant community and by the potential application of the Act to parents whose views of what is appropriate for their children might differ from that of the community.²⁸⁹ Given the alternatives discussed in the briefs and presentations of the parties and the lack of congressional findings or hearings on alternatives, the Court could not find that the Communications Decency Act was narrowly tailored.²⁹⁰ The Court further stated that the statutory defenses could not save the Act.²⁹¹ The Court agreed with the lower court's analysis of the defenses as unavailable or economically unfeasible.²⁹²

The Court then addressed the government's fallback position that the unconstitutional portions of the Act should be severed to leave intact any constitutionally permissible provisions.²⁹³ The only portion of the Act the Court found severable was the term "indecent" in section 223(a).²⁹⁴ By removing the word indecent, the section would then ban the transmission only of obscene material to a recipient known to be under eighteen.²⁹⁵ The remaining provisions of the Communications Decency Act could not be saved by such "textual surgery."²⁹⁶

In addition to the majority opinion, there was also an opinion by Justice O'Connor, joined by Chief Justice Rehnquist, concurring in the judgment in part and dissenting in part.²⁹⁷ Justice O'Connor agreed with the Court with regard to its concerns over the Act's effect on adult accessibility to protected material but wrote separately to explain her view that the Communications Decency Act was "little more than an attempt by Congress to create 'adult zones' on the Internet [and that] precedent indicates that the creation of such zones can be constitutionally sound."²⁹⁸ Nonetheless, she saw the Communications Decency Act as having failed to meet the requirements for such

286. *Id.* at 2346.

287. *Id.*

288. *Id.*

289. *Id.* at 2347.

290. *Id.* at 2333.

291. *Id.*

292. *Id.* at 2349.

293. *Id.* at 2350.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.* at 2351 (O'Connor, J., concurring in part and dissenting in part).

298. *Id.*

zoning laws because it would unduly restrict access by adults.²⁹⁹ Justice O'Connor did note the progress being made in screening software, tags on the addresses of indecent material, and the PICS project.³⁰⁰ She suggested that the development of such technology would make cyberspace more like the real world and, therefore, more amenable to a zoning law approach.³⁰¹ Nonetheless, the Act must be assessed against the background of available technology, and the only way to avoid liability currently is to refrain completely from indecent speech.³⁰²

Justice O'Connor also broke with the majority in its refusal to either accept or reject the contention that the Act unconstitutionally interfered with the First Amendment rights of minors,³⁰³ based on *Ginsberg*'s recognition that minors may be denied access to material protected for adult consumption but deemed obscene as to minors.³⁰⁴ Although the Act might reach some material that is protected even as to minors, Justice O'Connor was not convinced that there was the real and substantial overbreadth required to prevail on a facial challenge to a statute.³⁰⁵ Instead, Justice O'Connor believed that there would be little that was patently offensive but not obscene as to minors.³⁰⁶

III. RESURRECTING THE REGULATION OF INDECENCY

A. General Considerations

1. The Lessons of *Denver* and *Reno*

There is guidance to be drawn from the *Denver* and *Reno* cases. Probably most important is that, in the effort to protect children from the effects of indecent material, adults must not be limited in the nonobscene material they may access, at least not to a degree greater than is necessary. This lesson is not new. It is, in fact, the conclusion reached in *Butler v. Michigan*.³⁰⁷ But, it should be clear from the later cases that *Butler* reaches beyond outright bans on material that might be harmful to minors and includes restrictions that unduly affect the availability of material to adults based on harm to minors.

A second, related lesson is that any defenses that are offered in an attempt to narrowly tailor the statute to the interest in protecting minors must

299. *Id.* at 2353.

300. *Id.* at 2354.

301. *Id.* at 2353.

302. Justice O'Connor also addressed the issue of knowingly transmitting indecent material to a minor. *Id.* She would have upheld the law as it applies to adult transmission of such material when the sender knows *all* the recipients are minors; however, she would not have upheld the law in the chat room context in which some minors are present. *Id.* at 2355.

303. *Id.* at 2356.

304. *Id.* at 2353. *Ginsberg* will be discussed *infra* notes 346-58 and accompanying text.

305. *Reno v. ACLU*, 117 S. Ct. at 2356-57.

306. *Id.* at 2356.

307. See *supra* notes 68-71 and accompanying text.

not be too burdensome on publishers or program providers. If the cost involved is sufficiently large as to be unbearable by small or noncommercial publishers, the speech of those publishers will be chilled to a level appropriate for minors. Adults will be left without a forum or source of speech that they have a constitutional right to utter or access. If the statutory defense is technological, the technology must be relatively inexpensive and readily available or the development of such technology must be mandated.

There are also propositions from the foregoing cases which would provide tempting lessons. One such candidate is the positive comments offered in that part of *Denver's* majority opinion regarding the V-chip. In looking at narrow tailoring of the segregate and block provision at issue, the Court noted that the Telecommunications Act of 1996 contained alternatives that were less restrictive.³⁰⁸ The Court pointed to requirements in the Act that programming on cable channels primarily dedicated to sexually explicit programming be scrambled or, if requested by the subscriber, blocked.³⁰⁹ The Court also noted that the V-chip requirement of the Act was a less restrictive way of blocking sexually explicit programming.³¹⁰ It is tempting to conclude that requiring scrambling and the V-chip are, therefore, constitutional, but the Court did not so rule.³¹¹

The Communications Decency Act mandated the creation of the V-chip.³¹² All televisions with a diagonal screen size of thirteen inches or greater, manufactured after a date set by the FCC, but no later than two years after the passage of the Act, are required to contain such a chip, on penalty of being banned from shipment in interstate commerce.³¹³ The chip will be designed to detect a signal that will accompany the broadcast of violent programming.³¹⁴ If parents activate the chip, the television will not display any program accompanied by the signal.³¹⁵ The Act also calls for the creation of a Television Rating Code by an advisory committee to be named by the FCC.³¹⁶ The name of the chip makes it sound like it is aimed solely at violence, however, the rating system is broader. The Act calls for guidelines and procedures for identifying and rating programming with sexual, violent, or other indecent content.³¹⁷ Any programming that has been so rated may be broadcast, but only if accompanied by the signal that will allow parental blocking.³¹⁸

308. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2392 (1996).

309. *Id.*

310. *Id.*

311. *Id.*

312. 47 U.S.C.A. § 303 note (West Supp. 1997).

313. *Id.* §§ 303(x), 330(c).

314. *Id.* § 303(x).

315. *Id.*

316. *Id.* § 303(w).

317. *Id.* § 303(w)(1).

318. *Id.* § 303(w)(2).

The advisory committee is to be composed of "parents, television broadcasters, television programming producers, cable operators, appropriate public interest groups, and other interested individuals from the private sector and is [to be] fairly balanced in terms of political affiliation, the points of view represented, and the functions to be performed by the committee."³¹⁹ The advisory committee is required to submit a final report of its recommendations within one year from the date of the appointment of its first members, but there is a provision under which the broadcast industry might forestall action by the committee.³²⁰ The advisory committee provisions do not take effect until one year from the passage of the Act, and even then:

- (1) . . . only if the Commission determines, in consultation with appropriate public interest groups and interested individuals from the private sector, that distributors of video programming have not, by such date—
 - (A) established voluntary rules for rating video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children, and such rules are acceptable to the Commission; and
 - (B) agreed voluntarily to broadcast signals that contain ratings of such programming.³²¹

Thus, if broadcasters establish their own rating system, and that system is satisfactory to the FCC, the committee will not develop its own ratings system.

