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FOREWORD

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I have always thought that one of the most fascinating and rewarding characteristics of the law is that it is a constantly changing and dynamic system. Like the amoeba and many other life forms, the legal system expands and contracts and changes shape and direction depending on the environment that surrounds it. Indeed, one of the great advantages of being a member of the legal profession is the opportunity to change one's field of concentration and focus on a new area as the legal system itself generates new fields and opportunities in response to new stimuli.

That probably has been truer in the latter half of the twentieth century than at any other time in legal history. In my professional lifetime I have seen the birth of the civil rights movement with the attendant development of the law of discrimination, which, of course, now transcends the question of equality of race to embrace gender, ethnicity, national origin, age, disability, and, although it sadly lags in terms of the developmental cycle, sexual orientation. I also have watched the birth of modern securities law and its transmogrification from an initial stage that heavily emphasized the regulation of securities registration, proxy statements, and the like, through a lengthy period that saw the emergence of various forms of securities litigation, the substantive law surrounding Rule 10b-5, and its enforcement through class actions, and then to the development of the merger and acquisition practice that is central to the practice of a number of large law firms today.

There are many other entries in this list of new fields that have emerged in recent decades. What used to be the simple law of nuisance has become the massive superstructure we know as environmental protection. Consumerism has been born out of the common law of fraud, negligence principles have developed into product safety and liability, OSHA practice, and the ever expanding notion of the duty to warn—sometimes carried to foolish excess in the form of the ubiquitous, and occasionally mind-

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less, notices that one can find on virtually any product in our marketplace. Labor law practice, which in my youth seemed simply to embrace the mastery of a few labor-management statutes, has grown to include the legal regulation of every aspect of the workplace, embracing notions of privacy, harassment, worker safety, and drug testing; it even attempts to reach beyond the workplace, regulating aspects of the lives of employees. And then there is the exploding subject of health law, which directly or indirectly affects all of us in society.

Now, yet another new kid has moved into the legal neighborhood—technology. Not so long ago, technology meant product safety and patent law, and little more. Today, of course, information technology represents one of the fastest growing fields in the profession. My cherished copyright course, a field I entered many years ago as a result of the stimulation of my beloved mentor Professor, later Justice, Benjamin Kaplan, was a subject that attracted me because it involved books and plays and music and art. I didn't really mind that it was considered a boutique aspect of the legal curriculum (a nice euphemism for a fringe or marginal subject) that was elected by a very modest number of students interested in those creative disciplines, or by those simply curious about the field (or the professor teaching it), or by those who needed two credits to complete their third year academic program and thought it might be fun.

Today, of course, copyright has expanded and merged with related subjects and is called intellectual property by some (not me). The field is dominated to a considerable degree by the myriad questions relating to the emergence of computer technology and its unprecedented permeation of our information-based society, questions about the proper scope of copyright protection for computer programs and data banks, the appropriateness of copyright and patent laws as we have known them for centuries for the electronic world in which we now live, and many others. Far from a boutique subject now, hordes of students flock to it like lemmings, thinking it is the key to modern practice. After all, how could any megafirm not hire them given their background in the subject? The law firms themselves proudly boast during hiring season about how much "IP" work they do!

The preceding paragraphs were not written with any bitterness or even nostalgia; they are not the prattling of a curmudgeon or an old fogey. I still love books and plays and music and art, but the computer revolution has not gone unnoticed by me, espe-

cially since the issues raised have their own intellectual beauty. Indeed, I was drawn into computer-copyright issues at a very, very early stage—the mid-1960s—when one of the great early thinkers in the field, J.C.R. Licklider, an MIT professor, innocently asked me (apparently expecting an immediate and definitive answer) whether the creation of an electronic library that linked all of the universities in our nation together posed any copyright problems. The question, which, of course, had never occurred to me at that primitive stage, struck me like a lightning bolt. I began my own personal exploration of the problems of the copyrightability of various forms of computer productivity, whether the computerization of protected material might constitute a copyright infringement, and the need for new ways of thinking about copyright—and other forms of intellectual property—in a world of gigabytes and nanoseconds.

No sooner had the heat and dazzling aura of that first lightning bolt begun to recede when a call from the Senate Subcommittee on Constitutional Rights, chaired by Senator Ed Long of Missouri and then by Senator Sam Ervin of North Carolina (of Watergate fame), confronted me with another genial (although pointed) inquiry: "What are the potential privacy implications of computer technology?" When I modestly and accurately replied that I had never thought about that subject, the reply from the subcommittee was sharp and stern: "Well, start thinking about it, because you appear to be the only law professor in the United States who has given any thought to the legal implications of information technology." Ironically, that arguably complimentary statement was true, but consisted merely of a short and superficial article on copyright and computers published during my days on the Michigan Law School faculty.

And so my personal love affair with the right of privacy, particularly privacy and technology, began. It has continued unabated during the thirty years since. My book, *The Assault on Privacy: Computers, Data Banks and Dossiers*, published in 1971, virtually the first on the subject, had a futuristic and, some said, unrealistic view of the potential magnitude of the problem. Today, its fears and apprehensions seem "old hat" as the new capabilities of information technology seem to have outstripped every one of my concerns of yesteryear.

As time has progressed since these two early forays into technology and law, I have come to realize that what we are witnessing is the birth of a completely new legal world, requiring

the generation of a new legal system. The questions no longer are restricted to what are the copyright or privacy questions information technology raises; such questions frame the inquiry much too narrowly. We must begin to divine the type of comprehensive legal regime that must be established to regulate and facilitate life in the eventually intergalactic world of information—cyberspace. Who could have predicted that the legal implications of computer technology would have such geographic reach? After all, it started as batch processing activities that took place within the four squares of a large mainframe computer. Then, with the aid of developments in communications technology, it evolved into on-line activities via remote terminals. "On-line" has become networks of computers without boundaries, and now flies under the rubric of the Internet or the World Wide Web. Further iterations can be expected!

Cyberspace is not merely a metaphor that lacks reality. Nor is it merely analogous to a new country that calls out for legal stability and definition; it is a new universe, and if it is to survive and flourish in a civilized, responsible fashion, a system of rules and regulations will have to be developed to guide its users and to govern its transactions. At this point, we are just beginning to understand these realities. As yet, we do not even know what the source of those rules and regulations may be. Will it be private ordering? Do we expect the common law to generate the necessary doctrines? How much will be needed in the form of new statutes and regulations? And, since information transfers do not naturally respect national boundaries and may have profound cultural and political implications, when will the bilateral and multilateral treaties begin to emerge?

So, a new legal field has emerged once again, this time under the rubric of information or computers and the law. The field has grown well beyond the early musings about copyright (or intellectual property, if you insist on political correctness) and privacy, and now embraces problems of tort liability, antitrust, communications regulation, pornography, and criminal law, among others. Indeed, each day seems to bring a new intersection between technology and traditional doctrine. Law school courses and seminars are sprouting everywhere; a plethora of casebooks and textbooks are emerging.

And so it is with great pleasure and institutional pride that I pen this introduction to the *Journal on Legislation*'s Special Issue on Computers and Legislation, and commend it to your

consideration. The contents truly represent a veritable feast of forward looking subjects that reflect the frontier character of the field. To their credit, the editors have selected authors and topics to stimulate us about many of the "hot buttons" of our time. And we should not miss the subtle message throughout the articles that there is a great need for intelligent policy making in order to avoid the extremes of crippling the technology by over-regulation or allowing lawlessness to prevail through under-regulation.

The Soma, Muther, and Brissette piece on transnational extradition for computer crimes certainly provides a "wake-up" call for anyone interested in law enforcement in an electronic age. The reality is that banks and other financial institutions can be robbed electronically across national boundaries. We probably will not be sending state troopers and the FBI after the twenty-first century's incarnation of John Dillinger and Bonnie and Clyde. In a world of instantaneous electronic debits and credits transversing the globe, how will extradition work?

The theme of updating existing criminal law is pursued by Stephen B. Heymann, an experienced member of the United States Attorney's Office in Boston. He sounds a very useful warning that much of the existing statutory framework works as well with the new technologies as it did with the old and that revision should not be undertaken in a mindless fashion or as a subterfuge for pursuing another philosophical agenda. Having sounded that warning, however, Heymann identifies numerous conditions under which the current framework lacks the coherence and capacity to deal with many contemporary problems of law enforcement that the burgeoning possibilities of computer crime in cyberspace create.

Michael Leib's piece on e-mail and the wiretap laws presents a strong case for legislative action to correct what he believes is insufficient protection from governmental interception of electronic communications, such as e-mail, in the Electronic Communications Privacy Act of 1986. He argues that there is a discontinuity between electronic communications and wiretaps in that there is no suppression remedy for electronic communications and for electronic communications that are seized in violation of the federal statute. In many respects the article shows some of the inherent risks in trying to legislate about a new phenomenon, given how much is unknown and unknowable at any given moment in time regarding a technology as dynamic

and young as is information technology. One of the imperatives in dealing with such a phenomenon legislatively, of course, is that the statute may have to be revisited as the experience base grows and wiser policy choices are possible through revision.

