1-1-1996

Virtual Prostitution: New Technologies and the World's Oldest Profession

David Cardiff

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation


This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
Virtual Prostitution: New Technologies and the World's Oldest Profession

by
David Cardiff*

Table of Contents
I. Outline of the New Technologies ........................................ 874
II. A Brief History of the Laws Relating to Pornography .... 877
   A. Pornography in General ........................................ 877
   B. Dial-a-Porn Cases ............................................ 882
   C. Pornography as Prostitution Cases .......................... 887
III. Arguments For and Against Aggressive Porn Regulation ........................................ 889
    A. The Arguments for Stricter Regulation ................... 890
    B. The Arguments for Less-Strict Regulation ............. 893
IV. The New Technologies—Freeing the Pig from the Parlor ........................................ 895
    A. Applying a Nuisance Approach to the New Technologies ........................................ 895
    B. The Nuisance Approach and the CDA .................... 897
V. Conclusion ........................................................................ 900

Introduction

The age of interactive video on demand (VOD) is nearly upon us.\(^1\) Several communities across the country have already served as test sites for the new technologies that will provide VOD.\(^2\) While the

1. Video on demand technologies will allow consumers to download entertainment and educational programming directly into their homes. See infra note 10. The technologies will offer several advantages over traditional methods of receiving entertainment and educational programming, the primary advantages being convenience and increased choice. See infra notes 21-32 and accompanying text. Numerous different technological approaches for distributing and receiving such video programming are either currently available, or likely to be so in the near future. See Robert Corn-Revere, New Technology and the First Amendment: Breaking the Cycle of Repression, 17 Hastings Comm/Ent L.J. 247, 249-51 (1994). It is possible to distribute the programming over fiber optic telephone cable, existing cable-TV cable, satellite transmission, and microwave transmission. Id.

VOD can also be delivered over hybrid fiber/coaxial cable architectures. See Michael R. Niggli & Walter W. Nixon, III, A Serendipitous Synergy: Why Electric Utilities Should Install the Information Superhighway, 7 Electricity J. 26, 29 (Feb. 1994). This opens up the field of VOD delivery to utility companies as well as phone and cable companies. See id. A number of tests have been run using such an architecture. See Steven R. Rivkin, While the Cable & Phone Companies Fight . . . Look Who's Wiring the Home Now, N.Y. Times, Sept. 26, 1993, §6 (Magazine), at 46. Telephone companies, including Pacific Bell and Ameritech Corp., are also establishing hybrid fiber/coax setups for VOD delivery. See Lewis H. Young, Exploring the Interactive Market: Confusion, Confusion, Confusion, Electronic Bus. Buyer, Dec. 1, 1993, available in 1993 WL 2954662.

It may also be possible to provide VOD over existing twisted pair telephone wiring using high speed modems and compression/decompression technology, though at present the compression/decompression technology is not sufficiently sophisticated. Telephone Interview with Peter Ham, Software Engineering Manager for Sybase, Inc. of Emeryville, California (Mar. 1, 1996) [hereinafter Telephone Interview with Peter Ham].

VOD actually comes in two forms: (1) Pure VOD; and (2) near VOD (NVOD). Telephone Interview with Peter Ham, supra note 1. The difference between the two primarily has to do with bandwidth requirements. VOD is essentially point-to-point communication between a publisher (service provider) and a customer. Because it is point-to-point, VOD greatly increases the need for bandwidth. NVOD, by contrast, is point to multi-point between the publisher and several customers. Consequently, less bandwidth is required. Id.

2. The following communities have served, or are about to serve, as test sites: Fairfax County, Virginia; Orlando, Florida; Montgomery County, Maryland; Baltimore, Maryland; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; Virginia Beach, Virginia; northern New Jersey; Cerritos, California; and Denver, Colorado, with many other installations well into the planning stages. See Mike Mills, Bell Atlantic to Expand Video on Demand Test, Wash. Post, Jan. 23, 1995, at F3; Paul Farhi, Wiring up Washington, Wash. Post, July 4, 1994, at F1; Paul Farhi, Bell Plans Interactive Video Service in Six Markets, Wash. Post, May 20, 1994, at F2; John Lippman, 'TV of Tomorrow' Is a Flop Today, Wash. Post, Sept. 1, 1993, at F1; Paul Farhi & Elizabeth Corcoran, Interactive in Orlando, Wash. Post, Dec. 13, 1994, at A1. Sybase, Inc., of Emeryville, California, is one of the leading software developers for interactive television (ITV) systems. See Sybase Technology Demonstrated to Senate Commerce Committee, M2 Presswire, Dec. 11, 1995, available in 1995 WL 10872541. Sybase ITV software has been used in ITV tests in
technology is still far too expensive for broad-based consumer use,\(^3\) it is likely that most communities will have access to these services within the next decade or so.\(^4\) Despite the glowing promises of convenience and increased choice offered by video on demand, this portion of the information superhighway may be fraught with troublesome moral and policy issues. The new technologies are certain to refocus a contentious moral and legal debate about pornographic communications.\(^5\) Because the new technologies will combine audio

3. According to Ed McCracken, chairman of Silicon Graphics, Inc., of Mountain View, California, the technology is still "at least ten times too expensive." Quoted in Farhi & Corcoran, supra note 2, at A1 (quoting Ed McCracken).

4. Id.

5. Pornography and new media technologies often go hand in hand. And where pornographers go, prosecutors and legislators are sure to follow. On July 28, 1994, Robert and Carleen Thomas, a married couple from Milpitas, California, became the first persons to be convicted for distributing pornography over the Internet. See David Landis, Sex, Laws & Cyberspace, USA TODAY, Aug. 9, 1994, at D1.

In addition to federal prosecutors, Congress and the President have recently gotten into the act. On February 8, 1996 President Clinton signed into law the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996). This massive piece of legislation (710 pages), the primary purpose of which is to deregulate the American telecommunications industries, includes a section (Title V, section 501 et seq., amending title 47 U.S.C. section 223) entitled the Communications Decency Act of 1996 (CDA). The CDA, sponsored by Senator Jim Exon (D. Neb.), is meant to respond to the perceived "problem" of indecent and obscene communications on the internet.

Furthermore, the federal government has not been alone in attempting to regulate the transmission of pornography via new technologies. Numerous states have enacted regulations in this area, and many more are in the process of doing so. In January, 1996, "the New York State Legislature passed a bill that would penalize the transmission of indecent material to minors using a computer system." Legal Matters: Battle Over "Cyberporn" Moves to State Level, INTERNET WEEK, Feb. 5, 1996, available in 1996 WL 7055470. Nine states (Connecticut, Georgia, Illinois, Kansas, Maryland, Montana, New Jersey, Oklahoma and Virginia) had passed such laws by early 1996. Leslie Miller, State Laws Add to Net Confusion, USA TODAY, Feb. 5, 1996, at 6D. Four others (Maryland, North Carolina, Pennsylvania, and Virginia) have such statutes pending. See Legal Matters: Battle Over "Cyberporn" Moves to State Level, supra. At present, it is not clear to what extent the CDA may preempt these state provisions. "'The federal pre-emption is not very strong in [the CDA],' "[says] Steven Cherry of Voters Telecommunication Watch. Thus, instead of one law, [internet] users may have to contend with many at once." Id.