There are serious arguments that the V-chip legislation may be unconstitutional. Some of those arguments are limited to the V-chip requirements for violent material,³²² but others are directed at the entire scheme.³²³ The requirement that televisions contain V-chips would seem to raise no constitutional difficulty. The statute is merely an exercise of the power to regulate interstate commerce and simply restricts the interstate shipment of televisions failing to meet the specifications set. It would also seem that the implementation of a rating system by the broadcasters themselves would not raise a constitutional issue. However, that may not be as clear as it seems. During the 1970s, in an effort to limit children's exposure to sexually oriented or violent material, the chair of the FCC met with the three major television networks and suggested that material not suitable for young chil-

319. *Id.* § 303(w)(1).

320. *Id.*

321. *Id.* § 303 note.

322. See generally Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. REV. 1487 (1995) (questioning the constitutionality of attempts to regulate television violence and suggesting that ratings aimed at helping parents may be acceptable); Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978) (stating that content based regulation of television violence is unconstitutional). The ability to regulate violent images may not be as broad as whatever capacity exists to regulate sexually indecent materials.

323. See *infra* notes 376-79 and accompanying text.

dren be scheduled only after 9:00 p.m. and be accompanied by warnings.³²⁴ Each network then developed the sort of programming guidelines that had been discussed, as did the National Association of Broadcasters.³²⁵ Shortly thereafter, a group of television writers and production companies challenged the guidelines in federal court.³²⁶ The court declared the plan unconstitutional.³²⁷ In the court's view, the FCC had pressured the networks and the National Association of Broadcasters into adopting the policy. The adoption of the policy, under such pressure, was held to be a violation of the First Amendment.³²⁸ While the court would have allowed truly voluntary plans on the part of broadcasters, the adopted plans had not been voluntary.³²⁹ If the networks adopt a ratings system pursuant to the V-chip legislation, that might also be seen as involuntary.

If the networks fail to establish a satisfactory ratings system and the FCC attempts to impose its own ratings, the clearly involuntary ratings will certainly be challenged.³³⁰ Ratings may be seen as the very sort of licensing requirements that the prohibition on prior restraints was designed to prevent.³³¹ That denial of licensing authority and of prior restraints is at the very core of the First Amendment.³³² One may respond by arguing that ratings are not licenses, but the legislation would require that one form of protected expression go through a regulatory framework to which others are not exposed. This discrimination among forms of protected speech, even on grounds of offensiveness, is not constitutionally permissible.³³³ One may argue that the burden imposed by ratings is less than that imposed by the channeling requirements approved in *Pacifica*. Even if that were true, if rat-

324. *Writers Guild of Am. v. FCC*, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976) (citing National Association of Broadcasters, *THE TELEVISION CODE*, 2-3 (18th ed. 1975)).

325. *Id.*

326. *Id.*

327. *Id.* at 1161.

328. *Id.* at 1072.

329. The court also found antitrust law problems in the agreement of the National Association of Broadcasters and networks to limit broadcasts. *Id.* at 1143. The antitrust aspects were addressed years later, when Congress granted an antitrust exception for discussions among the networks aimed at reducing televised violence. See *The Television Program Improvement Act of 1990*, 47 U.S.C. § 303(c) (1994).

330. Actually, the Telecommunications Act fails to direct the imposition of the FCC panel's ratings system. See *infra* notes 378 and accompanying text.

331. See J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1158-64 (1996).

332. See generally *Near v. Minnesota*, 283 U.S. 697 (1931) (stating that historically the chief purpose of First Amendment protection as it applies to the press is the prevention of prior restraints).

333. See, e.g., *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975) (holding that a city ordinance prohibiting the showing of films containing nudity, including nonobscene nudity, on drive-in screens visible from the street is unconstitutional); *Cohen v. California*, 403 U.S. 15 (1971) (holding that a nonobscene but offensive message on the back of a jacket was constitutionally protected).

ings are seen as working as a form of prior restraint, they may be more burdensome than the later imposed penalties for a failure to channel.

The United States Supreme Court in *Reno v. ACLU* also referred to various technological approaches which would allow parents to block material they find objectionable.³³⁴ The majority did not hold that the requirement of such blocking technology would be constitutional. Instead, the Court used the potential availability of technology to argue that the approach employed by Congress was not narrowly tailored.³³⁵ While that might be read as indirect approval of such an approach, without an examination of the issues it raises, the dictum should probably not be read too strongly. Justice O'Connor and Chief Justice Rehnquist seemed to provide somewhat more explicit approval for screening. Justice O'Connor discussed screening software and PICS and said that once they are sufficiently developed to be effective and available, they would make cyberspace amenable to the zoning that has been allowed in the physical world.³³⁶

Given these arguments against imposed ratings and the fact that the Supreme Court did not rule in either case on these provisions of the Telecommunications Act or an equivalent approach to Internet ratings, it may be a mistake to rely too heavily on the simple references of the Court to those provisions as being less restrictive. A rating system in which the producers or publishers of programs and Internet material rate their own offerings would seem less problematic than government ratings, so long as the rating is voluntary. However, the continued debate on television ratings indicates that only public pressure is likely to lead to adequate ratings in that medium. The Internet, lacking whatever control licensing provides for the broadcast media, is likely to present even greater difficulties in obtaining publisher cooperation in ratings. Clearly, incentives will be required, but any incentives to rate must be consistent with the Constitution and must not impose penalties on speech, rated or unrated, that is constitutionally protected.³³⁷

It is also unclear how much weight should be given to the *Denver* majority's reference to scrambling and blocking. While the commercial providers of cable programming have the technological ability and the capital necessary to scramble signals, scrambling might be a substantial burden on noncommercial or small Internet publishers. Furthermore, a requirement that they scramble indecent material, without the market having a uniform system of descrambling, would raise the same sort of chilling problems that troubled the courts in the Internet cases.

334. *Reno v. ACLU*, 117 S. Ct. 2329, 2336-37 (1997).

335. *Id.* at 2348.

336. *Id.* at 2353-54 (O'Connor, J., concurring in part and dissenting in part).

337. Such incentives could be positive incentives or penalties based on the dissemination of unprotected material. Requirements and penalties directed at protected material would, of course, have to be justified under a heightened scrutiny standard.

