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J.D. Candidate, 1996, Fordham University School of Law.

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Cover Page Footnote
This Note is dedicated to my parents, Ellen, and Stephen Rappaport, and my brother, Hartley Rappaport, for their constant love, support and encouragement. I would like to thank Professor Ann Moynihan for her insight and inspiration.
Rules of the Road: The Constitutional Limits of Restricting Indecent Speech on the Information Superhighway

Stacey J. Rappaport*

INTRODUCTION

There are many ways to communicate a dirty joke. A comedian can tell the joke to a crowd of people during an outdoor performance in a park. A humorist can print the joke in a book, magazine or newspaper. A comic can send copies of the joke through the postal mail. A radio announcer can broadcast the joke over the public airwaves. A teenager can call on a telephone and convey the sordid narrative. An entrepreneur can establish a "dial-a-joke" service where a caller dials a phone number to hear a recording of the foul tale. A comedian can tell the joke on a cable television program. And now, a computer user can access an on-line computer service and "post" the joke on a computer bulletin board or send it to selected addresses via electronic mail.

Under existing federal statutes, the radio announcer and the teenager could be punished for their indecent verbal communications.1 In contrast, the First Amendment's free speech provision2 protects the comedian who tells the joke in the park,3 the entrepre-

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2. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

neur managing the call-in service, the humorist who prints the joke in a publication, the comic who mails the joke through the U.S. mail, and the comedian who tells the joke during a cable television program. A new wave of computer communications legislation, however, has made the computer user’s fate unclear.

The proliferation of pornography and other offensive material available on computer networks and through on-line services has prompted congressional representatives and senators to introduce several bills that would regulate speech on computer networks. The first of these bills, introduced to the U.S. Senate, entitled the

4. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (holding that First Amendment prohibited ban on adult access to indecent telephone messages that were not obscene).

5. See Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667 (1973) (holding that First Amendment protected university newspaper political cartoon which depicted policemen raping Statue of Liberty and Goddess of Justice, and newspaper headline story entitled “Motherf—— Acquitted” which discussed member of organization “Up Against the Wall, Motherf——”).

6. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (holding that government could not prevent sender from sending mail unless the recipient could not avoid objectionable speech contained in mail); cf. Rowan v. United States Post Office Dep’t, 397 U.S. 728 (1970) (holding that government could prevent sender from sending mail to addressee upon request from addressee).

7. See Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp 1099, 1117 (D. Utah 1985), aff’d, 800 F.2d 989 (10th Cir. 1986), aff’d, 480 U.S. 926 (1987) (holding that First Amendment prohibited penalizing distributors of every indecent cable program that was not obscene).


10. See H.R. 1978, supra note 8; S. 892, supra note 8; S. 714, supra note 8; H.R. 1004, supra note 8; S. 314, supra note 8.
Communications Decency Act of 1995\textsuperscript{11} ("Communications Decency Act") would criminalize sending indecent written and visual communication via computer.\textsuperscript{12} The goal of the Communications Decency Act is to enable children to use computer networks without exposure to sexual conversations or images.\textsuperscript{13}

Another bill, the Protection of Children from Computer Pornography Act of 1995 ("Protection of Children from Computer Pornography Act"),\textsuperscript{14} would prohibit computer transmission of indecent material to minors\textsuperscript{15} and would also impose liability on on-line service providers who knowingly allow their services to be used to transmit indecent material to persons under eighteen years of age.\textsuperscript{16} While both these bills may accomplish the legitimate objective of protecting children from harmful or offensive material, they may also seriously abridge the First Amendment rights of adults.

Two other bills introduced to Congress in 1995 focus on giving adults more control over children's access to material on computer networks. The Child Protection, User Empowerment and Free Expression in Interactive Media Study Act\textsuperscript{17} ("Leahy Amendment") would direct the Department of Justice to study existing obscenity laws and determine the enforceability of these laws on computer transmitted communications.\textsuperscript{18} The Leahy Amendment also calls for an evaluation of available technology enabling parents to exercise control over the information children receive via computer networks\textsuperscript{19} and recommendations to encourage the development of

\textsuperscript{11} S. 314, supra note 8. A similar bill was introduced in the House of Representatives. H.R. 1004, supra note 8.
\textsuperscript{12} S. 314, supra note 11; see Lawmakers Patrolling Info Superhighway, NEWSBYTES NEWS NETWORK, Feb. 17, 1995, available in Westlaw, ALLNEWS Database.
\textsuperscript{14} S. 892, supra note 8.
\textsuperscript{15} Id. § 2.
\textsuperscript{16} Id. § 2(b)(2)-(3).
\textsuperscript{17} S. 714, supra note 8; 141 CONG. REC. S5548 (daily ed. Apr. 7, 1995).
\textsuperscript{18} S. 714, supra note 8, § 1(a).
\textsuperscript{19} Id. § 1(a)(3)(A).
parental control technology.\textsuperscript{20} Similarly, the proposed Internet Freedom and Family Empowerment Act\textsuperscript{21} ("Cox/Wyden Amendment") seeks to promote the development of user-control technologies\textsuperscript{22} and preserve the free exchange of information on the Internet without government intrusion.\textsuperscript{23}

The enactment of one or more of these bills will determine whether a computer user who transmits a dirty joke over a computer network could be held criminally liable. However, while the First Amendment does not protect the radio announcer who broadcasts a dirty joke,\textsuperscript{24} it could shield the computer user from liability. Although the joke's content is the same regardless of the medium in which the speaker chooses to communicate, the Supreme Court has held that the medium through which the speaker delivers the joke determines the speaker's level of constitutional protection.\textsuperscript{25} Because the Internet is a multifaceted network which consists of many different media for expression, such as bulletin board systems, electronic mail, and real-time conferencing,\textsuperscript{26} its different functions may receive different levels of constitutional protection. Constitutional regulation of the Internet, therefore, depends upon defining and distinguishing different Internet functions and the First Amendment analyses that apply to those different functions.

\textsuperscript{20} Id. § 1(a)(4).
\textsuperscript{21} H.R. 1978, supra note 8.
\textsuperscript{22} Id. § 2(b)(3).
\textsuperscript{23} Id. § 2(b)(2).
\textsuperscript{24} See FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that government may restrict indecent radio broadcasts).
\textsuperscript{25} See, e.g., Sable, 492 U.S. at 131; Wilkinson, 480 U.S. at 926, aff'd, 800 F.2d 989 (10th Cir. 1986), aff'd, 611 F. Supp. 1099 (D. Utah 1985); Bolger, 463 U.S. at 60; Papish, 410 U.S. at 667; Cohen, 403 U.S. at 26; see also discussion infra part I.C (discussing First Amendment protection for traditional modes of expression).
This Note argues that statutes regulating indecent speech on a computer network that do not distinguish between the different methods of communication available on the computer network are unconstitutional. Part I analogizes functions of the Internet to traditional methods of communication such as broadcasting, postal mail, and telephone, and explains the First Amendment protection available to these more traditional methods of communication. Part II discusses recent Internet indecency legislation. Part III applies First Amendment principles to the analogous Internet functions, showing that the government cannot constitutionally regulate indecent speech on a computer network, except in extremely limited circumstances. Part III also explores alternative solutions to minimize children's access to sexual materials on the Internet without impeding adults' First Amendment right to access the materials.

This Note concludes that statutes regulating indecent speech on the Internet must comply with the Supreme Court's decisions concerning regulating indecent speech in other media. Consequently, such statutes are unconstitutional unless they specifically address the Internet's various attributes and consider the limited circumstances under which indecent speech can be regulated.

I. THE INTERNET AND THE FIRST AMENDMENT

A. The History of the Information Superhighway

The "information superhighway" is "a broadband, multimedia electronic network through which digitally coded information (voice, video, text, data, graphics ...) runs to and from any point in the network to any other point in the network."27 The Internet is part of the information superhighway,28 and grew from an experimental computer network called ARPANET.29 The U.S. Depart-

mament of Defense’s Advanced Research Projects Agency\textsuperscript{30} ("ARPA") designed ARPANET\textsuperscript{31} as part of a military effort to build a computer network that could function even if part of the network were destroyed.\textsuperscript{32} Soon after, many organizations began building private computer networks called local area networks ("LANs").\textsuperscript{33} Many of these organizations wanted to connect their LANs to the ARPANET to allow computer users on different LANs to communicate with one another.\textsuperscript{34} Furthering this "interconnection" concept, and building on the new networking technology,\textsuperscript{35} the National Science Foundation\textsuperscript{36} ("NSF") created NSFNET.\textsuperscript{37} NSFNET connected universities to each other and linked these chains of universities to a supercomputer center, which was connected to other supercomputer centers.\textsuperscript{38} NSFNET subsequently became the backbone of the Internet.\textsuperscript{39}

The Internet, the world’s largest computer network,\textsuperscript{40} connects computer users to share information and resources. Anne Meredith Fulton, \textit{Cyberspace and the Internet: Who Will Be the Privacy Police?}, 3 \textsc{CommLaw Conspectus} 63, 63 n.5 (1995).

\textsuperscript{30} \textsc{Rheingold, supra} note 29, at 67.
\textsuperscript{31} \textsc{Krol, supra} note 29, at 13. In the event of nuclear war, ARPANET would allow computer users to communicate, even if a bomb eradicated part of the network. \textsc{Rheingold, supra} note 29, at 74; see \textsc{Krol, supra} note 29, at 13.

ARPANET eliminated the need for a central network communication command center by using "packet-switching" technology. \textsc{Rheingold, supra} note 29, at 74. "Packet-switching" divides all communications into small data packets, addresses each packet by source and destination, and labels each packet with information about the other packets with which it should connect when it reaches its destination. \textit{Id.} Routers (or "nodes") along the network read the packet addresses and direct the packets to their respective destinations. \textit{Id.} Nodes continuously update one another on packet routing information. \textit{Id.} Thus, even if a node is destroyed, another node will ensure that the packet reaches its destination by rerouting the packet. \textit{Id.; see also} \textsc{Krol, supra} note 29, at 13.