Finally, in addition to the state and national laws, there is "a patchwork of individual countries' laws to deal with." See Miller, supra (quoting America Online attorney William H. Burrington). The effect of other countries' pornography laws on U.S. citizens was illustrated in December, 1995, when CompuServe, in response to pressure from German authorities prosecuting a Bavarian pornography case, announced that it was blocking access to more than 200 sexually-explicit Internet newsgroups. See James Coates, CompuServe Yields to Demand for Limitation; Germany Opposes Explicit Newsgroups, CHI. TRIB., Dec. 29, 1995, at 1; Tom Abate, Access Denial Alarms On-Line Users; CompuServe Action Widely Lamented, S.F. EXAMINER, Dec. 30, 1995, at A1.
and video with interactive capabilities, this debate will likely be far more intense than that which centered on the dial-a-porn industry in the 1980s.\(^6\)

Just as the development of mass announcement systems via "976" numbers in the early 1980s\(^7\) fostered the development of the phone sex industry,\(^8\) new technologies that allow video on demand, and particularly interactive video, are likely to generate a potentially lucrative new forum for the sex trade. Unlike the mere audio transmissions available on traditional phone systems, the new technologies will offer services combining aspects of phone, video, and cable TV communications.\(^9\) The home entertainment center of the not-too-distant future is likely to offer viewers an electronic, menu-controlled interface through which individuals can access various programs for viewing from a variety of archival databases.\(^10\) If the marketplace alone is to control, these services will include programs and services specializing in erotica.\(^11\) As with other technological

---


7. See Maretz, supra note 6, at 497.


10. "[A] switched video network will expand the possibilities for diversification of programming ad infinitum. [Regional telephone companies] will be able to offer individual viewers a potentially infinite choice of programming that can be ordered at any time. The viewer will simply dial a computer data bank, and the program will be delivered over the network to the viewer's home. Infinity will replace scarcity." Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1082 (1994) [hereinafter *The Message in the Medium*]; see also infra notes 19-26 and accompanying text.

developments that have produced new fora for the dissemination of erotica, the marketplace will not be the sole player in determining availability. Government, at all levels—local, state, federal, and international—will inevitably play a major role.\(^\text{12}\)

The combination of these new technologies with pornography raises important legal issues implicating the First Amendment\(^\text{13}\) as well as the privacy and autonomy rights of consumers.\(^\text{14}\) Traditionally, the law has drawn distinctions both between obscenity and indecency\(^\text{15}\) as well as between the levels of First Amendment protection provided to the various media.\(^\text{16}\) This Note will analyze the current state of the law which relates to services which are analogous to those offered by the new technologies. It will recommend appropriate steps that can be taken to effectively regulate these new technologies while simultaneously protecting the First Amendment rights, as well as the privacy and autonomy interests, of viewers and service providers. Section I will outline the capabilities of the developing technologies in regard to pornographic communications. Section II will provide background concerning the relevant law in this area, with a primary

---

12. See Landis, supra note 5. With the development of the Internet, it is also important to realize that the regulation of pornography can no longer be considered purely a local, state or national concern. The Internet allows for world-wide inter-connectivity, and thus for relatively fast and easy inter-continental traffic in pornography. This opens the door to attempts at inter-continental prosecution of pornographers.


14. See Cleary, supra note 13, at 517-19; Lynn, supra note 11, at 113-14.


focus on dial-a-porn and pornography-as-prostitution cases. Section III will outline the general arguments for and against increased regulation of pornography. Section IV will analyze how the new technologies fit the existing legal doctrine, and will also briefly analyze how the recently enacted Communications Decency Act of 1996 fits into the broader legal doctrine. This Note will conclude by suggesting that the new technologies themselves may provide the answers to many of the concerns that traditionally have led to efforts to restrict the dissemination of pornographic communications; it will also suggest that privacy and autonomy interests—rather than the more traditional First Amendment focus—may represent the most compelling argument against aggressive regulation of electronically-disseminated pornography.

I

Outline of the New Technologies

Video on demand can be provided by a variety of different apparatus.\(^ {17} \) Regardless of the physical apparatus that is the selected means of transmission, the various delivery systems are likely to share many similar characteristics.\(^ {18} \) Of significant relevance to this discussion, most delivery systems will be capable of providing sophisticated blocking and selection services to allow consumers both a choice of programming and the ability to restrict access to certain programming options.\(^ {19} \) Of equal relevance, the new technologies will offer a truly sophisticated level of interactivity.\(^ {20} \)

17. See supra note 1 and accompanying text.

18. See, e.g., Farhi & Corcoran, supra note 2. Most delivery systems will allow, at a minimum, a simulation of VCR technology. They will, for example, allow replay, stop, fast-forward, etc. See also Corn-Revere, supra note 1, at 249-51.

19. To the extent that the new technology allows consumers to select from archival databases, the current world of network and cable television will be dramatically altered. Much as home computer users select from software and CD-ROM packages, entertainment consumers of the near future will be able to select programming packages and limit their universe of entertainment to the options that they have selected. The tests of VOD technology that have been performed using Sybase's software technology indicate that VOD will support a wide variety of entertainment choices, including videos, TV re-runs, and numerous other options. Telephone interview with Peter Ham, supra note 1. These choices have been made available to test-site viewers through the use of a graphical-user-interface involving an on-screen (TV) display with text, icons, and realistic pictures, accessed through a hand-held remote control device. Id.

To the extent that the new technologies will mimic aspects of current telephone or cable system technologies, consumers will be able to block or screen out unwanted programming. See
The most promising technologies, in the long-run, will be those offering viewers the greatest freedom of choice. These will more closely resemble what one finds on the personal computer systems of today than what one finds on current TV networks and cable systems. Consumers will be able to buy or rent not just the programming options, but the individual programs that they most desire. A viewer who wishes to watch only certain episodes of Monty Python's Flying Circus or Saturday Night Live, for instance, will be able to use an on-screen menu to select particular episodes from an archival database, and download them in a matter of moments.

When combined with blocking and selection technologies, such a menu system will make for a vastly different viewer than today's average couch potato. Rather than taking what is given, tomorrow's cyber-viewer will be able to comprehensively select what is available for his or her household. Those viewers who, for example, wish to restrict access to premium movies or erotic video will be able to:

---


Such blocking technology has already found a home on the Internet. At least four software programs are available that allow parents to block or screen undesirable internet sites: Net Nanny, Surfwatch, Cybersitter and Cyber Patrol. Ian Haysom, Computer Program Turns Parents into Internet Censors, Ottawa Citizen, Feb. 15, 1996, at C6. Blocking devices have also been made available for Sybase's ITV tests, through, for instance, the use of personal-identification numbers (PIN's). Telephone Interview with Peter Ham, supra note 1.

Parents also can control the VOD content available to their children by making their PIN's unavailable to their children, or by selecting different PIN's for various service providers, and only making available to their children the PIN's that the parents feel are appropriate. Id.


21. Bruce Ryon, an analyst for Dataquest, Inc. in San Jose, California who has studied consumer demand in this area, observes: "People want control of what comes into their homes, . . . [t]hey want to control what they see and what is entertaining them." Young, supra note 1.

22. One possible model for the home entertainment interface of the near future is the personal computer graphical user interface (GUI) (e.g., an Apple Macintosh or PC running Windows). The GUI model is the basic approach taken by Sybase. See supra note 19.

23. For example, cable channels.

24. See Hammond, IV, supra note 19, at 190-91. ("Consumers within a particular group, class, race, industry or religious sect can have their own programs, mini networks, and data bases specifically designed to meet their needs, beliefs, and interests.") (referring to M. Ethan Katsh, The Electronic Media and the Transformation of Law 103 (1989)). This is no longer merely theory. Such choices have already been made available to consumers in various test markets. See supra note 2; infra note 32.

25. Either via a computer screen or TV screen, depending upon the technology that is employed. (There is an ongoing debate as to which platform—TV or computer—will ultimately dominate the ITV market.) See Young, supra note 1.