2. Obscenity as to Children

The approach to be suggested here, for indecency on all the electronic media, is based on the theory of variable obscenity. The obscenity exception to the First Amendment was recognized in *Roth v. United States*.³³⁸ The current test for obscenity, as stated in *Miller v. California*,³³⁹ asks:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³⁴⁰

Variable obscenity is an approach to obscenity law that takes into account the audience to which the material is distributed.³⁴¹ The theory originated with Professors Lockhart and McClure, as a suggestion for addressing concerns over the exposure of adolescents to materials aimed at adults.³⁴² If such material is not obscene, it is protected when distributed to adults, but that does not mean that distribution to minors is also protected. Variable obscenity allows consideration of the audience in determining whether material is obscene and prohibiting the distribution of obscene material to that particular audience. The Supreme Court recognized the concept of variable obscenity in *Mishkin v. New York*.³⁴³ The Court held that, for material designed for and distributed primarily to a sexually deviant group, the proper test for the "appeal to the prurient" interest requirement was the prurient interest of the deviant group.³⁴⁴ Even material that had no such appeal to the average person could be obscene as to the intended and likely target group.³⁴⁵

338. *Roth v. United States*, 354 U.S. 476 (1957).

339. *Miller v. California*, 413 U.S. 15 (1973).

340. *Id.* at 24 (citation omitted).

341. Given the varying degrees of protection afforded the various media, it may seem odd to offer one approach for application to several media. Where that approach, however, is one that has served to limit the protection of the most protected media, the print media, its application to other media, whether or not they merit less protection, is reasonable. Whether the media are easily seen as distinct, as had been the prevailing theory, has also been called into question. See Thomas Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1722 (1995). In an era where the Internet comes into the home over phone lines, where the telephone company and cable distributors are competitive, where broadcast media are delivered by cable, and where the newspaper is delivered electronically, the old distinctions may have lost their value.

342. William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 85 (1960).

343. *Mishkin v. New York*, 383 U.S. 502 (1966).

344. *Id.* at 508.

345. *Id.* at 509.

Variable obscenity, as applied to youth, was recognized by the United States Supreme Court in *Ginsberg v. New York*.³⁴⁶ Ginsberg had been convicted of selling "girlie magazines," containing pictures of female nudity, to a sixteen year old boy.³⁴⁷ The New York courts had held the sales to be in violation of a New York law making it a crime "knowingly to sell . . . to a minor . . . any picture . . . which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors."³⁴⁸ The ban also extended to "explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors."³⁴⁹ The statute also provided several definitions. "Nudity" was defined as:

the showing of the human male or female genitals, pubic area or 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, or the depiction of covered male genitals in a discernibly turgid state.³⁵⁰

"Sexual conduct" was defined as "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast."³⁵¹ The statute defined "harmful to minors" in a way that made it consistent with the contemporaneous test for obscenity:

"Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

- (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.³⁵²

Turning to the constitutional analysis of the statute, the Supreme Court first noted that the magazines at issue were not obscene when sold to adults,³⁵³

346. *Ginsberg v. New York*, 390 U.S. 629, 638-39 (1968).

347. *Id.* at 631.

348. N.Y. PENAL LAW § 484-h(2)(a) (1965). Section 484-h of the New York Penal Law is reprinted in full in the *Ginsberg* opinion. *See Ginsberg v. New York*, 390 U.S. at 645-47, app. A. The Supreme Court also cited obscenity statutes from thirty-five states containing provisions regarding distribution to minors. *See id.* at 647-48, app. B.

349. N.Y. PENAL LAW § 484-h(2)(b) (1965).

350. *Id.* § 484-h(1)(b).

351. *Id.* § 484-h(1)(c). The statute also provided definitions for "sexual excitement" and "sado-masochistic abuse." *See id.*

352. *Id.* § 484-h(1)(f).

and that the appellant did not argue that the magazines did not meet the statutory definition of "harmful to minors."³⁵⁴ Thus, the only real issue was the availability of a different standard for obscenity, when material is distributed to minors.³⁵⁵ The Court concluded that the statute did not intrude on whatever freedom of speech the Constitution grants to minors.³⁵⁶ A state has the power to regulate for the well-being of its children, both in support of parents in their upbringing of their children and based on the state's own interest in the character of its youth.³⁵⁷ Thus, the only remaining question, according to the Court, was whether or not the legislature could rationally conclude that exposure to the restricted materials would harm youth.³⁵⁸

The legislature had included in the statute a finding that the material condemned was "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state."³⁵⁹ While the Supreme Court expressed doubt that this finding was an accepted scientific fact, it did not require that the finding be scientifically established.³⁶⁰ Because obscenity is unprotected by the First Amendment, it could be suppressed without establishing such a basis.³⁶¹ The Court simply had to determine that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."³⁶² The Court then looked to the scientific studies available and concluded that, while a causal link between obscenity and the impairment of ethical and moral development had not been established, neither had such a link been disproved.³⁶³ Because the materials were unprotected, the Court refused to require "'scientifically certain criteria of legislation'" and was unwilling to

353. *Ginsberg v. New York*, 390 U.S. 629, 634 (1968).

354. *Id.* at 643.

355. *Id.* at 634-35. There was also a challenge based on vagueness, but the Court noted that the statutory definition matched the requirements for defining adult obscenity as then presented in *Memoirs v. Massachusetts*. *Id.* at 643 (citing *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966)).

356. *Id.* at 638. The majority in *Reno v. ACLU* found fault with the government's reliance on *Ginsberg*, because the Communications Decency Act failed to protect material with value for minors and did not allow parents to provide minors such material. *Reno v. ACLU*, 117 S. Ct. 2329, 2341 (1997). It is with regard to the first of these issues that Justice O'Connor broke with the majority. She believed the amount of material covered by the Communications Decency Act, but still having value for minors or not appealing to their prurient interests, to be rather small. *Id.* at 2356 (O'Connor, J., concurring in part and dissenting in part).

357. *Ginsberg v. New York*, 390 U.S. at 640.

358. *Id.* at 641.

359. *Id.* (quoting N.Y. PENAL LAW § 484-e (1965)).

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* at 641-42.

find a lack of a rational basis for the conclusion that such materials harm minors.³⁶⁴

The importance of this decision is the relationship between what was taken to be obscene as to youth and what is defined to be indecent in the electronic media context. The FCC's definition of indecent cable programming reaches "programming 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."³⁶⁵ The New York statute at issue in *Ginsberg* would appear to reach most, if not all, of the FCC regulation's target, and with less concern over vagueness.³⁶⁶ The nudity and sexual activity aspects of the statute, coupled with the "harmful to minors" requirement, address patently offensive depictions of sexual organs or activities. While depictions of excretory organs and activities were not within the prohibitive scope of the statute in *Ginsberg*, the standard presence of such prohibition in obscenity statutes generally, and the Supreme Court's approval of its inclusion,³⁶⁷ would indicate that their inclusion in a statute aimed at banning the distribution of obscene material to minors does not raise a constitutional problem. The only additional change that should be made would actually enlarge the scope of a statute like that in *Ginsberg*. The third prong of the "harmful to minors" definition, the "utterly without redeeming social importance for minors" clause, should be updated to reflect the *Miller* test's requirement that material should be protected, if it, taken as a whole, has serious literary, artistic, political, or scientific value for minors.³⁶⁸ This requirement should address the Court's concern that material with value for minors would be barred.

364. *Id.* at 643 (quoting *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911)).

365. 47 C.F.R. § 76.701(g) (1996).