Given the seemingly never-ending debate about attempts to abate the flow of "pornography," "obscenity," "indecency," and "patently offensive material" through the nation's communicative channels, old and new, it is not surprising that the Special Issue is graced by two articles on these subjects as they relate to the growing recognition that the problem is manifesting itself in dramatic new ways on the Internet. For those of us who grew up in an environment in which the battlefield consisted of racy novels, risqué magazines, and stag movies, Professor Debra D. Burke's article on the criminalization of virtual child pornography comes as a bit of a culture shock. The notion of taking existing images, perhaps of adults in perfectly "decent" dress and demeanor, using morphing techniques to generate child pornography, and then transmitting these "virtual" images, often no longer recognizable from their real version, over the Internet for potential world-wide access boggles the mind. Professor Burke's analysis of the Child Pornography Prevention Act of 1996, which was designed to reach computer-generated child pornography, and of the existing Supreme Court precedents, raises serious questions as to the constitutionality of certain portions of that legislation. And finally, on a related subject, Vikas Arora takes on the Communications Decency Act, another controversial legislative attempt to regulate some of the contents of computer transmissions, the constitutionality of which currently is before the Supreme Court.

This Special Issue is a significant contribution to the growing literature on cyberspace, and the importance of approaching its regulation with delicacy and foresight. I cannot think of any aspect of modern life in which the twin risks of under-regulation and over-regulation are as great as with regard to the way we handle information technology. Now that the legislative box has been opened, we must be very careful indeed to minimize the possibility that it will be Pandora-like in consequences. If this Special Issue makes us think about that, it will have done its job.

ARTICLE

TRANSNATIONAL EXTRADITION FOR COMPUTER CRIMES: ARE NEW TREATIES AND LAWS NEEDED?

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This Article examines the inability of extradition law to respond quickly to changes in criminal law. This is especially problematic with respect to computer crime legislation, which is constantly evolving in response to today's computer criminals. In this Article, the authors explore the nexus between these two areas of law and evaluate the ability of extradition law to properly account for computer crimes. They also identify the characteristics that make certain types of computer crime legislation especially incompatible with extradition. Finally, they propose multiple solutions, including a multilateral convention, to facilitate the extradition of computer criminals.

Twentieth-century extradition law has been described as "belong[ing] to the world of the horse and buggy and the steamship, not . . . the world of commercial jet air transportation and high speed telecommunications."[1] The outdated character of extradition doctrine, in combination with the recent increase in international crimes such as terrorism and drug trafficking, has forced many countries to manipulate extradition law in order to punish criminals outside their jurisdictional reach and legal authority. Like extradition, the laws governing computer crime struggle to keep pace with rapid technological advancements that threaten to leave the law an archaic relic of the distant past. International extradition law and the laws governing computer crime share the similarity of being hopelessly outdated and therefore, lagging

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[1] Letter from Att'y Gen. Benjamin Civiletti to Sen. Edward Kennedy, *in* 126 CONG. REC. 26,923 (1980). On a similar note, Great Britain's 1870 Extradition Act is "widely-regarded as a creaking 'steam-engine affair.'" Bernard Jordan, *Proll Battle Highlights Extradition Chaos*, OBSERVER (London), Apr. 29, 1979, at 6.

behind the forces they are trying to regulate. The nebulous regions where these two doctrines meet are thus in need of reevaluation.

This Article contemplates the formation of extradition standards governing computer crimes. Part I examines the development of U.S. extradition law through bilateral treaties and domestic case law, highlighting the inadequacies of the present law. Where possible, this section also examines the extradition laws of other countries to illustrate the global perspectives necessary for reforming U.S. law. Part II compares and contrasts the major U.S. laws governing computer crimes with their counterparts in other countries. Three classifications of computer crime are used to illustrate the practicability of extraditing offenders of each crime. The first category includes child pornography and pedophilia, which all countries have uniformly adopted as criminal. The second category contains dangerous speech and pornography, crimes for which the opinions and approaches of countries are so divergent that new extradition laws and treaties would not be helpful in improving international cooperation. The third category encompasses computer crimes that either most or all countries have criminalized, but where a lack of uniformity of laws fails to provide predictable extradition of such criminals. Part III then proposes several domestic and international legislative solutions, including a multilateral treaty, which respond to some of the shortcomings of current extradition law and help to close this gap between extradition law and computer crimes.

I. EXTRADITION LAW

The process of extradition can be defined simply as the surrendering of a criminal or accused criminal by one sovereign to another.[2] From its earliest usages, extradition has existed within the rubrics of both international law and diplomacy.[3] In early civilizations, such as the Egyptian, Chinese, and Chaldean, the process depended more on principles of comity and reciprocity between sovereigns than on punishment of individual crimi-

[2] *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 1 (1974).

[3] *See* I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 5 (1971). Extradition treaties originally grew out of peace and alliance treaties, where the return of one sovereign's criminals was a sign of friendship and cooperation, rather than duty. *See id.* at 6.

nals.[4] As could be expected from an agreement designed to promote relations between nations, individual rights were overlooked.

From these informal beginnings, and with the advent of better means of international communication and transportation, the concept of extradition treaties expanded. Beginning in the eighteenth century, formal treaties, rather than the informal notions of reciprocity that had served in the past, became the main instruments permitting extradition.[5] As the twentieth century ends, it is becoming exceptionally clear that the legal structure defining extradition has become a burden in today's atmosphere of international crime, leaving individual countries to find ways around the treaties that were once so important. This section first develops the history of extradition, then discusses some of the fundamental characteristics of extradition law, examining their place in the modern world.

A. *History and Development*

Although the early history of extradition was informal, it inspired many of the concepts that survive today. Extradition has been a factor in transnational cooperation since the beginning of written history. The first known extradition agreement was between Ramses II of Egypt and the Hittite prince Hattusili III in 1280 B.C.E.[6] At that time, and for two millennia to follow, extradition occurred in the absence of treaty and was merely an ad hoc offering of goodwill between sovereign neighbors.[7] Likewise, early extraditions were concerned primarily with the apprehension and return of political criminals and criminals who had committed violent crimes in their home states.[8] Even though the majority of early extraditions occurred without any formal agreement or procedure, the millennia of practice formulated the

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[4] *See* Luis Kutner, *World Habeus Corpus and International Extradition*, 41 U. DET. L.J. 525 (1964).

[5] *See id.* at 525–26.

[6] *See* SHEARER, *supra* note 3, at 5.

[7] Even the Roman Empire, with its vast region and numerous neighbors, did not resort to official extradition treaties. *See* COLEMAN PHILLIPSON, 1 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 358–74 (1911). Few extradition treaties covering ordinary criminals existed until the 19th century. *See* JOHN BASSETT MOORE, 1 TREATISE ON EXTRADITION AND INTERSTATE RENDITION 10 (1891); *see also* EDWARD CLARKE, A TREATISE UPON THE LAW OF EXTRADITION 18, 22 (4th ed. 1955).

[8] *See* MOORE, *supra* note 7, at 10.

notions of reciprocity and comity upon which modern extradition treaties are based.[9]

The birth of formal extradition treaties did not occur until the eighteenth century, with the development of better forms of transportation—the railroad and steamship—and the destruction of the static economic system of feudal Europe.[10] The Industrial Revolution brought not only the need and ability to cross national borders, but also expanded the definition of extraditable offenses to include those of crimes against property and money. Above all else, this age of enlightenment popularized the notions of individual liberty and equality, which, until that point, were never a consideration in extradition.[11] The increased frequency of requests for extradition, the growing importance of international cooperation among European states, and the fledgling recognition of individual rights all gave rise to the need for definitive and comprehensive obligations. The development of the extradition treaty satisfied this need. The explosion of extradition treaties on the continent of Europe was followed, albeit slowly, by ones in the United States and Britain.[12] This tardiness was due primarily to the fact that neither country had many immediate neighbors with which to enter into such treaties. The first major treaty containing a provision on extradition signed by these two powers was the Jay Treaty of 1794.[13] Article 27 of the Jay Treaty stated that government officials:

> will deliver up to justice all persons who, being charged with murder or forgery . . . shall seek asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed.[14]

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[9] For more discussion of reciprocity, see *infra* Part I.B.1.

[10] *See* SATYA BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 17 (1966).

[11] *See id.* at 18.

[12] *See* SHEARER, *supra* note 3, at 12. The United States entered into 90 treaties in the 50-year period surrounding the French and American Revolutions. *See generally* BASSIOUNI, *supra* note 2, at 16. These 50 years proved the most influential period in the development of extradition law.

[13] *See* WILLIAM M. MALLOY, 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 590 (1910). The Jay Treaty was actually one of amity, commerce, and navigation, having only one article, Art. 27, devoted to the topic of extradition.

[14] Jay Treaty, *reprinted in* WILLIAM M. MALLOY, 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 605 (1910) [hereinafter Jay Treaty].