(1) have the movies available, but choose to "lock them out" at particular times or for particular users; or (2) choose not to have the movies available at all.28 Such options will be particularly popular with parents who wish to limit their children's viewing options in order to economize or to insure that the children do not watch "inappropriate" programming.29

Another important and related characteristic that will be shared by these new technologies is interactivity.30 The mere act of selecting from a menu-based archival database of entertainment (and other) programming, of course, represents a degree of interactivity. Beyond this level, however, lie more sophisticated strata on which the consumer will be able to interact with others and with the technology itself. One basic example of a semi-sophisticated level of interactivity is video-phone technology, which is currently available in several markets.31

As these technological advances progress, it is certain that purveyors of sexually-explicit materials will be included within the milieu of electronic publishers seeking an audience in this brave new interactive world.32 Sexually-oriented works that are—and will be—disseminated over the new communications media range from the not-even-indecent-by-virtually-anyone's-standard to the obscene-by-even-the-most-liberal-First-Amendment-supporter's-standards.

In short, just as the development of Mass-Announcement-Services (MAS) telephone system technology in the 1980s led to a burgeoning of the Dial-a-Porn trade, interactive VOD technologies will inevitably lead some publishers to use these new technologies to satisfy the demand for pornography33 by providing on demand video

27. This could be achieved in numerous different ways, including the use of PIN's, passwords, voice-recognition systems, finger-print ID's, or more traditional forms of parental supervision.
29. On the issue of parental concern over their children's television viewing diet, see Peterson, supra note 6, at 2025-27.
30. See supra notes 10 and 19.
31. The video-phone may be the most obvious example for interacting with others; as for interacting with the technology itself, the most obvious example may be interactive video games.
porn, as well as more sophisticated pornographic services. Because these new technologies will necessarily involve a blurring of the traditional categories of information providers, and because pornographic publishers are certain to seek access to these potentially lucrative technologies, this Note will next examine the existing legal doctrine in related areas in order to develop a framework for analyzing what an appropriate legal and regulatory response to these nascent problems should look like.

II

A Brief History of the Laws Relating to Pornography

A. Pornography in General

The United States has vast experience in regulating—and often in attempting to prohibit—pornographic communications. Efforts have been made at both the state and federal levels, and have involved administrative agencies, courts, legislatures, and executive branch committees. As Lori Douglass Hutchins has pointed out, such efforts can be broken down into several broad categories: (1) obscenity statutes; (2) public nuisance laws; (3) zoning ordinances; (4) civil rights legislation; and (5) laws dealing with pimping, pandering, and prostitution.

The rationales put forth for all these varied efforts at restricting pornography have been multitudinous. For some, the primary

34. To begin with, the services offered may not differ much from what is offered on pay cable currently, such as the Playboy Channel.

35. The services that will be technologically feasible are likely to be extraordinarily comprehensive, and will include, among other things, a merger of the video phone technology with the dial-a-porn economic mentality to create a potential for—at one extreme level—an online voyeuristic dial-a-prostitute service. See, e.g., supra note 11. Under such a system, a pornography consumer will be able to dial a video phone dial-a-porn service and request that the actors and actresses who answer engage in particular sex acts for the caller to watch.

But that will not represent the only type of service available. Other examples would be: (1) private (not for profit) video phone "sex" between consenting adults; (2) downloaded pornographic movies and still images; (3) virtual sex games and simulations (See, e.g., Susan Etta Keller, Viewing and Doing: Complicating Pornography’s Meaning, 81 GEO. L.J. 2195, 2203 & n.39 (1993)); and (4) sex therapy workshops. The above list is speculative and far from comprehensive.

36. See Corn-Revere, supra note 1, at 260-62; see generally De SOLA POOL, supra note 9.
37. See Lynn, supra note 11, at 27-37; Hutchins, supra note 33, at 978-88.
38. Hutchins, supra note 33, at 978-94.
39. See infra Section III.
argument is the protection of minors. For others, the primary concern is the exploitation of women. Still others are concerned about the problem of urban blight that often accompanies porn emporiums. Some have articulated a concern that pornography leads to crimes of violence. Lastly, there is a generalized concern about the negative impact of pornography on society's overall structure of morality.

Whatever the reasons that are put forward, the net result of all the regulations, statutes, and case law in the area of pornography is a haze. The Supreme Court has been willing to extend some protection, usually based on First Amendment concerns, to producers and consumers of pornography, but that protection has often been severely limited.

The general standard for pornography, as articulated by the Supreme Court, is that indecent communications are protected under the First Amendment, whereas obscene communications are not.


42. See Paris Adult Theatre v. Slaton, 413 U.S. 49, 58 n.8 (1973); Loewy, supra note 41, at 485-87.


44. See, e.g., Gianni P. Servodidio, The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment, 67 TUL. L. REV. 1231, 1255 (1993); see generally Collins & Skover, supra note 11.

45. See generally Loewy, supra note 41.

46. Id. at 493.

47. See Sable Communications v. FCC, 492 U.S. 115, 126 (1989)("Sexual expression which is indecent but not obscene is protected by the First Amendment . . . ").

48. See Miller v. California, 413 U.S. 15 (1973). Miller established the following test, commonly referred to as the "community standards" test, for determining whether a given communication is obscene: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically
Distinguishing that which is obscene from that which is indecent can, however, be difficult. The Supreme Court, in *Miller v. California*, established a shifting standard of relativity for determining what is obscene: that which is considered obscene, and thus not constitutionally protected in one community, may not be considered obscene, and therefore may receive constitutional protection, in another. Thus, an individual’s constitutional rights in the area of sexually-oriented communications depend in part upon the local community in which that person engages in the act of disseminating or receiving that communication. As a consumer of erotica, one’s constitutional rights further depend not just upon the community in which one is consuming, but also upon the exact location within that community. For example, the Supreme Court held in *Stanley v. Georgia* that one cannot be prosecuted for viewing an obscene publication if it is done in the privacy of one’s own home.

Defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” Davis, supra note 8, at 626 (quoting *Miller*, 413 U.S. at 24) (citations omitted). As E. Edward Bruce has noted, however, the Supreme Court’s articulation of a constitutional law of obscenity truly began with *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), a case that actually involved no obscenity—or at least no sexually-oriented materials. *Chaplinsky* was a “fighting words” case. But the *Chaplinsky* Court, in dicta, listed other words, including the “lewd and obscene” that, like fighting words, go beyond the protection of the First Amendment because they “are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” E. Edward Bruce, Comment, *Prostitution and Obscenity: A Comment Upon the Attorney General’s Report on Pornography*, 1987 Duke L.J. 123, 124 (1987) (quoting *Chaplinsky*, 315 U.S. at 572).

50. *Id.*, at 24. It is interesting that the Constitution, which is supposed to apply equally to all U.S. citizens, would, in this one particular area, provide unequal rights and protections to citizens depending upon the particular community in which they happen to be communicating. It seems antithetical to the very nature of a written constitution that it could possibly be interpreted to support such a theory of relativity of rights.
51. Under this standard, one would generally expect to have greater constitutional rights in San Francisco’s Tenderloin district than one would in a small Southern Bible Belt town, regardless of whether one were the publisher or consumer of the sexually explicit materials.

Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one’s own home. If the First Amendment means
Whereas obscene publications receive no constitutional protection, indecent publications are protected by the First Amendment, though they are not absolutely free from regulation. Of course, it should be clear that one has no way of knowing for certain, ahead of time, whether the sexually-oriented product will offend the community's sense of morality so as to make it obscene. In order to find out whether the product is obscene (or merely indecent) one may have to wait for a decision from a group of twelve of one's peers.

This problem of waiting for judgment by the community will become more urgent when the technology of dissemination advances. For example, when one is operating a nude dance club in a particular community, it may seem fair for the community to have input as to whether such an establishment violates the community's standards of decency. But when the technology you are dealing with involves the dissemination of information from a centralized database, wherein consumers from various different communities dispersed across the country (and around the world) actively select the sexually-oriented materials from the database, the relevancy of community standards is far more tenuous. Nevertheless, the standards that have been handed down by the Supreme Court remain in force, and it is important to realize that those standards have been applied even where there has not been a close fit to reason.