366. It is possible that certain language, such as that at issue in *Pacifica*, may not be obscene, even as to youth. Depending on how the language is used, however, and the youthfulness of the audience, it could be within the scope of the proposed statute.

367. The Court in *Miller*, explained that "plain examples of what a state statute could define for regulation under part (b) of the standard . . . [include] [p]atently offensive representations or descriptions of . . . excretory functions." *Miller v. California*, 413 U.S. 15, 25 (1973). The Supreme Court majority in *Reno v. ACLU* did find fault with the Communications Decency Act's inclusion of excretory activities and sexual and excretory organs, but only in the context of a discussion of vagueness compared to the *Miller* requirement that the subject matter of the depictions be specifically defined by applicable law. See *Reno v. ACLU*, 117 S. Ct. 2329, 2344-45 (1997). The Court also noted that *Miller* was limited to sexual conduct. *Id.* This may just be a call for greater specificity in any future restrictions. It may also, however, be simply a reiteration of the requirement that the depiction appeal to the prurient interest. If that is so, it must be remembered that provocative nude poses, as defined in *Ginsberg*, were sufficient to appeal to the prurient interest of youthful viewers. See *Ginsberg v. New York*, 390 U.S. at 632, 636.

368. Under this prong, material containing nudity or sexual content might still be protected. If the material has serious value for minors, then despite its sexual content, it is not obscene as to children.

There is no reason why *Ginsberg* should be limited to print media. Obscenity law itself extends to electronic communications. Judge Dalzell, in *ACLU v. Reno*, conceded that the government could punish the distribution of obscene material on the Internet,³⁶⁹ as did the United States Supreme Court majority implicitly in its *Reno v. ACLU* decision.³⁷⁰ Indeed, convictions for operating computer bulletin boards containing obscene materials have been upheld.³⁷¹ The only plausible argument that would distinguish *Ginsberg* would be a claim that in distributing magazines to adults, it is easier to avoid distributing magazines to minors, than it would be to selectively distribute electronic media. That argument, backed up by the *Butler* decision, makes clear the importance of relying on existing or mandated methods of screening that do not impose a heavy burden on distributors.

B. Resuscitating Cable Regulation in the Wake of Denver

The concern over cable indecency that gave rise to the statute partially struck down in *Denver* can be addressed by a statute guided by the holdings in *Denver*, *Ginsberg*, and *Butler*. Such a statute would go beyond the regulation contained in the Cable Television Act. That act requires that indecent or sexually explicit programs on cable channels dedicated primarily to sexually oriented programming be scrambled so that nonsubscribers do not receive them.³⁷² If such channels are not scrambled, the programming must be channeled into hours when children are less likely to be watching.³⁷³ Even assuming that those requirements are constitutional,³⁷⁴ they do not address indecent programming on cable channels not primarily dedicated to sexually oriented programming. It is also less than clear that, under indecency analysis, the provisions are constitutional. Broadcast indecency rules, under the rationale of *Pacifica*, may carry over to cable. But, if scarcity and public ownership of the airwaves are necessary to *Pacifica*, cable may not be subject to the same rules.³⁷⁵

Programming on channels not primarily dedicated to sexually oriented programming would be affected by the V-chip portions of the Telecommunications Act. Although most of the publicity over the V-chip has centered on the control of violent programming, the V-chip also has the capability of blocking sexually explicit programming, if it is accompanied by the signal

369. See *ACLU v. Reno*, 929 F. Supp. 824, 865 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

370. *Reno v. ACLU*, 117 S. Ct. at 2350. The Court severed the word "indecent" from section 223(a), saying it could then leave the rest—the proscription on knowingly transmitting obscene material to minors—standing.

371. See, e.g., *United States v. Thomas*, 74 F.3d 701, 701-02 (6th Cir. 1995) *cert. denied*, 117 S. Ct. 74 (1996) (holding that the intangible nature of Internet material did not preclude prosecution for interstate transportation of obscene materials).

372. 47 U.S.C.A. § 560 (West Supp. 1997).

373. *Id.*

374. See *supra* notes 55-57 and accompanying text.

375. See *supra* note 90 and accompanying text.

required to activate the chip.³⁷⁶ The rating system to be developed by distributors of video programming would include ratings based on sexually explicit content, and for any programming so rated, the rating must be transmitted with the program.³⁷⁷ It is, however, unclear whether V-chip ratings will be assigned to all programming. While the advisory committee will develop a rating system, if the distributors fail to provide a satisfactory system, implementation is not guaranteed.

Left unclear [in the statute] is whether the Commission would be empowered to require that broadcasters accept the advisory committee's rating system. Also left unclear is whether the FCC would have the power to insist that all programming be rated before it can be broadcast. The fail-safe provision is left deliberately toothless to avoid constitutional problems of prior restraint and compelled speech.³⁷⁸

While public opinion may be sufficiently strong with regard to network programming and sufficiently effective when brought to bear against local affiliates as to lead to ratings, that opinion might not carry over as strongly to cable providers. The constitutional and implementational difficulties potentially faced by the V-chip regulations make it unwise to rely solely on their protection.³⁷⁹

The alternative statute proposed here would criminalize the intentional, knowing, or reckless distribution to minors of cable programming that is obscene as to minors.³⁸⁰ The responsibility would not be on the cable system operator. Instead responsibility would be on the programmer. Programmers could show whatever material they like, but if the material is distributed to minors, and the programmer was at least reckless in that distribution, the programmer would be criminally liable.

To survive a constitutional challenge this approach provides the programmer with a viable defense. The defense is similar to the defense rejected in the *Reno* cases as unavailable.³⁸¹ It is, however, available here. Congress has already mandated that all televisions manufactured after a certain date contain a V-chip. Cable programmers, therefore, should be allowed a defense if their programming is accompanied by a signal which would trigger the chip. While all material obscene as to youth would not necessarily be blocked

376. See *supra* notes 309-10 and accompanying text.

377. 47 U.S.C.A. § 303.

378. Balkin, *supra* note 331, at 1157-58.

379. See *supra* notes 322-28 and accompanying text.

380. In *Reno v. ACLU* the United States Supreme Court distinguished *Ginsberg* on several grounds. One such ground was that the statute in *Ginsberg* defined minors as persons under 17, while the Communications Decency Act defined minors as those under 18. *Reno v. ACLU*, 117 S. Ct. 2329, 2341 (1997). While the distinction might not be dispositive, it would be more prudent to limit the application of the statute to making such materials available to those under 17.

381. See *id.* at 2349-50; *Shea v. Reno*, 930 F. Supp. 916, 943-50 (S.D.N.Y. 1996); *ACLU v. Reno*, 929 F. Supp. 824, 846-49 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

from youthful viewers, because parents may not immediately replace their old televisions with V-chip equipped models, a statute like that in *Ginsberg* does not always prevent minors from obtaining sexually indecent printed material. If parents keep indecent printed material for their own use, they must decide how diligently to keep such materials away from children. Likewise, parents who have cable television should exercise similar, or even greater, diligence.³⁸²

Premium cable channels, such as movie channels, that require an extra viewing fee should not be exempt from penalties. While such channels are scrambled for those not paying for the service, the same is true of cable generally. Only those who pay have the service. Providers such as HBO, Cinemax, and Showtime know that households with children obtain their services. Indeed, they schedule programming aimed at young audiences but generally restrict their less child-appropriate fare to later hours. Not accompanying adult programming with a V-chip signal would, given the knowledge that subscriber households contain children, be reckless.