\textsuperscript{32} \textsc{Krol, supra} note 29, at 13.
\textsuperscript{33} \textit{Id.} at 14. Generally, LANs connect desktop workstations to one another through a single site-based timesharing computer. \textit{Id.}
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textsc{Rheingold, supra} note 29, at 84.
\textsuperscript{36} \textsc{Krol, supra} note 29, at 14. The National Science Foundation is an agency of the U.S. government. \textit{Id.}

\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textsc{Rheingold, supra} note 29, at 84.
\textsuperscript{40} \textsc{Krol, supra} note 29, at xix.
many computer networks including federal networks, regional networks, campus networks, and foreign networks.\textsuperscript{41} Other networks, such as Fidonet\textsuperscript{42} and BITNET\textsuperscript{43} are connected to the Internet through gateways on the information superhighway.\textsuperscript{44} In this Note, the term "Internet" is used, as it is colloquially, to include all interconnecting global computer networks existing on the information superhighway.

B. \textit{Comparing Internet Functions with Traditional Modes of Expression}

The Internet represents a unique medium, containing characteristics of many different traditional methods of communication such as broadcast, mail, and telephone media.\textsuperscript{45} With a computer and a modem, a computer user can access a variety of on-line services including electronic bulletin board systems, electronic mail services, and real-time conferencing utilities.\textsuperscript{46}

1. Electronic Bulletin Boards

An electronic (or "computer") bulletin board functions like a computerized message board: anyone may post public messages, read messages left by others, or hold direct conversations with individuals.\textsuperscript{47} Users dial a central computer via modem, and once their terminals are linked with the bulletin board system they may communicate with other users and access various information databases.\textsuperscript{48} Since computerized bulletin board posting allows a user to reach a vast audience, like broadcasting, this Internet function

\begin{thebibliography}{99}
\bibitem{41} \textit{Id.} at 15. An estimated 30 million people use the Internet worldwide. Steve Lohr, \textit{Who Uses Internet? 5.8 Million Are Said to Be Linked in U.S.}, N.Y. \textit{Times}, Sept. 27, 1995, at D2. The number of computer users in the U.S. who use the Internet, although difficult to calculate, may be close to 15 million. \textit{See id.} (suggesting that survey concluding that size of Internet user population in U.S. is 5.8 million may be inaccurate).
\bibitem{42} Symposium, \textit{supra} note 26, at 243, 244 n.25.
\bibitem{43} \textit{Id.} at 243, 244 n.26.
\bibitem{44} \textit{Id.} at 244.
\bibitem{45} \textit{See supra} note 26 and accompanying text.
\bibitem{47} \textit{Id.} at 217-19.
\end{thebibliography}
permits “one-to-many” communication.\textsuperscript{49} Electronic bulletin board posting also has many of the attributes of speech in a public setting, such as a park.\textsuperscript{50} Additionally, like radio broadcasts, bulletin board messages enter the privacy of the home.\textsuperscript{51}

Broadcasting and computerized bulletin boards, however, are dissimilar in several ways. First, unlike broadcasting, accessing a bulletin board is substantially more complicated than throwing a radio switch;\textsuperscript{52} anyone accessing a bulletin board system must maintain a certain level of computer expertise.\textsuperscript{53}

Second, when a broadcast listener tunes in to a particular radio station, he or she is unaware of the content of the forthcoming broadcast.\textsuperscript{54} The listener may be bombarded with offensive or unwanted aural communications.\textsuperscript{55} In contrast, the bulletin board user actively seeks, chooses, and views particular subject areas.\textsuperscript{56} Thus, unwanted and unsolicited bulletin board messages do not intrude on the privacy of the home;\textsuperscript{57} instead, only invited messages enter the private realm.

Third, bulletin board systems can maintain warning, screening, and blocking mechanisms.\textsuperscript{58} Radio broadcast listeners, however, may tune in to an offensive broadcast after the radio announcer

\textsuperscript{49} Id. at 135. “One-to-many” communication involves communication between one source and many individuals. Cf. id. (distinguishing “one-to-many” communication from “one-to-one” communication). A commercial bulletin board system may have a gateway to the Internet, but it is not part of the Internet. Symposium, supra note 26, at 288.


\textsuperscript{51} Jensen, supra note 46, at 238-39. But see infra text accompanying notes 67-72 (drawing analogy between bulletin boards and public fora).

\textsuperscript{52} See Jensen, supra note 46, at 239.

\textsuperscript{53} Id.


\textsuperscript{55} See id. at 748-49.

\textsuperscript{56} Jensen, supra note 46, at 238-39.

\textsuperscript{57} Id.

\textsuperscript{58} See, e.g., Don Oldenburg, Rights on the Line; Defining the Limits on the Networks, WASH. POST, Oct. 1, 1991, at E5 (describing bulletin board system that warns users when they are about to enter erotic discussion groups).
gives a warning about the nature of the following broadcast. Thus, the listener is unaware of the warning and may encounter unwanted and unexpected communication. Conversely, a bulletin board user usually receives the warning before he or she chooses to access a particular bulletin board. The user chooses to access the bulletin board according to its description, and consequently, is protected from seeing unwanted communication.

Finally, a bulletin board user may employ software filters which filter objectionable content, or blocking mechanisms which prevent the user from accessing undesired bulletin boards. Similar devices are not available for live radio broadcasts.

However, many of the attributes which make computer bulletin boards dissimilar to radio broadcast media are those that make computer bulletin boards similar to cable television media. First, like the computer bulletin board user, the cable subscriber must affirmatively contact the cable system to receive cable programming. Second, electronic devices allow cable subscribers to prevent reception of unwanted and unauthorized cable programming, just as software filters prevent computer users from receiving unwanted material. Finally, television guides provide viewers with advance notice of cable program content; bulletin boards, likewise, often warn of content through bulletin board names and descriptions provided before the computer user accesses the bulletin board.

A computer bulletin board is also analogous to a traditional public forum, such as a park or public sidewalk. A public forum

59. See id.; see, e.g., Levy, supra note 9, at 48 (noting that names of picture files define file content and that computer users do not happen upon offensive material effortlessly).
60. See, e.g., Oldenburg, supra note 58.
61. See infra notes 275-81 and accompanying text.
63. Id.
64. See infra text accompanying notes 275-81.
66. See supra notes 58-60 and accompanying text.
67. Naughton, supra note 50, at 430. But see id. at 431 (discussing dissimilarities
is specifically designed for the communication of ideas and information, and is "truly a marketplace of ideas." 68 Similarly, the sole function of a bulletin board is the communication of information between numerous computer users. 69

A computer bulletin board operates like a bulletin board in a town square. 70 For example, a town inhabitant may create a flyer in the privacy of his home. Once he or she posts the flyer on the bulletin board, the message is in the public arena. Similarly, computer bulletin board users typically access bulletin boards and post messages from computers in the privacy of their own homes or offices. 71 However, once a user posts a message, the message enters the public realm. Thus, computer bulletin board users and recipients of communication in public settings have similar privacy interests. 72

 Critics of the concept of the bulletin board as a traditional public forum contend that, unlike city streets and parks, computer bulletin boards have not been held in trust for the use of the public

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68. Id. at 430 (quoting Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 658 n.2 (1981) (Brennan, J., dissenting in part)). The Communications Decency Act as originally drafted was criticized because it imposed significant liability on bulletin board system operators ("sysops"). Susan Moran, On-Line Firms Freed from Big Brother Role in Obscenity Bill, CHI. SUN-TIMES, Mar. 27, 1995, at 41. Recent changes to the bill have eliminated sysop liability for computer users' transmissions. Id.

69. See Naughton, supra note 50, at 430 (noting that unlike sidewalks, streets and parks, computer networks were specifically created for purpose of communication).

70. See id. at 413 (stating that computerized public message areas resemble traditional bulletin boards and public fora).

71. Cf. Peter H. Lewis, Report of High Internet Use Is Challenged, N.Y. TIMES, Dec. 13, 1995, at D5 (stating that report that 24 million Americans and Canadians use the Internet may be inaccurate because people with lower incomes who were less likely to use personal computers at home or work were underrepresented in survey).

