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COMMENTS

LEARNING TO LOVE “THE ULTIMATE PERIPHERAL” — VIRTUAL VICES LIKE “CYBERPROSTITUTION” SUGGEST A NEW PARADIGM TO REGULATE ONLINE EXPRESSION

I. INTRODUCTION

Meet Rebecca.¹ At the age of eighteen, Rebecca was the victim of a propane heater explosion while spending the weekend at a friend's cabin following her high school graduation. Rebecca was burned horribly, yet she somehow survived. Tragically, her disfigured face repulses even those who knew and loved her before the tragedy. Surgeons have done all that is medically possible, but have been unsuccessful in restoring Rebecca's former facial structure. As a result, Rebecca's social life has suffered the most, as she has been unable to share intimacy with another person.

A physical and emotional pariah, Rebecca remains to this day a “real”² virgin. In response to a magazine advertisement, Rebecca purchased a *Sybian II* masturbation machine.³ Connected to her computer, the *Sybian II* has truly proved to be the “ultimate sensual gift a woman can give herself.”⁴ By linking with an Internet site⁵ through her

1. “Rebecca” is a purely fictional character and the events depicted in this Comment pertaining to Rebecca are products of the author's imagination.

2. For purposes of this article, “real” is used to denote actual events which transpire in the tangible world outside the realm of computer and communications networks. Compare *infra* note 7 and accompanying text (distinguishing “real” from “virtual” events).

3. See, e.g., PENTHOUSE, Advertisement, Feb. 1995, at 161. Although the *Sybian II* does not exist as of the time of this writing, at least one real, free-standing “internal massage,” or masturbation, machine is offered for sale to women through national pornographic magazines. PENTHOUSE, Advertisement, Feb. 1995, at 161. Named “Sybian,” it does not currently connect to a user's computer. A similar machine, the “Venus II,” is available for use by men. *Id.*

4. *Id.*

5. EDWARD A. CAVAZOS & GAVINO MORIN, CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD 4-5 (1994). In general, a site on the Internet comprises

computer's modem, Rebecca has access to a variety of "virtual"⁶ lovers.

a single computer which is capable of being remotely accessed by other computers through telephone lines that carry digital signals. *Id.* at 2. The "host" computer may be small enough to fit upon a desktop or it may be an automobile-sized supercomputer connected to dozens of telephone lines. *Id.*

The Internet consists of a mass of computer systems accessible from remote locations. *Id.* The systems are connected by "data highways" and networks. *Id.* The process of connecting remote computers through digital networks is straightforward:

Typically, a user with a personal computer makes a connection with another computer through standard telephone lines. When the connection is established, the user's computer and the remote host system become linked in a way to create the perception that there is no physical distance between the two machines. This is the case even if the two machines are hundreds of miles or even continents apart from one another. In this simple example of [Internet] communication, the mechanics are no more complex than those involved in a standard voice telephone call. Unlike the common telephone call, however, where there is one simple stream of data being transmitted, when computers communicate there can be immense amounts of data transferred simultaneously. [An] entire book can be sent across the globe in just a few seconds, as can financial data, digitalized audio and video, and computer software . . . [t]hese are just a few examples to illustrate uses of a completely new medium of communication, a medium that brings with it not only an immense potential for productivity, but also a wide range of novel problems and unique twists on old ones.

Id.

In the future many such problems will undoubtedly stem from the use of the Internet as a conduit for transmitting digital signals to control remote machinery and industrial processes. Douglas Waller, *Onward Cyber Soldiers*, *TME*, Aug. 21, 1995, at 38. Current examples of such use include the operation of offshore oil derricks, railcar switchyards, satellites, surveillance and security devices, and electric power grids. *Id.* In these instances, human "operators" are able to indirectly control, through a keyboard, mouse, joystick or similar "peripheral," real events which register on the immediate perceptions and experiences of distant persons. *Id.* See also *infra* note 13 for discussion about the prospect of remote surgery, or "cybersurgery."

As is often the case with other human affairs, not all uses of the Internet for remote control purposes have productive aims. For example, anecdotal evidence suggests that at least one individual has developed a robotic cat toy which can be controlled through the Internet. Professor David E. Sorkin, Lecture at The John Marshall Law School's CYBERSPACE LAW SEMINAR, *A Law of Cyberspace?* (Aug. 31, 1995). Reportedly, an Internet user may remotely access the cat owner's computer and, by manipulating the user's own peripheral device, direct the movement of the cat toy to influence the behavior of the cat. *Id.* Simultaneously, the user can see and hear the cat's responses through his computer and use this feedback to correct the actions of the toy so as to thoroughly perplex the feline. *Id.*

6. Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, *Keynote Address at the First Conference on Computers, Freedom & Privacy*, Mar. 26, 1991, reprinted in *THE HUMANIST*, Sept.-Oct. 1991, at 15. "Virtual" is used here to indicate apparent, intangible "events" which are perceived by human beings through the use of computers. Thus, "virtual reality" is a concept which denotes a fantasy world "in which people can essentially turn their minds into computer peripherals capable of perceiving and exploring the datamatrix." *Id.* Professor Tribe further describes virtual events as "three-dimensional, interactive hallucination complete with sight, sound and touch—allowing the [computer] user literally to move through and experience information." *Id.* As such, "virtuality" has enabled people to "have the sense they [are] actually entering a place that [has] no correlation in physical reality In this setting, people

Online,⁷ Rebecca experiences sensual auditory, visual and tactile stimuli interactively,⁸ in real-time, with men who she pays and who are sometimes situated at remote locations thousands of miles away.⁹ Manipulating controls akin to those of a video game, these male “cyberprostitutes”¹⁰ indirectly control the movements, vibrations and temperature of the *Sybian II* in response to Rebecca’s cues which are transmitted through a small video camera and microphone affixed to her computer’s monitor. Simultaneously, through Rebecca’s computer monitor and audio speakers, the cyberprostitutes communicate their own ad-libbed comments and expressions.¹¹ Of course, prior to rendering their services, these men — or perhaps their employers — require electronic verifica-

[have] carried out business transactions, communicated with one another, worked, played, and, as they have done in every other place they had occupied, broke the law.” CAVAZOS & MORIN, *supra* note 5 at 1.

7. “Online” is a term of art that refers to the process of accessing and using the Internet. CAVAZOS & MORIN, *supra* note 5 at 2-5.

8. Laura Land Sigal, Note, *Challenging the Telco-Cable Cross-Ownership Ban: First Amendment and Antitrust Implications for the Interactive Information Highway*, 22 *FORDHAM URB. L. J.* 207, 234 (1994). Interactive communications occur through media which permit communications to flow in both directions instantaneously. *Id.* Common examples of interactive communications include telephone conversations and video conferences. *Id.* Interactive communications are distinguishable from “static information” systems in which communications flow in one direction only, e.g., correspondence through the postal system and cable television broadcasts. Jerry Berman & Daniel J. Witzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 *YALE L. J.* 1619, 1619 nn.1 & 2.

Moreover, “[t]he most striking representative of the new media in existence today is the Internet, the rapidly evolving ‘network of networks’ that carries [interactive] computer communications, data, text, voice and video all over the world.” *Id.* The attribute of interactivity is the hallmark of Internet technology and makes communications similar to those of Rebecca and the cyberprostitutes possible today. *Id.* The speed and amount of information which can be transmitted through the Internet are multiplying at geometric proportions with the advent of “new physical transport mechanisms, such as fiber optics, high-capacity copper wires [and] high-bandwidth satellite transmissions” that afford “the potential for dramatically greater capacity than is available today.” *Id.*

9. The transnational ramifications of the Internet are beyond the scope of this Comment. Accordingly, the reader is asked to assume that all transactions discussed herein occur within the territorial boundaries of the United States and are subject only to federal and state laws.

10. See *infra* note 15 and accompanying text for additional material on the author’s concept of cyberprostitution.

11. See, e.g., Jiri Weiss, *Conferencing Software: No More Meetings?*, *PC WORLD*, May 1995, at 162-63. In recent years, it has become commonplace for audio speakers, microphones and video cameras to be integrated with computers. *Id.* at 162. Businesses and individuals are discovering the benefits, especially those pertaining to cost reductions and efficiency enhancements, that are achievable through real-time audio and visual Internet communications. *Id.* at 163.

tion that Rebecca's First Virtual¹² account remains in good standing.

Transactions like Rebecca's may likely materialize as research indicates that the underlying technology is imminent.¹³ However, Rebecca's pursuit of happiness may be unlawful. Congress may rush to criminalize such activities by instituting an online agency to police the Internet for a myriad of virtual, online "vices."¹⁴ The question remains as to how the courts will respond to such laws.

By anticipating the vice of cyberprostitution¹⁵ and the advent of the technology supporting it,¹⁶ this Comment demonstrates how Internet technology is creating a new set of moral dilemmas that render Congress

12. See WWW Page: *Information about First Virtual*, FIRST VIRTUAL HOLDINGS, INC., April 18, 1996, <http://www.fv.com/info/index.html> (offering on-line debit accounts). "First Virtual" denotes the series of service and trade marks owned by First Virtual Holdings, Inc. (a Wyoming corporation) and First Virtual Corporation (a California corporation) for use in connection with electronic commerce through the Internet. *Id.*

13. See generally Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times By Consumers In Over 2,000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L. J. 1849 (1995) (reporting on the use of the Internet as a prolific means to communicate both obscene and indecent sexual expression). However, the study has been questioned as to its accuracy and validity. Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J. L. & TECH. 87, 93, n.31 (1996).

This Comment contends that human ingenuity and social conditions are such that it is simply a matter of time before someone develops the rudimentary hardware and software required to interface machines like the *Sybian* to computers and the Internet. The technology and, more importantly the financial incentives, clearly exist today for such applications. Similar, yet exceedingly more complex, technology is presently being tested that may enable surgeons to perform cyber-surgery on patients located thousands of miles away by using computer-assisted robots operated through digital networks. Geoffrey Cowley *et al.*, *RoboDocs and Mousecalls*, NEWSWEEK, Feb. 27, 1995, at 66. "With this process, we can 'move' the best medical talent to our patient's bedside instead of forcing the patient to get on a plane and go to the specialist." *Id.* See also Douglas D. Bradham, *The Information Superhighway and Telemedicine: Applications, Status and Issues*, 30 WAKE FOREST L. REV. 145 (1995) (highlighting the origin and history of remote medicine).

14. A vice is "[a] fault, defect, or imperfection. Immoral conduct, practice or habit; e.g., prostitution." BLACK'S LAW DICTIONARY 1404 (5th ed. 1979). Accordingly, vice crimes are "crimes of immorality such as prostitution, lewd and lascivious behavior and obscenity." *Id.* at 1405. States are permitted to regulate lewd conduct via traditional police power in order to provide for "the health, safety, and morals of the public." Burke, *supra* note 13, at 101, n.83.

15. "Cyberprostitution" is the author's paradigm for a virtual phenomenon that results in real sexual gratification achieved through a commercial transaction and: (1) is experienced by at least one person who is not physically proximate to another; (2) transpires in real-time through computer peripherals that communicate sensual auditory, visual and tactile communications of the parties to the transaction; (3) at least one party remotely controls a computer peripheral that contacts the genitals of the other.

16. See *supra* note 8 and accompanying text for a discussion of the present and future technologies that make fully-interactive Internet transactions possible.

and the courts ill-equipped to respond through traditional regulation.¹⁷ This Comment also establishes that the Internet-specific regulations enacted or contemplated by Congress to criminalize and police virtual vices are doomed to fail regardless of the normative judgments concerning such activities.¹⁸

The main and pervasive weakness of all the Internet morality legislation enacted by Congress is that it is not rooted in the technology inherent in Internet transactions. In this respect, cyberprostitution serves as a persuasive metaphor that supports the contention that the Internet, with all of its potential as a socially useful medium of communication, cannot be regulated through a traditional legal approach. Demonstrated through the paradigm of cyberprostitution, the Internet's technical attributes cannot be harmonized with any of the areas of law that have traditionally controlled illicit vices in the real-world.

Cyberprostitution does not fit present case law or statutory conceptions of real, physically-based crimes like prostitution. Nor can cyberprostitution communications necessarily be categorized under a constitutional analysis as either obscene¹⁹ or indecent²⁰ expression, due in part to the inherently private nature of the transaction between cyberprostitutes and their customers.²¹ Even if such communications were

17. Steven Levy, *Technomania*, NEWSWEEK, Feb. 27, 1995, at 26. The inability of both the legislatures and the courts to timely adjust legal doctrine to meet the rapid pace of technological change has been occasioned by new communications media like the Internet:

The [Internet] revolution has only just begun, but already it's starting to overwhelm us. It's outstripping our capacity to cope, antiquating our laws, transforming our mores, reshuffling our economy, rendering our priorities, redefining our workplaces, putting our Constitution to the fire [and] shifting our concept of reality . . . [i]t's time to take a deep breath and examine where the revolution might be headed and what we might do to ease the transitions and ensure that its benefits will be broad and benign.