From this treaty was born the notion of double criminality,[15] which later became the bedrock on which all treaties are based. Like extradition agreements in the past, the extraditable offenses were limited to murder and forgery,[16] other crimes not being important enough to seek extradition. Individual rights, such as speciality[17] and the political offense exception,[18] were omitted, exemplifying the primacy of state interests.[19]

It was not until the United States entered into extradition agreements with European countries, especially France, that U.S. treaties began to modernize. This should not be surprising, given France's predominant social, political, and legal influence in the region after the French Revolution and the numerous campaigns of Napoleon.[20] The 1843 extradition treaty between the United States and France not only expanded the list of extraditable offenses to include crimes such as piracy, arson, and robbery, but was the first U.S. treaty to add a statutory exception for political crimes.[21] This addition proved essential in the formation of the political offense exception to extradition. Political offenses previously served as the principal offenses for which countries sought criminals abroad.[22] Other concepts protecting individual liberties, such as the non-extradition of nationals and speciality, also developed.[23]

Since the late 1800s, extradition treaties have flourished in the developed world. Since World War II there have been a number of attempts at promoting multilateral agreements along with adopting international standards of extradition. In several of these in-

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[15] For more discussion of double criminality, see *infra* Part I.B.3.

[16] *See* MALLOY, *supra* note 13, at 605.

[17] For more discussion of speciality, see *infra* Part I.B.5.

[18] For more discussion of the political offense exception, see *infra* Part I.B.4.

[19] *See* MALLOY, *supra* note 13, at 605.

[20] *See generally* ROBERT PALMER, THE WORLD OF THE FRENCH REVOLUTION (1971) (discussing the role of the French Revolution on international relations in Europe); ALFRED COBBAN, ASPECTS OF THE FRENCH REVOLUTION (1968) (same); LEO GERSHOY, THE FRENCH REVOLUTION AND NAPOLEON (1964) (same).

[21] *See* MALLOY, *supra* note 13, at 526. The newfound liberalism seen in the statutory exemption for political crimes, however, was not immediately recognized as an essential ingredient to all extradition treaties. In its next three treaties, the United States only included the exception in its 1850 treaty with Switzerland, while omitting it from its two later treaties with Hawaii and Prussia. *See* SHEARER, *supra* note 3, at 15–16.

[22] *See* SHEARER, *supra* note 3, at 5. After the French revolution, other nations' revolutionaries, who fled persecution to seek refuge in France, found not only an intellectual climate to foster their beliefs, but also a legal system that granted them asylum. *See id.*

[23] *See generally* EDWARD CLARKE, A TREATISE UPON THE LAW OF EXTRADITION 28 (2d ed., 1874) (discussing the development of U.S. extradition law).

stances, regions have been successfully linked together. While bilateral and multilateral treaties are still important when countries decide whether to surrender a person, it is obvious that some countries follow a liberal interpretation of treaties (or blatantly reject the treaties) to allow for extradition.

B. *Characteristics of U.S. Extradition Treaties*

The United States, following international custom, requires formal extradition treaties. Accordingly, the United States has over 100 extradition treaties with countries all over the world. While the range of time in which they were formed spans the century, there are basic characteristics that remain constant. These characteristics are sources for both national and individual rights under the treaty, and include the need for reciprocity, a treaty, double criminality, the political offense exception, speciality, and procedural requirements.

1. Reciprocity

Reciprocity is the notion that one sovereign will surrender fugitives so long as its own requests for fugitives will be honored.[24] Although reciprocity is one of the fundamental bases on which extradition is possible, many view extradition, even without reciprocity, as a benefit to both countries. The requesting party may exact punishment on the wrongdoer, and the requested party may relieve itself from the burden of housing another country's criminals.[25] For this reason, reciprocity is most likely to be considered either when no treaty exists or when a requested party consistently refuses extradition to a requesting party. The United States would thus likely never refuse extradition on truly reciprocal grounds, but might use reciprocity as an excuse for

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[24] *See* SHEARER, *supra* note 3, at 31. Many of the United States' bilateral treaties do not specifically address reciprocity in their articles, but reciprocity can be assumed through simple adherence to a treaty. *See* Valentine v. U.S. *ex rel.* Neidecker, 299 U.S. 5, 9 (1936) (stating that the U.S. Constitution prohibits extradition except when provided for by law or treaty).

[25] *See* GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 26 (1991) (citing CLIVE PARRY, 6 BRITISH DIGEST OF INTERNATIONAL LAW 805 (1965)). Members of the Royal Commission on Extradition in Great Britain in 1978 pointed out that "[n]o State could desire that its territory should become a place of refuge for the malefactors of other countries." SHEARER, *supra* note 3, at 29.

refusal when the political and diplomatic relationships with the other country are strained.

2. Treaty

Despite extradition law's early development as an informal, friendly means of state cooperation, treaties are now required in order to allow for consistent and reliable extradition policies.[26] The United States Supreme Court in *Factor v. Laubenheimer* interpreted international law to mean that there is no legal right to demand extradition in the absence of a treaty.[27] Moreover, Congress mandated in 18 U.S.C. §§ 3183–3184[28] that there must be a treaty or convention in order to extradite one of its own nationals.[29] Therefore, there is no legal obligation to extradite someone to a requesting country in the absence of a treaty, and likewise, few requests for extraditions without treaties are ever made.[30]

3. Double Criminality[31] and Extraditable Offenses

Double criminality requires that the offense charged[32] be considered criminal in both the requesting and the requested juris-

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[26] Some countries do not require treaties to be in force for extradition to be possible. For example, France and Switzerland statutorily provide for extradition where no treaty exists. Common law countries, however, are more likely to require more formalistic treaty obligations. *See* GILBERT, *supra* note 25, at 26.

[27] 290 U.S. 276, 287 (1933); *see also* U.S. v. Rauscher, 119 U.S. 407, 411 (1954) ("The legal right to demand his extradition and the correlative duty to surrender [the accused] to the demanding country exist only when created by treaty."). Academics have long debated the existence of the duty to extradite without treaty obligations. "It is, perhaps, enough to say in regard to these authorities . . . that their conflict of opinion shows that the principle of extradition, viewed irrespectively of treaty stipulations, has never been so established in the practice of European nations as to entitle it to be regarded as an international law." SAMUEL SPEAR, LAW OF EXTRADITION 3 (1885).

[28] 18 U.S.C. §§ 3183–3184 (1994).

[29] The U.S. Constitution protects U.S. nationals from extradition at the whim of the executive branch. *See* Valentine, 299 U.S. at 9.

[30] *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 59 (1987). There are, however, instances where individuals were extradited to the United States in the absence of treaty. Most notably, the United States has requested the extradition of drug smugglers whose crimes were not listed under the extraditable offense section of the treaty. *See, e.g.*, U.S. v. Accardi, 241 F.Supp. 119 (S.D.N.Y. 1964), *aff'd*, 342 F.2d 697 (2d Cir. 1964), *cert. denied*, 382 U.S. 954 (1965).

[31] Double criminality is referred to by many scholars as "dual criminality."

[32] Double criminality does not require that formal legal proceedings be instigated against the extraditee before extradition is possible. For example, the U.S.-Argentina

dictions.[33] Double criminality protects states' rights by promoting reciprocity and also safeguards individual rights by shielding the individual from unexpected and unwarranted arrest and imprisonment.[34] All U.S. extradition treaties include some form of double criminality language.

Double criminality, however, is not a necessary requirement for the return of accused nationals who have fled their jurisdiction. For example, the United States' extradition treaty with Mexico states:

> [T]he requested Party shall grant extradition if:
> a) its laws would provide for the punishment of such an offense committed in similar circumstances, *or*
> b) the person sought is a national of the requesting Party. . . .[35]

Thus, extradition is possible if the requesting party is merely asking for the return of one of its own nationals who has committed a crime punishable in the requesting state.

Extradition treaties specify which offenses will be extraditable through either the enumerative approach or the eliminative approach. The enumerative approach requires a listing of extraditable offenses, either in the body of the treaty or in an attached appendix.[36] From a limited beginning that provided for only two extraditable offenses, murder and forgery,[37] modern treaties have come to include exhaustive lists of extraditable offenses. The extradition treaty between the United States and Mexico, for example, includes murder, malicious wounding, kidnap, rape, and robbery, as well as crimes against money interests, such as

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extradition treaty creates the reciprocal duty of the requested party to return an extraditee if "charged with or convicted by the judicial authorities of the" requesting state. Extradition Treaty, Jan. 21, 1972, U.S.-Arg. art. 1, 23 U.S.T. 3501, 3504 [hereinafter U.S.-Arg. Extradition Treaty]. "Charged," when used as a verb, has been interpreted to mean "accused" and should not be read to imply the necessity of formal "charges" unless the treaty specifically requires them. *See* Emami v. United States District Court, 834 F.2d 1444, 1448 (9th Cir. 1987) (interpreting the U.S.-German Extradition Treaty); *In re* Jan Alf Assarsson, 635 F.2d 1237, 1242–43 (7th Cir. 1980) (interpreting the U.S.-Sweden Extradition Treaty).

[33] *See* SHEARER, *supra* note 3, at 137.

[34] *See id.* While double criminality creates mutual obligations, it should not be confused with reciprocity. Where reciprocity creates an expectation that the requesting state shall equally honor similar future requests, the doctrine of double criminality contemplates similar crimes. *See* BASSIOUNI, *supra* note 2, at 314.

[35] Extradition Treaty, May 4, 1978, U.S.-Mex. art. 1, para. 2, T.I.A.S. No. 9656, at 5061–62 [hereinafter U.S.-Mex. Extradition Treaty].

[36] *See* BASSIOUNI, *supra* note 30, at 330.