72. See Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) ("we are often 'captives' outside the sanctuary of the home and subject to objectionable speech"); cf. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975) (holding that persons on public streets have limited privacy interests that do not justify banning all nude films visible from those streets); Cohen v. California, 403 U.S. 15, 21-22 (1971) (stating that a person's privacy interest in a courthouse corridor or public park is significantly less than an individual's privacy interest in his or her home).
for purposes of assembly and discussing public questions.\textsuperscript{73} This is because computer bulletin boards are recent technological developments, and thus, have not attained traditional public forum status.\textsuperscript{74} Yet this analysis fails to consider that evolving traditions may require courts to adapt precedents from the physical environment and apply them to the electronic environment.\textsuperscript{75} Also, while city streets and parks serve other important societal functions in addition to providing fora for communication, the computer bulletin board’s only function is the communication of ideas and information.\textsuperscript{76} Thus, the bulletin board may require a higher level of First Amendment protection.\textsuperscript{77}

2. Electronic Mail Systems

An electronic mail system functions differently from a bulletin board system, since electronic mail does not have the same message posting features of a bulletin board system. Instead, electronic mail operates like a postal system: the sender transmits a message to another individual’s electronic mailing address via central computer.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{73} Naughton, \textit{supra} note 50, at 431 (emphasizing that the traditional use of the medium determines its forum status).
\item \textsuperscript{74} Id.
\item \textsuperscript{76} See \textit{id.} at 140 (arguing that public forum status should be determined by medium’s communication function rather than physical attributes). A First Amendment analysis should focus on the communication function of a medium rather than the physical characteristics of the medium in order to preserve the fundamental freedom of speech. \textit{See id.; Note, The Message in the Medium: The First Amendment on the Information Superhighway}, 107 HARV. L. REV. 1062, 1077 (1994) (stating that debate about communication technology regulation focuses too much on comparison of technologies rather than how First Amendment values are best served); \textit{see also} David J. Goldstone, \textit{The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)}, 46 HASTINGS L.J. 335, 383 (1995) (listing characteristics defining public fora on computer network).
\item \textsuperscript{77} See Naughton, \textit{supra} note 50, at 429-31 (discussing importance of communication medium’s principal or sole purpose as communication of ideas in determining whether that medium should receive higher level of constitutional protection as public forum).
\item \textsuperscript{78} Lynn Becker, \textit{Electronic Publishing: First Amendment Issues in the Twenty-First Century}, 13 FORDHAM URB. L.J. 801, 805 n.14 (1985). Some bulletin boards have elec-
Electronic mail does not permit simultaneous conversation. The sender transmits a message to the recipient’s address and the message remains in the recipient’s electronic mailbox until the recipient logs on the network, reads it, and deletes it.\(^7\) In this respect, electronic mail is similar to postal mail.

3. Real-Time Conferencing

Real-time conferencing is another method of communicating on the Internet. This method allows users to simultaneously communicate with one another by typing messages back and forth in real time.\(^8\) Thus, real-time conferencing has characteristics of both telephone and postal mail communication.

Although real-time conferencing allows users to have concurrent conversations like the telephone, real-time conferencing is not as intrusive as telephone communication for several reasons. First, when a telephone rings, the call recipient’s quietude is immediately interrupted by the sound of the ring. When using a real-time conferencing utility, the message recipient must already be on-line to get a message on his or her machine that another on-line user wants to converse. The message the real-time call recipient receives is usually a visual message, and not the invasive ring of a telephone.

Second, the telephone is a highly confrontational medium.\(^8\) First, before answering the telephone, the recipient is unaware of the caller’s identity.\(^9\) The recipient is then confronted, not only by the statements of the caller, but by the voice and person of the caller.\(^10\) In contrast, when using the real-time conferencing function, the recipient must answer a sender’s “chat request” to converse with

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80. \textit{See} Schlachter, \textit{supra} note 48, at 141. This function is also called “chatting.”
81. \textit{Rheingold, supra} note 29, at 108.
82. \textit{Id.}
83. \textit{Id.}
the sender; therefore, the recipient is either aware of the sender’s identity or voluntarily chooses to chat with an anonymous sender. Also, since the sender and recipient do not hear or verbally speak with each other, the recipient is not confronted with the sender’s voice, tone, inflection, or person. Thus, real-time conferencing does not invade the recipient’s sphere of privacy like a telephone call.

Real-time conferencing also bears some similarities to postal mail. While telephone calls are extremely personal invasions, the unwilling recipient of mail is “violated” only by the content of the message. The mail recipient receives a written communication in his or her mailbox, while the real-time conferencer receives a written communication on his or her screen.

However, real-time conferencing is more intrusive than physical mail because of the immediacy of its delivery. The time period between writing a physical mail message and its ultimate delivery is significantly longer than the immediate delivery of a real-time conferencing message. Obviously, the post office cannot deliver mail as quickly as the virtually simultaneous communications occur on a real-time conferencing utility. The real-time conferencer is more quickly confronted with messages than a mail recipient, and thus may feel that the sender is looming closer to home.

Although a real-time conferencing recipient is not confronted with the

84. See Rheingold, supra note 29, at 179.
85. Even if the sender communicates anonymously, the recipient has the option of not “answering” the sender’s request to conference. Since the real-time conferencing medium does not have the incessant and annoying ring of the telephone, persistent real-time calls are not as intrusive as persistent telephone calls. Cf. Royall, supra note 81, at 1417 n.63 (likening harassing telephone calls to actual trespasses because ringing telephone “beckons to be answered” and caller’s identity is usually unknown before telephone is answered).
86. Cf. id. at 1416-17 nn.62-63 (discussing confrontational nature of telephone call).
87. Id. at 1416 n.62.
88. See Rheingold, supra note 29, at 79. Internet communication lines can transmit information at forty-five million bits per second. Id. At this speed, an Internet user can send five thousand pages per second. Id.
89. Cf. Royall, supra note 81, at 1416-17 n.62 (discussing importance of caller’s sensory confrontation with call recipient, in addition to content of caller’s statements, in determining level of invasion of recipient’s privacy).
sender's voice, tone, inflection, or person like a telephone call recipient,\(^90\) the real-time conferencing recipient encounters the sender more personally than a mail recipient: the recipient is immediately aware of the sender's presence as the sender's message is being communicated.\(^91\)

Therefore, for the reasons discussed above, real-time conferencing falls between telephone communication and postal mail communication on the invasion of privacy spectrum.

Future communications media will most likely combine features of bulletin board systems, electronic mail, real-time conferencing, aural communication and visual images.\(^92\) Additionally, these media will be highly interactive\(^93\) and will not be analogous to any one traditional method of communication.\(^94\) They will also combine many of the most intrusive aspects of the traditional methods of communication.\(^95\) Someday, pressing one button may connect a listener to a face, a voice, and unwanted communication without warning.\(^96\) Alternatively, the media's interactivity may give users

\(^90\) See Royall, supra note 81, at 1416-17 nn.62-63.

\(^91\) See supra note 88 (discussing speed of real-time conferencing communication).

\(^92\) See Jerry Berman & Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 YALE L.J. 1619, 1619 n.1 (1995). Features of the future media will include "the convergence of traditionally distinct media—such as television, telephones, and computer networks—into overlapping or common modes of communication." Id.

\(^93\) Id. Non-interactive media, or passive media, do not allow users to engage in dialogue. PATRICK M. GARRY, SCRAMBLING FOR PROTECTION: THE NEW MEDIA AND THE FIRST AMENDMENT 48 (1994) (passive media are systems for one-way communication). The passive medium user can receive communication but cannot communicate with the source through the passive medium. See id. For example, television is a passive medium. Id.

Interactive media allow two-way communication. Id. An interactive medium gives more control to the user than a passive medium by permitting the user to choose the information he or she receives, rather than forcing the user to absorb the information the sender chooses to send. Id. at 50.

\(^94\) See GARRY, supra note 93, at 49 ("a new personal computer will merge various forms of technologies like the computer, television, and videodisc into one interactive multimedia system"). Single technological systems are merging previously distinct methods of communication. Id. at 148. Thus, a one-to-one relationship no longer exists between a medium and its use. Id.

\(^95\) See id. at 49 ("the emergence of interactive multimedia will bring together—on a screen in people’s living rooms—information, music, voices, photographs, and video").

\(^96\) See id.
the ability to exercise complete control over the information and images they access.  

C. First Amendment Protection for Traditional Modes of Expression

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . . .” Consequently, serious First Amendment concerns arise when the U.S. government attempts to regulate speech, regardless of the vehicle of expression.

The Supreme Court, however, has held that freedom of speech is not an absolute right. Under the First Amendment, both the content and context of speech are critical elements. Thus, the government can constitutionally prohibit speech that creates a “clear and present danger,” or is designated as low value speech. Low value speech includes “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” This speech is “unprotected” by the First Amendment.

Where speech does not fall within one of the unprotected cate-

97. Berman & Weitzner, supra note 92, at 1632; see supra note 93 (discussing interactive media).

98. U.S. Const. amend. I.


103. Chaplinsky, 315 U.S. at 572.

104. Id.

gories, the speech is "protected" by the First Amendment; it is presumptively constitutional, and the government may not regulate it absent a compelling state interest.\textsuperscript{106} Many statutes limiting protected speech are designed to protect "unwilling listeners"—those persons who do not wish to hear, see or otherwise be disturbed by a communication.\textsuperscript{107}

Therefore, to maintain the delicate balance between the right of one individual to communicate and the right of another individual to be left alone, the Supreme Court has created a two-part standard: "[t]he ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."\textsuperscript{108} The substantiability of an individual's privacy interest is determined by the forum in which the communication is received.\textsuperscript{109} An individual's privacy interest is greatest in the home,\textsuperscript{110} and least in a highly public place.\textsuperscript{111}

The intolerability of the invasive speech is determined by the type and nature of the communication.\textsuperscript{112} A communication is least intolerable when one can easily avoid the communication, and most intolerable when one cannot escape the communication.\textsuperscript{113} Visual

\textsuperscript{106.} See \textit{Sable}, 492 U.S. at 126; \textit{Pool}, supra note 100, at 59-74.

\textsuperscript{107.} See, e.g., \textit{Kovacs v. Cooper}, 336 U.S. 77 (1949) (ordinance prohibiting use of sound amplifier which emits loud and raucous noises held constitutional); \textit{Martin v. City of Struthers}, 319 U.S. 141 (1943) (ordinance prohibiting person distributing advertisements door-to-door from knocking on door, ringing doorbell or otherwise summoning inhabitant to door held unconstitutional); \textit{Packer Corp. v. Utah}, 285 U.S. 105 (1932) (statute prohibiting tobacco advertisements by billboard or placard challenged under Fourteenth Amendment).

\textsuperscript{108.} \textit{Cohen}, 403 U.S. at 21 (emphasis added).


\textsuperscript{110.} See \textit{Royall}, supra note 81, at 1419.

\textsuperscript{111.} See \textit{Erznoznik}, 422 U.S. at 209 (restrictions on protected speech "have been upheld only when the speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure"); \textit{Cohen}, 403 U.S. at 21-22.