To convict, actual distribution to a minor would be required; that is, the prosecutor would have to show that a minor either stumbled on to, or affirmatively tuned in to, material that is obscene as to children. The same is, of course, true with a charge of distributing obscene printed material to children. The lengths to which cable programmers are asked to go are also no greater than are expected for the print media.³⁸³ Stores that sell magazines not obscene and intended for adult purchasers, stock those magazines behind the counter or place them in sealed plastic bags prohibiting access to children.³⁸⁴ Accompanying the cable broadcast by a signal seems no more burdensome.

382. Given *Ginsberg*'s reliance on state's power to help parents control the access their children have to sexual material and the Supreme Court's concern in *Reno v. ACLU* that the penalties of the Communications Decency Act would apply to parents transmitting indecent material to their children, (such as disseminating birth control information to their seventeen-year-old college freshman child or allowing their children to access such material on a home computer) the parental control aspect of the approach suggested here is critical. *Reno v. ACLU*, 117 S. Ct. at 2348.

383. Programmers may, in fact, face a lesser burden. A seller of printed material might incur liability for the sale of material, obscene as to children, to a mature-looking minor and may even be set up to face such liability. Under the approach suggested here, a minor cannot be purposely exposed to material as a way to establish liability. Failure to purchase or use a television with a V-chip or the failure to activate the chip does not lead to liability for the programmer. It is only the failure to include a signal resulting in a minor's exposure that would lead to prosecution.

384. A recent Ninth Circuit decision upheld a statute that required new limitations on the methods of distribution to prevent exposing minors to indecent material. *Crawford v. Lungenren*, 96 F.3d 380, 382 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1249 (1997). The court found no constitutional violation in a California statute banning the sale of "harmful matter" from unsupervised, sidewalk vending machines, unless identification cards or tokens issued by someone who checked the purchaser's age were required. *Id.* at 385-89. The court did not argue that the potential distribution to minors meant that the material was unprotected. Instead, the court held that the statute met strict scrutiny, based on the statute's narrow tailoring to the compelling interest in protecting the physical and psychological well-being of children. *Id.*

This approach avoids the need of governmental pre-screening and rating of material to be presented. It is the programmer that makes the original decision as to the nature of the program material. That programmer chooses whether or not to include the signal. It is true that the penalty for being wrong may be a criminal conviction and the accompanying penalties of such a determination. But again the same is true for a merchant who chooses whether or not to allow a minor to buy a particular publication. There may be some chilling effect on the speech of cable programmers, but the effect is minor. The broadcaster will not be chilled in broadcasting the material, but merely into being overly cautious in accompanying its programming with the signal. Adult access should be unaffected.

With regard to effects on the First Amendment rights of minors, again it is only material obscene as to minors that is prosecutable. While some additional material may be chilled, the situation is again no different from that for the other media or for material obscene as to adults. Merchants may refuse minors access to non-obscene printed material out of caution. Similarly, publishers of materials aimed at adults may stay farther away from the line marking obscenity than is necessary using the same caution. The United States Supreme Court has been willing to accept the possibility that some speech bordering on obscenity—material that is at the periphery of the First Amendment—may be chilled.³⁸⁵ The situation should be no different here.

The criticism that indecency regulations ignore children's First Amendment rights by not exempting material with serious value for children is also addressed.³⁸⁶ Material which, taken as a whole, has serious literary, artistic, political, or scientific value for minors is not obscene as to youth. While there may again be an objection that providers are forced to anticipate whether such value will be found, the argument is the same for the print media and for material aimed at adults. Furthermore, if parents decide that their own children, particularly children almost at the age of majority or mature beyond their years, would find serious value in a program that might not have such value for the average child, the parent can deactivate the V-chip, either permanently or on a show-by-show basis. The final decision on viewing for each child is ultimately made by his or her parents. The cable provider is forced only to provide parents the means to control their children's viewing.

385. Language expressing lesser concerns is found in *Pacifica*. See *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978). The language was in the plurality portion of the opinion, but cited *Bates v. State Bar* and *Young v. American Mini Theatres* as support. *Id.* (citing *Bates v. State Bar*, 433 U.S. 350 (1977); *Young v. American Mini Theatres*, 427 U.S. 50 (1976)). While the concurrence by Justice Powell, joined by Justice Blackmun, specifically objected to the theory that the Court could determine what speech is more or less valuable, he did concur in a judgment that would have a chilling effect. *Id.* at 760. Justice Powell did so because of the characteristics of the broadcast media and the need to protect children—characteristics and a need similar to those found in the context under present consideration. *Id.* at 757-61.

386. See *ACLU v. Reno*, 929 F. Supp. at 863-64; see also *Reno v. ACLU*, 117 S. Ct. at 2348 (finding it unnecessary either to accept or reject the contention that the Communications Decency Act violated the First Amendment by restricting material with value for minors).

The last potential difficulty to be addressed is the community within which prurient appeal and patent offensiveness are to be assessed. It may be acceptable not to define the community. In *Sable*, the United States Supreme Court noted the constitutionality of bans on telephonic communication of obscene material, even though the statute did not define the community.³⁸⁷ The Court denied that the failure ran afoul of the "contemporary community standards" requirement of *Miller*.³⁸⁸ The statute at issue was seen as no more establishing a national standard for obscenity than federal statutes barring shipping obscene materials through the mail. If distributors distribute materials to communities with different standards, they must ascertain the community standards for each community.³⁸⁹

Cable broadcasts seem to be sufficiently similar to the phone communication in *Sable*. Broadcasters know what communities they are serving and can investigate the standards of those communities. Providers with limited resources are likely to be small and perhaps local providers with a smaller investigative task. Furthermore, it would seem likely that there would be somewhat less variation from community to community with regard to what appeals to the prurient interest of children or is offensive when displayed to children as compared with adult audiences.³⁹⁰

C. Re-Regulating the Internet

The approach to regulating material available on the Internet should be quite similar to that of printed media, allowing certain changes in the available defenses because of the technological differences between the two media. As with television, cable, or print, obscene material may be proscribed. Judge Dalzell, in his opinion in *ACLU v. Reno*, conceded that "the Government could punish these forms of speech [obscenity and child pornography] on the Internet even without the [Communications Decency Act]. The Government could also completely ban obscenity and child pornography from the Internet."³⁹¹ Similarly, the Supreme Court majority in *Reno v. ACLU*, held that by severing the ban on knowingly transmitting indecent material to minors from section 223(a) of the Communications Decency Act, it could leave the parallel ban on obscene material standing.³⁹² Just as there is no reason why obscenity law should not apply to the Internet, there is no reason why the doctrine of obscenity as to children should not apply. Again, the purposeful, knowing, or reckless distribution to minors of materials obscene as to children can be criminalized, just as in the statute at issue in *Ginsberg*. But again, adult access to material not obscene as to adults must not be restricted. There must be reasonable ways available in which publishers may

387. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 124-26 (1989).