Id.

18. 141 CONG. REC. H8287 (daily ed. Aug. 2, 1995) (statement of Rep. Wyden). This view is shared by some members of Congress familiar with Internet technology. Representative Wyden was unapologetic in his view that "[i]n the U.S. Senate, they have somehow come up with the idea that our country should have a Federal Internet censorship army designed to try to police what comes over the Internet. [T]his idea . . . would make the Keystone Cops look like Cracker Jack crime fighters." *Id.*

19. See *infra* notes 54-56 and accompanying text for a discussion of the Supreme Court's obscenity doctrine.

20. See *infra* notes 54, 60-61 and accompanying text for a discussion of the Supreme Court's treatment of indecent expression.

21. This Comment restricts its scope to adult cyberprostitution and therefore, does not address the issue of child pornography. Transactions between cyberprostitutes and their customers are assumed to be technologically protectable through encryption technology and therefore unavailable for public perusal. Encryption is "the process of using secret codes to protect or conceal information" including data communicated through the Internet. Phillip E. Reiman, Note, *Cryptography and the First Amendment: The Right to Be Unheard*, 14 J. MARSHALL J. COMPUTER & INFO. L. 325, 325 (1996). Secret codes are used to

deemed indecent, constitutionally-valid regulations would not be available to prohibit this vice. Similarly, the traditional government rationales which have previously justified the regulation of harmful or offensive communications disseminated through other media are unavailing in the cyberprostitution context. Additionally, from a practical viewpoint, discreet policing of cyberprostitution would be impossible insofar as the electronic signals supporting this transaction are indistinguishable technologically from similar impulses supporting socially useful processes such as cyber-surgery.²²

If the Government attempts to regulate cyberprostitution through traditional means, it will likely adopt the familiar pattern of rushing to regulate speech without stopping to think.²³ The Government should first do what it has eventually done with other novel forms of communication:²⁴ understand the technology intended to be regulated. However, this process is undeniably arduous and time consuming; therefore, the Government has rarely been willing to engage in such a process.²⁵ Not surprisingly, the Government has again found it easier to implement traditional measures in the Internet context, despite the fact that such means are inappropriate for the medium.

In order to understand the relevance of the cyberprostitution paradigm, one must necessarily begin with the current state of the law which deals with controlling harmful sexual expression and then analyze why such legal means are unavailing in the Internet context. Accordingly, Part II of this Comment examines the legal doctrines involved in cyberprostitution's real world analogues. Specifically, Part II focuses on the attributes of sexual interactions that the legislatures and the courts tra-

"limit access to the contents of a message to a select group," including consenting adults. *Id.* at 328. In the Internet context, "encryption is the key to privacy," as well as an important component of controlling access to offensive communications. *Id.* at 325, n.3 (quoting John Mintz & John Schwartz, *Chipping Away at Privacy? Encryption Device Widens Debate Over Rights of U.S. to Eavesdrop*, WASH. POST, May 30, 1993, at C1).

22. See *supra* note 13 for a discussion of the emerging technology of cybersurgery.

23. See generally *infra* notes 69-72 and accompanying text highlighting nearly ten years of litigation involving sexually explicit telephone services which resulted from the legislature's refusal to follow the guidance of the courts.

24. See, e.g., 18 U.S.C. §§ 2251-2257 (1988 & Supp. IV 1992) (validated by *U.S. v. Knox*, 776 F. Supp. 174 (M.D. Pa. 1991), *aff'd*, 32 F.3d 733 (3d Cir. 1994), *cert. denied*, 1994 WL 512613 (Jan. 17, 1995)); and the often-amended Communications Act of 1934 that provides that civil penalties for broadcasting obscene or indecent material over the airwaves. 18 U.S.C. § 1464 (1993) (validated by *Community Communications Co. v. Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982)). These are prime examples of federal communications regulations that have successfully withstood legal challenges.

25. See *infra* notes 69-72 and accompanying text for a contemporary example of government's reluctance to address the technological attributes of new communications media, namely, the initial attempts to regulate telephone sex.

ditionally deem "prostitution."²⁶ Next, Part II examines the principles that constitute the underpinnings of the Supreme Court doctrines regarding indecent²⁷ and obscene²⁸ expression. Since federal regulation of the "dial-a-porn"²⁹ industry serves as one model for controlling potentially obscene and harmful expression like cyberprostitution, the doctrines are addressed from the viewpoint of Congress' recent attempts to regulate morality in the context of the telecommunications media.³⁰ Part II then examines the Communications Decency Act of 1996³¹ which extends criminal sanctions to Internet service providers or Internet users who make or transmit obscene or indecent communications online.³²

Part III of this Comment establishes why the presently applicable laws and statutes, especially the federal Internet legislation recently enacted by Congress, cannot effectively prohibit, regulate or even manage the cyberprostitution services contemplated here. More importantly, the cyberprostitution paradigm demonstrates that traditional government regulation is not the most appropriate means for controlling offensive, but not harmful sexually expressive Internet communications. Therefore, this Comment proposes an alternate approach to manage sexual expression online that will likely prove effective while at the same time respecting fundamental constitutional liberties.

26. BLACK'S LAW DICTIONARY, 1100 (5th ed. 1979). "Prostitution" is defined differently within the various common law jurisdictions. Accordingly, the conduct which the prostitution statutes proscribe may vary as well. Nonetheless, as a general rule prostitution consists of "performing, or offering or agreeing to perform a sexual act for hire." *Id.* A closely-related vice, pandering, is defined by the common law as the inducement of another person to act as a prostitute. *Id.* at 1000; see also 18 U.S.C. § 2421 (criminalizing the interstate transportation of persons for purposes of prostitution).

27. See *infra* notes 54, 60-61 and accompanying text for an explanation of the Supreme Court's indecency doctrine.

28. See *infra* notes 54-56 and accompanying text for an explanation of the Supreme Court's obscenity doctrine.

29. Christian A. Davis, Comment, *Revisiting the Lurid World of Telephones, Sex, and the First Amendment: Is This the End of Dial-A-Porn?*, 2 WIDENER J. PUB. L. 621, 621, n.1 (1993). Dial-a-porn is transmission of pornography via the telephone. *Id.* In exchange for a fee, callers using the service may listen to a "description or depiction of actual or simulated sexual behavior" that may also involve rape, torture, sadomasochism, incest, bestiality, excretion and other deviant sexual activities. *Id.* Dial-a-Porn is a lucrative business: the total fees collected from dial-a-porn service users amounted to \$2.4 billion over the five year period following their inception in 1983. Steven J. Potter, Note, *Constitutional Law — The Regulation of Telephone Pornography — Sable Communications, Inc. v. Federal Communications Commission*, 24 WAKE FOREST L. REV. 433, 448 (1989).

30. See *infra* notes 69-72 and accompanying text for an example of the Government's repeated and unsuccessful attempts to manage sexual expression in the telephone medium.

31. 47 U.S.C. § 609.

32. See *infra* notes 91-98 and accompanying text for a discussion of the provisions and legislative history of the Communications Decency Act of 1996.

II. BACKGROUND

Government faces a Sisyphean task³³ when it drafts legislation to regulate a particular communications medium. Just when regulations appear to be both logically coherent and constitutionally acceptable, a new technological twist emerges that creates another challenge for the policy-makers.³⁴ Instead of achieving its legislative goal of regulating the technology, the Government is often confronted with the potential dismantling of the very framework that it envisioned would control the technology.³⁵

In such instances, government response tends to be reactionary as opposed to deliberation.³⁶ The paradigm of cyberprostitution demonstrates that the recent congressional legislation for regulating sexually-expressive Internet communications is no exception to this phenomenon. Necessarily, the first step is to understand the current laws and doctrines that online vice police would most likely use to control illicit transactions on the Internet.

A. TRADITIONAL PROSTITUTION

Cyberprostitution may be a future vice, but its real-world antecedent has existed since biblical times.³⁷ Prostitution was historically con-

33. Sisyphus was a mythical character in the lore of Ancient Greece who was condemned by the Olympian gods to push a boulder up the side of a mountain for eternity. At the conclusion of each trip, as the boulder approached the pinnacle, the rock would slip from Sisyphus' grasp and roll downwards until it reached the bottom of the mountain. Consequently, at the moment when an exhausted Sisyphus began to believe that his work was nearly accomplished, he was confronted with the stark reality that the entire process of pushing the boulder up the mountain would commence anew.

34. See *infra* notes 69-72 and accompanying text for a synopsis of Congress' attempts to legislate morality in the dial-a-porn context.

35. See *infra* notes 70-72 and accompanying text for a discussion of the federal government's initial regulations to control dial-a-porn communications and the fact that they were rejected and modified several times because the regulations were not the least restrictive solutions to the moral dilemma then confronting the government.

36. Berman & Witzner, *supra* note 8, at 1630. This contention is proven by the fact that the federal dial-a-porn legislation, and related Federal Communications Commission (FCC) regulations, were enacted within a short period of time and with scant debate on the part of Congress—although the courts were required to deal with the regulations “[t]hrough several years of litigation.” *Id.* In striking down the initial dial-a-porn regulations, the courts found the legislation was unconstitutionally overbroad. The courts held that the regulations constituted a thinly-disguised attempt to prohibit *all* sexually-expressive telephone communications instead of merely regulating their dissemination pursuant to Congress' constitutional mandate. *Id.*

37. “Do not prostitute thy daughter, to cause her to be a whore; lest the land fall to whoredom, and the land become full of wickedness.” LEVITICUS 19:29 (Rev.); see also *Smithwick v. State*, 762 S.W.2d 232, 234 n.2 (Tex. Ct. App. 1989) (noting that “[p]rostitution has been known at least since the time of Judah . . . [and] the Mosaic Code . . . punished prostitutes with burning”); *Commonwealth v. DeStefanis*, 658 A.2d 416, 419

strued as "sexual intercourse for hire."³⁸ Nonetheless, in the modern era the Government has attempted with some regularity to broaden the scope of prostitution into an imprecise catch-all offense that transcends physical interaction.³⁹ However, courts usually reject government actions of this sort.⁴⁰

(Pa. Super. Ct. 1995) and *Commonwealth v. Potts*, 460 A.2d 1127, 1134 (Pa. Super. Ct. 1983) (both stating that the social stigma of "prostitution has persisted since biblical times").

38. *DeStefanis*, 658 A.2d at 419.

39. MODEL PENAL CODE § 251.2 (1994). Most of the modern prostitution statutes broaden the scope of the offense by proscribing a variety of commercialized sexual activities that do not involve actual intercourse. *Id.* Representative of these statutes is the Model Penal Code which sets forth the elements of the offense as follows:

- (1) Prostitution. A person is guilty of prostitution, a petty misdemeanor, if he or she:
 - (a) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or
 - (b) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

Id. "Sexual activity" includes "homosexual and other deviate sexual relations." *Id.* A "house of prostitution" is "any place where prostitution or promotion of prostitution is regularly carried on by one person under the control, management or supervision of another." *Id.* An "inmate" is a person "who engages in prostitution in or through the agency of a house of prostitution." *Id.* "Public place" means "any place to which the public or any substantial group thereof has access." *Id.*

Modern prostitution statutes are imprecise because they seldom define the boundaries of the culpable conduct which constitutes "sexual activity" within the meaning of the statute; instead, the modern statutes leave this term to subjective interpretation by the so-called "reasonable person," i.e., the courts and juries. *Potts*, 460 A.2d at 1127; *State v. Wright*, 561 A.2d 659, 661 (N.J. Super. Ct. 1989); *but see* 720 ILCS 5/11-14 (West 1994), which avoids such ambiguity:

Prostitution . . . [a]ny person who performs, offers or agrees to perform any act of sexual penetration . . . for money, or any touching or fondling of the sex organs of one person by another person, for money or anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution.

Illinois is one of the few jurisdictions that actually defines the type of "sexual activity" which is criminal: "intentional or knowing touching or fondling . . . either directly or through clothing, of the sex organs, anus or breast . . . for the purpose of sexual gratification or arousal."