[37] *See* Jay Treaty, *supra* note 14, at art. 27.

larceny, embezzlement, receiving stolen property, and interfering with the international trade and transfer of funds.[38]

The enumerative approach, developed at a time in U.S. history when specificity was appropriate because few crimes were extraditable, has outlived its usefulness. A key drawback of this approach is its inability to respond to inadvertent omissions or substantial changes in the law. Omissions of offenses give the requested state the valid right under international law to refuse extradition. Likewise, under the principle that extradition is prohibited unless provided for by law or treaty,[39] the United States would be barred from extraditing its own nationals if the alleged crime were not covered by a treaty. To rectify this situation, numerous revisions and amendments to extradition treaties are constantly needed to ensure the applicability of extradition treaties to new laws.[40]

To avoid the limitations the enumerative approach imposes on extradition treaties, most modern treaties adhere to the eliminative method of discussing extraditable offenses.[41] Under the eliminative method, actions are extraditable if, under both nations' laws, they are subject to a minimum level of punishment.[42] In most treaties, extradition is allowable for crimes that carry a potential sentence of at least one year incarceration.[43] The required minimum sentence length refers to the "potential" and not the "actual" sentence.[44]

While the eliminative approach is more practical, limiting the need to update and amend a treaty's articles constantly, it poses its own interpretative difficulties, specifically regarding novel

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[38] *See* U.S.-Mex. Extradition Treaty, *supra* note 35, app., T.I.A.S. No. 9656 at 5076–78.

[39] *See* Valentine v. U.S. *ex rel.* Neidecker, 299 U.S. 5, 9 (1936).

[40] *See* SHEARER, *supra* note 3, at 134.

[41] This represents the common trend in most bilateral and multilateral extradition treaties. *See* GILBERT, *supra* note 25, at 38. This change is exemplified by the extradition treaty between the United States and Switzerland, which switched from an enumerative approach to an eliminative one by allowing extradition for all crimes with a sentence of more than one year. Extradition Treaty, Nov. 14, 1990, U.S.-Switz., Letter of Transmittal, art. 2, S. TREATY DOC. No. 104-9 (1990).

[42] *See* BASSIOUNI, *supra* note 30, at 331.

[43] *See, e.g.*, Extradition Treaty, May 11, 1995, U.S.-Jordan, art. 2, para. 1, S. TREATY DOC. No. 104-3 (1996) [hereinafter U.S.-Jordan Extradition Treaty] (permitting "extradition for any offense punishable under the laws of both countries by deprivation of liberty for more than one year, or by a more severe penalty such as capital punishment").

[44] *See, e.g.*, U.S. v. Clark, 470 F. Supp. 976, 978 (D. Vt. 1979) (stating that where an extradited individual is given less than a possible one year sentence for violating a crime in his home country, leniency in sentencing does not raise a bar to extradition).

domestic laws.[45] Double criminality has become a burden to states that must determine not only whether the action is criminalized in both states, but also the severity of punishment in both states. Because of this difficulty, U.S. courts have shown an unwillingness to submit to in-depth examinations of the differences between U.S. and a foreign country's laws,[46] thus allowing extradition where the criminal laws of both countries are merely similar. United States courts abandoned the practice of strictly comparing statutes in the early part of the twentieth century[47] when the Supreme Court decided *Wright v. Henkel.*[48] In *Wright*, the Supreme Court looked to the prohibited act, rather than the strict language of the statutes, to determine whether double criminality was satisfied.[49]

While some countries, such as the United States, are willing to liberalize treaty interpretation of double criminality, other countries are unwilling to bend and insist on strict interpretations of the treaty language. Thus, despite this loosening of U.S. standards, matching criminal statutes from one jurisdiction to the next is still a problem. The Swiss government, for example, failed to find the existence of double criminality based on the United States' requested extradition of a Swiss financier on RICO charges.[50] Given the relative newness of computer crime statutes, this patch-work atmosphere of varying extradition standards results in unpredictable outcomes in the battle against international computer crime.

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[45] This is particularly true in the case of computer crimes. *See infra* Part II.

[46] This is due in large part to a lack of knowledge concerning comparative law. For an example of where double criminality was completely ignored, see *United States v. Deaton*, 448 F. Supp. 532 (N.D. Ohio 1978), which states that the particular crime was so peculiar to the U.S. system that it would be unnecessary to look for a counterpart in German law.

[47] For a comprehensive examination of the evolution of U.S. extradition law, see Jonathan O. Hafen, Comment, *International Extradition: Issues Arising Under the Dual Criminality Requirement*, 1992 BYU L. REV. 191.

[48] 190 U.S. 40, 58 (1903).

[49] This comparison of the similarity of prohibited acts was affirmed in *Collins v. Loisel*, where the Court found that the "law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive . . . [but that it] is enough if the particular act charged is criminal in both jurisdictions." 259 U.S. 309, 312 (1922).

[50] *See* Hafen, *supra* note 47, at 213.

4. Political Offense Exception

Since its inception in France in the nineteenth century, many countries continue to object vehemently to the political offense exception. United States courts have defined political offenses as acts committed in the course of and incidental to violent political disturbances.[51] A typical political offense exception clause reads: "[e]xtradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence."[52] The purpose of the political offense exception is to "mix[] inseparably the humanitarian concern for the fugitive on the one hand and on the other the politically motivated unwillingness of the requested state to get involved in the [domestic] political affairs of the requesting state."[53] Although extradition historically focused on returning political prisoners, states later began to adopt the liberalist notion of protecting individuals accused of political offenses.[54]

A recent trend has been to eliminate the political offense exception entirely because it offers defenses for international terrorism and hate crimes.[55] This tendency is strongest among European countries, where the predominant view is that criminal activity is not necessary to affect political change in democratic states.[56]

5. Speciality

The speciality doctrine provides that a fugitive shall be tried in the requesting state only for the crimes for which he was surrendered. Although speciality is implicitly "accepted by all states as part of the rules of extradition,"[57] its reach has receded in the hopes of promoting efficient extradition policies.[58] Under

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[51] *See, e.g.*, Sindona v. Grant, 619 F.2d 167, 173 (2d Cir. 1980); *In re* Ezeta, 62 F. 972, 994 (N.D. Cal. 1894).

[52] European Convention on Extradition, Dec. 13, 1957, art. 3, 359 U.N.T.S. 273, 278.

[53] GILBERT, *supra* note 25, at 113 (quoting STEIN, DIE AUSLIEFERUNGSAUSNAHME BEI POLITISCHEN DELIKTEN 377 (1983)).

[54] *See* BASSIOUNI, *supra* note 2, at 370–71.

[55] *See Justice Ministers Hope to Drop Concept of Political Crime in Europe*, EUROPEAN SOCIAL POLICY, Apr. 14, 1994, *available in* LEXIS, News Library, Arcnews File.

[56] *See id.*

[57] GILBERT, *supra* note 25, at 106.

[58] *See generally* 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 321 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

certain circumstances, some treaties permit a requesting country to prosecute the extraditee for crimes additional to those for which he was surrendered.[59] For example, Article 14 of the U.S.-Argentina Extradition Treaty provides:

> A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted . . . unless . . . the requested party has manifested its consent to his detention, trial or punishment for an offense other than that for which extradition was granted or to his extradition to a third State provided such other offense is [an extraditable offense].[60]

Because of the limited number of circumstances in which speciality would stop additional prosecutions, it is apparent that speciality serves not to protect the rights of the person, but primarily as a tool to ensure smooth relations among countries. A party's consent, however, is permissible only when the other offenses would be extraditable, consistent with the double criminality requirement.

The United States has violated the doctrine of speciality on numerous occasions.[61] Likewise, the United States rarely objects when other countries prosecute for reasons other than those specified in U.S. extradition hearings.[62] Non-compliance with speciality raises especially probing questions when a requesting country makes a request under the guise of laws shared by both countries, but then brings charges against the surrendered extraditee for separate crimes not punishable, or even protected, by the requested nation's laws.

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[59] *See* Kenneth E. Levitt, *International Extradition, The Principle of Specialty, and Effective Treaty Enforcement*, 76 MINN. L. REV. 1017, 1019–20 (1992).

[60] U.S.-Arg. Extradition Treaty, *supra* note 32, at 3514–15.

[61] *See, e.g.*, U.S. v. Paroutian, 299 F.2d 486 (2d Cir. 1962) (allowing prosecution for concealment and receipt of heroin when extradition was based solely on trafficking charges); Fiocconi v. Att'y Gen., 462 F.2d 475 (2d Cir. 1972) (allowing indictment for narcotics charges when extradition was based solely on conspiracy charges, on the assumption that the requested country would not object since both countries had similar narcotics laws); Berenguer v. Vance, 473 F.Supp. 1195 (D.D.C. 1979) (stating that once a person has been ordered extradited, there is no judicial recourse if the U.S. State Department consents to his being tried for another crime by the requesting country).

[62] The last formal objection was in 1978 for Australia's additional charges against a drug trafficker caught in the United States. *See* Extradition, 1978 DIGEST § 5, at 395–97.