388. *See id.*

389. *Id.* at 125-26.

390. See *infra* notes 402-07 and accompanying text (for a discussion of the differences regarding the Internet community, and other aspects of this issue).

391. *ACLU v. Reno*, 929 F. Supp. at 865 (citation omitted).

392. *Reno v. ACLU*, 117 S. Ct. 2329, 2350-51 (1997).

protect themselves and not be chilled into limiting the materials they publish to those fit for children.

The key is to mandate the availability of the defenses, suggested but found unavailable in the Internet cases. Much of the rationale of the *Reno* opinions was based on the inability of Internet publishers to limit the distribution of the material they provide. The implication was that narrow tailoring would be met if providers could easily and inexpensively adopt one of the verification or screening approaches that were included in the statute, or explication of the statute, as defenses. Because the technology was unavailable, the defense was also unavailable, and the statute was effectively overbroad in that publishers would be chilled into providing only what was fit for children.

The *Reno* courts, the Supreme Court, and both District Courts, each noted the development of PICS by a consortium of Web publishers.³⁹³ PICS would allow tags to be attached to Internet addresses which would provide electronic ratings. "When the system is fully implemented, PICS-compatible client software (including browsers, newsgroup readers, and mail readers), Internet service providers, and commercial on-line services will be able to detect PICS tags and block content based on how a parent has configured the software."³⁹⁴ Just as Congress had mandated that all televisions manufactured in the future must contain a V-chip, Congress could require that all browser software and all mail and newsgroup reader software contain PICS. As with the V-chip, it would be the parents' prerogative to configure the software to block material accompanied by the signal.

Once PICS is mandated, the inclusion of a PICS signal would constitute a defense to the distribution to minors of material obscene as to children. But, each publisher of Internet material would be liable for the purposeful, knowing, or reckless distribution to minors of material obscene as to children. Such obscenity would be defined as it was in the statute at issue in *Ginsberg*, but with community standards defined relative to the Internet medium. As with cable, an actual distribution would be required; that is, some minor must have accessed material obscene as to children. Again, however, a defense would be that the publisher attached the PICS signal.

With regard to e-mail and listserv messages, the software used to write and send messages should be required to provide a choice as to whether the message transmitted should be made available to minors. The best approach would be to have a default setting that limited the message to adults and/or non-PICS-activated receivers. The sender could toggle off the limitation, if the sender intended to make the material available to children. This would reduce the negligent transmissions of such material by senders who failed to toggle on the PICS tag, in a system where the default position allowed access by minors. This would eliminate the concern expressed in the Supreme Court's *Reno v. ACLU* opinion that the inclusion of a single minor in a chat

393. See *id.* at 2354; *Shea v. Reno*, 930 F. Supp. 916, 932 (S.D.N.Y. 1996); *ACLU v. Reno*, 929 F. Supp. at 838.

394. *Shea v. Reno*, 930 F. Supp. at 932.

room, or on a mailing list, would limit the speech of all participants.³⁹⁵ Participants may still offer any indecent, non-obscene speech, but must accompany the message with a PICS signal. Minors using PICS-activated computers would not receive the message, but adults and minors whose parents allow their children to receive such material would still have access.

The Web presents an additional difficulty. The publisher of a Web page should be liable for distribution to minors of material obscene as to children that appears on that page, just as any other publisher is so liable, unless a PICS signal is attached. Web pages, however, commonly contain hypertext links to other pages, and those other pages often contain links to still other pages. If the publisher of a Web page is to be held responsible for all information that could be linked from the publisher's page, there would be a substantial chilling effect. The only way in which a publisher could assure itself of protection would be to provide no links. Links, however, are often the best way to find the material the browser is seeking. Once one relevant site is found, that site's links to other sites are extremely valuable. While a list of relevant sites could replace the links as access tools, the need to key in the URL addresses of those related sites would make access more difficult and time consuming.³⁹⁶

Fortunately, it is not necessary to make a Web publisher responsible for all linked sites. If the publisher links to another site originating in the United States, that site is also subject to the requirements of the proposed statute.³⁹⁷ That site, if it contains material obscene as to children, will be required to contain a PICS activating electronic tag. If the site does not contain such a tag, the publisher will be criminally liable for children's exposure to prohibited material. Publishers whose own sites are not PICS activating and who link to the site should be allowed to rely on those other publishers adhering to the law and be allowed the defense. The only exception should be if the government can prove a scheme in which a publisher purposely links to a site it knows to be both obscene and not PICS activating with the intent to make that site available to children.³⁹⁸

There are also, however, a significant number of sites that originate outside the United States. Those sites would not be subject to the statute requiring PICS tags for material obscene as to children, and a publisher could

395. *Reno v. ACLU*, 117 S. Ct. at 2355.

396. Search engines create not only a list of potentially relevant sites, but also a collection of links. The ability to then browse the linked sites quickly for relevance is much of what makes the search engine valuable. A system in which only a list was generated, and in which the user had to key in the URLs, would be cumbersome and would limit the usefulness of the Web.

397. The URLs of United States sites can be identified by certain suffixes, such as "edu," "com," or "org." Foreign sites have suffixes indicating the country of origin, such as "uk" for the United Kingdom.

398. If a publisher that would for some reason be difficult to prosecute were to establish a non-PICS activating site containing obscene material, other more easily prosecutable publishers should not be allowed the opportunity intentionally to flout the law by linking to those sites through their own nonobscene sites and making obscene material available.

not rely on their inclusion of a PICS tag if their material were obscene as to children. If United States publishers were strictly liable for the material in foreign linked sites, there would again be a chilling effect. Non-PICS activated sites—sites believed to have value for children—would likely be unwilling to link to foreign sites, and children would lose the international and multi-cultural benefits the Internet can provide. The better approach is to allow the government to prosecute for links to a foreign site only if it can prove that the site was obscene at the time the United States provider included it as a link. The United States publisher is then under a duty to view any site to which it links and, if that site contains material obscene as to children, attach a PICS tag to its own page. If the foreign linked site later adds material that is obscene as to children, the United States page publisher should only be liable, if it becomes aware that it is now linking to a non-PICS activating but obscene as to children site.³⁹⁹ Additionally, the United States publisher that links to a foreign site should be responsible only for that site. If the foreign site links to additional sites, the United States publisher need not attach a PICS activating tag based on the material on those second, or greater, level of links, unless the United States publisher knows that they contain material obscene as to minors. That is, the duty to investigate foreign sites, before linking them to a United States non-PICS activating site, extends only to the first level of links.⁴⁰⁰

This still leaves open the possibility that a foreign site containing material that is obscene as to children might be accessed, not as a link from a Web page, but as the result of a Web search. This is, of course, technically connecting through a link, because the list that results from a search is a list of links. It would seem to be unreasonable, however, to require that those constructing search engines and providing browser services examine every page to which they provide a link. The browser software will already be required to have the capacity to block, if parents wish, all sites not including a signal that they are fit for children. Any foreign sites then accessed would have to be sites that have decided to make themselves available to children, but some foreign page publisher might choose to include material that is obscene as to

399. An alternative would be to require that all software that will contain PICS tag identification be set to exclude all material without a tag indicating no obscenity rather than excluding material that is tagged as being obscene as to children. But, the effect of such an approach would be that children, whose parents have activated the PICS screen, would not be able to access foreign sites, unless those sites decided voluntarily to include a PICS non-obscene tag.