\textsuperscript{112.} See Nadel, supra note 109, at 101.

\textsuperscript{113.} See \textit{id.} In \textit{Cohen v. California}, the defendant wore a jacket bearing the words "Fuck the Draft" in a courthouse. 403 U.S. at 16. He was convicted under a statute which proscribed maliciously and willfully disturbing the peace or quiet of any neighbor.
communication, such as publicly displayed messages and mail, are easily avoided. Alternatively, the blaring of a sound truck or other aural communication are significantly more intrusive. Phone calls are particularly intrusive, since the caller directly confronts the recipient and compels a reaction. The time of day at which the communication occurs can also affect the level of intolerability of the invasion.

Respect for an individual's decision to reject communications directed at that individual is fundamental to a person's right to privacy in the home. Accordingly, limitations on the dissemination of messages to both willing and unwilling recipients are much more difficult to justify than restrictions which give unwilling recipients the right to reject unwanted communications and maintain willing recipients' right to receive the same communications.

114. See Nadel, supra note 109, at 102-03.
115. See Kovacs v. Cooper, 336 U.S. 77 (1949); Nadel, supra note 109, at 103.
116. See Royall, supra note 81, at 1416-17 nn.62-63 (discussing intrusive aspects of telephone calls).
117. See Sable, 492 U.S. at 121; Pacifica, 438 U.S. at 729.
119. See Nadel, supra note 109, at 104-05. Compare Bolger, 463 U.S. 60 (holding that government could not place absolute ban on mailing of contraceptive advertising) with Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (holding that govern-
Therefore, where the intolerability of the invasion and the substantiality of the privacy interest are not at their peak levels, the government must allow the sender to communicate. The government may protect an unwilling recipient of a communication by giving the recipient the right to reject further unwanted communication from that sender. If the sender continues to communicate to the recipient after receiving notice of the recipient's wish to receive no further communication from that sender, the invasive communication may become intolerable. However, in order for the sender to suffer criminal sanctions, the recipient's burden of avoiding the continued communication must outweigh the sender's right to communicate his or her message.

In Rowan v. United States Post Office Department, the Supreme Court accorded discretion to reject unwanted communications to postal mail recipients. Rowan involved a federal statute that instructed the Postmaster General, upon receipt of notice from an addressee, stating that the addressee had received material that he or she found to be erotically arousing or sexually provocative, to direct the sender to refrain from mailing to that addressee. ment could grant unwilling recipient's request that Postmaster General order cessation of mailing from particular sender).

120. Compare Sable, 492 U.S. at 128 (holding that since dial-in communication is initiated by affirmative act of listener, the level of invasion is not so intolerable as to justify governmental restriction) with Pacifica, 438 U.S. at 748 (holding that since broadcasting is uniquely pervasive and uniquely accessible to children, government may prohibit broadcasting indecent speech).

121. Compare Bolger, 463 U.S. at 60 (holding statute unconstitutional which permits Postal Service to dispose of contraceptive advertisements without notifying sender and without authorization from addressee) with Rowan, 397 U.S. at 728 (holding statute constitutional which permits addressee to direct Postmaster General to direct sender of advertisements to stop mailing to that addressee).

122. See Rowan, 397 U.S. at 738.

123. See Cohen, 403 U.S. at 21. The sender's right to communicate is sufficiently protected by these provisions. See Rowan, 397 U.S. at 738. The notice from the unwilling listener to the sender must be so clear and unambiguous that the sender is presumed to know that the recipient wishes no further communication from the sender. See id. (specific notice from Postmaster General).


125. Id. at 729-30.

126. Id. at 730.
Congress enacted the statute in response to public and congressional concern with the use of mail facilities to distribute offensive advertisements.\textsuperscript{127} The legislature's objective was to protect minors and the privacy of homes from offensive material and to place discretion in the hands of the addressee.\textsuperscript{128} The Court upheld the statute's constitutionality, recognizing the importance of according householders the right to decide what should enter the home\textsuperscript{129} and noting that the mailer's right to communicate remains protected since it "is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer."\textsuperscript{130} In addition to expressly providing clear notice to the mailer of the specific communication to be proscribed, the statute also provided a definitive description of the consequences resulting from an alleged violation of the Postmaster General's order.\textsuperscript{131} Thus, the sender's right to communicate was significantly protected since the mailer had to receive an extremely clear warning before the government could prohibit continued communication.\textsuperscript{132}

Subsequently, in \textit{Bolger v. Youngs Drug Products Corporation},\textsuperscript{133} the Court reinforced \textit{Rowan}'s holding. \textit{Bolger} considered a federal statute which allowed the Postal Service to discard contraceptive advertisements before they reached the addressee and without consent from the addressee.\textsuperscript{134} The Court stressed the importance of giving the recipient of a potentially offensive advertisement the right to refuse the mailing.\textsuperscript{135} Since the statute did not provide the recipient with the opportunity to both review the mail-

\begin{itemize}
  \item \textsuperscript{127} \textit{Id.} at 731.
  \item \textsuperscript{128} \textit{Id.} at 732.
  \item \textsuperscript{129} \textit{Id.} at 737 ("what may not be provocative to one person may well be to another").
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.} at 738-39. If the Postmaster General had reason to believe that a sender had violated his order, the statute authorized him to notify the sender of his belief, and grant the sender the opportunity to respond and a hearing. \textit{Id.} at 730. After the hearing, if the Postmaster General determined that his order was violated, he could seek a court order directing the sender to comply with his order. \textit{Id.}
  \item \textsuperscript{132} See \textit{id.} at 738.
  \item \textsuperscript{133} 463 U.S. 60 (1983).
  \item \textsuperscript{134} \textit{Id.} at 61.
  \item \textsuperscript{135} \textit{Id.} at 72.
\end{itemize}
ing and unilaterally decide whether he or she would like to receive future mailings from the sender, the Court held the statute unconstitutional.\textsuperscript{136}

Thus, in both \textit{Rowan} and \textit{Bolger}, the Court identified a specific speech limitation standard: government may limit \textit{protected} speech where a communication continues to invade a substantial privacy interest after the sender receives clear and unambiguous notice of the \textit{specific} communication that the listener does not want to receive, and the recipient's burden of avoiding the communication is unacceptable.\textsuperscript{137}

Since indecent speech is protected under the First Amendment,\textsuperscript{138} the Court applies the speech limitation standard defined in \textit{Rowan} and \textit{Bolger} when determining the constitutionality of a statute prohibiting indecent speech. For example, in \textit{Sable Communications of California v. FCC},\textsuperscript{139} the Supreme Court addressed the constitutionality of section 223(b) of the Federal Communications Act of 1934.\textsuperscript{140} This statute prohibited indecent and obscene interstate commercial telephone messages,\textsuperscript{141} and was designed to re-

\begin{footnotes}
\footnotetext[136]{Id.}
\footnotetext[137]{See id. at 60; \textit{Rowan}, 397 U.S. at 728.}
\footnotetext[138]{\textit{Sable}, 492 U.S. at 126. Indecent speech is that which "describes [or depicts], in terms patently offensive as measured by contemporary community standards ... sexual or excretory activities and organs." \textit{In re Pacifica Found.}, 56 F.C.C.2d 94, 98 (1975).}
\footnotetext[139]{492 U.S. 115 (1989).}
\footnotetext[141]{47 U.S.C. § 223(b) (1982 & Supp. V 1987) (current version at 47 U.S.C. § 223(b) (1988 & Supp. V 1993)). At the time that Sable commenced the action, the statute criminally penalized "Whoever knowingly—(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call ... ." \textit{Sable}, 492 U.S. at 123 n.4 (quoting 47 U.S.C. § 223(b) (1982 & Supp. V 1987)). Before the Supreme Court rendered its decision, 47 U.S.C. § 223(b) was amended to place the prohibition of obscene commercial telephone messages in a separate subsection from that criminalizing indecent commercial telephone messages. \textit{Id.} at 123 n.5 (discussing 47 U.S.C. § 223(b) (1988)). This amendment, however, did not affect the substantive prohi-}
\end{footnotes}
restrict the access of minors to "dial-a-porn" services.\textsuperscript{142} In \textit{Sable}, the Court permitted the ban on obscene commercial telephone messages,\textsuperscript{143} but held the portion of the statute prohibiting indecent commercial telephone messages unconstitutional.\textsuperscript{144} Since indecent sexual expression is protected speech,\textsuperscript{145} the Court determined that it could allow the government to regulate protected speech to promote a compelling interest, as long as the government chose the least restrictive means to further that interest.\textsuperscript{146} The Court recognized the government's significant interest in protecting minors from speech that, although not obscene, may have a harmful influence.\textsuperscript{147} However, the Court stated that "the government may not 'reduce the adult population ... to ... [hearing] only what is fit for children.'\textsuperscript{148} According to the Court, a total ban on indecent

\begin{itemize}
  \item \textit{Sable}, 492 U.S. at 120. A "dial-a-porn" service offers prerecorded pornographic telephone messages through a telephone network. \textit{Id.} at 117-18. Callers dial a special adult message number and are charged a special fee. \textit{Id.} at 118. The fee collected is shared between the message provider and the telephone network. \textit{Id.}
  \item \textit{Id.} at 124.
    \begin{itemize}
      \item \textit{Miller}, 413 U.S. at 24. Obscene speech is not protected under the First Amendment. \textit{Id.} at 23.
    \end{itemize}
  \item \textit{Id.} at 126.
  \item \textit{Id.}
  \item \textit{Id.} at 126-27.
  \item \textit{Id.} at 128 (quoting \textit{Bolger v. Youngs Drug Prods. Corp.}, 463 U.S. 60, 73
\end{itemize}
commercial telephone messages was not narrowly tailored to meet the government’s legitimate objective of protecting minors, since the ban denied adults access to these messages. Indeed, the FCC had conducted extensive hearings and determined that credit card, access code, and scrambling rules were satisfactory deterrents to minors’ access to dial-a-porn messages, thus, the government could achieve their legitimate objective through these less restrictive means. The Court further found that the recipient’s burden of avoiding the communication was acceptable because the recipient of the communication could not receive the communication without soliciting the communication himself. Therefore, the government could not limit the protected speech under the Court’s speech limitation standard, and the statute was held to be unconstitutional as applied to indecent commercial telephone messages.