6. Procedural Requirements

Requesting countries often face overwhelming procedural hurdles in requesting extradition. While an in-depth examination of these procedural obstacles is beyond the scope of this Article, it is important to highlight several major procedural issues.[63] The treaty, an obligation that binds the forming countries together regardless of the treaty's effect on the domestic law of either country,[64] is the first place to look when determining the procedural requirements for extradition.[65] All modern treaties contain some express limitations on the procedural aspects of extradition hearings that take place in the requested country.[66]

For the most part, U.S. extradition treaties have contained the same procedural requirements for the last forty years.[67] A request for extradition is initiated when the requesting country sends a request for extradition to the U.S. Secretary of State. The request is subsequently forwarded to the U.S. Attorney of the federal district court in the district where the individual to be extradited is located.[68] This request must be accompanied by a description of the person sought and a statement of the relevant facts and applicable law of the case, including the law prescribing the punishment

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[63] Procedural requirements are important because most extradition treaties place the financial burden, including the incarceration costs, on the requested country. It is therefore most cost-effective for the Unites States to take advantage of an expedited process, in order to minimize the time from request until actual surrender. The extradition of Andrija Artukovic, taking over 25 years, is an example of a long-delayed extradition. *See* Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986). This was an unusual case because the requesting country was Soviet-allied Yugoslavia and the crime was politically motivated. It is a sad testament to the effectiveness of the extradition proceedings that only three months after his return to Yugoslavia, Artukovic was tried and died while awaiting execution for his crimes. *See* Benjamin Wittes, *Another Demjanjuk?*, LEGAL TIMES, Dec. 16, 1996, *available in* LEXIS, Legnew library, Lgltme File.

[64] A country cannot opt out of a treaty obligation merely by claiming that the treaty offends domestic legislation. *See* SHEARER, *supra* note 3, at 195.

[65] Procedure is also subject to the requirements of 18 U.S.C. §§ 3181–3196. *See* BASSIOUNI, *supra* note 30, at 506.

[66] *See, e.g.*, Extradition Treaty, June 8, 1972, U.S.-U.K., art. VII, 28 U.S.T. 227, 231. Even the Jay Treaty of 1794 procedurally limited extradition, stating that extradition should only be granted, "on such evidence of criminality, as according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial." Jay Treaty, *supra* note 14, at 605. For the most part, treaties to which the United States is not a party seldom include internal procedural rules. *See* BASSIOUNI, *supra* note 30, at 501.

[67] *Compare* Extradition Treaty, June 27, 1995, U.S.-Bol., art. VI, S. TREATY DOC. No. 104-22 (1996), *with* Extradition Convention, Dec. 10, 1962, U.S.-Isr., art. X, T.I.A.S. No. 5476, at 1707 (containing nearly identical texts).

[68] Alternatively, the requesting country may bring the action in the federal district court by means of private counsel. *See* BASSIOUNI, *supra* note 30, at 506.

and enforcement of the offense.[69] If the accused has not yet been convicted of the crime for which extradition is sought, the requesting state must also provide evidence that establishes probable cause that the fugitive committed the offense.[70]

Once a request for extradition has been brought before the federal district court, a U.S. magistrate or judge issues an arrest warrant.[71] Because extradition is subject to federal jurisdiction, the Federal Bureau of Investigation will carry out the subsequent arrest and investigation.[72] After an arrest is made, the decision of whether the individual will be extradited is made at a "probable cause" hearing.[73]

The procedural requirements for the events following apprehension are usually not delineated in either statute or treaty.[74] Over the last 100 years, court precedent has clarified this ambiguity in procedure in three ways.[75] First, extradition is not a criminal proceeding, but rather is conducted much along the lines of a preliminary hearing.[76] The fugitive, once in custody, is given few procedural safeguards against wrongful extradition. Neither the Federal Rules of Evidence[77] nor the Federal Rules of Criminal Procedure[78] apply; accordingly, hearings often rely

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[69] *See, e.g.*, U.S.-Jordan Extradition Treaty, *supra* note 43, art. 8, S. TREATY DOC. No. 104-3. Substantive errors can easily be corrected by amendment or re-submission of a request at any time during the judicial hearing. *See Ex parte* Schorer, 197 F. 67 (E.D. Wis. 1912). The only timing requirement is that the request must be submitted in proper form before the Secretary of State will authorize the surrender. *See* Collins v. Loisel, 262 U.S. 426 (1923).

[70] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 comment b (1987).

[71] *See* BASSIOUNI, *supra* note 30, at 507. If a treaty permits "provisional arrest" preceding filing of the formal request, an arrest warrant could be issued based solely on the request of the U.S. Attorney. *See id.* Most treaties include this type of language. *See, e.g.*, Extradition Treaty, July 2, 1971, U.S.-Spain, art. XI, 22 U.S.T. 738.

[72] *See* BASSIOUNI, *supra* note 30, at 507.

[73] *See id.*

[74] Unlike most civil law countries, the U.S. system makes the judicial determination conclusive as to the refusal of extradition and advisory as to concession. *See* SHEARER, *supra* note 3, at 199.

[75] Most of today's decisions refer back to the controlling precedent of early 20th-century cases, "an era when constitutional safeguards of criminal procedure were undeveloped and meager, and due process of law meant something less than it does today." John G. Kester, *Some Myths of United States Extradition Law,* 76 GEO. L.J. 1441, 1442 (1988).

[76] *See, e.g.*, U.S. v. Galanis, 429 F. Supp. 1215, 1224 (D. Conn. 1977) (stating constitutional criminal prosecution safeguards do not extend to extradition proceedings).

[77] *See* Messina v. U.S., 728 F.2d 77, 80 (2d Cir. 1984); *see also* FED. R. EVID. 1101(d)(3) (stating that the Federal Rules of Evidence of criminal litigation do not apply to extradition hearings).

[78] FED. R. CRIM. P. 54(b)(5) (stating that the Federal Rules of Criminal Procedure are not applicable to extradition).

on hearsay testimony and unauthenticated documents.[79] Likewise, other safeguards used in criminal proceedings are unavailable.[80] As Justice Holmes stated, "[i]t is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time."[81] As the above statement suggests, the extradition hearing almost completely bypasses procedural safeguards of individual rights.

Not all courts disregard procedural individual rights in extradition hearings. While Supreme Court precedent states that extradition treaties should be liberally construed in favor of extradition,[82] judges have tremendous discretion to allow a defendant to show why he should not be extradited. Often, when a politically suspect country seeks extradition, or when the requesting country is unlikely to provide a fair trial, the court may allow the defendant more opportunities to present facts as to why he should not be extradited and may look for technicalities in the treaties that allow for legal refusal of extradition.[83] This informal judicial recourse is limited drastically, however, by the non-inquiry rule, which prohibits judges from basing their extradition decision on the procedures that await the fugitive upon being extradited to the requesting country.[84]

The second procedural issue clarified by court precedent is that the burden of proof in extradition is substantially less than that required in a criminal proceeding. The only requirements are that the conditions of the treaties be met and that the requesting country present enough evidence to support a possible finding of guilt if the defendant is extradited.[85] Even

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[79] *See, e.g.*, Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 271 (1986) (allowing hearsay); Zanazanian v. U.S., 729 F.2d 624 (9th Cir. 1984) (allowing unsworn police summary of witness statement as evidence); U.S. *ex. rel.* Sakaguchi, 520 F.2d 726 (9th Cir. 1975) (allowing documents into evidence despite inconsistencies in text).

[80] There are no automatic discovery rights; no ordinary protections of the Sixth Amendment to the U.S. Constitution, except the right to counsel; may be no applicability of the Fourth Amendment exclusionary rule; and no doctrine of double jeopardy by which to bar the government from re-trying the defendant in another extradition hearing. *See* Bingham v. Bradley, 241 U.S. 511, 517 (1916); Jhirad v. Ferrandina, 536 F.2d 478, 485 (2d Cir. 1976); Simmons v. Braun, 627 F.2d 635, 637 (2d Cir. 1980).

[81] Glucksman v. Henkel, 221 U.S. 508, 512 (1911).

[82] *See* Factor v. Laubenheimer, 290 U.S. 276, 293–94 (1933).

[83] *See* Kester, *supra* note 75, at 1446–47.

[84] *See* Gallina v. Fraser, 278 F.2d 77, 78 (2d Cir. 1960). "It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." Jhirad v. Ferrandina, 536 F.2d at 484–85.

[85] *See* Bryant v. U.S., 167 U.S. 104, 107 (1897) (examining only whether the

these minimal requirements, however, have not been consistently satisfied.[86]

Third, while extradition decisions are granted appellate review, the scope of this review is limited to habeus corpus jurisdictional issues.[87] In contrast, other countries give greater appellate latitude.[88]

Once the judicial officer determines that extradition should be granted, the fate of the fugitive is placed back in the hands of the Secretary of State, who has final authority to authorize the extradition.[89] There are very few instances in U.S. history where the Secretary of State has refused to extradite an individual.[90] The only time a refusal occurs is when policy or international relations, rather than individual rights, dominate.[91]

II. Extradition of International Computer Criminals

In the foreseeable future, the Internet user population, already greater than 34 million users[92] in 146 countries,[93] is expected to double annually.[94] Consequently, international computer crime is a

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magistrate had jurisdiction, the offense was within the terms of the treaty, and adequate facts were presented by the requesting country to prove criminality).

[86] The United States has extradited persons in at least two cases where the accused criminal had not even been charged with a crime in the requesting countries. *See* Emami v. U.S. Dist. Court, 834 F.2d 1444, 1448 (9th Cir. 1987); *In re* Assarsson, 635 F.2d 1237 (7th Cir. 1980).