720 ILCS 5/12-12(e) (West 1994).

40. *See, e.g.,* *People v. Freeman*, 758 P.2d 1128 (1988). The *Freeman* case is a typical example of this phenomenon and involved the State of California's attempt to regulate pornographic films. In *Freeman*, a producer of non-obscene pornographic films was convicted of five counts of pandering because he paid for "performers" to engage in sexual acts on camera. *Id.* at 1135. The *Freeman* court held that the prostitution statutes did not contemplate the sexually-expressive transactions at issue because the producer's purpose for hiring professional pornographic film stars was not for his own sexual gratification but instead was for the purpose of making films. *Id.* at 1132. Further, the court concluded that the state's efforts to regulate sexually-expressive films through the California prostitution and pandering statutes was nothing more than a "transparent attempt at an 'end run' around the First Amendment and the state obscenity laws." *Id.* at 1130; *see also* *Michigan ex rel.*

Prostitution requires some form of intimate touching between the prostitute and the customer, whether actual or inchoate, "for the purpose of sexual arousal or gratification of the customer or the prostitute."⁴¹ The key element, direct genital contact, stems from government's concern for the public welfare.⁴² Since prostitution involves intimate bodily contact,⁴³ the incidence of sexually-transmitted diseases may increase. Prostitution may also foster derivative crimes, including murder, battery, robbery and substance abuse. This activity may concentrate in dangerous "red light" districts.⁴⁴ Additionally, public displays of illicit physical contact between prostitutes and their customers may erode community standards of morality, posing unique risks to the health and

Wayne County v. Dizzy Duck, 535 N.W.2d 178 (Mich. 1995) (where an owner of "adult entertainment establishment" was prosecuted under a Michigan nuisance statute for permitting commercial sexual performances on his premises as well as other illicit activities which the county prosecutor attempted to categorize as common law prostitution); *People v. Kovner*, 409 N.Y.S.2d 349 (N.Y. Sup. Ct. 1978) (where a producer of pornographic films was prosecuted under the New York pandering statute for hiring performers to engage in obscene sexual acts on camera); *United States v. Roeder*, 526 F.2d 736 (10th Cir. 1975) (where a film producer was prosecuted after transporting a female actress in interstate commerce for the purpose of making sexually-oriented films); *State v. Kravitz*, 511 P.2d 844 (1973) (where a theater owner was prosecuted under the Oregon prostitution and pandering statutes for paying performers to engage in live sex acts in front of an audience).

41. *Freeman*, 758 P.2d at 1130, quoting *People v. Hill*, 103 Cal. App. 3d 525, 534-35 (Cal. 1980).

42. ARELENE CARMEN & HOWARD MOODY, *WORKING WOMEN: THE SUBTERRANEAN WORLD OF STREET PROSTITUTION* 12-15 (1985). An example of a legitimate government rationale for curbing prostitution is the prevention of sexually-transmitted diseases (STD's) such as the HIV/AIDS virus. *Id.* One commentator suggested that there exists a "substantial benefit to society from the dissemination of non-obscene sexual materials, such as greater awareness of the health hazards of sexual promiscuity." Philip M. Cohen, Case-note, *People v. Freeman — No End Runs on the Obscenity Field or You Can't Catch Me from Behind*, 9 LOY. ENT. L. J. 69, 90 (1989). Therefore, if socially useful communications that deal with sexuality, for example, video cassettes used in connection with HIV/AIDS awareness, exposed disseminators to criminal sanctions under guise of prostitution, their availability may diminish and net social costs would possibly rise.

By distorting the legitimate rationales for criminalizing prostitution and related vices government may undermine the laws enacted to control other crimes. *Id.* at 88. For example, in the *Freeman* case, had the defendant producer's conviction for pandering had been affirmed, "[n]o prosecutor would bother going through the laborious and difficult process of convincing a jury that [sexually-explicit transactions were obscene] if all he had to prove was that [the participants] engaged in a sexual act and that [someone] paid," i.e. prostitution. *Id.* at 89. Over the course of time, such misuse of prostitution and related statutes would likely render "all obscenity statutes irrelevant and redundant" and would therefore undermine the legitimacy of government action in these areas of the law. *Id.*

43. For the purposes of this Comment, "intimate" contact refers to direct and proximate contact between two persons which involves the touching of at least one person's genital area.

44. CARMEN & WOODY, *supra* note 42, at 12-15 (noting that prostitution increases the incidence of crimes where prostitutes congregate).

welfare of children.⁴⁵

In discharging its duty to safeguard public morality, the Government has sometimes prosecuted sexual expression it deems immoral, such as pornographic performances.⁴⁶ Unquestionably, this action risks chilling "the production of plays, movies, and materials traditionally protected from [g]overnment interference by the First Amendment."⁴⁷ Thus, courts may be required to override the legislature if the legislature attempts to expand criminal liability for prostitution to protected speech or conduct.⁴⁸

Therefore, the rule controlling criminal liability for prostitution in circumstances that involve new types of sexual expression is straightforward: no direct genital touching between the parties to the transaction equals no conviction. The rule achieves constitutionally valid outcomes, since criminalizing prostitution is premised on narrow government rationales, the absence of which dictate that fundamental constitutional concerns must prevail.⁴⁹ The next section examines the constitutional limits of government's mandate to protect public morality in the context of communications media.

45. CARMEN & MOODY, *supra* note 42, at 12 (stating that society feels that it needs to stigmatize prostitution in order to uphold public morals).

46. See *supra* note 40 and accompanying text (discussing the *Freeman* case).

47. *People v. Greene*, 441 N.Y.S.2d 636, 638 (1981). Because the Constitution protects most speech but not obscenity, a prostitution statute "may not be construed to prohibit [sexual activities] not obscene in character." *Id.* However, as the *Freeman* case illustrates, the Government has engaged in precisely this type of unconstitutional action under the guise of controlling prostitution. See *supra* note 40 and accompanying text for a discussion of the *Freeman* holding.

48. See *infra* note 53 and accompanying text for a discussion of protected sexual expression in the First Amendment context.

49. CARMEN & MOODY, *supra* note 42, at 14. Moreover, the harms associated with prostitution have "historically played a larger role than the perceived moral" infringements; such harms include venereal disease, organized crime, "robberies and assaults," narcotics trafficking and other such "ancillary crime." Julie Pearl, Note, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS L. J. 769, 786-87 (1987). The legitimate government rationales for policing illicit sexual activities in public places include preventing the spread of STDs, teenage pregnancy and crimes that often accompany vices like prostitution. Accordingly, "in a substantial number of cases [the prostitute is] at once a perpetrator and a 'victim' of [the] far more serious criminal activities" that relate to prostitution. *People v. Behncke*, 534 N.Y.S.2d 79, 82 (N.Y. Crim. Ct. 1988).

It is intuitive that all of these social harms arise from the immediate physical proximity of prostitutes, their customers and the public. Consequently, the legitimate government rationales for regulating sexually-expressive transactions are unavailing in circumstances where illicit vice activities do not involve immediate physical proximity, especially if they preclude direct physical contact altogether. *Id.*

B. THE CONSTITUTIONAL PARAMETERS OF "OBSCENE"
VERSUS "INDECENT" SEXUAL EXPRESSION

Government's responsibility for safeguarding public morality encompasses more than policing street prostitution.⁵⁰ Communications media, especially cinema and radio and television broadcasts, must be regulated to ensure basic standards of decency.⁵¹ Nonetheless, even when government is concerned with the well-being of children⁵² it may not infringe fundamental First Amendment protections for expression.⁵³

The distinction between indecent⁵⁴ versus obscene⁵⁵ communications is the crux of maintaining an appropriate constitutional balance of

50. David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 120 (1994), (quoting Alexander Bickel, *On Pornography II: Dissenting and Concurring Opinions*, 22 PUB. INTEREST 25, 26 (1971)). For example, "[s]exual expression can be zoned to remote parts of town, denied access to the airwaves until late at night, and even criminally suppressed if the community finds it simultaneously appealing, offensive, and valueless." *Id.*

51. See *infra* note 63 and accompanying text regarding government's duty to manage the communications media. Communications transmitted through the airwaves have historically been subject to heightened regulation by government in comparison with other media. Burke, *supra* note 13, at 118. There are three rationales advanced in support of stringent regulation. First, "broadcasts . . . confront individuals in the privacy of their own homes" through the mere flick of a switch, whether deliberate or unintentional. *Id.* Second, broadcasts are readily accessed by children. *Id.* at 119. Finally, the airwaves are a limited public resource and government therefore ought to confine the use of such resources to uses that advance the public interest. *Id.* at 119-20. In contrast, other communications media tend to obviate these rationales because they require affirmative steps to access. *Id.* at 120.

52. See Annemarie J. Mazzone, Comment, *United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 167 (1994) (noting that possession of child pornography is a strict liability offense under recent Supreme Court decisions); John Quigley, *Child Pornography and the Right to Privacy*, 43 FLA. L. REV. 347 (1991) (analyzing *Osborne v. Ohio*, 110 S. Ct. 1691 (1990), which affirmed state statutes "prohibiting the in-home possession of child pornography for personal use"). Pornography involving children is an exception to the Supreme Court's doctrine in First Amendment jurisprudence because the Court has acknowledged that the unique harms inflicted on children by such communications outweigh even fundamental considerations of privacy. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

53. *Roth v. United States*, 354 U.S. 476, 487 (1957). The Supreme Court recognized that sexual expression is a necessary prerequisite to solving many of the problems that concern the public. *Id.* Thus, even publicly disseminated communications that may offend "the young, the immature or the highly prudish" and do not appeal to the intellect "contribute . . . greatly to the development and well-being of our free society and are indispensable to its continued growth." *Id.* at 488-90.

54. *FCC v. Pacifica*, 438 U.S. 726 (1978). In *Pacifica*, the Supreme Court analyzed the precedent with respect to obscene and indecent expression in the context of broadcast communications media. The Court distinguished "indecent" communications from "obscene" communications on the basis that they do not appeal to prurient interests; instead, indecency "merely refers to [more generalized] nonconformance with accepted standards of morality." *Id.* at 739-40.

sexual expression and moral standards.⁵⁶ Although there is no bright line test,⁵⁷ the Supreme Court held that sexual expression is indecent where the expression is patently offensive and there exists a risk of exposure to children.⁵⁸ Obscene communications are those which are highly offensive, appeal to abnormal or perverse interests in sexual intercourse, and lack any socially redeeming value.⁵⁹

Which of the two classifications applies to a particular sexually expressive communication determines the constitutionality of its regulation.⁶⁰ The Government has the power regulate the dissemination of

55. *Roth*, 354 U.S. at 489. Under the Court's constitutional doctrine, obscene communications are those which have no "redeeming social value" and "tend to corrupt the public morals" by appealing to the "prurient interests" of the recipients, as judged by the "average person" in the geographic community in which the communication is disseminated. *Id.* "Prurient interests" are those which flow from a "shameful or morbid interest in nudity, sex, or excretion . . . beyond [the] customary . . . description or representation of such matters" and do not encompass "normal, healthy sexual desires." *Id.* Federal law also prohibits mailing, transporting for public sale or distribution, and broadcasting obscene communications. 19 U.S.C. § 1461 *et seq.* (1992).

56. *Miller v. California*, 413 U.S. 15 (1973). The Supreme Court uses a three-part test to ascertain whether sexual expression is obscene. *Id.* at 24-26. Under the *Miller* test, a publicly-disseminated communication may be classified as obscene if a reasonable person from the community in which it has been disseminated would find that the communication, when taken as a whole: 1) "appeals to the prurient interest" of the recipient; 2) "has patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse or sodomy, or masturbation, or lewd exhibition of the genitals;" and 3) "lacks serious literary, educational, artistic, political, or scientific value." *Id.*

57. Arnold H. Loewy, *Obscenity, Pornography, and First Amendment Theory*, 2 WM. & MARY BILL RTS. J. 471, 473 (1993). Although here Loewy discusses the Supreme Court's two constitutional classifications of sexual expression, the Court to date has not given the lower courts or Congress a bright line. In most instances "the Court is forced to make highly artificial [ad hoc] distinctions based on prurient appeal" that offer scant guidance to the regulators. *Id.*

The practical impact of the absence of any bright-line is that "[s]exual expression jurisprudence . . . rests more on the assertion of distinctions than on reasonable analysis." Cole, *supra* note 50, at 111. An illustration of the sometimes illogical outcomes reached under the Court's doctrine in this area is discussed by Professor Cole, who points out that the Court has in the past upheld the right to privately possess obscene material in the home, even though "any number of consenting others may be invited," including children; yet, the Court has affirmed criminal sanctions in cases where consenting adults were exposed to similarly obscene materials at theaters to which minors and unconsenting adults were barred. *Id.* at 141.

58. See *infra* notes 80-88 and accompanying text discussing the constitutional protections afforded indecent expression.