Jurisprudence touching upon obscenity and indecency cuts too broadly for this Note to comprehensively cover. But even a cursory examination of the decisions reveals two overarching concerns articulated time and again by the courts: a concern for the interests of minors, and a concern with the "nuisance" aspects of pornography.

55. It may also seem fair to inquire into the issues of appropriate zoning, etc. On the other hand, it may not seem so fair to the private property owner whose livelihood is at stake.

56. See The Message in the Medium, supra note 10, at 1078-81, 1083-87.

57. For instance, in United States v. Reidel, 402 U.S. 351 (1971), the Court upheld a conviction for mailing obscene materials to adults who had consented to receive the materials. In United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973), the Court went even further, holding that a consenting adult consumer had no right to receive obscene materials in the mail, even for viewing in the privacy of the home.

These two concerns are well-illustrated by the case of *FCC v. Pacifica Foundation*.\(^6\)

In *Pacifica*, the Supreme Court held that indecent speech is entitled to constitutional protection, but that such speech may nevertheless be regulated due to the state’s compelling interest in protecting minors from exposure to indecent materials.\(^6\) The *Pacifica* decision corresponded with the Court’s long-held recognition that the state has a “compelling . . . interest in protecting minors from offensive expressions of speech in an attempt to provide for their physical and psychological well-being.”\(^6\)

Furthermore, much of the indecency regulation has been based on nuisance doctrine.\(^6\) Nuisance doctrine has been particularly applicable to pornography which is likely to impact minors.\(^6\) Thus, the FCC, “in an effort to avoid airing potentially indecent broadcasts at a time when children may be in the audience,”\(^6\) has made provisions to “channel the airing of such broadcasts to the late evening hours.” The FCC’s efforts have been based primarily on nuisance doctrine.\(^6\) As Theresa M. Sheehan has noted, given certain circumstances or contexts, the law of nuisance seeks not to prohibit particular offensive activities, but instead “to regulate or control [them] by limiting [them] to certain times of the day or night in an effort to accommodate those who wish to engage in the activit[ies], as well as those who are inconvenienced or disturbed by [them].”\(^6\)

---

59. See infra notes 63-65 and accompanying text.
61. Id. at 749-51.
63. See Hutchins, supra note 33, at 983 n.49 (quoting McKinney v. Alabama, 424 U.S. 669, 679 (1976) (Brennan, J., concurring) (“This Court has acknowledged the value . . . [of nuisance statutes to] the vexing problem of reconciling state efforts to suppress sexually oriented expression with the prohibitions of the First Amendment.”)).
64. Thus, the *Pacifica* Court quoted Justice Sutherland’s opinion in *Euclid v. Amber Realty*: “A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard . . . . We simply hold that when the [FCC] finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.” *Pacifica*, 438 U.S. at 750-51 (quoting *Euclid v. Amber Realty*, 272 U.S. 365, 388 (1926)).
65. Sheehan, supra note 8, at 352.
66. Id.
67. Sheehan, supra note 8, at 352-53 (citing *Pacifica*, 438 U.S. at 731-33). As Sheehan further notes, even after the FCC announced guidelines in 1987 for regulating indecent radio broadcasts—updating the old “Seven Dirty Words” test—the “FCC continued its reliance
rationale applied by the Pacifica Court in upholding the FCC regulations.68

B. Dial-a-Porn Cases

The dial-a-porn industry blossomed in the early 1980s.69 It was both immediately financially successful70 and instantly controversial.71 Soon after its inception, Congress responded to widespread complaints against the industry, and attempted to regulate dial-a-porn via restrictive legislation.72 Congress' approach was to make it "a crime to communicate directly, or by recording, any obscene or indecent message for commercial purposes to anyone under eighteen years of age,"73 but to provide "a defense to prosecution if the provider restricted minors' access to its messages in accordance with FCC procedures."74 The FCC implemented the Congressional scheme by promulgating regulations to "function as 'safe harbor defenses' for dial-a-porn providers."75 Under the FCC regulations, dial-a-porn providers had two options for avoiding criminal liability: (1) they could restrict their services to the hours of 9:00 p.m. to 8:00 a.m.; or (2) they could require credit card payment for the transmission of the sexually-explicit messages.76 The first restriction was directed at recorded MAS dial-a-porn messages; the second to sexually oriented live commercial telephone communications.77 The FCC reasoned that children were less likely to have access to such services during the listed hours, and also less likely to have access to credit card numbers.78
The Second Circuit reviewed the FCC regulations in three separate cases (the "Carlin Trilogy"—Carlin I, Carlin II, and Carlin III) brought by Carlin Communications, a large and successful dial-a-porn company. The court concluded that the FCC regulations amounted to content-based restrictions "because they did not apply to all 'dial-it' services, but only those delivering indecent messages." Thus, the court applied strict scrutiny, requiring that the government show that its "content based" regulations were not merely the product of a compelling governmental interest, but also that the restrictions were the "least restrictive means" to further such a compelling interest.

In Carlin I, the court struck down the FCC regulations that imposed "time channeling" because such regulations were not sufficiently necessary or "narrowly tailored." The court concluded that time channeling "did not further the Government's compelling interest because the regulations denied adults access to the service during certain hours, but the opportunity remained open for children to call these numbers during the hours in which access was available." Furthermore, the court concluded that time channeling did not satisfy the "least restrictive means" test, and instructed the FCC to examine other regulatory approaches, such as blocking and access codes.

In Carlin II, the court rejected the FCC's regulatory requirement which mandated that adult callers to dial-a-porn services obtain access codes or make payment by credit card prior to obtaining access to those services. The court held that it was not the least restrictive means available for regulating the dial-a-porn providers, reasoning that since the technology necessary to implement an access code system was not feasible at the time, such a regulation might drive the

79. Id. at 356.
80. Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) (Carlin I).
83. Sheehan, supra note 8, at 356.
84. Id. at 357.
85. Carlin I, 749 F.2d at 121.
86. Id. at 122-23.
87. Sheehan, supra note 8, at 357.
88. Carlin I, 749 F.2d at 122-23.
89. Carlin II, 787 F.2d at 856.
dial-a-porn providers out of business. The court ordered the FCC to "further investigate the feasibility of a blocking system." The court also rejected the viability of requiring decoding devices for scrambled messages, finding that such a requirement would constitute an "unfair burden" on adult consumers who wished to access the dial-a-porn services, since the consumers would have to bear the cost of the purchase and installation of the descrambling devices.

The FCC's regulations finally passed the Second Circuit's strict scrutiny test in Carlin III. In Carlin III, the court upheld the FCC regulations which "maintained the access code and credit card provisions, but [which were] amended to include two additional defenses: message scrambling and billing notification." The court held that the new regulations "did not unreasonably restrict adult access and that the compelling government interest in protecting minors could not, at this time, be served by a less restrictive means." The court did, however, direct the FCC to "consider other possibly less restrictive means of regulating dial-a-porn, such as beep-tone devices or blocking schemes, if and when they became technologically feasible."

In 1988, as a response to the Carlin III decision, Congress amended the Communications Act of 1934 by rewriting section 223 (the Telephone Decency Act), updating the regulations upheld in Carlin I. The new version of section 223 did not distinguish between communications that were obscene and those that were merely indecent; instead, it imposed an across-the-board ban on all for-profit dial-a-porn messages, whether obscene or merely indecent.