The Supreme Court has also held that indecent radio broadcasts do not receive the same level of First Amendment protection as indecent telephone messages. In *FCC v. Pacifica Foundation*, the Court justified its special treatment of indecent broadcasting by focusing on one of broadcasting’s unique characteristics: the ease with which children can access the broadcast medium. The Paci-

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149. *Id.* at 131.
150. *Id.* at 128.
151. *Id.*
152. *Id.* at 127-28.
153. See *Bolger*, 463 U.S. at 60; *Rowan*, 397 U.S. at 728; see also supra text accompanying note 137 (discussing speech limitation standard).
155. Compare *id.* (explaining why broadcast speech receives limited First Amendment protection) with *Pacifica*, 438 U.S. at 748-50 (holding that absolute ban on indecent telephone messages is unconstitutional).
157. *Id.* at 750. The FCC had previously identified four reasons why broadcasting requires special treatment:
(1) Children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference (citation omitted); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.
The Fica Foundation owned a New York radio station which broadcast comedian George Carlin's "Filthy Words" monologue at 2 o'clock in the afternoon. The Court drew a sharp distinction between this indecent broadcast and the situation in Cohen v. California. In Cohen, Paul Cohen wore the slogan "Fuck the Draft" on the back of his jacket in a courthouse. The Pacifica Court noted that though Cohen's message may have been incomprehensible to a young child, Pacifica's broadcast could be easily mimicked. While stressing the narrowness of its holding, the Court described the following factors relevant to its constitutionality determination: broadcasting's unique medium; the time of day of the broadcast; the content of the program in which the language was used; and differences among various broadcast media, such as radio, television, and closed-circuit transmissions. The Court recognized the government's significant interest in protecting its youth and in supporting parents' authority in their own home. Consequently, by applying the speech limitation standard, the Court identified indecent broadcasting as invading the highest level of privacy interest at the highest level of intolerability. The Pacifica Court thus, constitutionally limited the speech without first allowing the sender

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Id. at 731 n.2 (quoting In re Pacifica Found., 56 F.C.C.2d 94, 97 (1975)).
158. Id. at 729-30. The "Filthy Words" monologue included, according to the monologue itself, the "words you couldn't say on the public . . . airwaves, . . . the ones you definitely wouldn't say, ever . . . . The original seven words were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." Id. at 751 (appendix to opinion of the court). It should be noted that similar language has been constitutionally protected in other contexts. See, e.g., Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667 (1973) (holding that First Amendment protected university newspaper headline story entitled "Motherf— Acquitted"); Cohen v. California, 403 U.S. 15 (1971) (holding that First Amendment protected "Fuck the Draft" slogan worn on jacket in courthouse).
159. 403 U.S. 15, 16 (1971); see supra note 113.
161. Id. at 748-50.
162. Id. at 749-50.
163. Cf. supra text accompanying note 120 (discussing balancing test Court must apply before allowing or prohibiting communication).

The Supreme Court also recently rejected a constitutional challenge to a federal statute which bans indecent programming on radio and broadcast television during the day and in prime-time hours. Linda Greenhouse, Justices Allow Limits on Indecent Radio and TV Shows, N.Y. TIMES, Jan. 9, 1996, at 25.
to communicate.¹⁶⁴

Subsequently, in *Community Television of Utah, Inc. v. Wilkinson*,¹⁶⁵ the court distinguished cable from broadcast media. *Community Television* involved the Utah Cable Television Decency Act which provided that officials could bring nuisance actions against anyone who "continuously and 'knowingly distributes indecent material . . . over any cable television system."¹⁶⁶ The district court held that the *Pacifica* rationale did not apply to the cable medium since, unlike radio broadcasts, a cable television subscriber acts affirmatively to specifically invite the cable medium into the home¹⁶⁷ and adequate blocking devices exist to prevent reception of any cable programming that the subscriber has not authorized.¹⁶⁸ The court, quoting language from the FCC's *amicus curiae* brief, noted that: (1) cable service requires the viewer to affirmatively contact a cable company and request a subscription;¹⁶⁹ (2) a subscriber must pay a premium to receive certain channels;¹⁷⁰ (3) a cable subscriber may block cable programming through a "lock box;"¹⁷¹ and, (4) television guides provide advance notice of the nature and content of programs.¹⁷² The court also noted that a strong parental interest in supervising children existed.¹⁷³

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¹⁶⁴ *Pacifica*, 438 U.S. at 748-50.
¹⁶⁶ *Id.* at 1100 (citation omitted).
¹⁶⁷ *Id.* at 1113.
¹⁶⁸ *Id.* "[C]able TV is not an intruder but an invitee whose invitation can be carefully circumscribed." *Id.*
¹⁶⁹ *Id.*
¹⁷⁰ *Id.* Without payment, the cable signal is scrambled so that the viewer cannot receive either visual or aural cable communication. *Id.*
¹⁷¹ *Id.*
¹⁷² *Id.*
¹⁷³ *Id.* at 1115. Recently, the Supreme Court has agreed to review the constitutionality of certain indecent cable programming restrictions. Linda Greenhouse, *Justices to Rule on Limiting Cable TV’s Sexually Explicit Programs*, N.Y. Times, Nov. 14, 1995, at A20. In *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir.), cert. granted, 116 S. Ct. 471 (1995), the court of appeals upheld the constitutionality of FCC regulations which give cable operators discretion to ban indecent programming. *Id.* at 125. The regulations provide that if the cable operator does not regulate indecent programming on its leased-access channels, the operator must segregate the indecent programming on a
Similarly, the Supreme Court has held that visual communication in a public environment is not subject to the same restrictions as radio broadcasts. In *Erznoznik v. City of Jacksonville,*\(^{174}\) the Court considered a city ordinance which prohibited a drive-in movie theater from showing films containing nudity when the movie screen is visible from a public street or place.\(^{175}\) The limited privacy interests of persons on public streets did not justify censorship of protected speech on the basis of content.\(^{176}\) Instead, the Court held that the burden of avoiding the speech fell upon the offended viewer who could readily avert his or her eyes.\(^{177}\) The government's interest in prohibiting youths from viewing the films, therefore, was insufficient to necessitate such a broad prohibition on all nudity to all members of the community.\(^{178}\) Speech that was not obscene as to youths nor otherwise legitimately proscribed could not be suppressed solely to protect the young from ideas or images that the government deemed unsuitable for them.\(^{179}\) Applying its speech limitation standard, the Court concluded that individuals on public streets did not have substantial privacy interests and could easily avoid further communication.\(^{180}\)

Thus, in *Sable,* *Rowan,* *Bolger,* *Pacifica,* *Erznoznik,* and

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\(^{174}\) 422 U.S. 205 (1975).
\(^{175}\) Id. at 206-07.
\(^{176}\) Id. at 212.
\(^{177}\) Id.
\(^{178}\) Id. at 213.
\(^{179}\) Id. at 213-14.
\(^{180}\) See Bolger, 463 U.S. at 60; Rowan, 397 U.S. at 728; see also supra text accompanying note 137 (discussing speech limitation standard).
through the Court’s affirmance of Wilkinson, the Court consistently applied the speech limitation standard and drew the following conclusions: (1) indecent broadcasting can be constitutionally limited; (2) indecent commercial telephone messages cannot be constitutionally banned; (3) unsolicited sexually oriented advertisements can be mailed where the recipient has the right to reject the mailings; (4) films containing nudity may be shown at a drive-in theater that is visible from a public street; and (5) indecent cable broadcasts must receive more constitutional protection than indecent radio broadcasts.

II. PROPOSED LEGISLATION CONCERNING INDECENT SPEECH ON THE INTERNET

During 1995, several bills were introduced to Congress which would affect the transmission of indecent speech via the Internet.\(^{181}\) Both houses passed Internet regulation legislation,\(^ {182}\) but each house’s approach to the issue of indecent speech regulation significantly differed.\(^ {183}\) While the Senate measure would penalize those who transmit indecent speech,\(^ {184}\) the House bill would preserve the Internet’s present status, free from government regulation.\(^ {185}\)

Although the exact language of the proposed Internet regulation statute has not yet been finalized, it is expected that the proposed statute will contain language prohibiting indecent speech on the Internet.\(^ {186}\) Indeed, House telecommunications conferees voted nar-

\(^{181}\) See supra note 8.

\(^{182}\) See infra notes 197, 231 and accompanying text.


\(^{184}\) See infra part II.A.

\(^{185}\) See infra part II.D. As of this writing, Congress has not yet voted on a final measure, but a joint conference committee composed of representatives from both the House and the Senate have convened to compromise on the specific provisions of an Internet regulation statute. See Edmund L. Andrews, For Telecommunications Bill, Time for Some Horse Trading, N.Y. TIMES, Dec. 4, 1995, at D1, D10.

\(^{186}\) See Edmund L. Andrews, Bill Would Curb On-Line Obscenity, N.Y. TIMES,
rowly for a provision that would make computer users liable for providing indecent material to children, but would protect on-line service providers whose customers use them to transmit sexually explicit material.

The following is a brief description of the Internet indecency bills introduced throughout 1995.