400. If a foreign site managed to obtain a URL with a suffix indicating United States origin, a link to that site should be protected, unless the publisher knows the site contains material obscene as to children. This provides an example of how a failure to attach the PICS tag would still not subject the publisher to liability. The publisher would not have been reckless in allowing access to what was believed to be a United States site itself subject to the statute.

children and still not include the PICS activating tag.⁴⁰¹ The solution to this potential problem is for the browser software also to provide parents an option under which searches will be limited to United States sites. Those sites will be subject to the statute and the sites to which they link will also either be subject to the statute or will have been checked by the publishers of the initial sites providing the links. It is, of course, possible that foreign sites with value will be inaccessible, but parents who wish their children to have access to such sites may choose not to activate the United States limitation on searches, just as they may allow their children to use the Internet with no PICS screening at all.

This PICS based approach puts the onus on the sender or publisher. It eliminates the massive, perhaps undoable task of the government or an independent board examining and providing ratings for millions of Web sites. It also brings within the scope of regulation e-mail and newsgroups. Furthermore, it does so in a way that does not prevent adults from communicating with, or providing information for, each other. The publisher or e-mail sender must determine whether or not the material being provided is obscene as to minors and may be liable if mistaken, but that is the same as it is for distributors of print material. Print distributors can still distribute indecent material to adults, while being careful to refuse to provide minors material that is obscene as to children. Electronic publishers and e-mail senders may also communicate indecent material to adults, but must be careful not to provide minors with material obscene as to children. The proposed defenses spell out what constitutes care. The level of care required, including a PICS tag or examining foreign linked sites, seems minimal. The burden would seem no greater than the seller of indecent magazines requesting evidence of age from one who purchases such a magazine.

Here, too, there may be concern over the community within which prurient appeal and patent offensiveness are to be assessed. Again, as in *Sable*, it may be acceptable not to define the community, or a standard based on the Internet community may be acceptable.⁴⁰² The statute at issue in *Sable* was not seen as establishing a national standard for obscenity to any degree greater than federal statutes barring mailing obscene materials.⁴⁰³ With the Internet, however, arguments based on requiring the sender to know the standards of the community into which depictions are sent and to be judged by that standard, lose force. Material on the Internet is accessible everywhere, and publishers will face either a national standard or the standards of any community in which charges are filed.

It is interesting to note that the original community standards requirement was intended not to assure the most widespread possible distribution of pornographic material but rather to allow communities to be more restrictive. The *Miller* Court said that it would not require that the people of Maine or

401. The foreign publisher may have intended to provide such material to minors or may, because foreign Web servers would not be subject to the statute, be working through a server that does not provide the means for inserting the PICS activating signal.

402. See *supra* notes 48-52 and accompanying text.

403. See *supra* notes 50-54 and accompanying text.

Mississippi accept depictions tolerable in New York City or Las Vegas.⁴⁰⁴ It is despite this origin that the community standards requirement has come to be seen as limiting the authority to regulate. It is also the case, however, that arguments that the people of Maine or Mississippi ought not limit what residents of New York City or Las Vegas may see as reasonable, and the Supreme Court *Reno v. ACLU* decision expressed concern that the Internet indecency limitations of the Communications Decency Act would be judged by the standards of the community most likely to be offended.⁴⁰⁵

The better response is based on the other reason for adopting a community standards test set out by the *Miller* Court. The Supreme Court noted that juries would be asked to answer a question of fact as to community standards, and the Court thought it was unrealistic to expect that a single formulation could be articulated that would cover all the states.⁴⁰⁶ But, the people of Maine and Mississippi are more likely to be in agreement with the people of New York City and Las Vegas over what violates standards of appropriateness for children than they are for adults. A national standard for what should be made available to children is, therefore, not unrealistic. In fact, the Supreme Court's *Reno v. ACLU* decision did leave standing the provision of section 223(a) barring knowingly transmitting obscene material to minors over the Internet.⁴⁰⁷ That would appear to reflect a lack of concern over geographic community, at least with regard to obscene materials. If, in fact, there would be less disagreement over the standards for what is obscene as to minors, there should be even less concern over a community standards test for that variety of obscenity based on the Internet community.

D. Television and Videotapes

Returning briefly to the issue of broadcast television, *Ginsberg* provides a strong, but constitutional, incentive for the television networks to adopt V-chip ratings, at least for material with particularly strong content. If cable broadcasters can be held liable for the distribution to minors of material that is obscene as to children, when a minor sees such a program not accompanied by a V-chip signal, the greater authority to regulate the broadcast media, as shown by *Pacifica*, should make the application to broadcast television easily justified. The programs would be rated by the broadcasters, and like the distributor of "girlie magazines," they would be liable for the failure to take steps to prevent access by minors to material later held to be obscene as to children.

Videotapes may not raise as much concern as broadcast media, cable, and the Internet. Because such tapes must be purchased or rented, *Ginsberg*-like liability could be found when a video store distributes a tape containing material that is obscene as to children to a minor. Nonetheless, Congress might choose to require that sexually explicit videotapes also contain the sig-

404. *Miller v. California*, 413 U.S. 15, 32 (1973).

405. *Reno v. ACLU*, 117 S. Ct. 2329, 2347-48 (1997).

406. *Miller v. California*, 413 U.S. at 30.

407. *Reno v. ACLU*, 117 S. Ct. at 2350.

nal that activates the V-chip. Because viewing a videotape requires a television, the V-chip that will eventually be contained in televisions will limit the access of minors to objectionable tapes. Most commercial videotapes are already rated, and the only effect of such a law would be that manufacturers would include on the tape an electronic version of the rating already on the box.

E. *Depictions of Violence*

Since the entire approach suggested here has been based on *Ginsberg*, the application to depictions of violence would be less than obvious. *Ginsberg* recognized that what is obscene may vary with the audience. It is, however, the offensiveness, explicitness, and value with regard to the audience that allows the variation. *Ginsberg* does not provide for a variation in the type of subject matter that may be found obscene.

The Supreme Court cases defining obscenity, such as *Miller*, have discussed only depictions of sexual or excretory organs or activities.⁴⁰⁸ Other cases have said that not all that is offensive is obscene and that, to be obscene, material must be erotic.⁴⁰⁹ These cases have led lower courts to conclude that only sexual or excretory material can be obscene and, specifically, that material cannot be considered obscene based solely on the explicitness and offensiveness of the violence depicted.⁴¹⁰

I have argued elsewhere that limiting obscenity to sexual or excretory organs and activities is unwarranted and that a sufficiently explicit and offensive depiction of violence can also come within the obscenity exception to the First Amendment.⁴¹¹ There is nothing in the ordinary language concept of obscenity that limits it to sex or excretion at the exclusion of violence. Case law and statutes relied on in establishing the obscenity exception in *Roth*,⁴¹² or in English law prior to the late 1800s, also failed to establish a limitation to sex and excretion. It was only in the Victorian era, a constitutionally irrelevant era, that the limited view of obscenity developed.⁴¹³ Furthermore, I have attempted to demonstrate that the First Amendment policies offered to justify the obscenity exception apply as well to violence as to sex or excretion.