Congress' action did not withstand constitutional scrutiny for long. In Sable Communications v. FCC, the Supreme Court

90. Sheehan, supra note 8, at 358.
91. Id.; Carlin II, 787 F.2d at 856.
92. Carlin II, 787 F.2d at 853; see Sheehan, supra note 8, at 369-72 nn.151-71 and accompanying text for further information on the proposed blocking systems.
93. Sheehan, supra note 8, at 359.
94. Id. at 359-60.
95. "Beep tone devices require that a beep-tone occur at the beginning of each sexually explicit recorded message. The customer would have a device installed at [his or her] premises which would detect the beep-tone and automatically terminate the call." Id. at 360 n.82. For further information and analysis on beep tone devices, see Peterson, supra note 6, at 2043.
96. Sheehan, supra note 8, at 359-60.
97. Id.
98. Id.
VIRTUAL PROSTITUTION

invalidated the Telephone Decency Act as it applied to indecent communications, although the Court upheld it as applied to obscene communications. The Court concluded that the total ban imposed by Congress did not meet the standard of being narrowly drawn to serve a compelling governmental interest. "Instead, the legislation had reduced what adults may hear to that which is appropriate for children in violation of [adults'] First Amendment free speech rights." The Sable holding was subsequently applied, in Action for Children's Television v. FCC, to strike down similar FCC regulations in different media: radio and television broadcasting.

After Sable and Action for Children's Television, Congress again jumped into the fray, this time updating section 223 by adopting the "Helms Amendment," which required telephone companies to implement reverse blocking where technically feasible. The FCC also got involved by implementing new regulations in response to the Congressional actions. The new FCC regulations again set forth "safe harbor" defenses for providers. Furthermore, the FCC "codified the legislature’s ‘reverse blocking’ requirement . . . to make it clear that the mandatory blocking . . . is not an alternate

100. Id. at 117.
101. Id. at 126.
102. Sheehan, supra note 8, at 361.
104. The FCC adopted a rule banning all indecent broadcasts, with no “safe harbor” provisions. See Sheehan, supra note 8, at 362-66. In Action for Children's Television v. FCC, the court, relying upon Sable, invalidated these regulations under a “strict scrutiny” analysis. See id.; see also infra notes 115-116 and accompanying text.
105. Sheehan, supra note 8, at 366-67. “Reverse blocking is the process by which a telephone company will, at its central office, prevent calls from going through to specified exchanges or numbers unless the customer affirmatively requests access.” Id. at 367. Under the Helms Amendment, reverse blocking was required only in those instances when the telephone company provided billing and collection services to dial-a-porn companies; it did not apply where the dial-a-porn providers collected payment directly from the customers via credit card. Id. Furthermore, “[t]elephone companies [were] shield[ed] from prosecution for allowing an individual under eighteen years of age to gain access to a dial-a-porn message under this statute if they have acted in good faith in determining whether . . . to block or permit access to a dial-a-porn provider.”
106. Davis, supra note 8, at 642.
107. Id. The regulations contain the following “safe harbor” provisions: A dial-a-porn provider can avoid liability if it: “(1) [Notifies] the carrier of its services that it offers sexually explicit messages, (2) [requests] the carrier to specifically identify these calls on the customer's bill, and (3) [requires] the adult user of the services to pay by credit card, obtain an access code, or use a descrambler.” Sheehan, supra note 8, at 368; see also 47 C.F.R. § 64.201 (1990); Information Providers Coalition v. FCC, 928 F.2d 866, 871 (9th Cir. 1991).
defense to the FCC regulations, but must be *complied with in addition to* the FCC regulations unless the dial-a-porn provider engages in independent billing and collection."  

Shortly after the FCC promulgated these regulations, several groups challenged the constitutionality of both the Helms Amendment and the derivative FCC regulations. In *Information Providers Coalition v. FCC*, the Ninth Circuit focused primarily on the question of the constitutionality of the reverse-blocking requirement, holding that the Helms Amendment did not violate the *Sable* standard because the regulations were narrowly tailored to fit the compelling governmental interest of preventing minors from accessing indecent dial-a-porn messages.

In *Dial Information Services Corp. v. Thornburgh*, the second case challenging the Helms Amendment and the related FCC regulations, the Second Circuit held that the Amendment and regulations did not violate the *Sable* least restrictive means test. Thus, both the Second and Ninth Circuits have held that the regulatory scheme of the Helms Amendment and concomitant FCC regulations comport with First Amendment requirements.

These decisions illustrate the courts' willingness to articulate a standard that provides less-than-absolute protection for producers and consumers of communications that may be considered indecent. In applying First Amendment "strict scrutiny" analyses, courts are willing to uphold the validity of content-based restrictions when the government can articulate the compelling governmental interest of protecting minors. Under this prong of strict scrutiny, courts engage

---

109. Sheehan, *supra* note 8, at 368. If the provider does engage in independent billing and collections, it is not subject to the reverse blocking requirement. See *supra* note 8; Sheehan, *supra* note 8, at 368; see also 47 U.S.C. § 223(c) (Supp. II 1990).


111. 928 F.2d 866 (9th Cir. 1991).

112. *Id.* at 879.


114. *Id.* at 1541-43.

115. This is not the same "strict scrutiny" as is applied in equal protection analysis. As Professor Gerald Gunther has observed, equal protection "strict scrutiny" is more appropriately characterized as "fatal" scrutiny, since "true" strict scrutiny will almost inevitably lead to the invalidation of a challenged statute. See Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 8 (1972).
in an elevated scrutiny balancing test, with the balance tilted heavily, but not conclusively, towards the protection of communications.\textsuperscript{116}

\section*{C. Pornography as Prostitution Cases}

Anti-obscenity laws, though popular at present, are not the only available method for restricting and punishing purveyors of pornography. It has also been common for zoning laws, anti-nuisance laws, and even prostitution, pimping, and pandering statutes to be applied to pornographers.\textsuperscript{117} While the nuisance and zoning laws may still be applied to pornography transmitted through advanced communications media, the nature of the new technologies will likely diminish the usefulness of those laws in the war on pornography.\textsuperscript{118} Prostitution, pimping, and pandering laws, on the other hand, will remain logical weapons in the cyber-porn battle.\textsuperscript{119}

Prostitution laws may apply because their language is generally basic, straightforward, and relevant to the field of commercial pornography.\textsuperscript{120} Most prostitution statutes, for instance, generally

\begin{itemize}
\item \textsuperscript{116} But see Sheehan, supra note 8, at 378-80. While Sheehan concludes that \textit{Sable} (and its progeny) employed and established a strict scrutiny test, she seems to rely almost entirely upon the language the court employed (compelling interests/least restrictive means), rather than focusing on the results or even the actual analysis applied by the court. Had the \textit{Sable} court applied a rigid strict scrutiny analysis, the government regulations (e.g., the Helms Amendment) would likely not have survived because less burdensome alternatives, such as voluntary blocking and parental supervision, were available.
\item \textsuperscript{117} See Hutchins, supra note 33, at 978-94.
\item \textsuperscript{118} While it may be possible to zone out of existence a pornographic book store or movie arcade, it makes less sense, and likely will be far more difficult, to zone out of existence a pornography producer who is working the Internet. The traditional concern of zoning, \textit{i.e.}, quality and appropriate use of neighborhoods, is much less relevant when one cannot clearly tell, without undertaking extensive research, exactly who the pornography producer is, and exactly why the use is inappropriate for a given locale. A similar logic applies to nuisance law: while a porn theatre may be a nuisance in a residential neighborhood, in part because it may bring seedy characters into that neighborhood, cyber-porn keeps them at home.
\item \textsuperscript{119} See Hutchins, supra note 33, at 988-89; Bruce, supra note 48, at 134; Loewy, supra note 41, at 478.
\item \textsuperscript{120} See, e.g., \textsc{Cal. Penal Code} § 266e (West 1988). The California statute provides in relevant part: "Every person who purchases, or pays any money or other valuable thing for, any person for the purpose of prostitution as defined in subdivision (b) of Section 647 . . . is guilty of a felony." \textit{Id.} California Penal Code section 647(b) defines prostitution broadly to include "any lewd act between persons for money or other consideration." \textsc{Cal. Penal Code} § 647(b) (West 1988 & Supp. 1996). New York's statute states simply that "[a] person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee." \textsc{N.Y. Penal Law} § 230.00 (1995). Relevant sections of Oregon's statute provide as follows:
\begin{enumerate}
\item "Place of prostitution" means any place where prostitution is practiced.
\item "Prostitute" means a male or female person who engages in sexual conduct or
make it a crime to pay someone to engage in an act of sex. There is no requirement of physical contact between the customer and the prostitute. Further, there is generally no explicit requirement of physical proximity between customer and prostitute, or temporal proximity between the act requested and payment.