59. *Miller*, 413 U.S. at 20 n.2.

60. *Id.* at 21; Davis, *supra* note 29, at 633. Communications classified as "indecent" are afforded a much higher degree of constitutional protection than those that qualify under the *Miller* test as "obscene." *Sable v. FCC*, 492 U.S. 115, 123-24 (1989). Specifically, regulating indecent expression is constitutional only if the regulations serve a compelling government interest and the means used to advance the interest are the least restrictive

indecent communication if the government entity articulates and establishes a compelling reason for doing so.⁶¹ However, the regulation cannot constitute a full ban on indecent speech. In comparison, the Government can totally prohibit obscene communications, since obscenity does not fall within the protections of the First Amendment.⁶² However, the Supreme Court has carved out an exception to governmental prohibition of obscene expression by holding that the Government cannot interfere with the perusal of obscene materials in places where individuals have legitimate expectations of privacy,⁶³ such as in their homes.⁶⁴

available and avoid unnecessarily infringing other constitutional rights. *Ferber*, 458 U.S. at 758. While the *Pacifica* Court used an intermediate standard of constitutional scrutiny because of the pervasiveness and availability of radio as a public forum, the Court affirmed FCC "time, place and manner restrictions" that limited indecent radio broadcasts to late night time slots when children were unlikely to hear them. *Pacifica*, 438 U.S. at 726, 749-51. The Court held that these restrictions were constitutionally proper since the "least restrictive means" of achieving the government's interest in protecting children and did not outright ban the broadcasts. *Id.*

61. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 569 (1991). The *Barnes* Court held that Government must establish a compelling interest and use the least restrictive means necessary to achieve its stated purpose. *Id.* Nonetheless, the Court noted that decency "law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated [on constitutional grounds] the courts will be very busy indeed." *Id.*

62. See *supra* note 55 and accompanying text discussing that the Constitution does not protect obscene expression.

63. *Stanley v. Georgia*, 394 U.S. 557 (1969). An individual's right to privacy is the right to be free from government interference in those facets of life in which he has a reasonable expectation of being left alone. *Id.* at 563-64. The right to privacy is not enumerated in the Constitution and is therefore a "penumbra," or peripheral right implied by the Supreme Court as indispensable to the exercise of other First Amendment rights. *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965). Although the right to privacy is implied, the Court has held that it is essential because "[w]ithout . . . [it] the specific rights would be less secure." *Id.* at 563-64. Accordingly, the Supreme Court acknowledges that although "the First and Fourteenth Amendments recognize a valid governmental interest in [safeguarding public morality] . . . the assertion of that interest cannot . . . be insulated from constitutional protections [of individuals' privacy] . . . The door barring federal and state intrusion [into the realm of privacy] . . . cannot be left ajar." *Stanley*, 394 U.S. at 563-64. Thus, the Court has acknowledged constitutionally protected "zones of privacy" in human transactions involving marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978), procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), abortion, *Roe v. Wade*, 410 U.S. 113 (1973), and contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972). As a fundamental right, privacy may only be intruded upon by government "if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest." *Planned Parenthood v. Casey*, 505 U.S. 833, 929 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

In reaching the appropriate balance between privacy and morality the Court often draws a public/private distinction, the rationale of which is summarized as follows:

A man may be entitled to read an obscene book in his room, or expose himself indecently there We should protect his privacy. But if he demands a right to

Other considerations may similarly impact the constitutionality of the Government's treatment of sexual expression. Communication media easily accessed by children or inadvertently received by unconsenting adults, for example, may heighten the need for government intervention.⁶⁵ The converse is also true when a medium of communication has

obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies . . . [insofar as he] intrudes upon us all, want it or not.

Cole, *supra* note 50 at 141.

A commentator suggested several alternative rationales as to why the Supreme Court permits many forms of sexually expressive communication in private although it flatly condemns them when they are disseminated in public. *Id.* at 154. First, the Court apparently feels that the public/private distinction “is necessary to protect children and unconsenting adults from exposure to offensive and degrading materials.” *Id.* Second, the public/private distinction represents an attempt to compromise between the requirements of an egalitarian society and the selfish human needs of the members of that society. *Id.* at 156. Third, although the Court recognizes that sex plays an integral part in human existence, it must subordinate sexual activity and sexual communications in order to enable society to achieve its more compelling “productive endeavors.” Cole, *supra* note 50, at 159. Fourth, given that government derives its authority from the ability to control human conduct, the Court may perceive sexuality as a direct threat to the government itself insofar as sexuality has historically resisted social control. *Id.* at 161-62. Finally, the Court accedes to regulations controlling sexual activity and sexual communications when exposed to public view because such forms of social control are the only practical means by which to establish socially tolerable norms. *Id.* at 176-77, n.231.

64. *Stanley*, 394 U.S. at 568. “[I]ndividual privacy is entitled to greater protection in the home than on the streets . . . the right of every person to be let alone must [always] be placed in the scales” of justice. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). Accordingly, obscene communications are protected from government action so long as they are not received outside the sanctuary of a building in which the recipient has a “legitimate expectation of privacy.” *Katz v. United States*, 389 U.S. 347, 359 (1967).

Stanley qualified the *Roth* holding “that obscenity is not expression protected by the First Amendment” insofar as the *Roth* decision dealt only with obscene communications that were disseminated in public and thus the Supreme Court was not required to balance the government's interest with an individual's right to privacy. *Stanley*, 394 U.S. at 560. In comparison, the *Stanley* decision for the first time addressed the question of whether “a statute imposing criminal sanctions upon the mere (knowing) possession of obscene matter” is constitutional. *Stanley*, 394 U.S. at 559-60. The Court held that the defendant did indeed have an unfettered “right to satisfy his intellectual and emotional needs in the privacy of his own home.” *Id.* at 565. In reaching its decision, the Court emphasized that “[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.” *Id.*

65. *Pacifica*, 438 U.S. at 748. In *Pacifica*, the Supreme Court held that “broadcast media have established a uniquely pervasive presence in the lives of all Americans . . . [insofar as] indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home.” *Id.* Pervasive media are therefore more susceptible to government regulation due to their unique ability to “[i]ntrude on the privacy of the home, or the degree of captivity [which characterizes their recipient that] makes it impractical for the [recipient] to avoid exposure.” *Erznoznik*, 422 U.S. at 209. Similarly, indecent communications carried by non-pervasive media may be regulated on the basis of the relative ease

built-in safeguards against such access.⁶⁶ Moreover, courts also consider where sexual expression falls on a conduct/expression continuum to determine constitutionality.⁶⁷ As a general rule, the closer to pure expression a particular communication is, the more deference government must accord it.⁶⁸ However, the legislature has not always tried to regulate sexual expression pursuant to the guidance of the courts.

C. THE HISTORY OF FEDERAL DIAL-A-PORN REGULATION

The history of federal dial-a-porn regulation illustrates the interplay between First Amendment protections for indecent expression and gov-

by which inadvertent access to them may be obtained by minors and unconsenting adults, i.e., their "accessibility." *Sable v. FCC*, 492 U.S. 115, 130-31 (1989). Nonetheless, "the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Erznoznik*, 422 U.S. at 214. Thus, even in cases where indecent communications are merely disseminated through accessible, as opposed to pervasive, media government regulation is only appropriate upon a "showing that substantial privacy interests [of the recipient, i.e., the right to not be exposed to such communications,] are being invaded in an essentially intolerable manner." *Id.* at 210.

66. *Pacifica*, 438 U.S. at 748.

67. *Texas v. Johnson*, 491 U.S. 397, 406 (1989). In *Johnson*, Justice Brennan summarized the Supreme Court's constitutional doctrine on the expression versus conduct dichotomy as follows:

The Government generally has a freer hand a free in restricting expressive conduct than it has in restricting the written or spoken word It may not, however, proscribe particular conduct *because* it has expressive elements It is . . . not simply the verbal or nonverbal nature of the expression, [instead it is] the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Id. (citations omitted). Thus, where the activities at issue constitute pure conduct, such as conduct that involves nothing more than incidental expression, the Court generally accords the government broad leeway to regulate, and even to prohibit, harmful conduct. *Id.*

Representative of the Court's application of its expression versus conduct doctrine is *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Hardwick*, the Court addressed the question of whether the right to privacy included homosexual sodomy between consenting adults in their homes. *Id.* at 221. In the Court's opinion, Justice White deemed such conduct pure and held that the privacy protections of the Constitution did not extend to homosexual sodomy. *Id.* at 210.

Justice White distinguished homosexual sodomy from the obscene communications at issue in *Stanley* and reasoned that in instances of the latter the communications were protected under the Constitution because they were "firmly grounded in the First Amendment" insofar as they had substantial expressive elements—in contrast with the conduct at issue in *Hardwick*. *Id.* at 193. Justice White also noted that the government's interest in regulating homosexual sodomy, a practice long criminalized in the common law, was "compelling" because recognizing sodomy as a valid exercise of the right to privacy would lead to acknowledging similar rights to engage in illicit conduct such as "adultery, incest and other sexual crimes [merely because] they are committed in the home." *Id.* at 210.

68. *Cole*, *supra* note 50, at 114. "While sexual conduct is far from unregulated, constitutional law permits more extensive regulation of the public representation of sexual behavior than of the behavior itself." *Id.*

ernment's attempts to manage new forms of sexual expression. In 1983, commercial services first offered sexual gratification at the end of a telephone line.⁶⁹ The FCC⁷⁰ responded to complaints that children could access dial-a-porn services⁷¹ by instituting telephone regulations that effectively banned both indecent and obscene telephone communications.⁷² Dial-a-porn service providers challenged the FCC regulations on constitutional grounds for nearly a decade of litigation.⁷³

In *Carlin Communications, Inc. v. FCC ("Carlin I")*,⁷⁴ the United States Court of Appeals for the Second Circuit deemed the FCC regulations invalid because the regulations totally banned indecent telephone communications.⁷⁵ The regulations also failed to incorporate narrowly tailored technical means then available for restricting access.⁷⁶ Subsequently, in the derivative case *Carlin II*,⁷⁷ the court held that a modified

69. Potter, *supra* note 29, at 452. One commentator has sketched the emergence of the dial-a-porn industry:

Telephone pornography, or dial-a-porn, first became available in February 1983 when Drake Publisher began transmitting the messages in the New York area. A short time later, Carlin Communications, Inc., which is now the largest telephone pornography supplier in the country, assumed Drake's operations and formed subsidiaries in large cities around the United States. Sable Communications, Inc., one of the Carlin subsidiaries, assumed operations from Carlin in southern California in December 1983.

Id. at 452.

70. *United States v. Davis*, 564 F.2d 840 (9th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) (discussing the scope of authority of federal agencies). Congress has constitutional authority to empower an administrative agency like the FCC to impose its own regulations and apply both civil and criminal sanctions. *Id.* at 843-44. The only requirements are that the delegation of power is within the scope of congressional authority and the exercise of power conforms to guidelines submitted in advance to Congress. *Id.*

71. Potter, *supra* note 29, at 433, 454-56. Government's primary concern was the impact of dial-a-porn on the moral and physical well-being of children. *Id.* Once dial-a-porn became widely available, there was "substantial evidence" that children routinely accessed dial-a-porn services. *Id.* There were "numerous documented instances" that children who obtained access to such services engaged in—with other children—the actual types of sexual activities they heard. *Id.* at 433-34.

72. *Carlin Communications, Inc. v. FCC (Carlin I)*, 749 F.2d 113 (2d Cir. 1984). Compliance with these regulations "would [have] place[d] substantial economic and administrative burdens on" dial-a-porn service providers and would have "discourage[d] many adults from using the service[s]." *Id.* at 123.

73. See generally Potter, *supra* note 29, for a discussion of the history of federal dial-a-porn regulation and resulting litigation.

74. *Carlin I*, 749 F.2d at 122, 124.

75. *Id.*

76. *Id.*

77. *Carlin Communications, Inc. v. FCC (Carlin II)*, 787 F.2d 846, 856 (2d Cir. 1986). The FCC also dictated the time, place and manner by which the public could access dial-a-porn communications. *Id.* at 846-48.

version of the regulations was likewise unconstitutional.⁷⁸ Although the modified regulations created a complimentary system of scrambling devices, access codes and credit card-only payments, the technical solutions were unduly restrictive on adults' First Amendment right to communicate indecent expression.⁷⁹ In certain regions,⁸⁰ the telephone infrastructure did not support all elements of the system and therefore service providers could not comply with the regulations.⁸¹ The FCC issued new regulations which permitted dial-a-porn services to elect their choice of suitable technical means for limiting access.⁸² In *Carlin III*,⁸³ the court deemed the new regulations constitutional.⁸⁴

In response to the *Carlin* cases,⁸⁵ Congress amended the Communi-

78. *Carlin II*, 787 F.2d at 848. In the preamble to its analysis, the *Carlin II* court observed that the new regulations "comport . . . neither with this court's prior ruling, nor with overall constitutional or statutory considerations." *Id.*

79. *Id.* at 854. The dial-a-porn service providers successfully argued that implementation of the new regulations was still "technically infeasible," as well as "economically and administratively impractical," and therefore amounted to an outright ban on indecent dial-a-porn communications. *Id.* at 851.