[87] As Justice Holmes stated, "all technical details need not be proved beyond a reasonable doubt." Fernandez v. Phillips, 268 U.S. 311 (1925); *see also* Eain v. Wilkes, 641 F.2d 504, 508 (7th Cir. 1981) ("[T]he district judge [on habeus corpus] is not to retry the magistrate's case."). The scope of review, however, recently has been expanded to consider gross violations of treaty and constitutional rights. *See* Quinn v. Robinson, 783 F.2d 776, 787 (9th Cir. 1986).

[88] For example, although it took six months, Gary Lauck was able to appeal his extradition from Denmark to Germany to the highest court in Denmark. *See infra* notes 171–175 and accompanying text.

[89] *See In re* United States, 713 F.2d 105, 110 (5th Cir. 1983) (stating that the Secretary of State has final decision whether to surrender the fugitive). Before allowing someone to be returned, the Secretary of State reviews the matter de novo, considering both the fate of the individual and the political aspects, and decides whether or not to proceed even if no legal barriers disallow it. *See* 18 U.S.C. § 3186 (1982); Shapiro v. Secretary of State, 499 F.2d 527, 531 (D.C. Cir. 1974) (stating extradition is a matter within the exclusive purview of the Executive).

[90] *See generally* Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313, 1315 (1962).

[91] *See* Kester, *supra* note 75, at 1485.

[92] *See* Tom Guariso, *What's in a Web?*, Sun. Advocate (Baton Rouge), Feb. 2, 1997, at 1K.

[93] *See* Note, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 Vand. J. Transnat'l L. 75, 81 (1996).

[94] *See id.*

growth industry, and neither political borders nor language barriers will limit this expansion. The lack of uniform national laws on computer crime, combined with discordant attitudes among countries towards this issue, results in varying degrees of enforcement and punishment. This section highlights the lack of uniformity that works to the disadvantage of the requesting country, making the process of extradition of computer criminals more complicated, lengthy, and costly. This section divides the dominant forms of computer crime into three categories based on their treatment across various nations. The first category includes actions for which there is a general consensus on criminality; that is, most nations agree that the actions in question should be criminal. The second category contains actions for which such consensus on criminality does not exist. The final category includes actions with recognized criminality, but varying standards and punishments.

A. *General Consensus on Criminality*

For certain activities, such as child pornography and pedophilia, there is a general consensus among nations that the behavior should be illegal. Since countries also agree as to the proper severity of punishment, extradition can proceed with little difficulty.

1. Child Pornography

Because of cross-cultural attitudes against the sexual exploitation of children, most nations have enacted legislation against child pornography.[95] Moreover, there is a high degree of cooperation among law enforcement agencies to prosecute child pornographers. Despite this policy of non-tolerance, the traditionally covert nature of child pornography has enabled many of its makers and patrons to escape detection by law enforcement officials. Fortunately, the underground character of this crime has also limited the dissemination of this material. Currently, however, the legal and enforcement difficulties have prompted pornographers to utilize the Internet's technological advances, which have

[95] *See, e.g.*, 18 U.S.C. § 2252 (1994); An Act to Amend the Criminal Code, ch. 46, s. 2, 1993 S.C. § 163.1 (Can.).

provided a forum to transmit child pornography secretly and anonymously.[96] Accordingly, since the advent of the Internet, the child pornography market has grown rapidly.

The United States Supreme Court first addressed child pornography in the 1982 case of *New York v. Ferber*.[97] In *Ferber*, the Supreme Court distinguished child pornography from pornography depicting adults and upheld a New York state statute prohibiting the knowing distribution of materials promoting a sexual performance by a child.[98] The Court reasoned, inter alia, that the First Amendment does not protect child pornography as it does adult pornography.[99] Therefore, although U.S. law, such as the constitutional protection of speech, traditionally has shielded individuals from extradition for behavior that may be criminalized outside the United States, the First Amendment does not protect child pornographers from prosecution or extradition.

Although the Supreme Court preferred state regulation of child pornography,[100] Congress has enacted two statutes regulating child pornography. First, the Child Protection Act (CPA) provides for fines and imprisonment of up to ten years for any person who knowingly ships or transports, receives or distributes, sells or possesses with the intent to sell, child pornography in interstate or foreign commerce by any means, including by computer.[101] The federal government's expanded efforts to control on-line child pornography has increased the enforcement of this law. In 1993, federal authorities utilized this statute to launch operation "Long Arm."[102] The operation resulted in raids in fifteen states,

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[96] *See* Rajiv Chandrasekaran, *Undercover on the Dark Side of Cyberspace*, WASH. POST, Jan. 2, 1996; *see also* Sen. Paul Trible (R-Va.), Editorial, *How to Protect Electronic Speech*, WASH. POST, Jan. 16, 1986, at A20.

[97] 458 U.S. 747 (1982).

[98] *See id.*

[99] Preferring state to federal legislation, the Supreme Court listed five reasons why state governments have great latitude in restricting pornography: (1) the state's compelling interest in safeguarding the physical and psychological well-being of a minor, *see id.* at 756–57; (2) the creation and distribution of child pornography is based on sexual abuse, *see id.* at 759; (3) the ability to make money in the distribution of child pornography provides incentive to become involved in illegal activity, *see id.* at 761; (4) the value of child pornography is de minimus, *see id.* at 762; and (5) child pornography is not protected by the First Amendment, *see id.*

[100] *See supra* notes 97–99 and accompanying text.

[101] *See* 18 U.S.C. § 2252 (1994).

[102] *See DOJ Warns Against Child Pornography*, TELEVISION DIG., Sept. 6, 1993, *available in* 1993 WL 2882129. Operation Long Arm uncovered a scheme where, for an annual fee of $85, customers could connect to a service that provided free pictures of young children engaged in sexual acts. *See* Susan Houriet, *Pornography Seized at Home of Bristol Man*, HARTFORD COURANT, Nov. 20, 1993, at B1, *available in* 1993 WL 8460494.

the investigation of forty-five Americans, and six indictments for knowingly importing child pornography from a bulletin-board service based in Denmark.[103]

A second source of federal regulation of child pornography was recently enacted in September 1996, when Congress passed the Child Pornography Protection Act (CPPA).[104] Similar to its predecessor the CPA, the CPPA prohibits the distribution, possession, receipt, reproduction, sale, or transport of child pornography.[105] A noticeable difference between the two statutes, however, is the stiffer penalties against consumers, producers, and distributors of child pornography in the CPPA.[106]

In language very similar to that of the U.S.'s CPPA, the U.K. Protection of Children Act criminalizes the production and distribution of indecent photographs or computer generated images of children.[107] Additionally, the U.K. Criminal Justice Act criminalizes possession of child pornography.[108] Likewise, in Canada, a conviction for possessing child pornography carries a maximum five-year jail term;[109] a conviction for distributing, making, or importing child pornography carries a maximum ten-year jail term.[110]

A troubling example of the prevalence of international computer crimes and the need for extradition involving child por-

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[103] *See* Houriet, *supra* note 102, at B1. For more details on this matter, see generally *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995).

[104] Pub. L. No. 104-208, Title 1, § 121, 110 Stat. 3009 (codified at 18 U.S.C.A. §§ 2251–2252A, 2256, and 42 U.S.C.A. § 2000aa (West Supp. 1997)). According to Sen. Orrin Hatch (R.-Utah), the law created a "comprehensive statutory definition of the term 'child pornography.'" 142 CONG. REC. S11842 (daily ed. Sept. 30, 1996). Child pornography now includes any "visual depictions . . . including any . . . computer-generated image or picture . . . of sexually explicit conduct": (1) produced using children "engaging in sexually explicit conduct"; (2) which appear to be of a "minor engaging in sexually explicit conduct;" (3) which has been "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct;" or (4) which is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C.A. § 2256(8) (West Supp. 1997).

[105] *See* 18 U.S.C.A. § 2252A(a) (West Supp. 1997).

[106] *See id.* § 2252A(b). A first-time offender could face fines and up to 15 years imprisonment. A repeat offender distributor or producer would be fined and imprisoned for a period between 5 to 30 years, and a repeat offender possessor would be fined and imprisoned for a period of 2 to 10 years. *See id.*

[107] *See* Protection of Children Act, 1978, ch. 37 § 1 (Eng.); *see also* Yaman Akdeniz, *Computer Pornography*, 10 No. 2 INT'L REV. L. COMPUTERS & TECH. 235, 246–47 (1996).

[108] *See* Criminal Justice Act, 1988, ch. 33, § 160 (Eng.); *see also* Akdeniz, *supra* note 107, at 248.

[109] An Act to Amend the Criminal Code, ch. 46, s. 2, 1993 S.C. § 163.1(4) (Can.).

[110] *See id.* § 163.1(2).

nography was unmasked in September 1996, when police in California discovered a pedophile ring known as the "Orchid Club."[111] The ring included sixteen members from the United States, Finland, Australia, and Canada.[112] The group, using a process similar to video conferencing, was physically abusing children as young as five and broadcasting pictures live through the Internet.[113] During a session, members could send requests to the individual abusing the child detailing what form of abuse they wished to see.[114] The Orchid Club's activities were illegal in every country in which the perpetrators resided. It is almost certain that if extradition is requested, each country housing an accused will grant requests for extradition.[115]

Most countries agree as to the illegality of child pornography and the severity of punishment, and thus this is an area where the extradition process is likely to flow smoothly. The United States would likely extradite a child pornographer upon request. In the case of an eliminative treaty, the U.S. federal statutes that regulate child pornography call for sentences of one year or more. Alternately, if an enumerative treaty governed the process, and if child pornography were not explicitly listed, the court could categorize the offense as equivalent to another specified offense, such as rape or kidnapping.[116] Accordingly, double criminality requirements would be met in all requests for extradition.