These statutes are likely to have tremendous relevance to the hybrid kind of dial-a-porn that the new technologies make feasible. Under traditional (audio only) dial-a-porn, a customer may request that a performer engage in a particular sex act for money, and may even believe that the performer is engaging in that particular sex act. The customer, nevertheless, lacks a method for verifying authenticity. It is left entirely to the caller's imagination. A video phone communication removes such limitations. A video phone customer could, in theory, call a dial-a-porn service that offers live interactive video fantasies, and request that performers engage in particular sexual acts in exchange for payment by credit card. If the performers actually perform the sex acts, this situation would fit within the

---

(4) "Sexual conduct" means sexual intercourse or deviate sexual intercourse.
(5) "Sexual contact" means any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desires of either party.


Oregon law further provides that:

(1) A person commits the crime of promoting prostitution if, with intent to promote prostitution, he knowingly:
   (a) Owns, controls, manages, supervises or otherwise maintains a place of prostitution or a prostitution enterprise; or
   (d) Engages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution.

OREGON REV. STAT. § 162.012.

121. See, e.g., N.Y. PENAL LAW § 230.00.
122. California Penal Code section 647(b), for instance, provides that:
   A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, in addition to the agreement, is done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act.


123. See supra notes 120-122; see also FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 178-88 (1982).
124. See supra note 35.
proscriptions of many of the prostitution statutes. Even if the performers do not perform, this might amount to solicitation of prostitution. Furthermore, the persons who run the services may be guilty of pimping and pandering.

If this sounds far-fetched, it should not. Numerous cases have held that individuals who hire actors and actresses to engage in filmed or photographed sex acts for commercial reproduction can be prosecuted under state pimping, pandering, and prostitution statutes. As of the late 1980s, one commentator, Laurie Douglass Hutchins, espoused this as a positive contribution to the war on pornography. If prostitution, pimping, and pandering laws can be applied to the actions of those who are making pornographic movies, there is no logical reason why the same laws cannot, and will not, be applied to video-phone dial-a-porn and other similar activities that may be made available via new technologies.

III

Arguments For and Against Aggressive Porn Regulation

As the statutes, regulations, and case law concerning pornography have developed and proliferated, a raging debate has taken place concerning whether sexually-oriented communications are receiving more or less legal protection than that to which they are entitled. This section will examine some of the basic arguments that commentators have made—both pro and con—in order to lay the framework for an analysis of how the legal doctrine applies to the development of new technologies.

125. For example, performing a sex act for valuable consideration. See supra note 122. Note also that under such a scenario, the customers and performers may be found to have violated the prostitution statutes of a given state, and the performers’ employer may be found to have violated the pimping and pandering statutes, even when the employer would have a valid “safe harbor” defense under section 223(c) because here the customer pays directly by credit card.

126. See generally Hutchins, supra note 33, at 988-94.

127. Id.


129. Hutchins, supra note 33, at 1002.

130. There may, however, be some valid reasons why such laws should not be made applicable, as this Note will make clear in Section IV.

131. For example, simulated (virtual) sex. See supra note 35.
A. The Arguments for Stricter Regulation

Arguments for allowing stricter limitations upon the dissemination of pornographic materials can be broken down into two broad categories. The first category includes a series of arguments outlining the positive harm that pornography inflicts upon society. These arguments share the assumption that because the harm caused by pornography is so great, pornography should be restricted or prohibited, and that pornographers—both publishers and consumers—should be prosecuted and otherwise punished.

The second category consists of arguments outlining pornography's relative lack of value. While these are not entirely separate from arguments in category one, the emphasis shifts. Here, the focus is not on the positive harm, but on the negative good. These theorists argue not that pornography should be restricted because it is bad, but that pornography deserves less protection than other forms of communication because it has no redeeming social value.132

Category one arguments can themselves be broken down into several sub-categories. While many people agree that pornography is harmful, they have different reasons for finding it so.

One concern articulated time and again is that pornography leads to anti-social behavior—to violence and sex crimes.133 The validity of the evidence backing such a correlation, however, is hotly contested.134 Furthermore, "[i]f . . . obscenity is speech, the law seems quite clear that proof of antisocial behavior emanating from it would not [alone] justify its suppression."135 Moreover, even if, as some commentators argue, obscenity is not speech,136 pornography can be either indecent or obscene, depending upon the community in which it is judged. There is scant solid evidence showing a clear distinction between the

132. "In struggling with the task of separating proscribable obscenity from protected speech, the Supreme Court has for more than thirty years inquired whether the material has an undesirable impact on its audience and whether it has social value." Bruce, supra note 48, at 123.
133. See Loewy, supra note 41, at 472.
134. "In the late 1960's Denmark repealed its pornography laws, thus making sexually explicit material much more available to the public. In the ensuing years, Danish studies found that the incidence of sex crimes diminished overall, flatly contradicting the notion that exposure to pornography leads to increased violence . . . ." Winkelman, supra note 41, at 258 (citations omitted).
135. Loewy, supra note 41, at 472 ("According to Brandenburg v. Ohio, even advocacy to commit crimes cannot be punished unless it reaches the level of incitement to imminent illegality.") (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)).
136. See, e.g., Schauer, supra note 123, at 178-80.
relative societal harm caused by indecency and obscenity. Thus, the concern with the societal harm purportedly caused by obscenity seems to have little logical or empirical justification.

Another argument commonly made in favor of suppressing pornography is that it exploits those who engage in the pornographic sex acts. This argument, often couched in terms of the exploitation of women, should apply across gender lines because pornography is not limited to the exploitation of women. In addition, this argument relates to a traditional rationale behind prostitution laws: the idea that the laws are designed to protect the prostitutes themselves from exploitation. Some may see this rationale as being highly paternalistic, invasive of individual autonomy, and not a compelling state interest.

A third argument, which has gained favor over the past decade, and which is related to the second argument, is that pornography represents a form of discrimination against women and thus violates their civil rights. This argument has been popularized by Katherine McKinnon and Andrea Dworkin. As previously mentioned, however, this argument loses force when one examines the diversity of pornography. Not all pornography exploits women. Therefore, a generalized approach to regulating pornography that focuses on the civil rights of women may be seen as overreaching.

A fourth argument for restricting pornography is tied to traditional nuisance/zoning analysis. Under this approach, pornography is viewed as a detrimental, blight-inducing influence on the community. This argument is supported, to an extent, by common experience: many communities that house porn emporiums are subject to urban blight. There are, however, at least two problems

137. It would be virtually impossible to compile such statistics since the definition of obscenity depends upon the community.
138. See Keller, supra note 35, at 2216-23.
139. See supra note 41 and accompanying text.
140. For an exaggerated take on this, see Collins and Skover, supra note 11, at 1389: "In pornotopia, women porn men, men porn women, women porn women, and men porn men with equal vengeance. At its pinnacle, the pornographic state is constituted to ensure equality of eroticized exploitation."
141. See supra note 41 and accompanying text.
142. See supra note 41 and accompanying text.
143. See supra note 140; Keller, supra note 35, at 2238; see generally Lynn, supra note 11, at 48-73.
144. See supra note 42 and accompanying text.
with this approach: (1) the precise cause is unclear, and (2) it has no relevance to electronically-distributed pornography.