80. *Id.* at 848. The court was concerned primarily with the state of New York telephone region. *Id.*

81. *Carlin II*, 787 F.2d at 855-56. In view of the guidance contained in its *Carlin I* opinion the Second Circuit found this noncompliance troublesome. *Id.* In effect, the access code requirement for the New York telephone region still prohibited all dial-a-porn communications in that area due to the technical attributes of the telephone company which did "not permit [a dial-a-porn] caller to communicate the access code to the telephone company or service providers." *Id.* at 855.

82. 2 F.C.C.R. 2714, 2722 (1986). Specifically, the FCC provided that in areas in which credit card or access code requirements were burdensome or unworkable, due to the technical attributes of the telephone facilities, dial-a-porn providers could comply with the modified regulations by scrambling their communications. *Id.* Consequently, the FCC would restrict sales of the dial-a-porn descrambling devices to consenting adults. *Id.* The FCC also recommended that all dial-a-porn service providers "adopt a uniform method of scrambling and direct [the telephone companies] to submit complete technical specifications" so that the scrambling devices could be made compatible. *Id.*

83. *Carlin Communications, Inc. v. FCC (Carlin III)*, 837 F.2d 546 (2d Cir. 1987).

84. *Id.* at 556. Specifically, the *Carlin III* court concluded that the FCC's regulatory scheme "provided a reasonable analysis explaining its decision to add scrambling as an optional defense" in cases of inadvertent access by children. *Id.* The court was satisfied that, under the new regulatory scheme, consenting adults would "continue to have access [to dial-a-porn communications], with minimal inconvenience, while minors' access is restricted No censorship of the content [by government] is involved." *Id.* at 557 (citations omitted).

85. 129 CONG. REC. H16559 (daily ed. Nov. 18, 1983) (statement by Rep. Kastenmeier). A statement on the House floor by Representative Kastenmeier, a co-sponsor of the amendment, captured Congress' heavy reliance on the FCC to develop dial-a-porn regulations: "We leave it to the FCC to prescribe the specific [i.e., technical] regulations that permit adult access while limiting children's access." *Id.* Another co-sponsor of the amendment, Representative Bliley, made the following telling remarks on the House floor: "[T]he ruling in *Pacifica* clearly affirms the FCC's ability and authority [to develop the technical dial-a-

cations Act of 1934 in an attempt to codify the FCC regulations.⁸⁶ The legislation⁸⁷ incorporated technical means for preventing access by children but treated indecent and obscene communications as equivalents.⁸⁸ Consequently, in *Sable v. FCC*,⁸⁹ the Supreme Court invalidated Congress' version of the decency regulations. Congress later enacted regulations that passed constitutional scrutiny because they did not ban indecent dial-a-porn communications.⁹⁰ The history of dial-a-porn regulation and its judicial interpretation demonstrates that once the Government understands the technical attributes of the communications medium it wants to regulate, it can do so in a constitutionally valid manner.

D. THE COMMUNICATIONS DECENCY ACT OF 1996, 47 U.S.C. § 223

The Government has again attempted to legislate morality. The most recent regulation touches on a new communications medium, the Internet. In February 8, 1996, President Clinton signed the Communications Decency Act of 1996 ("CDA")⁹¹ into law as part of the comprehen-

porn regulations] . . . This amendment clarifies that question and . . . I believe it was absurd for the FCC to even consider their authority in that area questionable based on *Pacifica*." *Id.*

86. 47 U.S.C. § 223(b)(1) (1983). Through this amendment Congress criminalized all "obscene, lewd, lascivious, filthy or indecent" dial-a-porn communications. *Id.* The legislation provided in relevant part:

whoever knowingly . . . by means of telephone (directly or by recording device) any obscene, lewd, lascivious, filthy or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or . . . permits any telephone facility under such person's control to be used [for this purpose] shall be fined in accordance with title 18, United States Code, or imprisoned not more than two years, or both.

Id.

Thus, dial-a-porn services could be held criminally liable even when sexually expressive communications were received by a minor or nonconsenting adult inadvertently. Brian D. Woolfall, Comment, *Implications of a Bond Requirement for 900-Number Dial-A-Porn Providers: Exploring the Need for Tighter Restrictions on Obscenity and Indecency*, 30 CAL. W. L. REV. 297, 303 (1994).

87. *Carlin I*, 749 F.2d at 119, n.9. The legislation from its inception was "rushed . . . due in part to [a] 180-day congressional injunction" which made the legislative process "somewhat superficial." *Id.*

88. *Carlin III*, 837 F.2d at 560-61. Specifically, in *Carlin III*, part of the court's analysis was mistaken and induced Congress to merge the two classifications: "the words 'or indecent' are separable so as to permit them to be struck and the statute otherwise upheld." *Id.* Consequently, all sexually-explicit dial-a-porn communications were treated the same, i.e., as obscenity, in disregard for the mandate of *Miller*. *Id.*

89. 492 U.S. 115 (1989).

90. 47 U.S.C. § 223(b) (1989 & Supp. II).

91. 47 U.S.C. § 609 (captioned "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technolo-

sive Telecommunications Act of 1996.⁹² Impetus for the CDA originated largely from the legislative efforts of Senator James D. Exon, commencing in 1993, to eradicate immoral and offensive online communications.⁹³ Interestingly, Congress enacted the CDA during a national election year.⁹⁴

The CDA is a direct response to recent studies⁹⁵ indicating a statistically significant number of Internet sites that offer sexually explicit and sometimes obscene text and graphical images that minors can access from home.⁹⁶ Although, like the federal dial-a-porn regulations eventually implemented, the CDA acknowledges technical barriers to access by minors, such as scrambling devices, access codes and credit card-only payments, the CDA primarily relies on the deterrent effect of criminal penalties to control access to offensive online material.⁹⁷ Specifically,

gies"), amending 47 U.S.C. §151 (the Communications Act of 1934), as amending 47 U.S.C. § 223 (subtitled "Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities").

92. 47 U.S.C. § 609, amending 47 U.S.C. 151 *et seq.* (the Communications Act of 1934); see also Reid Kanaby, *Federal Indecency Ban Already Having an Effect Online Though It's Not Yet Being Enforced, Critics Say the Communications Decency Act is Chilling Free Speech on the Internet. Supporters Say It's Long Overdue*, PHILADELPHIA INQUIRER, March 7, 1996, at F03.

93. *Legislation Introduced to Expand 'Indecency' Liability of Telecommunications Service Providers*, 7 No. 3 J. PROPRIETARY RIGHTS 31 (1995). The first attempt to police morality on-line was part of the unsuccessful Telecommunications Reform Bill of 1993 (S.1822, 103d Congress, Sections 801-804) and had language nearly identical to the current Communications Decency Act of 1995. *Id.* Interestingly, the broadcast and dial-a-porn regulations discussed above only included commercial communications within their scope. In contrast, the CDA and its predecessors encompass all communications on-line, whether commercial or not. Burke, *supra* note 13, at 121.

94. See Susan Benkelman, *Indecent Exposure/Cyberspace: Does It Need to be Censored?*, NEWSDAY, Mar. 17, 1996 at A07; Harvey A. Silvergate, *Cyber Speech at Risk*, NAT'L L. J., Mar. 4, 1996 at A19 (noting that, although the Clinton Administration has expressed serious reservations about the constitutionality of the CDA, "the president may have felt compelled to sign the bill to prevent Republicans from claiming that he's soft on pornography during this fall's campaign"). The process of enacting the CDA bears a striking resemblance to the politic manner by which the initial dial-a-porn regulations were adopted prior to *Carlin I*. See *supra* note 87, noting that the dial-a-porn legislative process was "somewhat superficial."

95. See generally Rimm, *supra* note 13, at 1849-51 (claiming sexual materials are available in large numbers on-line).

96. See *supra* note 71 and accompanying text (providing an example in the dial-a-porn context of the consequences of exposing minors to sexually explicit material).

97. In § 223(e)(5)(A)-(B), the CDA provides for affirmative defenses in cases where minors do indeed access prohibited material and the supplier has attempted to restrict such access by "appropriate measures" that are "feasible under available technology." The act also enumerates "verified credit card, debit account, adult access code, or adult personal identification number" procedures as affirmative defenses. Otherwise, the act does not recognize available technical means for controlling access to offensive communications at the receiving end and instead applies criminal penalties to on-line users who permit such ac-

the CDA contains two provisions, each of which criminalizes certain types of expression when transmitted online. The first, § 223(a)(1)(B),⁹⁸ imposes felony liability on anyone who knowingly uses a “telecommunications device”⁹⁹ to provide, in any way, obscene or indecent communications to a minor.¹⁰⁰ Thus, a party who allows someone under the age of eighteen to access an obscene or indecent communication through a telecommunications medium is subject to felony prosecution.¹⁰¹ The second relevant criminal provision, § 223(d),¹⁰² punishes anyone who knowingly uses an “interactive computer service”¹⁰³ to, in any way, communicate to a minor any expression that “in context . . . [is] patently offensive as measured by contemporary community standards . . . [and involves] sexual or excretory activities or organs.”¹⁰⁴ Nowhere in either

cess to be transmitted through their computers. *See supra* notes 82-84 and accompanying text for a treatment of some of the technical means for restricting access by minors to adult communications.

98. § 223(a)(1)(B) provides that whomever:

by means of a telecommunications device knowingly (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . . shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

Note that this language impermissibly merges obscene and indecent expression in contravention of *Miller*. *See supra* notes 60-61 and accompanying text which support the proposition that the failure to distinguish between the two classifications of expression renders the proviso constitutionally infirm.

99. The CDA defines a “telecommunications device” in the negative, i.e., by stating what the term does not include. *See* § 223(h)(1)-(2).

100. *See supra* note 98 for the statutory language comprising § 223(a)(1)(B).

101. *See* § 223(a)(1) and (d). The CDA imposes the following criminal penalties, including up to two years imprisonment and/or: in the case of an individual, a fine up to \$250,000; with respect to a corporate entity, a fine up to \$500,000. *Id.*

102. § 223(d) provides:

Whoever . . . in interstate or foreign communications knowingly . . . uses an interactive computer service to send to a specific person or persons under 18 years of age, or . . . uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication . . . [or] knowingly permits any telecommunications facility under such person’s control to be used for an activity prohibited . . . with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

103. 47 U.S.C. § 230(e). The section defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” *Id.*

104. *See supra* note 102 for the full statutory text.

§ 223(a)(1)(B) or § 223(d) are there any definitions or guidelines as to what constitutes obscene versus indecent expression,¹⁰⁵ or the terms "in context,"¹⁰⁶ "patently offensive,"¹⁰⁷ or "contemporary community standards."¹⁰⁸

The CDA constitutes a sweeping precedent¹⁰⁹ for the Government's ability to mandate moral standards in a communications medium.¹¹⁰ As such, several lawsuits challenging the CDA on constitutional grounds were filed almost contemporaneously with the CDA becoming law.¹¹¹ Congress apparently anticipated such challenges to the constitutionality

105. See *supra* notes 54-61 and accompanying text for a discussion of the constitutional ramifications of this distinction.

106. 47 U.S.C. § 223(d).

107. *Id.*

108. *Id.*

109. John Schwartz, *Senate Bill to Punish On-Line Obscenity*, L.A. TIMES, March 24, 1995, at 1995 WL 2029098. Characterizing on-line pornography as "totally out of control," Senator Exon has led the charge to enact "sweeping reforms" that are intended to set appropriate moral standards for on-line telecommunications. *Id.* Senator Exon has cited controversial articles which claim that the majority of Internet sites are used for immoral purposes and threaten the health and safety of the nation's youth, as well as unconsenting adults. *Id.* According to the Senator, "tough federal laws are needed" to penalize persons who are "polluting" on-line communications. *Id.*

As proposed, the Exon bill was similar to the Telecommunications Reform Bill of 1993 rejected by the Senate. *Id.* The bill would have enlarged the scope of the Communications Act of 1934 to subsume all telecommunications media under the Helms amendment and impose strict criminal liability. *Id.* The bill would have subjected all providers of on-line services to liability for each incident of transmitting obscene, indecent, lewd or offensive communications or for permitting minors or unconsenting adults to access such communications, regardless of whether they knew or should have known that such materials were disseminated through their services. WWW Page: *Electronic Privacy Information Center*, <http://epic.org>, viewed september 13 (last updated Aug. 2, 1995) (copy on file with J. MARSHALL J. COMPUTER & INFO. L.).