408. See *Miller v. California*, 413 U.S. at 23-24.

409. See *Cohen v. California*, 403 U.S. 15, 20 (1971); *Roth v. United States*, 354 U.S. 476, 487-88 (1957).

410. See, e.g., *Video Software Dealers Ass'n v. Webster*, 773 F. Supp. 1275, 1276 (W.D. Mo. 1991) (holding overbroad a Missouri statute that restricted the dissemination of videocassettes depicting "morbid" and "patently offensive" violence); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 522 (Tenn. 1993) (affirming the decision of Chancellor that Tennessee statute regulating the display of "materials deemed harmful to minors" did not violate the United States or Tennessee Constitutions, but the term "excess violence" was unconstitutionally vague).

411. See generally KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION* (1996).

412. See *Roth v. United States*, 354 U.S. at 489-90.

413. SAUNDERS, *supra* note 411, at 87-110.

If the conclusion that sufficiently explicit and offensive violence can be obscene is accepted, then *Ginsberg* would indicate that there would also be a category of violent obscenity as to children. Material that would be acceptable, when viewed by adults, could be obscene, when distributed to minors. Cable broadcasters, as well as over-the-air television, could face liability for violent material unaccompanied by a V-chip activating signal. Similarly, Internet providers would have to attach a PICS activating tag to violent material.⁴¹⁴

414. Vagueness concerns would dictate that any statute be as specific as that in *Ginsberg*. In SAUNDERS, *supra* note 411, I suggested a statute such as the following:

Disseminating Excessively Violent Material to Minors

I. Disseminating Excessively Violent Material to Minors Proscribed: person is guilty of disseminating excessively violent material to minors when:

1. With knowledge of its character and content, he sells or loans to a minor for monetary consideration:
 - (a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image which depicts actual or simulated: murder, manslaughter, rape, mayhem, battery, or an attempt to commit any of the preceding crimes and which, taken as a whole, is harmful to minors; or
 - (b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof and which, taken as a whole, is harmful to minors; or
2. Knowing the character and content of a motion picture, show or other presentation which, in whole or in part, depicts crimes enumerated in paragraph (1)(a) hereof and which is harmful to minors, he:
 - (a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or
 - (b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or
 - (c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture show or other presentation.
3. An act done by or to a part-human/part-animal character, an animal character depicted as possessing human like mental character or a fictional creature depicted as possessing human like mental characteristics and otherwise meeting the definitions for the crimes included this clause satisfies the definitional requirements of clause (1)(a) hereof.

Disseminating excessively violent material to minors is a [misdemeanor of the ___ degree][felony of the ___ degree].

II. Definition of Terms

The following definitions are applicable to subsection I hereof:

IV. CONCLUSION

The greatest criticism of the approach suggested here for protecting minors from indecency may be that it does not go far enough and would take too long to implement. It leaves the issue in the hands of parents, since parents must activate the V-chip or the PICS software. That, however, is also a strength, from the point of view of constitutionality. *Ginsberg* was, in large part, based on the government interest in assisting parents in controlling the moral development of their children.⁴¹⁵ When the government asserts its own interests in controlling the upbringing of children, it is on less secure ground.⁴¹⁶ It will also take some time before all televisions and Internet software contain the V-chip or PICS capability. Again, however, the decision is in the hands of parents. They can update their software and buy a television containing a V-chip or any retrofit device that may be manufactured for existing televisions.⁴¹⁷

From a constitutional law point of view, the approach taken is superior to those struck down and to the current V-chip legislation and should survive challenge. The government is not placed in the position of rating television or cable offerings and Internet communications. In addition to avoiding the great practical problems of rating such a sea of material, the specter of the

1. "Minor" means any person less than eighteen years old.
2. "Harmful to minors" means that quality of any description or representation, in whatever form, of violence, when it:
 - (a) Considered as a whole, appeals to the shameful or morbid interest in violence of minors; and
 - (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
 - (c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.
3. "Simulated" means the explicit depiction or description of any of the types of conduct set forth in section I(1)(a) of this statute, which creates the appearance of such conduct. Simulations may include animated presentations.

SAUNDERS, *supra* note 411, at 189-90 (citations omitted). The statute was based roughly on N.Y. PENAL LAW § 235.20-21 (McKinney 1994), which is the current version of the statute addressing sexual material that was at issue in *Ginsberg*. See *Ginsberg v. New York*, 390 U.S. 629, 631 (1968).

415. See *Ginsberg v. New York*, 390 U.S. at 639.

416. But see *id.* at 640 (stating that the state has an independent interest in the well-being of youth).

417. The reliance on parent implementation may be more serious for violent material than for sexual matter. While the government and society may be argued not to have a strong interest in the moral development of other people's children, the interest in preventing children from becoming violent and doing harm to others is strong, both on the part of the government and on the part of the potential victims.

government licensor of speech is avoided. Each provider or publisher makes its own decision on the intended audience for the material it places in the electronic media. They do so at small expense and using currently available or mandated technology. They do bear the burden of mistake, in that the failure to attach the signal or tag to material that is later held to be obscene as to children may lead to criminal liability. That, however, is also the situation faced by the print distributor, who sells a copy of a magazine to a minor.⁴¹⁸ The *Ginsberg* Court did not find this too great a price to pay for protecting minors.⁴¹⁹

There is always a concern of a chilling effect where the regulation of speech is at issue. With obscenity law generally, there is the concern that material that is not obscene will remain unpublished because of fear that it might be found obscene or that the cost of litigating its status will be too costly. In such a case, protected material is negatively affected by the statute. The United States Supreme Court has not been swayed by such arguments in the obscenity context. The problem should cause even less concern here. Under the approach proposed, no one would be chilled into not publishing or not broadcasting protected material that is close to the border of the unprotected. The effect on a publisher or producer who is chilled is simply to attach the V-chip signal or PICS activating tag. The producer or publisher is then protected. Furthermore, while minors may lose access to borderline material, parents who believe their children sufficiently mature as not to require protection may deactivate the V-chip or PICS screen.

418. The electronic media may, in fact, be less burdened. The magazine seller must be aware of the nature of the material sold, while taking a chance on whether or not it will be found obscene. *See, e.g.*, *Hamling v. United States*, 418 U.S. 87, 123-24 (1974) (holding where defendant mailed obscene brochures it was not necessary to prove that the defendant knew of the legal status of the material shipped—defendant's knowledge of the contents were sufficient). The producer of electronic material, or for that matter of print material, will have a better sense of the nature of the material than the vague awareness that a distributor may possess.

419. *See Ginsberg v. New York*, 390 U.S. at 640-43.