The fifth, and perhaps most common, argument against pornography is that it has a detrimental effect upon children. This argument is compelling when children have ready access to the medium through which the pornography is distributed, but loses persuasive force when children's access can be easily restricted without limiting adult access.

A final argument is that pornography, in general, is inconsistent with the moral climate of American society. This argument is the most hazy, and in many respects, the most difficult to defend. It relies primarily upon an assumption that widespread agreement exists about what is inappropriate for everyone in society, children as well as adults, to listen, to view, or to read. This view, nevertheless, has its support amongst legal commentators, such as Frederick Schauer, and more specifically, Ronald Collins and David Skover.

Collins and Skover articulate an extreme view on this topic. In a recent symposium piece entitled *The Pornographic State*, they defined the modern merger of technology and pornography as “pornotopia,” and urged that “[p]ornotopia emerges as the forces of self-gratification, mass consumerism, and advanced technology merge. The greater this synergy, the greater is the tendency toward a culture in which self-gratification replaces self-realization, in which the irrational consumes the rational, and in which images dominate discourse.” They further argued that “[t]he Madisonian First Amendment stands to lose its staying power when it is trivialized, marginalized, and eroticized by a mass commercial entertainment culture wed to self-gratification, particularly pornographic gratification.” They argue that this is so, at least in part, because “[i]n pornotopia, people are intoxicated with their First Amendment

145. Does the blight bring pornography or does the pornography cause the blight?
146. See The Message in the Medium, supra note 10, at 1095.
147. Id.; see also Davis, supra note 8, at 622-23 nn. 3-7 and accompanying text.
149. See generally Collins & Skover, supra note 11.
150. See Lynn, supra note 11.
151. See generally Collins & Skover, supra note 11.
152. Id.
153. Id. at 1375.
154. Id.
155. Id. at 1377 (citation omitted).
They further argue that there are far too few "guardians of the old First Amendment gates" to help insure that the concept of speech is limited so that the "prophylactic of the First Amendment" will not be made available to "protect any erotic act or eroticized object that might stimulate orgasm." All of the above can be described as positivist arguments. Each asserts that pornography should be restricted or prohibited because it is positively bad in one respect or another.

Still others argue that society should be able to restrict pornography, not so much because it is positively bad, but because it does not offer much that is positively good, at least not as an aspect of free speech. Schauer may be the leading proponent of this view.

Schauer has argued that obscene pornography deserves no constitutional protection under a "free speech principle" because pornography is not really speech at all—in fact, it is nothing more than the equivalent of a rubber sex aid such as a dildo. Schauer is not entirely willing to deny that pornography may be entitled to some protection under some theory, such as privacy or individual autonomy; his argument is merely that such imagery is unprotected as speech because it goes beyond the protections provided by the First Amendment.

**B. The Arguments for Less-Strict Regulation**

Many of the arguments in opposition to stricter regulations on pornography directly counter the arguments outlined above. For example, the argument that pornography leads to antisocial behavior is often rebutted by evidence that strong anti-pornography laws do not correlate to a reduction of antisocial behavior.

Others rebut the feminist anti-pornography stance by arguing that the McKinnon/Dworkin perspective "denies women any role in the social construction of their own or of men's sexuality. Women's

---

156. *Id.* at 1382 (citation omitted).
157. *Id.* at 1392.
158. *Id.* at 1394.
159. *Id.*
161. *Id.* at 181.
162. *Id.* at 184.
163. *Id.*
164. *See, e.g., supra* note 134.
sexuality is constructed for them [by McKinnon and Dworkin] by an invisible hand.”

Additionally, others argue that indecent, and even obscene, speech is protected communication under the First Amendment. Barry W. Lynn has urged that “[t]he Supreme Court[’s] . . . assumption that ‘obscenity’ contains no useful ideas and has virtually no social value . . . [and] [t]he underlying presupposition that there is a difference between sexually-oriented speech and all other kinds of speech is completely unwarranted.”

Lynn states that “sexually-explicit material fulfills the traditional functions of speech: transmitting ideas, promoting self-realization, and serving as a ‘safety valve’ for both the speaker and the audience.” Accordingly, pornography serves several functions that should be protected, like other forms of communication, under the First Amendment. It performs an educational function, a lifestyle-advocating function, a social and political speech function, a “self-realization” or “self-fulfillment” function, as well as a fantasy-fulfillment or “safety-valve” function. Lynn concludes that the only real distinction between pornography and other forms of communication is that “[p]ornography is always about sexuality, and discussion of sexuality makes many people particularly uncomfortable.”

Finally, it can be argued that modern communications media may simply have marginalized the relevance of national, state, and local pornography regulation. With a deregulated communications industry, and the advent and growth of international interaction through cyberspace, even national regulations are likely to be highly ineffective at best, and exceedingly intrusive at worst.

166. Lynn, supra note 11, at 48.
167. Id.
168. Id.
169. Id. at 49.
170. Id. at 49-50.
171. Id. at 51.
172. Id. at 53-55.
173. Id. at 57.
174. Given the development of new technologies, the Miller “community standards” doctrine seems particularly dated. The Miller standard is no longer capable of dealing with the dominant technological communications flora. While it may have made sense when the dominant means of distributing pornography was through books and magazines, the standard, like a pig in a parlor, seems out of place in the brave new cyber-world.
A. Applying a Nuisance Approach to the New Technologies

The traditional approach to regulating pornography has been a nuisance or balancing approach. On one side of the ledger—the side disfavoring restrictions—lie the interests of privacy, autonomy, and the communicative freedoms associated with the First Amendment. On the other side—the side favoring censorship—lie the moral and aesthetic interests of the society at large, with particular emphasis on the welfare of minors. The guiding principle behind the jurisprudence in this area has been the notion that, while indecent speech deserves some constitutional protection, we must keep the “pig out of the parlor.”

While some commentators have persuasively argued that First Amendment analysis should be identical regardless of publishing medium, it is important to recognize the obvious: different media present differing problems vis-à-vis pornography, and may, therefore, require different practical approaches when it comes to protecting the moral and aesthetic interests of the society at large. The pervasiveness of the communications medium is one characteristic that has received particular attention when courts have attempted to determine the appropriate level of First Amendment protections to grant. Such a focus makes good sense. While printed materials containing pornography, for instance, can be fairly effectively restricted based on age-based classifications, such restrictions do not work as well when the medium of dissemination is network television.

The new technologies, however, offer at least a partial “built-in” solution to the “problem” of pornography, primarily because of the level of control the consumer retains. Thus, the traditional nuisance concern presented by pornography—the pig in the parlor—is minimized—or even neutralized. All that truly remains to weigh against the privacy and autonomy interests of consumers are the general concerns with morality espoused by commentators such as

---

175. See, e.g., Corn-Revere, supra note 1, at 345.
176. See The Message in the Medium, supra note 10, at 1093-95.
177. Id. at 1094.
178. Id.
179. See supra notes 17-28 and accompanying text.
Collins and Skover. But while Collins and Skover, and others like them, have clearly articulated a generalized, emotional and moral fear\textsuperscript{180} of the “pornotopic” society, their analysis fails to clearly illustrate just what the actual harm of “pornotopia” is. Perhaps more importantly, they fail to show what the appropriate remedies are and how those remedies can be imposed without seriously impinging upon First Amendment rights, as well as privacy and autonomy interests.

The Collins and Skover analysis is, to be fair, highly accurate in at least one respect: the supply of pornography is predicated upon the demand for pornography.\textsuperscript{181} But if their approach is to hold sway, the probable result is not a reduction in demand, but rather a suppression of open outlets for that demand, which will likely drive the demand underground. It will also likely lead to the further persecution of consumers who engage in victimless crimes. While such a result may viscerally satisfy many, its dangers outweigh its benefits, for it will likely have a chilling effect on speech and will certainly invade the privacy and autonomy interests of individuals. Such an approach would be akin to “burn[ing] the house to roast the pig.”\textsuperscript{182}

Furthermore, while it may be legally possible to extend, for example, the prostitution laws to cover the new technologies, logically this would make little sense. A simple hypothetical will illustrate this point.