Moreover, the Telecommunications Reform Bill would have increased the maximum criminal penalties for violations from \$50,000 in fines, plus six months in prison, to \$100,000 and two years in prison (a felony). *Id.* In effect, the bill would have required on-line service providers to monitor each and every communication, including text, audio and visual data and files, when transmitted through their service. *Id.*

110. See *supra* notes 63-64 and accompanying text for a discussion of government's responsibility to safeguard public morality.

111. The law suits, which have been consolidated, were all filed in the Eastern District of Pennsylvania. The first suit was actually filed on February 7, 1996, by a coalition of abortion rights groups, including Planned Parenthood of New York City, California Abortion and Reproductive Rights Action League, National Abortion and Reproductive Rights Action League, Medical Students for Choice, and the National Abortion Federation, as plaintiffs. Another suit was filed on February 8, 1996, by the editor of the electronic newspaper The American Reporter. That same day, the American Civil Liberties Union ("ACLU") commenced a separate suit on behalf of a number of civil libertarians. The most interesting coalition, however, is one whose diverse plaintiffs include the American Library Association, America Online, Apple Computer, Compuserve, Microsoft, Prodigy, and the Society of Professional Journalists. This last group filed suit on February 26, 1996.

of the CDA, since the act expressly incorporates procedures for expedited judicial review in the event that its validity is contested.¹¹² News sources suggest that Congress drafted the CDA knowing that its scope was constitutionally overbroad.¹¹³ The overbroad contention may be supported by the fact that the CDA treats obscene and indecent expression as equivalents. Moreover, the CDA is imprecise as to what types of communications fall within the proscriptions of the act.¹¹⁴

The Supreme Court will likely determine the ultimate constitutional status of the CDA. However, the Internet medium is not amenable to traditional governmental approaches for regulating offensive expression. Accordingly, the Court may be forced to carve out new solutions to the problem of indecent speech on the Internet.

III. ANALYSIS

A. THE GOVERNMENTAL RATIONALE FOR CRIMINALIZING TRADITIONAL PROSTITUTION CANNOT APPLY TO CYBERPROSTITUTION

Cyberprostitution cannot easily conform to current regulation of real-world, physically-based regulations like prostitution statutes. Unlike prostitution, cyberprostitution does not include direct genital con-

112. 47 U.S.C.A. § 223, Sec. 561, entitled "Expedited Review." The procedures are bifurcated with the first proviso, 47 U.S.C.A. § 223, Sec. 561(a), mandating that "any civil action challenging the constitutionality . . . of this title or any amendment made by this title . . . shall be heard by a district court of 3 judges." The second proviso, 47 U.S.C.A. § 223, Sec. 561(b), mandates that any "interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment . . . unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court." Subsection (b) also requires that any appeal must be filed not more than 20 days after entry of an adverse ruling.

113. See, e.g., *Cybercensors Anti-Indecency Measures in New Law Go Too Far*, DET. FREE PRESS, Feb. 11, 1996, at 2F ("We, too, want to protect children from material that is harmful . . . [y]et the anti-indecency measures in the telecommunications reform bill . . . are overly broad and nebulous, and deserve a legal challenge"); *'Indecency' Attack On Internet 'Cyberporn' Can Be Controlled Without Stifling Our Freedoms*, David Appell Says, PHOENIX GAZETTE, Feb. 1, 1996, at B5 (the CDA "which leaves 'indecency' undefined . . . is a misguided attempt to impose particular moral codes on the newest, most powerful, two-way communication medium yet invited . . . [and] is an affront to the First Amendment and the civil rights for all Americans"); Anna G. Eshoo, *Nanny On the Net*, THE WASH. POST, Jan. 31, 1996, at A15 (the CDA "is the cyberspace equivalent of book burning and should be rejected outright"); John Schwartz, *Censors Beware: It's Difficult to Control Information On the Net*, THE WASH. POST, Feb. 12, 1996, at F19 (stating with respect to on-line censorship through the CDA, "good luck, guys . . . the [CDA] effort to control information is futile"); Harvey A. Silvergate, *Cyber Speech at Risk*, NAT'L LAW JOURNAL, Mar. 4, 1996, at A19 (if the CDA is not overturned, "government will exercise the power to act as parent to all of us, and a giant hole will have been carved in the First Amendment").

114. See generally Schwartz, *supra* note 113, at F19; Silvergate, *supra* note 113, at A19.

tact between prostitute and customer.¹¹⁵ Because cyberprostitution ultimately precludes any intimate touching, it cannot be treated as an equivalent of prostitution's illicit conduct.¹¹⁶

Prostitution statutes may not criminalize auto-erotic performances, or merely masturbating in the presence of others because these activities do not involve physical contact between prostitute and customer. For example, in *People v. Greene*,¹¹⁷ the Criminal Court of New York dismissed a prostitution charge because the sexual activity at issue involved only an "auto-erotic performance by the defendant for" the visual enjoyment of her customer.¹¹⁸ The *Greene* court concluded that auto-erotic performances are a type of fantasy activity protected by the First Amendment.¹¹⁹

Considering the hypothetical in Section I, Rebecca could not actually touch the cyberprostitutes. Instead, online sexual contact ultimately precludes actual genital contact.¹²⁰ When Rebecca interacts with virtual lovers situated perhaps on other continents, the parties' conduct with respect to the *Sybian II* cannot be proximate. Furthermore, there is no actual physical contact within the meaning of prostitution.¹²¹ As such, the activity between Rebecca and a cyberprostitute consists of only fantasy, which is protected conduct under the First Amendment.

Additionally, even conduct that does involve substantial physical contact is not prostitution if the intimate touching is indirect or merely incidental to fantasy.¹²² For example, in *People v. Georgia A.*,¹²³ the New York Criminal Court ruled that "the basic sado-masochistic relationship" is not a criminal offense.¹²⁴ In *Georgia A.*, the accused received her fee for "foot licking, spanking, domination and submission"¹²⁵ but

115. See *supra* note 42 and accompanying text (prostitution requires "some [form of] intimate touching between the prostitute and the customer").

116. See *supra* note 15 and accompanying text discussing the elements of cyberprostitution.

117. 441 N.Y.S.2d 636 (N.Y. Crim. Ct. 1981)

118. *Id.* at 638.

119. *Id.* at 637. "[T]he accused's agreement must, to be criminal, contemplate physical contact between the accused and one other person." *Id.*

120. See *generally* notes 2-13 and accompanying text for a depiction of cyberprostitution transactions.

121. See *supra* note 42 and accompanying text for the meaning of "contact."

122. *Greene*, 441 N.Y.S.2d at 637. "It is clear that the legislature did not intend [the prostitution statutes] to proscribe commercial agreements to engage in any and all kinds of sexual conduct . . . without physical contact . . . it would have been necessary for the legislature simply to proscribe all agreements to engage in sexual conduct for a fee." *Id.*

123. 621 N.Y.S.2d 779 (N.Y. Crim. Ct. 1994).

124. *Id.* at 781.

125. *Id.*

not for direct genital contact.¹²⁶ The *Georgia A.* court held that sado-masochism does not involve the type of sexual or intimate touching that prostitution contemplates and genital contact is merely incidental to sado-masochistic fantasy.¹²⁷

Similarly, cyberprostitution's intimate contact is clearly indirect and incidental to its fantasy purpose. Rebecca does not come in contact with an actual person's body; instead, she touches only the *Sybian II*. Any sexual gratification Rebecca receives, therefore, derives solely from her fantasy that she is in intimate physical contact with an actual human being. Accordingly, cyberprostitution is only an erotic performance or other type of fantasy activity that constitutes protected First Amendment expression, like auto-erotism and sado-masochism.¹²⁸

Additionally, traditional government rationales for criminalizing prostitution do not apply to cyberprostitution. Because prostitution involves direct genital contact, it contributes to the spread of sexually transmitted diseases.¹²⁹ Appropriately, the Government's responsibility for protecting public health may justify criminal penalties. However, because there is no contact between the cyberprostitute and his customer, there can be no transmission of diseases. In fact, Rebecca's choice to use the *Sybian II* instead of hiring a male prostitute may be much more beneficial to her physical health. Therefore, in the future, cyberprostitution may conceivably be condoned by society as a beneficent substitute for risky behavior.

The Government's legitimate rationale of combating ancillary crimes to prostitution¹³⁰ would not apply to cyberprostitution. Studies demonstrate that criminal activity such as murder, battery, robbery and

126. *Id.* See also *People v. Costello*, 395 N.Y.S.2d 139, 141 (N.Y. Sup. Ct. 1977) ("sexual conduct" for purposes of the New York prostitution statutes requires contact with at least one person's "clothed genital areas, clothed buttocks and clothed female breasts"); *State v. Burgess*, 669 S.W.2d 637, 640 (Mo. Ct. App. 1984) (stating "lap dance" which involves touching the clothing that covers genitals is not "sexual activity" within the meaning of the Missouri prostitution statutes if it does not entail touching "the genital themselves").

127. *Georgia A.*, 621 N.Y.S.2d at 781.

128. Further, the *Sybian II* is a slight modification of its predecessor, i.e., an autonomous masturbation machine that does not connect to computers or the Internet. Both versions of the *Sybian* machine can be operated in a non-Internet-linked mode by persons like Rebecca without the assistance of cyberprostitutes and in the privacy of their homes. Thus, Rebecca could choose to engage in standard Internet communications while autonomously controlling the *Sybian II* herself. In the alternate, she could choose to link the peripheral to an Internet site. Either way, Rebecca has not committed prostitution since masturbation constitutes prostitution only when it involves "commercial acts of sexual gratification involving the sex organs of one person in the hand of another . . . by direct manual contact." *People v. Warren*, 535 N.W.2d 173, 175 (Mich. 1995).

129. *CARMEN & MOODY*, *supra* note 42, at 15.

130. *Id.* Prostitution deteriorates the communities in which it flourishes by the derivative criminal activity that accompanies it into certain concentrated areas. *Id.*

substance abuse frequently accompany prostitution, especially when prostitutes congregate in red light districts.¹³¹ On the other hand, cyberprostitution transactions would disperse participants because there are no geographical districts. Moreover, cyberprostitutes are not visible like traditional prostitutes.¹³² Cyberprostitutes do not walk the streets; instead, they position themselves behind a computer. Accordingly, criminal activity cannot easily attach to something that has no geographical boundaries and cannot be spotted easily. Therefore, cyberprostitution would not be analogous to the derivative crimes attendant to prostitution. From a societal perspective, the cyberprostitution paradigm undermines the applicability of the crime rationale in online red light "areas."

Public interactions between traditional prostitutes and their customers clearly infringe normative standards of decency.¹³³ The morality rationale is, however, unpersuasive in the online context because of readily available encryption technology that would prevent cyberprostitution transactions from becoming the type of voyeuristic nuisance that society experiences with prostitution. Therefore, regulating cyberprostitution is unsupported by this rationale because cyberprostitution transactions would be inherently private affairs unobserved by the public.¹³⁴

Because the cyberprostitution paradigm involves neither the physically-based elements of prostitution, nor the legitimate physically-based government rationales that render prostitution criminal, the harms justifying its regulation through criminal penalties for illicit conduct are unavailing. The next section therefore, analyzes the constitutional protections afforded sexual expression within the cyberprostitution context.

B. TECHNOLOGY RENDERS CYBERPROSTITUTION NEITHER OBSCENE NOR INDECENT

When safeguarding public morality, the Government must narrowly tailor its regulations to fit the unique technical attributes of a particular communications medium.¹³⁵ Additionally, difficult constitutional problems surface when the content of the communication government

131. *Id.*

132. *Id.*

133. *Id.* at 13.

134. Common sense suggests that people like Rebecca who use cyberprostitution services would be unlikely to engage in masturbation outside of the home.

135. *See Sable*, 492 U.S. at 126-27. The *Sable* Court stressed that "Government may serve [its] legitimate interest, but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.'" *Id.* at 126 (quoting *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976)).

seeks to regulate is sexual in nature.¹³⁶ Cyberprostitution, at present only a paradigm, demonstrates how the technical attributes of the Internet may confound the Government in its attempts to regulate online sexual expression in a constitutionally valid manner.