A. The Communications Decency Act of 1995

On February 1, 1995, Senator Exon of Nebraska, introduced the Communications Decency Act to the U.S. Senate. The Communications Decency Act, as originally drafted, would have amended the section of the Federal Communications Act of 1934 which prohibits obscene or harassing telephone calls, imposing criminal

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189. The final legislation will probably be drawn from language in these proposals. See, e.g., Pearl, supra note 187 (describing proposed Internet indecency legislation language to be discussed during conference committee negotiations).


penalties for obscene or harassing use of *any* telecommunications facilities\textsuperscript{192} and criminally punishing those who create and send indecent speech over the Internet.\textsuperscript{193}

The Senate Committee on Commerce, Science, and Transportation passed the amendment in a vote on March 23, 1995,\textsuperscript{194} as part

Act of 1934 reads as follows:

\section*{§ 223. Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications}

(a) Whoever —

(1) in the District of Columbia or in interstate or foreign communication by means of telephone—

(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;

(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(2) knowingly permits any telephone facility under his control to be used for any purpose prohibited by this section,

shall be fined not more than $50,000 or imprisoned not more than six months, or both.

\textit{Id.}

\textsuperscript{192} S. 314, \textit{supra} note 190.

\textsuperscript{193} \textit{Id.} § 2(a)(1).

\textsuperscript{194} S. REP. No. 23, 104th Cong., 1st Sess. 14, 59-60 (1995). Part of the amendment, passed on March 23, 1995, reads as follows:

\textit{SEC. 223. OBSCENE OR HARASSING UTILIZATION OF TELECOMMUNICATIONS DEVICES AND FACILITIES IN THE DISTRICT OF COLUMBIA OR IN INTERSTATE OR FOREIGN COMMUNICATIONS.}

(a) Whoever—

(1) in the District of Columbia or in interstate or foreign communication by means of . . . telecommunications device— . . .

(A) knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image or other communication which is obscene, lewd, lascivious, filthy, or indecent;
of an overall telecommunications reform package. When the amendment was presented to the Senate on June 14, 1995, the language of the section punishing persons initiating the transmission of indecent speech was modified to only penalize persons who initiate the indecent speech "with intent to annoy, abuse, threaten or harass another person." The Senate passed the measure by a vote of 84-16.

The Communications Decency Act is aimed at curing misuse of the information superhighway. Senator Exon wants young

(B) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communication;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or...

(D) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or

(2) knowingly permits any... telecommunications facility under his control to be used for any purpose prohibited by this... subsection,

shall be fined not more that $100,000 or imprisoned not more than six months or both.

Id. at 83.

196. 141 CONG. REC. S8328 (daily ed. June 14, 1995). The addition of a specific intent requirement in the Communications Decency Act may cure some of the bill's constitutionality problems. Cf. Royall, supra note 81, at 1407-10 (discussing how specific intent requirement in telephone harassment statutes may bring such statutes within constitutional boundaries). By narrowing the scope of criminal conduct and clarifying the nature of prohibited conduct, the specific intent requirement may eliminate overbreadth and vagueness concerns. Id. at 1407-08. However, if the Communications Decency Act narrows its applicability only to those who act with an intent to annoy, harass, threaten or alarm, it fails to accomplish the purpose behind its creation: enabling children to use the Internet without encountering indecent material. See Panelists Debate Electronic Privacy Issues, supra note 13. Not every sender of indecent material acts with an intent to annoy, abuse, threaten or harass. For example, a computer user who sends a dirty joke on the Internet may intend only to make others laugh. This computer user would fall outside the Communications Decency Act's application and children would still be able to access the dirty joke.

197. 141 CONG. REC. S8347 (daily ed. June 14, 1995) (Rollcall Vote No. 263 Leg.).
people and small children to be able to "cruise . . . [the] superhigh-
way without being endangered by a whole series of smut [and] . . .
. pornography." Supporters of the measure claim that the bill
only extends to computer users the same level of protection already
available to telephone users. While anti-pornography campaign-
ers heralded the Communications Decency Act, computer users
and free speech activists vehemently opposed the legislation. Those opposing the Communications Decency Act questioned the
constitutionality of a statute regulating indecent non-broadcast
speech.

B. Protection of Children from Computer Pornography Act of 1995

Similarly, many have criticized the Protection of Children from
Computer Pornography Act for its proposed regulation of indec-
cent material. The bill, introduced by Senator Grassley on June 5, 1995, is intended to protect children without restricting adult
access to indecent material. The Protection of Children from

Senator Exon has proclaimed, "the information superhighway should not become a red
200. John Schwartz, Senate Bill to Punish On-Line Obscenity Draws Sharp Criticism,
201. See, e.g., Mike Mills & Elizabeth Corcoran, Senate Votes to Ban PC Network
"Obscenity", WASH. POST, June 15, 1995, at A1 (Communications Decency Act praised
by National Law Center for Children and Families); Carol Innerst, Anti-Porn Bill Makes
Waves in Cyberspace; Issue Centers on Internet's Status Under Law, WASH. TIMES, Mar.
7, 1995, at A4 (Communications Decency Act supported by National Coalition for the
Protection of Children and Families).
202. Marco R. della Cava, Users Abuzz over Internet Obscenity Bill, USA TODAY,
Mar. 7, 1995, at 1D; Elizabeth Weise, U.S. Computer Users Rally To Fight Decency Act,
on S. 892 Before the Senate Judiciary Committee, FED. DOCUMENT CLEARING HOUSE
CONG. TESTIMONY, July 24, 1995 (testimony of Jerry Berman, Executive Director, Center
for Democracy and Technology).
206. S. 892, supra note 204. The Act is co-sponsored by Senators Dole, Coats,
McConnell, Shelby, and Nickles. Id.
207. Regulation of Pornography, ELECTRONIC MESSAGING NEWS, Vol. 7, Issue 12,
June 14, 1995, available in Westlaw, ALLNEWS Database. The Act would amend 18
U.S.C. § 1464, which regulates broadcasting obscene language, in part, as follows:
Computer Pornography Act criminalizes transmitting, attempting to transmit, and offering to transmit indecent material to minors. It also penalizes any computer facility operator, electronic communications service provider, or electronic bulletin board service provider who knowingly or recklessly permits minors' access to indecent material.

Senators and lobbyists testifying before the Senate Judiciary

(2) TRANSMISSION BY REMOTE COMPUTER FACILITY OPERATOR, ELECTRONIC COMMUNICATIONS SERVICE PROVIDER, OR ELECTRONIC BULLETIN BOARD SERVICE PROVIDER—A remote computer facility operator, electronic communications service provider, electronic bulletin board service provider who, with knowledge of the character of the material, knowingly—

(A) transmits or offers or attempts to transmit from the remote computer facility, electronic communications service, or electronic bulletin board service provider a communication that contains indecent material to a person under 18 years of age; or

(B) causes or allows to be transmitted from the remote computer facility, electronic communications service, or electronic bulletin board a communication that contains indecent material to a person under 18 years of age or offers or attempts to do so shall be fined in accordance with this title, imprisoned not more than 5 years, or both.

(3) PERMITTING ACCESS TO TRANSMIT INDECENT MATERIAL TO A MINOR.—Any remote computer facility operator, electronic communications service provider, or electronic bulletin board service provider who willfully permits a person to use a remote computing service, electronic communications service, or electronic bulletin board service that is under the control of that remote computer facility operator, electronic communications service provider, or electronic bulletin board service provider, to knowingly or recklessly transmit indecent material from another remote computing service, electronic communications service, or electronic bulletin board service, to a person under 18 years of age, shall be fined not more than $10,000, imprisoned not more than 2 years or both.

S. 892, § 2(b)(2)-(3), supra note 204. Notably, this amendment also changes the title of this section from "Broadcasting obscene language" to "Utterance of indecent or profane language by radio communication; transmission to minor of indecent material from remote computer facility, electronic communications service, or electronic bulletin board service."

Id. § 2(a)(1).

208. S. 892, supra note 204, § 2(b)(2)(A).
209. Id.
210. Id.
211. Id. § 2(b)(3).
212. Id.
213. Id.
214. Id.
Committee on pornography on computer networks and the need for congressional action called for a more thorough examination of the computer pornography problem and user control technologies, rather than immediate government censorship of indecent Internet material. Critics of this legislation suggest that software filter technologies may offer effective solutions to the problem of children's access to computer pornography while preserving adults' right to access such material.

C. The Child Protection, User Empowerment and Free Expression in Interactive Media Study Act

While the Communications Decency Act and the Protection of Children from Computer Pornography Act would punish those who transmit indecent speech over the Internet, the Child Protection, User Empowerment and Free Expression in Interactive Media Study Act would require: (1) a comprehensive study of the appli-

216. See id.
217. See S. 314, supra note 190, § 2(a)(1); S. 892, supra note 204, § 2(b)(2)(A).
218. S. 714, 104th Cong., 1st Sess. (1995). The Act is sponsored by Senators Leahy, Kerrey, and Kohl. Id. In pertinent part, the Act reads as follows:

SECTION 1. STUDY ON MEANS OF RESTRICTING ACCESS TO UNWANTED MATERIAL IN THE INTERACTIVE TELECOMMUNICATIONS SYSTEMS.