Picture a video phone dial-a-porn service in which the actors engage in sex acts which are requested and viewed by customers who pay for these services by credit card.\textsuperscript{183} As Hutchins’ work points out, it may be possible to prosecute both the actors and the caller under prostitution, pimping, and pandering statutes.\textsuperscript{184} Now, add a twist: the actors, but not the callers, are located in a county in Nevada where prostitution is legal, and the callers reach them via a nationwide “900” video phone line. Since the actors are in a locale where prostitution is

\textsuperscript{180} The fear is apparently a fear of masturbation. See Lynn, \textit{supra} note 11, at 58. It should also be pointed out that such a fear of masturbation, and the cause and effect correlation between pornography and masturbation that is expressed both by Collins and Skover as well as by Schauer, is at least somewhat irrational. Anyone who has ever paid an extended visit to the zoo, particularly the primate cages, can by experience attest to the irrationality. Apes masturbate quite freely without the aid of pornography. That raises the question: Which came first, pornotopia or pornography?

\textsuperscript{181} Collins and Skover, \textit{supra} note 11, at 1378-79, 1382-83.


\textsuperscript{183} See \textit{supra} note 35 and accompanying text. This may well represent the future archetype of Collins and Skover’s “pornotopia.”

\textsuperscript{184} See \textit{supra} notes 117-131 and accompanying text.
legal, the actors may not be charged with violating state prostitution laws. The consumer, however, may be found guilty of engaging in prostitution, or at least solicitation of prostitution, particularly if he or she is located in a state with a broadly worded statute. Not only may the consumer be prosecuted for what traditionally has been considered a victimless crime, but he or she may be prosecuted for engaging in a sex act which is not illegal where the physical act was committed.

It is neither logical nor necessary to stretch our legal doctrine to such an extreme. When one examines the core values that we are attempting to protect, the traditional approach to pornography—the nuisance approach—is infinitely more sensible. If the nuisance approach, recently applied in the Carlin trilogy and Sable, were applied to the new technologies, the interests of individual privacy, autonomy, and free expression would have to be balanced against the "moral" interests of the society at large, and particular attention would have to be paid to the issues of pervasiveness and control. Given that the new technologies can so effectively keep the "pig out of the parlor," courts would be compelled to limit rather than expand restrictions on pornography.

B. The Nuisance Approach and the CDA

The CDA represents the most recent attempt by the federal government to regulate obscenity and indecency content which is disseminated via the telecommunications lines. It has already been successfully challenged on constitutional grounds in the federal courts, and its validity will likely be decided by the Supreme Court.

---

185. See Hutchins, supra note 33, at 996.
186. See supra notes 120-122 and accompanying text.
187. This would be akin to prosecuting Bill Clinton for smoking (but not inhaling) marijuana while he was at Oxford. (It was, after all, according to the President, merely a "virtual" puff.) The key point is that he was in a jurisdiction where such a puff was not illegal.
188. See, e.g., Corn-Revere, supra note 1, at 340-45.
191. At the time this Note was completed, the CDA had just been signed into law. Thus, I will not attempt to comprehensively analyze the CDA, leaving that task to future commentators. Instead, this Note narrowly focuses on how the CDA fits within the traditional nuisance concerns as outlined in Sable, Pacifica, and the Carlin trilogy.
192. See, e.g., Ramon G. McLeod & Reynolds Holding, Clinton OKs Telecom Overhaul; Rights Groups File Suit, S.F. CHRON., Feb. 9, 1996, at A1 ("Moments after the president approved
While it is still too early to speculate as to the CDA's ultimate constitutional fate, if the courts remain consistent with their earlier decisions and they continue to emphasize nuisance doctrine, the Act will most likely be invalidated.\footnote{194}

The CDA proscribes "indecent" and "obscene" communications by use of telecommunications devices.\footnote{195} While indecent communications are constitutionally protected under the First Amendment, this fact alone will not invalidate the Act. As Sable, Pacifica, and the Carlin trilogy make clear, the government can...
regulate indecent speech to protect minors, so long as the government selects the least restrictive means of doing so. Thus, the constitutionality of the CDA is likely to turn on the “least intrusive means” prong of First Amendment strict scrutiny analysis.

In order to satisfy the “least restrictive means” test, Congress included several “defense[s] to prosecution” (safe harbor provisions) in the CDA. Section 502 states that:

It is a defense to a prosecution . . . that a person—

¶(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to [a proscribed communication], which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

¶(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

The above safe harbor provisions do not seem to represent the “least restrictive means” of achieving Congress’ goal. They place the entire burden of protecting minors on the shoulders of the disseminators of information. No burden is placed upon parents, for instance, to implement the readily-available blocking schemes described in this Note to insure that their own children do not have access to inappropriate materials.

The danger in placing the burden entirely on the disseminator is readily apparent. Entrepreneurs engaged in the sex trade will easily be able to protect themselves against prosecution by implementing blocking strategies. Less-sophisticated individuals who pass along communications which may be deemed “indecent” may, however, not be able to protect themselves. Thus, rather than leading to the prosecution of online, for-profit smut providers, the sanctions of the law will likely only apply to unsophisticated and not-for-profit users.

Thus, because the CDA does not employ the least restrictive means, the courts should strike it down. Furthermore, such a holding is consistent with traditional nuisance analysis because no real nuisance

196. See Sable, 492 U.S. at 126.
197. The Act has also been challenged on the grounds that it is unconstitutionally vague. See Mills & Schwartz, supra note 192, at B1. This was the primary focus of the Shea decision. See Shea, 930 F. Supp. at 22-30. See also ACLU at 34-36.
199. Id.
exists if individuals can easily shield themselves from communications that they deem offensive or indecent.\textsuperscript{200}

Aside from its constitutional infirmities, the CDA can also be criticized on a more practical level. One of the biggest practical problems with the Act is that it continues the \textit{Miller} fallacy that obscenity is appropriately defined at the local level. Given the international scope of new technologies, it is high time to work towards a national—or even an international—standard for defining obscenity. Additionally, the CDA fails to resolve the problem that individuals can be prosecuted under state pimping, pandering, and prostitution laws by engaging in “virtual sex” over the telecommunications lines.\textsuperscript{201}

V

**Conclusion**

The big advantage offered by new technologies in relation to pornography is that they allow for a more effective balance between moral concerns and the interests of privacy, autonomy, and free expression. The nuisance aspects of pornography can be minimized, while privacy and autonomy can be maximized. While one’s neighbors may not approve of what that individual views in the privacy of his or her home, at least the neighborhood’s aesthetics and property values will not be damaged by the presence of a porn emporium. Further, the neighbor’s children will not be compelled to watch any programming the neighbor feels is inappropriate. New technologies will allow the viewers to select their own programming options, while leaving others free to select an entirely different set of options. Rather than being “pervasive” in the traditional sense of radio or network television broadcasts, new technologies will be point-to-point, much like the telephone. While many may not approve of the fact that individuals are engaging in virtual sex over the telecommunications lines, they will not be exposed to the material unless they proactively choose to be.

\textsuperscript{200} Judge Dalzell in \textit{ACLU} recognized this when he stated, “any content-based regulation of the internet, no matter how benign the purpose, could burn the global village to roast the pig.” \textit{ACLU}, 929 F. Supp. at 824, 843.

\textsuperscript{201} See supra notes 183-187 and accompanying text. Although this problem could be solved through federal legislation with reasonable safe-harbor provisions and strong preemption, the CDA contains neither.