The First Amendment curtails government's ability to regulate unless sexual expression is obscene, e.g., appealing to abnormal or perverse interests in sexual intercourse. Indeed, even if a given communication is obscene, other considerations may take greater constitutional priority and government interference may be unconstitutional.¹³⁷

The Internet in particular poses new challenges to the constitutionality of government regulation in the communications context. Internet communications can comprise text, sound, images and digital signals that control remote machinery.¹³⁸ Additionally, the Internet makes possible fully interactive communication,¹³⁹ in near real time, and under the aegis of software encryption technology.¹⁴⁰ No other communications medium combines all of these technical attributes.¹⁴¹

The appropriate starting point for analyzing the constitutionality of government regulation of sexual expression transmitted through the Internet is the Supreme Court's distinction between indecent and obscene

136. See generally note 65 and accompanying text for some of the constitutional problems associated with sexual expression in communications media.

137. In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Supreme Court held that material may be found to appeal to prurient interests in sex and patently offensive to community standards, yet still receive constitutional protection by virtue of having some redeeming social value. *Id.* at 419. *Miller*, discussed supra at note 56, subsequently revised the Court's holding in *Memoirs* insofar as it removed the burden from government to prove that materials are "utterly without redeeming social value." *Miller*, 413 U.S. at 24-5. Nonetheless, by retaining as its third prong the requirement that allegedly obscene material lack "serious" social value, the *Miller* court acknowledged that other considerations, privacy for example, may preclude government interference with sexual expression. *Id.* at 26.

138. Tribe, *supra* note 6, at 29 (noting that the Internet comprises text, audio and video, and electronic signals in digital form). The images, sounds and electronic signals generated by cyberprostitution transactions are not necessarily indecent let alone obscene, even if they were to be accessed by the public, in view of the encryption technology readily available for use with the Internet:

[w]ith strong cryptographic algorithms, users can rely on the computational prowess of their computer systems to encode messages, files, and any other digital information in such a way that only the [person transmitting a communication] and the intended recipient . . . can decipher it. Since all information on-line is digital, cryptography offers the ability to encrypt nearly everything that comprises cyberspace.

Id.

139. See *supra* note 8 and accompanying text for an explanation of interactive communications.

140. Tribe, *supra* note 6, at 29.

141. Tribe, *supra* note 6, at 29.

forms of communication.¹⁴² First, regulations that treat both categories of sexual expression as equivalent are unconstitutional.¹⁴³ Indecent Internet communications, although possibly offensive, are protected by the First Amendment. Therefore, government cannot regulate in a manner that would effect a complete ban on protected speech.¹⁴⁴ With respect to merely indecent expression, government regulation is limited considerably.¹⁴⁵ In view of the varying technical attributes of different communications media, the reasonableness of regulations is unique to each medium.¹⁴⁶ Accordingly, the Supreme Court mandates that however government chooses to enforce society's moral standards, the regulations must be the most narrowly tailored means necessary and available, while having the least restrictive impact on dissemination of the expression.¹⁴⁷

The Supreme Court also requires the Government to state a compelling interest for controlling indecent expression.¹⁴⁸ Since Congress has the burden of justifying the constitutionality of regulations on expression, if each of the above elements is not supported by the circumstances underlying the government action, the courts must hold the regulations to be unconstitutional restrictions.¹⁴⁹

Additional considerations may undermine the constitutionality of government regulation of communications media. In *Stanley v. Georgia*,¹⁵⁰ the Supreme Court held that individuals have the right to communicate obscenity in places where they have legitimate expectations of privacy.¹⁵¹ The *Stanley* decision crystallized the Court's mandate that government's responsibility for safeguarding public morality does not ex-

142. See generally *supra* note 65 (noting that the first step in analyzing government regulations in the communications context is the indecent/obscene dichotomy).

143. See generally notes 70-91 (discussing invalid dial-a-porn regulations that merged indecent and obscene expression).

144. See generally notes 70-91 (discussing First Amendment protections for indecent communications).

145. See *supra* note 65 and accompanying text for a discussion of the *Pacifica* case and the appropriate limits of government regulation of broadcast media within public fora. *Pacifica* would limit the permissible scope of government action. Members of Congress have acknowledged that government "must be careful not to reduce the adult population, which is guaranteed a right of access to simply indecent material, to the status of children." 140 CONG. REC. H8281-02, H8293 (daily ed. Aug. 2, 1995) (statement of Rep. Hyde, paraphrasing the Supreme Court in *Butler v. Michigan*, 352 U.S. 380 (1957)).

146. See *supra* note 60 for a discussion of reasonable time, place and manner restrictions for broadcast media.

147. *Carlin I*, 749 F.2d at 113; *Sable*, 492 U.S. at 123.

148. *Carlin I*, 749 F.2d at 113; *Sable*, 492 U.S. at 123.

149. *Carlin I*, 749 F.2d at 113; *Sable*, 492 U.S. at 123.

150. See *supra* note 65 and accompanying text for a comprehensive discussion of the Supreme Court's decision in *Stanley*.

151. *Stanley*, 394 U.S. at 565.

tend into the private realm of individuals' homes.¹⁵² Thus, the Government cannot ordinarily interfere with the free choice of people to expose themselves to indecent or even obscene expression in private.¹⁵³

Of course, privacy is not absolute. The Constitution gives government some deference to regulate communications in media that possess technical attributes which facilitate childrens' access to indecent expression.¹⁵⁴ However, government interference can only override privacy when a given medium is "pervasive" in that there are no built-in safeguards against access by minors.¹⁵⁵ As a general rule, this rationale only applies to broadcast media.¹⁵⁶

Because sexual expression can take many forms,¹⁵⁷ Supreme Court doctrine holds that the relationship between expression and conduct may impact the degree to which communications enjoy First Amendment protection.¹⁵⁸ A given communication usually receives constitutional protection inversely to the proportion that it comprises conduct.¹⁵⁹

Given that cyberprostitution embodies nearly all of the Internet's technical attributes, it captures the tension between sexual expression online and the Constitution as interpreted by the courts. Rebecca's interactions with cyberprostitutes, for example, would not necessarily be obscene. All parties to a cyberprostitution transaction could position the cameras attached to their computer monitors to only transmit images of their faces.¹⁶⁰ Also, the electronic impulses that remotely actuate machines like the *Sybian II* are indistinguishable from the signals that make cyber-surgery possible.¹⁶¹ Thus, although the act of cyberprostitution itself could be deemed obscene, the sexual expression inherent in the event might not be obscene when communicated online.

152. *Id.*

153. *Id.* at 566.

154. *See supra* note 65 and accompanying text for a discussion of the Supreme Court's decision in the *Pacifica* case.

155. *See Pacifica*, 438 U.S. at 748.

156. *See id.*

157. For example, a dial-a-porn communication comprises sounds transmitted through a telephone without text or images. Participants may also interact. In comparison, a pornographic cable television broadcast may involve sound, text and images, but it is passive since the transmission goes only from broadcaster to recipient.

158. *See supra* note 68 and accompanying text for a comprehensive explanation of the Supreme Court's treatment of this relationship.

159. *See supra* note 68 and accompanying text for a description of the levels of protection.

160. *See supra* note 13 regarding this technical feature. For example, in the case of Rebecca the "house rules" of a cyberprostitution service might dictate that the participants agree before the transaction not to expose their genital areas to the cameras or to use sexually-explicit language. By conforming to these rules, cyberprostitution communications would not qualify as obscene under the Supreme Court's analysis.

161. *See supra* note 13 (regarding cyber-surgery).

Of course, cyberprostitutes could choose to transmit obscene images or sounds in real time through the Internet. Nonetheless, through encryption technology only customers like Rebecca would have access to them.¹⁶² In *Stanley*,¹⁶³ the Supreme Court carved out a personal zone of privacy that includes individuals' homes. If Rebecca only receives her cyberprostitutes' encrypted expressions at home and the cyberprostitutes only receive Rebecca's cues at a place where there is a similar expectation of privacy, *Stanley* would shield even obscene cyberprostitution communications from government prosecution.¹⁶⁴

Indecent cyberprostitution communications would invoke even stronger First Amendment considerations.¹⁶⁵ Government could regulate, but not ban, indecent cyberprostitution expression.¹⁶⁶ Restrictions above and beyond reasonable and intermediate controls, such as time, place or manner limitations, would be constitutionally infirm, since they would not constitute narrowly tailored means for controlling access in view of currently available technology.¹⁶⁷

With respect to communications media with technical attributes that render them prone to undesirable access by minors or unconsenting adults, Supreme Court doctrine does allow government wider latitude.¹⁶⁸ The Internet, however, has built-in protections against access by children. In the case of cyberprostitution, for example, the complementary elements of visual inspection of the approximate age of potential customers and payment by password-protected First Virtual accounts almost guarantee access only by consenting adults.¹⁶⁹ In this

162. CAVAZOS & MORIN, *supra* note 6, at 29. The impact of encryption technology on Internet transactions can be summarized as follows:

Even with mammoth computers and vast amounts of resources, no one (including the government) can easily decrypt messages encrypted with today's more advanced cryptographic tools . . . individuals seeking absolute privacy no longer need to depend on the legal system for their protection. Rather, the technology itself provides all the protection needed.

Id.

163. *Stanley*, 394 U.S. at 565.

164. *See supra* note 57 and accompanying text (highlighting that even obscenity is protected in the sanctuary of private homes).

165. *See supra* note 60 and accompanying text discussing that indecent communications are entitled to First Amendment protection.

166. *Sable*, 492 U.S. at 126.

167. *Id.*

168. *See supra* note 65 and accompanying text discussing broadcast communications and other such "pervasive" media as amenable to greater regulation since access to broadcast communications arises from government's power.

169. From a practical viewpoint, cyberprostitution transactions are distinguishable from dial-a-porn services insofar as cyberprostitutes would have a visual indication of the approximate age of their customers. Also, cyberprostitution service providers would have the opportunity to consult in advance with potential customers in order to ascertain what was and was not acceptable in their interactions. Both factors would greatly reduce, if not

context, cyberprostitution communications are clearly not pervasive, in contrast with television and radio broadcasts, and therefore do not justify heightened constitutional scrutiny, as would be the case with indecent communications in general.¹⁷⁰

Whether cyberprostitution transactions encompass a greater degree of conduct than expression is not as clear. Although cyberprostitution represents a digital convergence of sight and sound, it also involves apparent conduct. Specifically, the remote operation of the *Sybian II*¹⁷¹ masturbation machine is almost certainly more than unique expression.

Labelling the *Sybian II* aspect of cyberprostitution "actual conduct," however, mischaracterizes its role in online communications. The *Sybian II* represents a unique hybrid of expression and conduct peculiar to the Internet. In effect, it renders cyberprostitution a virtual¹⁷² substitute for actual conduct. Cyberprostitution thus denotes a type of fantasy activity that is analogous to auto-erotic performance and sado-masochism. Because cyberprostitution includes an element of virtual conduct, remote masturbation, and not actual conduct entitles it to considerable First Amendment protection attaches.

In summary, the cyberprostitution paradigm demonstrates that the Constitution and judicial doctrine protect even bizarre forms of sexual expression when communicated through the Internet—notwithstanding society's disapproval to the contrary. Therefore, the pertinent question is what non-regulatory means are available for controlling access by minors.

C. THE CDA IS NOT THE ANSWER TO MANAGING ONLINE VICE

Present regulations created to control access to certain media are inapplicable to the Internet. The Government's recognition of the technical attributes of the dial-a-porn medium, and the guidance of the courts, led to the eventual success of dial-a-porn regulations.¹⁷³ In many respects, the current congressional approach to regulating sexual expres-

eliminate, the possibility that minors or unconsenting adults would inadvertently receive offensive cyberprostitution communications. This concern was the sole premise for dial-a-porn regulation. See *Sable*, 492 U.S. at 120-23.

170. *Sable*, 492 U.S. at 127-28. In *Sable*, the Supreme Court distinguished between the broadcast medium and the dial-a-porn medium on the basis that "[u]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Id.*

171. See *supra* note 3 and accompanying text for an explanation of the *Sybian* device.

172. See *supra* note 6 and accompanying text for a description of virtual events.

173. See *supra* notes 69-90 and accompanying text for a history of federal dial-a-porn regulation.

sion on the Internet correlates with the history of federal dial-a-porn regulation.

Dial-a-porn regulations were routinely invalidated because they did not incorporate the least restrictive technical solutions to the access problem.¹⁷⁴ Similarly, the regulations were unconstitutional because they effectively banned all telephone sex by applying criminal penalties to indecent expression.¹⁷⁵

Similarly, the CDA would ban nearly all sexual expression when transmitted through the Internet. The CDA attaches criminal sanctions not only to obscene and indecent sexual expression but to more benign "lewd, lascivious, or filthy" Internet communications as well.¹⁷⁶ This is precisely the type of sweeping language that the *Carlin* and *Sable*¹⁷⁷ courts deemed unconstitutional in the dial-a-porn context.