2. Pedophilia

A consensus on criminality and the need for extradition has also developed around pedophilia, a crime closely related to child pornography on the Internet. As one commentator stated, "[i]t used to be police would watch for pedophiles around bus stations or arcades. Now these [pedophiles] can go right into your home."[117] Although computer conversations seem harmless

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[111] *See Police Found Abuse Being Broadcast Live*, IRISH TIMES, Sept. 7, 1996, at 9, *available in* 1996 WL 11041396.

[112] *See id.*

[113] *See id.*

[114] *See id.*

[115] If extradition based upon child pornography could not be secured, charges of kidnap or child abuse could provide an easy alternative basis for extradition.

[116] If this were not possible, reciprocity would, nonetheless, allow extradition.

[117] John Larrabee, *Cyberspace: A New Beat for Police*, USA TODAY, Apr. 26, 1994, at 1A.

enough, contacts made in cyberspace can result in serious harm. Pedophiles contact children through "chat rooms." The anonymity of the situation allows the pedophile to pose as anything or anyone: a man or a woman, a boy or a girl. Unaware of the potential danger, children often give their names, addresses, and phone numbers to people they meet over the computer network. After gaining the child's trust, the pedophile sets up a meeting between the two, which often results in harm to the child. In response to this problem, two years ago the FBI established operation "Innocent Images."[118] To date, the FBI has obtained at least forty-five felony convictions, while, nationwide, several hundred cases remain open and under investigation.[119]

There are numerous examples of pedophiles harming children as a result of contact through the Internet. In May 1993, for example, George Stanley Burdynski, Jr., a ten-year-old boy, was abducted from his home.[120] The FBI investigation revealed that suspects had given neighborhood children computers and were communicating with them at night, without their parents' knowledge.[121] George Burdynski's body was never recovered, and the case remains open.[122] In April 1994, a Massachusetts man, convicted of raping two boys he met via the Internet, was sentenced to twenty years in prison.[123] That same month, a California man pleaded guilty to raping a fourteen-year-old boy he met through America Online.[124] In March 1996, the National Center for Missing and Exploited Children reported roughly a dozen cases over a six-month period where a child was lured away from home through a computer.[125]

As with the case of child pornographers, it is likely that the extradition process for pedophiles would be smooth. Even if using a vague enumerative treaty, there is enough international consensus to find double criminality. The U.S. courts have granted

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[118] *See* Karen Lee Ziner, *FBI Targets Pedophiles on Internet*, PROVIDENCE SUN. J., Nov. 10, 1996, at A1.

[119] *See id.*

[120] *See id.*

[121] *See id.*

[122] *See id.*

[123] *See* Larrabee, *supra* note 117, at 1A; *see also* Marc Friedman & Kenneth Buys, *"InfoJacking": Crimes on the Information Superhighway*, 13 No. 10 COMPUTER LAW. 1, 7 (1996).

[124] *See* Kerry Fehr-Snyder, *Playground for Pedophiles: Victims Found on Electronic Services*, PHOENIX GAZETTE, June 6, 1994, at C1.

[125] *See* Steve Mills, *New Danger: Computer Kidnap, Internet Gives Pedophiles a High-Tech Way to Stalk Children*, WIS. ST. J., Mar. 25, 1996, at 1A.

extradition of child molesters since as long ago as 1929.[126] In the case of In re *Dubroca y Paniagua*, the Republic of Cuba sought extradition based on a charge of seduction of a minor.[127] Lacking a precise equivalent to the Cuban law, the court relied on the listed crimes of seduction and corruption of a minor to satisfy the double criminality requirement.[128] Given the recent international outcry concerning the sexual exploitation of children, it is apparent that the United States and a majority of other countries will continue to construe liberally the requirements of double criminality in favor of extraditing suspect fugitives.[129]

B. *Lack of Consensus on Criminality*

Extradition is difficult for certain activities, such as adult pornography and dangerous speech, because not all nations criminalize such behavior.

1. Adult Pornography

Pornography depicting adults is easily one of the biggest businesses on the Internet.[130] The diversity of available material allows the tastes of any connoisseur of pornography to be satisfied, with such media as digitalized images, movies, and sexually explicit text representing such acts as bondage, bestiality, and sodomy.[131] Even live sex shows from Amsterdam's red-light district can be accessed on the Internet.[132]

In the United States, adult pornography is regulated at both the state and federal levels. State legislatures are the dominant source of regulation of adult pornography. Each legislature dif-

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[126] *See In re* Dubroca y Paniagua, 33 F.2d 181 (E.D. Pa. 1929).

[127] *See id.*

[128] *See id.* at 182.

[129] To date, there have been no additional formally reported extraditions of pedophiles. For an appraisal of international efforts to combat child abuse, see, for example, Editorial, *Belgium's Shame*, WALL ST. J. EUR., Aug. 27, 1996, at 6; Eric Thomas Berkman, Note, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397 (1996).

[130] *See generally* Joshua Quittner, *Vice Raid on the Net*, TIME, Apr. 3, 1995, at 63; Gerald Van der Leun, *Twilight Zone for the Id*, TIME, Mar. 22, 1995, at 36; *X-Rated: The Joys of CompuSex*, TIME, May 14, 1984, at 83; HOWARD RHEINGOLD, VIRTUAL REALITY 345–52 (1991).

[131] *See* Anthony Clapes, *The Wages of Sin: Pornography and Internet Providers*, 13 No. 7 COMPUTER LAW. 1, 2 (1996).

[132] *See Amsterdam's Live Sex Shows to Go on the Internet*, CHI. TRIB., Aug. 13, 1995, at 8.

fers on precisely what constitutes obscenity. On the federal level, both case law and statute are relevant in determining criminal liability for transmitting obscene material via the Internet. The Supreme Court, in *Miller v. California*, differentiated between constitutionally protected pornography and unprotected obscenity in establishing the definitive test for obscenity.[133] To be classified as obscene, the work must: (1) under contemporary community standards, appeal to the prurient interest; (2) depict or describe in a patently offensive way, sexual conduct specifically defined by state law; and (3) lack serious literary, artistic, political, or scientific value.[134] This test does not establish a federal standard; what constitutes obscenity may vary from state to state, or even community to community.

Both the federal obscenity statute[135] and the Communications Decency Act (CDA)[136] regulate obscenity on the federal level. The federal obscenity statute prohibits: (1) the import, or knowing use of a common carrier or interactive computer service for the interstate or foreign commercial transport of, obscene or indecent matter;[137] (2) the taking or receiving from any common carrier or interactive computer service any matter made unlawful under (1); and (3) the knowing transport in interstate or foreign commerce for the purpose of sale or distribution any obscene or indecent matter.[138] A first-time offender of this statute can face a fine as well as imprisonment for up to five years.[139]

The courts first endorsed application of this statute to an on-line pornographer in *United States v. Thomas*.[140] In *Thomas*, a California couple was found guilty on eleven counts related to distributing pornography from their home-based computer bulletin board service.[141] According to the court, since the Thomases had

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[133] 413 U.S. 15 (1973).

[134] *See id.* at 24.

[135] 18 U.S.C. §§ 1460–1469 (1994).

[136] Communications Decency Act of 1996, Pub. L. No. 104-104, §§ 501–561, 110 Stat. 56, 133–43 (amending and adding to 47 U.S.C. § 223).

[137] *See* 18 U.S.C. § 1462 (1994).

[138] *See id.* § 1465.

[139] *See id.*

[140] No. CR-94-20019-6 (W.D. Tenn. 1994), *aff'd*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 74.

[141] *See* Joshua Quittner, *Computers in the '90's; Life in Cyberspace; The Issue of Porn on Computers*, NEWSDAY, Aug. 16, 1994, at B27. Subscribers paid $99 a year to access the board, where they could choose from more than 20,000 digital images of people engaged in bestiality, incest, and other sexual acts. *See id.*

3500 subscribers across the country, they subjected themselves to the differing community standards nationwide.[142]

The CDA, signed into law in February 1996, restricts certain communications over computer networks.[143] The prohibited acts are punishable by fines and imprisonment for up to two years.[144] Only one day after the CDA became law, the American Civil Liberties Union, joined by a broad spectrum of entities representing providers and users of on-line communications, sued to enjoin enforcement.[145] A federal district court in Pennsylvania found the terms "indecent" and "patently offensive" to be unconstitutionally vague.[146] Until the constitutionality of the CDA has been determined, the Department of Justice has suspended enforcement.[147] The Supreme Court granted certiorari and heard oral arguments on this case.[148]

Global responses to pornography are varied. Some countries have adopted very liberal attitudes. For example, the Netherlands is associated with permissive laws regarding pornography and Eastern European nations lack laws regulating pornography altogether.