(a) STUDY AND REPORT.—Not later than 150 days after the date of enactment of this Act, the Attorney General shall complete a study and submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report containing—

(1) an evaluation of whether current criminal laws governing the distribution of obscenity over computer networks and the creation and distribution of child pornography by means of computers are fully enforceable in interactive media;

(2) an assessment of the Federal, State, and local law enforcement resources that are currently available to enforce those laws;

(3) an evaluation of the technical means available to—

(A) enable parents to exercise control over the information that their children receive and enable other users to exercise control over the commercial and noncommercial information that they receive over interactive telecommunications systems so that they may avoid violent, sexually explicit, harassing, offensive, or otherwise unwanted material; and
cability of current laws governing the distribution of pornography to pornography distributed via the Internet;\(^\text{219}\) (2) an assessment of available resources to enforce the current laws;\(^\text{220}\) (3) an evaluation of parental control technology\(^\text{221}\) and technical means to promote the free flow of information consistent with the Constitution;\(^\text{222}\) and (4) recommendations to encourage the development and use of user control technology.\(^\text{223}\) This study would be conducted by the Department of Justice.\(^\text{224}\)

In response to Senator Leahy’s request to review the Communications Decency Act, the Department of Justice outlined potential difficulties in that bill’s enforcement.\(^\text{225}\) The Department of Justice also suggested a comprehensive review of the problems targeted by such legislation,\(^\text{226}\) thus, essentially endorsing the Leahy Amendment.

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\(^\text{219}\) Id. § 1(a)(1).
\(^\text{220}\) Id. § 1(a)(2).
\(^\text{221}\) Id. § 1(a)(3)(A).
\(^\text{222}\) Id. § 1(a)(3)(B).
\(^\text{223}\) Id. § 1(a)(4).
\(^\text{224}\) Leahy Bill on Obscenity to Be Offered as Amendment to Telecom Legislation, BNA DAILY REP. FOR EXECUTIVES, May 10, 1995.
\(^\text{225}\) Id.
\(^\text{226}\) Id.
D. The Internet Freedom and Family Empowerment Act

The Internet Freedom and Family Empowerment Act would


SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL; FCC CONTENT AND ECONOMIC REGULATION OF COMPUTER SERVICES PROHIBITED.

(a) FINDINGS.—The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent [sic] an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.—It is the policy of the United States to—

(1) promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation;

(3) encourage the development of technologies which maximize user control over the information received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) ensure vigorous enforcement of criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(d) FCC REGULATION OF THE INTERNET AND OTHER INTERACTIVE COMPUTER SERVICES PROHIBITED.—Nothing in this Act shall be construed to grant any jurisdiction or authority to the Commission with respect to economic or content regulation of the Internet or other interactive computer services.

Id. § 2.
prohibit FCC regulation of computer services\textsuperscript{228} and encourage the development of parental and user control technologies.\textsuperscript{229} The Cox/Wyden Amendment recognizes that the availability of user control technologies would allow the Internet to continue to develop and permit users to avoid offensive material.\textsuperscript{230} The House passed the Cox/Wyden Amendment by a vote of 420 to 4 on August 4, 1995.\textsuperscript{231}

The Cox/Wyden Amendment heralded support from many civil liberties groups as well as President Clinton.\textsuperscript{232} Critics of such legislation, such as the Christian Coalition, argue that independent efforts of on-line services and parents to prevent children's access to indecent material may not be sufficient.\textsuperscript{233}

III. FIRST AMENDMENT PROTECTION FOR INDECENT SPEECH ON THE INTERNET

A. Applying First Amendment Principles to Internet Functions

Sable, Rowan, Bolger, Pacifica, Wilkinson and Erznoznik demonstrate that different media enjoy different levels of First Amendment protection.\textsuperscript{234} Since these different media are analogous to different Internet functions,\textsuperscript{235} applying a single regulatory standard to all facets of the Internet—as the Communications Decency Act and the Protection of Children from Computer Pornography Act

\textsuperscript{228.} Id.
\textsuperscript{229.} Id.
\textsuperscript{230.} Id.
\textsuperscript{231.} 141 CONG. REC. H8478 (daily ed. Aug. 4, 1995).
\textsuperscript{233.} See Pearl, supra note 187.
\textsuperscript{234.} See discussion supra part I.C; see also Donald E. Lively, The Information Superhighway: A First Amendment Roadmap, 35 B.C. L. REV. 1067, 1067-69, 1079-1100 (1994) (discussing First Amendment standards applied to different media and impact of interactive nature of future media on First Amendment standards for future media). But cf. Thomas G. Krattenmaker & L.A. Powe, Jr., Converging First Amendment Principles for Converging Communications Media, 104 YALE L.J. 1719, 1721 (1995) (arguing that different communications media are not treated differently for First Amendment purposes and that separate First Amendment jurisprudence for broadcasters should be discarded).
\textsuperscript{235.} See supra part I.B.
have proposed to do—is incongruous. The similarities of Internet functions to traditional media make the cases discussed above applicable to a First Amendment analysis of indecent Internet speech. However, the interactive nature of the Internet media eliminates the privacy interest concerns that such cases sought to address. Thus, if statutes broadly regulating indecent Internet speech are evaluated under such cases and substantial privacy interest concerns no longer exist, these statutes will probably be deemed unconstitutional. Consequently, indecent speech disseminated via bulletin boards, electronic mail, and real-time conferencing cannot be constitutionally restricted in accordance with the speech limitation standard applied in the Sable telephone

236. See Note, supra note 76, at 1087 (discussing functional distinctions and interactivity of methods for communication on information superhighway); see also supra note 94 (discussing merging of technologies in future media). The Communications Decency Act would amend a statute that currently applies only to telephone usage. See 47 U.S.C. § 223 (1988 & Supp. V 1993). Thus, the bill's authors appear to incorrectly analogize the use of all facets of the Internet to the use of the telephone. See 73 AM. JUR. 2D Statutes § 188 (1974) (statutes should be considered as whole and not as "isolated fragments of law"); Steven Levy, Indecent Proposal: Censor the Net, NEWSWEEK, Apr. 3, 1995, at 53 (Communications Decency Act treats digital transmissions like phone calls). The bill demonstrates a fundamental misunderstanding of how the Internet functions. Fear of new media technologies may have encouraged some to rush to regulate speech on the Internet without first acquiring a rudimentary knowledge of the many different methods of communication on the network. See generally GARRY, supra note 93, at 139-42.

Additionally, the Internet is a global network. Elizabeth Weise, How Do You Police a System When You Don't Know What it Is?, S.F. EXAM., Mar. 6, 1995, at D1; Journalists Talk About Cyberspace, Crime and Culture, Charlie Rose, JOURNAL GRAPHICS TRANSCRIPTS, Feb. 21, 1995, Transcript # 1318-2 (11:00 p.m. ET) ("the Internet has the power to export the First Amendment"). Thus, the U.S. government's unilateral imposition of strict speech restrictions may hinder the United States' participation in the global information exchange. See Weise, supra.

237. See supra part I.B.


239. See supra note 93 (noting that interactive media allow users to control more effectively information they receive).

240. See supra text accompanying note 108.

241. Id. The invasion of substantial privacy interests is necessary in order to constitutionally regulate indecent speech. Id.
case, the Rowan and Bolger mail cases, the Pacifica broadcasting case, the Wilkinson cable case, and the Erznoznik film case.

1. Electronic Bulletin Boards

As discussed above, electronic bulletin boards are somewhat analogous to broadcasting, cable, public fora, and telephone. Therefore, Pacifica, Wilkinson, Erznoznik, and Sable are relevant in defining the parameters of the First Amendment protection available to indecent speech posted on an electronic bulletin board.

While electronic bulletin boards bear certain similarities to broadcasting, electronic bulletin boards do not have the characteristics enumerated in Pacifica which make broadcasting a unique medium whose speech is subject only to limited First Amendment protection. Without these characteristics, indecent electronic bulletin board speech does not come within the ambit of Pacifica's narrow holding. Thus, Pacifica's restriction on indecent broadcast speech would probably not extend to indecent electronic bulletin board speech.

Computer bulletin board systems' similarities to cable systems make the court's reasoning in Wilkinson applicable to an evaluation of electronic bulletin boards' constitutional standing. Like cable users, the significant control which electronic bulletin board users exercise on the receipt of information negates the need for government regulation to protect electronic bulletin board users' privacy interests. Thus, indecent electronic bulletin board speech would be constitutionally protected under a Wilkinson analysis.

Since electronic bulletin board users and recipients of commu-

243. See supra note 157 (discussing characteristics of broadcasting).
244. See supra note 157.
245. See Pacifica, 438 U.S. at 750 (emphasizing narrowness of Court's holding).
247. See supra note 62 and accompanying text.
ication in public settings have similar privacy interests, the Erznoznik analysis is also relevant. Imposing criminal liability on the bulletin board user who posts an indecent message would be analogous to prosecuting the projector of a film containing nudity in Erznoznik. Like the film projector, an electronic bulletin board user can put indecent material in public view. However, just like the persons on public streets viewing the films containing nudity in Erznoznik, a bulletin board user viewing indecent material has a limited privacy interest. Thus, under Erznoznik, the limited privacy interests of a bulletin board user who views the indecent material, and the ease with which the offended viewer could avert his or her eyes, do not justify government restrictions on indecent bulletin board postings. Hence, indecent bulletin board postings would probably be constitutionally protected.

Sable is also relevant to a First Amendment analysis of computer bulletin board speech. In Sable, the Court allowed indecent speech to flow over telephone lines. As previously discussed, a telephone call is far more intrusive than a visual message, such as a bulletin board posting or electronic mail, due to a telephone call's highly confrontational nature. Therefore, since the Supreme Court did not uphold a prohibition for indecent speech transmitted by a highly intrusive phone communication, it is highly unlikely

249. See supra text accompanying note 72.
251. See supra note 70 and accompanying text.
252. Erznoznik, 422 U.S. at 206-07.
253. See supra text accompanying note 72.
254. See Cohen v. California, 403 U.S. 15, 21 (1971) (holding that where persons with limited privacy interests can avoid communication "simply by averting their eyes," communication cannot be prohibited by government).
255. See Sable Communications v. Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989); supra text accompanying note 149.
256. See supra note 81 and accompanying text.
257. Sable, 492 U.S. at 131. Sable can be distinguished because it involved a section of 47 U.S.C. § 223 which prohibited indecent commercial speech. See supra note 141. However, as discussed earlier, commercial speech is less protected than noncommercial speech. See Bolger, 463 U.S. at 64-65. Therefore, if the Court will protect indecent commercial speech, it should be even more careful to protect indecent non-commercial speech.
that it would uphold a similar restriction for messages transmitted via a less intrusive computer bulletin board system. Thus, a statute restricting indecent bulletin board postings is likely to be unconstitutional.