In *Carlin I*, the Second Circuit held the FCC's dial-a-porn regulations to be "unconstitutional content-based restrictions"¹⁷⁸ on indecent,

174. *Carlin I*, 749 F.2d at 123. For example, the use of invasive access codes involved "having each person who desired access to dial-a-porn services fill out some type of application form, which would then be sent to the appropriate dial-a-porn message service provider who would then have to rely on some system of age verification." *Id.* Interestingly, in its analysis the *Carlin I* court observed that "[p]erhaps a system of age verification would not be necessary . . . [a]fter all, parents do have substantial control over the disposition of [their telephones and] . . . [a]n access code sent to a child would presumably be intercepted by his or her parents." *Id.* at n.18 (citations omitted) Additionally, the court noted the potential "chilling effect" that might result from requiring the recipients of dial-a-porn communications to keep their names and other personal information on file with dial-a-porn service providers and that such a requirement "might discourage many adults from using the service" altogether. *Id.*

175. 47 U.S.C. § 223(b)(2)(A)-(B) (1988). Specifically, the relevant portion of the amended statute stated that criminal liability could attach to persons who knowingly: within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or . . . permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A) . . .

Id.

176. S.652, 104th Cong., 1st Sess. (1995); *see supra* note 88 (discussing the distinction between the CDA's use of the disjunctive "or" to describe the regulated categories).

177. *Sable*, 492 U.S. at 127-28. In *Sable*, the Court rejected the language "lewd, lascivious, and filthy" as an overbroad interference with otherwise constitutionally protected indecent communications and held that "the government may not 'reduce the adult population . . . to . . . only what is fit for children.'" *Id.* at 128 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73 (1983)). Interestingly, the Court distinguished *Sable* on the facts from its earlier affirmance of radio broadcasting regulations in *Pacifica* insofar as it reasoned that communications over the airwaves constitute media which are technically-distinct from telephone communications. *Id.* In fact, the Court stressed that "[t]he private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*." *Id.*

178. 749 F.2d at 113.

but otherwise lawful, telephone communications protected by the First Amendment.¹⁷⁹ The court ruled that the Government's treatment of obscene and indecent forms of sexual expression as equivalents did not constitute narrowly tailored means for promoting moral standards.¹⁸⁰ Similar to the decision in *Carlin I*, the CDA is an unconstitutional restriction on free speech. Congress cannot attempt to regulate Internet speech by grouping obscene and indecent speech together. Accordingly, the CDA is not narrowly tailored and likewise overbroad.¹⁸¹ Later, in *Sable*, the Supreme Court ruled that obscene and indecent forms of expression are distinct classifications.¹⁸² The *Sable* decision held that Congress' failure in this regard unconstitutionally banned all dial-a-porn.¹⁸³ Accordingly, the *Sable* holding establishes the CDA's invalidity because of the blurring of obscene and indecent speech. Further, the CDA contains language more expansive than the initial dial-a-porn regulations¹⁸⁴ and unconstitutionally infringes even non-sexual First Amendment-protected expression.¹⁸⁵

At present, Congress has not offered a compelling reason why Internet regulations merit disregard for constitutional considerations while restrictions on dial-a-porn must conform to Supreme Court mandate.¹⁸⁶ Even in the absence of government intervention, Internet users

179. *Id.* When a regulation is based on content of speech, "governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" Consolidated Edison v. Public Services Comm'n, 447 U.S. 530, 536 (1980). As a general rule, a restriction is unconstitutional when it controls either the "content or subject matter of the speech." *Id.* In view of the fact that the burdensome FCC regulations in *Carlin I* jeopardized the financial viability of dial-a-porn service providers the court held that the regulations amounted to government control over the content of lawful dial-a-porn communications. *Carlin I*, 749 F.2d at 120. Such imposition on First Amendment rights is unconstitutional given that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

180. *Carlin I*, 749 F.2d at 121-22.

181. Specifically, the Exon Bill may be unconstitutional because it criminalizes both obscene and indecent Internet communications thereby disregarding the Supreme Court mandate that the two classifications are to be regulated differently.

182. 492 U.S. at 124.

183. *Id.*

184. See *Sable*, 492 U.S. at 120-23 (tracing the history of the dial-a-porn regulations).

185. The dial-a-porn regulations at issue in *Sable* imposed criminal penalties only on dial-a-porn service providers and absolved recipients of liability. *Id.* In comparison, the CDA would sanction anyone who "makes, creates, or solicits" forbidden sexual expression on the Internet. 141 CONG. REC. S8386-02 (Daily ed. June 14, 1995) (statement of Sen. Exon). Because the Internet enables on-line users to transmit messages, the term "solicits" in the CDA would criminalize Internet users who simply directed others to a prohibited site. Therefore, the CDA unconstitutionally infringes non-sexual speech under the *Carlin* and *Sable* analyses and suffers from constitutional overbreadth.

186. Congress has failed to provide within the CDA the stated compelling purpose which would justify its particularly draconian treatment of the Internet, as opposed to the

could only access cyberprostitution if they possessed a computer, modem, telephone, *Sybian II*, First Virtual account, a cyberprostitute's online address and decryption software.¹⁸⁷ These technical requirements of the cyberprostitution paradigm ensure that minors and unconsenting adults would not access indecent communications.¹⁸⁸ Moreover, given the visual component of cyberprostitution and the unique types of interaction possible, even those who choose to participate would have advance notice of offensive sexual expression. In comparison, dial-a-porn provides none of these safeguards absent government intervention.

Both the initial dial-a-porn regulations and the CDA evince a disregard for the technical attributes of their respective media. Nonetheless, Congress eventually implemented valid dial-a-porn legislation rooted in the technology of the telephone medium. For example, the modified regulations provided affirmative defenses to dial-a-porn service providers who used scrambling devices, access codes and credit card-only payments.¹⁸⁹ In contrast, the defenses provided in the CDA are not grounded in Internet technology because the bill does not incorporate available technical means for restricting access. The *Carlin* and *Sable* courts held that similar omissions were arbitrary and capricious and thus the regulations did not constitute the least restrictive means for safeguarding public morality.¹⁹⁰ Therefore, according to the guidance of the courts, the CDA cannot pass constitutional muster until Congress amends it to incorporate a technical regime for restricting unwanted access.

telephone medium. "Users of the Internet and other on-line functions typically do not stumble across information, but go out surfing for materials on a particular subject . . . newsgroups or bulletin boards that have sexually explicit materials are named such that there can be little doubt what types of materials one might encounter if you try to get into that area." 141 CONG. REC. S8335 (Daily ed. June 14, 1995) (statement of Sen. Feingold).

187. See *supra* notes 15 and 21 and accompanying text for a description of these technical components of cyberprostitution.

188. See *supra* note 60 and accompanying text for a discussion of why such features also suggest that the courts would treat cyberprostitution as a hybrid form of expression and as not pure conduct; thus, cyberprostitution communications would receive maximum First Amendment protection.

189. See *Potter*, *supra* note 29, at 463 (noting that the implementation of technical means for limiting access to minors relieved dial-a-porn service providers from liability). Similarly, the author proposes several less restrictive means to shield minors from indecency online, ranging from, *inter alia*, greater parental involvement and online visual verification to methods involving software filtration, usage tracking, and the monitoring of billing statements.

190. See *supra* notes 81-84 and accompanying text for the least restrictive means test in the dial-a-porn context.

D. THE CYBERPROSTITUTION PARADIGM SUGGESTS A FRAMEWORK FOR EFFECTIVELY REGULATING SEXUAL EXPRESSION ONLINE

Since the CDA is not the answer to managing sexual expression online, this section suggests a more appropriate, albeit non-traditional, framework for controlling vice on the Internet. The cyberprostitution paradigm shows that government cannot effectively manage sexual expression online by regulations. Regulatory solutions nearly always trail technological advancements. Thus, government should attempt technical solutions to modern moral dilemmas before traditional remedies are shoehorned to fit them.

Technical solutions and self-regulation by the online community should be the benchmark for dealing with all but the most harmful online vices.¹⁹¹ For example, Congress could mandate the compulsory licensing of cyberprostitution services and impose a tax on their transactions. In turn, the revenues received could be used to fund technology-based regulatory schemes that would ensure adequate technical solutions so that minors were protected. In exchange, the providers of cyberprostitution services would receive a certain measure of legitimacy in addition to freedom from prosecution. Furthermore, families may purchase software that permits them to control childrens' access to sites.¹⁹² This self-regulation aspect should be based on an incentive approach and incorporate license features and cash bounties for reporting the most egregious online abuses.¹⁹³ By combining both technical solu-

191. See generally David Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability*, 12 *COMPUTER L. J.* 101, 120 (1993) (discussing the proposition that technology, combined with parental control, offer the best chance for protecting children on the Internet). Undoubtedly the most egregious moral dilemma presented by a free Internet is its use as a conduit for child pornography and other forms of child abuse. *Id.*

192. See, e.g., Nat Hentoff, *The Senate's Cybercensors*, *WASH. POST*, July 1, 1995, at A27. This source of contemporary news describes the recent availability of effective "filtering" software: "One democratic way of keeping Big Brother out of our [Internet communications] is being demonstrated by the Surfwatch Software Company in Los Altos, California, which has developed a program—as have other companies—that gives parents the power to block or filter access to those Internet locations that [Senator] Exon has called 'a red-light district.'" *Id.* Similar software is available for sale by CompuServe. Named "Internet in a Box for Kids," the software package provides highly effective "[s]ecurity features [that] block out inappropriate areas (determined by parents), provide an audit trail to trace inappropriate e-mail senders, and provide filters by protocol." *EGGHEAD SOFTWARE, INC., ADVISORY CIRCULAR*, Sept. 1995 (copy on file with J. MARSHALL J. *COMPUTER & INFO. L.*).

193. The author proposes that publicly offering cash bounties, including through the Internet itself, for information provided by Internet users that leads to the arrest and conviction of persons who use the Internet to promote prostitution, or other illicit vice activities involving minors, such as child pornography, is more likely to achieve the desired effect of curtailing the most egregious on-line vice. Additionally, given that scarce resources are still required to protect children in the real world, a system of private rewards that could be

tions and self-regulation, the Government would avoid curtailing the growth of socially-useful Internet transactions and sidestep the legal infirmities posed by more traditional means.

IV. CONCLUSION

This Comment has argued that new and socially useful Internet technologies, including videoconferencing and cybersurgery, have outpaced government's ability to traditionally curtail the novel vices and other undesirable activities which may accompany them. Conventional regulation, will simply be unable in most cases to achieve effective control over phenomena like virtual conduct that transpire interactively in near real-time under the aegis of encryption technology and through remotely actuated devices.

The cyberprostitution paradigm demonstrates the inability of government to control online sexual expression merely by attaching criminal penalties to communications that it deems undesirable. This traditional response, as most recently evidenced by the CDA, is rendered largely ineffectual by the Internet medium.

For example, government has historically addressed socially harmful sexual vices like prostitution by criminalizing the physical conduct of the participants. However, this approach is unavailing in the Internet context because the rationales for proscribing the transaction, namely disease, crime and the corruption of public morals, are obviated by the very nature of the Internet medium. In fact, cyberprostitution may serve as a benign substitute for its real world counterpart. Moreover, as this Comment has noted, attempts to broadly interpret prostitution beyond its traditional meaning to encompass cyberprostitution threaten basic First Amendment freedoms.

Since a given cyberprostitution transaction would not necessarily constitute indecent, let alone obscene, expression, the First Amendment would preclude government merely from attaching blanket criminal sanctions. Experienced in privacy, cyberprostitution exchanges will be sheltered from government interference from both a constitutional perspective as well as a practical viewpoint due to encryption technology readily available. And although obscene expression does not enjoy constitutional protection, merely indecent sexual expression cannot be banned outright, as the government discovered through unsuccessful attempts with dial-a-porn and now, with the CDA.

Unquestionably, government has a legitimate role to play in defining the bounds of conduct and expression on the Internet. Nonetheless,

funded without diverting tax dollars already earmarked for policing the real world would be highly desirable.

criminal penalties are not the most appropriate starting point. Cyberprostitution, at present only a hypothetical, has established that, with the advent of technologies which permit people to communicate interactively through the Internet, it is time for government to shift to a new paradigm. Common sense requires that this paradigm should be developed only after careful study, and must be anchored in the technology of the Internet medium itself.

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