2. Electronic Mail Systems

Since electronic mail functions most similarly to a postal mail system,\textsuperscript{258} \textit{Rowan} and \textit{Bolger} provide the appropriate context for a First Amendment analysis of this medium. Both \textit{Rowan} and \textit{Bolger} stressed the importance of the individual’s right to decide what physical mailings could enter the home.\textsuperscript{259} Analogously, electronic mail recipients should have the right to decide for themselves what kind of speech enters their homes.\textsuperscript{260} A statute which prohibits the computer transmission of indecent speech does not provide the recipient of indecent electronic mail with the option of accepting or refusing the speech before the sender is punished.\textsuperscript{261} Instead, it criminalizes all indecent speech sent by electronic mail.\textsuperscript{262} Thus, the Court would likely find the statute unconstitutional as applied to indecent electronic mail.

3. Real-Time Conferencing

Since real-time conferencing has both telephone and mail characteristics, the \textit{Sable}, \textit{Rowan}, and \textit{Bolger} analyses apply to this form of electronic transmission. The \textit{Sable} Court held that indecent commercial telephone messages were constitutionally protected, since the recipient himself had to call a phone number to re-

\textsuperscript{258} See Becker, supra note 78, at 805 n.14; \textit{supra} text accompanying note 78.

\textsuperscript{259} See \textit{supra} text accompanying notes 129 and 136.


\textsuperscript{261} Compare \textit{Rowan} v. United States Post Office Dep’t, 397 U.S. 728, 737 (1970) (holding that, upon request by unreceptive addressee, government is permitted to prohibit sender from mailing further material to that addressee) with \textit{Bolger} v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983) (holding that government may not unilaterally prevent sender from mailing to protect recipients who might potentially be offended unless objectionable speech is unavoidable).

receive the messages. Real-time conferencing, however, is not the same kind of utility as a "dial-a-porn" service. The recipient of a real-time message does not necessarily seek that message. Therefore, Sable may only apply where the real-time recipient sought the indecent message before receiving it.

Real-time conferencing's similarities to postal mail provides a stronger analogy for First Amendment analysis. As with electronic mail, Rowan and Bolger seem to prohibit government from shutting off communication to real-time recipients of indecent speech. However, real-time conferencing's similarities to telephone communication make the analysis more complicated. Consistent with the Court's speech limitation standard, the immediacy of the real-time recipient's confrontation with the real-time caller may indicate that the real-time recipient has a lower intolerability threshold than an electronic mail recipient. The real-time recipient has more difficulty avoiding the offensive communication. This avoidance burden, however, is significantly less than that of a telephone call recipient because real-time conferencing is a visual medium; the real-time conferencer cannot hear the voice, tone or inflection of the caller. Although the real-time recipient bears more of an avoidance burden than the electronic mail recipient, the real-time burden is still an acceptable burden to bear. Real-time conferencers can easily avert their eyes or turn off the computer. Therefore, a statute restricting indecent speech is probably unconstitutional as applied to real-time conferencing.

Interactive media allow users to exercise control over the information they receive. The above cases demonstrate that the government can only constitutionally regulate indecent speech in interactive media to the extent that user control would not allow the user to effectively avoid the communication and maintain the user's privacy interest. The interactive nature of Internet functions limits

264. See RHEINGOLD, supra note 29, at 179; supra text accompanying note 84.
265. See supra text accompanying notes 259-62.
266. See supra note 88 and accompanying text.
267. See supra note 88 and accompanying text.
268. Berman & Weitzner, supra note 92, at 1632.
computer users' privacy interests and allows users to avoid unwanted communication. Thus, statutes which restrict indecent Internet speech, without considering the Internet's different functions and interactive nature, are presumably unconstitutional.

B. Alternative Solutions Exist To Minimize Children's Access to Indecent Material

Statutes regulating Internet media content are not necessary to minimize children's access to indecent or harmful speech. Where user control technologies allow the user to identify the content of the transmission and to screen certain content, there is no need for government interference.269

Today, many options exist which protect children and allow adults to freely decide what kind of speech flows into their home.270 First, many computer bulletin boards are explicitly labelled to make users aware of their contents.271 This gives willing recipients the right to receive communication while allowing unwilling recipients the opportunity to avoid the communication.272 Thus, the decision to receive the speech on the Internet is left to the individual, not the government.

Second, existing laws may apply to certain forms of Internet communication. For example, laws that prohibit the dissemination of child pornography apply to pornography distributed via the Internet.273 Similarly, computer bulletin board users may also be

269. See DONALD E. LIVELY, ESSENTIAL PRINCIPLES OF COMMUNICATIONS LAW 263-64 (1992). The constitutional concept of privacy pertains to intrusions into a protected sphere as well as to notions of personal autonomy. Id. Placing the focus of the privacy concept on individual choice to avoid or welcome a particular communication, rather than on government protection from unwanted intrusions, comports more with the U.S. constitutional value system that favors autonomy rather than "authoritative selection." See id. at 264.


272. See John Bebow and Dave Farrell, Free Speech vs. Lawless Cyberspace: A New Conflict, GANNETT NEWS SERVICE, Feb. 15, 1995, available in Westlaw, ALLNEWS Database (stating that by considering Communications Decency Act, Congress is acting as though it is regulating mass media and not medium in which users can control information they receive).

Any person who . . . knowingly makes, prints, or publishes, or causes to be
liable under federal provisions prohibiting distribution, transportation and publishing of obscene materials.\textsuperscript{274} Third, new technology, such as software filters and special services that provide a "clean" version of the Internet to younger users, would protect children while allowing adults to access their choice of material.\textsuperscript{275} Various interest groups could design rating systems which, if parents subscribed, would limit children’s access to material if it met a certain rating.\textsuperscript{276} For example, high-technology companies which are lobbying to defeat any government censorship measure have formed a consortium to create the technology standards to filter offensive material from the Internet.\textsuperscript{277} This group, the Platform for Internet Content Selection (PICS)\textsuperscript{278} seeks to develop technology standards so that all filtering programs would have certain common software codes,\textsuperscript{279} and to create a movie-like rating system to rate Internet content.\textsuperscript{280} In fact, many software companies already sell filtering software.\textsuperscript{281}

\begin{itemize}
\item[(A)] made, printed, or published, any notice or advertisement seeking or offering—
\begin{itemize}
\item any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . . ;
\item participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct.
\end{itemize}
\end{itemize}

\textit{Id.}


\textsuperscript{274} Jensen, \textit{supra} note 46, at 228.
\textsuperscript{275} Levy, \textit{supra} note 236.
\textsuperscript{278} Laurent Belsie, \textit{Keeping ‘Cybersmut’ Beyond Kids’ Reach}, CHRISTIAN SCI. MONITOR, Sept. 11, 1995, at 4.
\textsuperscript{279} Lohr, \textit{supra} note 276.
\textsuperscript{280} Belsie, \textit{supra} note 278.
Lastly, parents can actively guide and supervise children's use of the Internet.\textsuperscript{282} Adults should help children explore the available resources on the Internet and select appropriate material.

Thus, many alternatives to statutes restricting indecent Internet speech maintain adults' personal autonomy while protecting children from indecent speech. Where such effective alternatives exist, statutes severely restricting indecent Internet speech are unconstitutional because they are not the least restrictive means of achieving the government's objective to protect children from offensive material.\textsuperscript{283} Unlike statutes regulating indecent computer network speech, statutes which encourage the development of filtering technology comport with First Amendment ideals of free speech and personal autonomy.\textsuperscript{284}

**CONCLUSION**

As electronic fora and computer-based expression become more prevalent, traditional modes of expression may become impractical and inefficient.\textsuperscript{285} Constitutional principles, however, must hold fast under "merely technological transformations."\textsuperscript{286} Although the core First Amendment principles of freedom of speech and press make freedom of expression a steadfast rule,\textsuperscript{287} "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."\textsuperscript{288} Each medium presents its own peculiar problems, and so, the standards applied to that medium

\begin{itemize}
\item \textsuperscript{282} Stone, supra note 270; Levy, supra note 236. Parental autonomy is a constitutionally protected interest. Lively, supra note 269, at 263.
\item \textsuperscript{283} See Sable, 492 U.S. at 126.
\item \textsuperscript{284} See Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2458 (1994). "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." Id.
\item \textsuperscript{285} Taviss, supra note 50, at 782-83.
\item \textsuperscript{286} Tribe, supra note 238, at 20. "[F]idelity to original values requires flexibility of textual interpretation." Id. at 21.
\item \textsuperscript{288} See id. at 268 (quoting Red Lion Broadcasting v. FCC, 395 U.S. 367, 386 (1969)).
\end{itemize}
must be well-suited to address that medium’s unique characteristics. Simply transferring one set of standards from one medium to another without careful analysis will limit technological progress and infringe on freedom of expression.

The proposed legislation regulating indecent speech on the Internet is not narrowly tailored and demonstrates a lack of understanding of the many vehicles for expression on the information superhighway. Since alternative solutions exist which would preserve the Internet as an interactive marketplace of ideas and maintain the rights of individuals to exercise personal autonomy, the government should help implement these solutions rather than impose speech restrictions.

As the Court stated in Bolger, "The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." The Court’s command should not be disregarded just because, today, the mailbox is electronic.

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