The United Kingdom, like the United States, does not directly ban pornography depicting adults, but instead places some restraints on its production. The United Kingdom employs two statutes to regulate pornographic materials both on and off of the Internet. The Obscene Publications Act of 1959 defines obscenity as articles that deprave and corrupt persons likely to read, see or hear the matter.[149] The Act makes it an offense for

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[142] *See id.*

[143] The CDA criminalizes: (1) the creation, solicitation, and transmission of any obscene or indecent communications via an interactive computer service with the intent to annoy, abuse, threaten or harass another person; (2) taking such action knowing the recipient to be under the age of 18, regardless of who initiated the communication; (3) using an interactive computer service to send to a specific person under 18, or to display to any person under 18 any communication that depicts or describes, in patently offensive terms as measured by community standards, sexual or excretory organs, regardless of who initiated the communication; or (4) knowingly permitting one's telecommunication's facility to be intentionally used for acts proscribed in (1)–(3). *See* 18 U.S.C.A. § 223 (West Supp. 1997).

[144] *See id.*

[145] *See* A.C.L.U. v. Reno, 929 F.Supp. 824 (E.D. Pa. 1996), *cert. granted*, 117 S. Ct. 554 (1996).

[146] *See id.* at 856–57.

[147] *See Internet Regulations on Hold*, L.A. TIMES, Feb. 24, 1996, at D2.

[148] The Supreme Court heard oral arguments on March 19, 1997. *See* Linda Greenhouse, *Spirited Debate in High Court on Decency Rules for Internet*, N.Y. TIMES, Mar. 20, 1997, at B10.

[149] Akdeniz, *supra* note 107, at 236–37.

a person to publish, or possess with the intent to publish, any obscene article.[150] Included within the definition of "article" is matter stored on a computer disk.[151]

Finally, other countries have adopted a very strict stance against pornography. Germany adopts this more stringent attitude towards pornography on the Internet, requiring service providers to censor sexually explicit sites.[152]

In Asia, Singapore has led the way in promoting tighter regulation of the Internet, including access to and distribution of pornography. In March 1996, the Singaporean government announced tough new rules banning "smut and material that upsets the political, social or religious status quo," making it the first Asian country to do so.[153] To implement this policy, the Singapore Broadcast Authority will license Internet service providers within Singapore and will restrict access to banned websites.[154] Likewise, resellers must equip their libraries with filtering software and content providers will be held liable for the substance.[155] Since enactment, at least one person has been arrested for downloading pornographic information from the Internet.[156]

Other Asian countries, hoping to find legislative examples on which to build their own regulatory frameworks, have closely watched Singapore's regulatory activities. Hong Kong, for example, similarly prohibits the broadcast of pornography. Pornography that originates outside the territory, however, is outside the jurisdiction of enforcement authorities.[157] Japan, however, rejected Singapore's approach. The 1996 arrest of a Japanese

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[150] *See id.* at 237.

[151] *See id.*

[152] *See Internet Hit with First Government Censorship*, FIN. POST (Toronto), Dec. 29, 1995, at 4, *available in* 1995 WL 4355727. The sites can still be accessed by computer users who access the Internet directly, rather than through an on-line service. *See id.*

[153] Darren McDermott, *Singapore Spins a Web Over the Internet: New Regulations Will Give Authorities Wide Powers to Police Content*, ASIAN WALL ST. J., July 12, 1996, at 3.

[154] *See* Siti Rahil & Shuichi Nakamura, *Internet Braves Singapore's Tight Censorship Rule*, Japan Econ. Newswire, Aug. 24, 1996, at 1, *available in* WESTLAW, Jwireplus Database.

[155] *See id.* The goal of these regulations is to make access more difficult and more expensive. Despite these stringent regulations, Singaporeans can still access prohibited websites through external Internet services providers such as America Online. *See* McDermott, *supra* note 153, at 3.

[156] *See Singapore Internet Fine*, FIN. TIMES (London), Sept. 26, 1996, at 6, *available in* 1996 WL 10615429. The man was fined S$61,000 for downloading 61 sex films. *See id.*

[157] *See* Charlotte Parsons, *Fears that Thousands May Have Access Through Network Systems to CD-ROM Graphic Sex*, S. CHINA MORNING POST, Apr. 24, 1994, at 3, *available in* 1994 WL 8763809.

businessman on charges of distributing obscene materials on the Internet seemed to signal Japan's desire to conform with the East's regulatory approach towards pornography.[158] Since this was the first Internet-related arrest, Japan's National Police Agency established a commission to study alternative legislative means to fight crime related to computer networks.[159] The commission determined self-regulation of pornography by private groups was the most appropriate means of control for Japan.[160] This decision was based on the Constitutional guarantees of the right to know and freedom of expression.[161]

The non-uniformity of approaches creates a potential problem for extradition because it is unclear whether the U.S. laws would apply to foreigners who offer illegal pornographic materials from foreign-based bulletin boards. Neither the federal obscenity statute nor the CDA limits its application to U.S. citizens, but rather both apply to any person. Assuming the CDA, in some form, is eventually implemented, the requirement that the provider "knowingly" sent obscene or indecent material to a person under eighteen could be problematic for extradition. Proving the existence of such knowledge under the CDA would be very difficult because, unless the foreigner had previous knowledge as to the identity of the recipient, there would be virtually no way to verify the age of the recipient. Lacking such a showing, it is unlikely that any court would honor a petition for extradition since it would be unclear whether a crime occurred in the requesting state.

Similarly, seeking extradition of a foreigner under the federal obscenity statute would be difficult because obscenity is based on subjective community standards that are very difficult to transplant internationally. Foreign courts would be saddled with the formidable task of assessing which forms of pornography violate U.S. law. Likewise, the difficulty, expense, and time commitment placed on the U.S. government to prove obscenity standards would virtually eliminate any attempt at uniform enforcement

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[158] *See Computer Users Fear Clampdown After Pornography Arrest in Japan*, L.A. TIMES, Feb. 2, 1996, at 10D. This arrest was possible because the defendant was operating within Japan and the obscene material involved lewd pictures rather than words. Penalties for this crime are two years imprisonment or a $236,000 fine. *See id.*

[159] *See Police Set Up Task Force on Computer-Related Crimes*, JAPAN COMPUTER INDUSTRY SCAN, Apr. 15, 1996, at 1, *available in* 1996 WL 7605358; *see also Japanese Police Make First Internet Arrest*, J. COM., Feb. 5, 1996, at A5, *available in* LEXIS, News Library, Curnws File.

[160] *See Group Rules Out New Legal Regulation of Internet Porn*, Japan Econ. Newswire, Dec. 26, 1996, at 1, *available in* WESTLAW, Farnews Database.

[161] *See id.*

through extradition hearings. Further, even if the United States satisfies its burden of proving that such activity constitutes a crime within its jurisdiction, extradition may still be denied if the pornography is not a crime in the requested state. Given the liberal legislation of many European countries, the United States would face difficulties even with its closest political and economic allies.

Where double criminality exists, however, it would not be difficult to extradite a person charged with either of these crimes. Since five years is the maximum punishment allowable for violation of the federal obscenity statute and two years is the maximum imprisonment under the CDA, double criminality standards would permit extradition as most treaties contain a one year minimum sentence.[162]

2. Dangerous Speech

Neo-Nazis, antigay hate groups, pedophiles, pot smokers, and militant animal-rights activists are among those who have embraced on-line services.[163] The power of promotion via this new technology has enticed many groups to utilize this rather than more traditional forms of advertising.

The Free Speech Clause of the U.S. Constitution[164] guarantees individuals the right to speak freely. This right is not absolute; certain types of speech can be regulated or even prohibited depending on their content.[165] Still, compared to other countries, the United States' regulation of free speech is very liberal. Federal Bureau of Investigation Director Louis Freeh commented that extremists' speech, "'however despicable, is rightly protected by the Constitution.'"[166] In contrast, Canada criminalizes any communication that "willfully promotes hatred against any identifiable group"[167] or "incites hatred against any identifiable group" where a breach of the peace is likely to follow.[168]

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[162] *See* 18 U.S.C. § 1465 (1994).

[163] *See* Jared Sandberg, *Fringe Groups Ply Their Trades in Cyberspace*, ASIAN WALL ST. J., Dec. 9, 1994.

[164] U.S. CONST., amend. 1.

[165] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that the government can only regulate speech when it is necessary to prevent actual or imminent harm).

[166] Marc Fisher & Steve Coll, *Hate Groups: An International Cooperative*, WASH. POST, May 11, 1995, at A31.

[167] *See* Criminal Code, R.S.C., ch. C-46, § 319(2) (1985) (Can.).

[168] *See id.* § 319(1).

The United States' liberal regulation of speech has resulted in extremist groups funnelling information through the United States to other countries where tighter controls on speech exist. One major example of this is the publication of Nazi-related materials. Most European countries have legislation that prohibits Nazi activity.[169] As of 1994, Austria, Belgium, France, the Czech Republic, Germany, Israel, and Switzerland had either created or strengthened laws designed to combat Holocaust denial.[170] Germany, in particular, makes it a criminal offense to display Nazi symbols or express pro-Nazi sentiments.

Any extradition under this category of computer crimes would seemingly be very difficult. The case of Gary Lauck revealed, however, that perpetrators of dangerous speech can still be held accountable for their actions; one would expect a similar phenomenon with respect to dangerous speech on the Internet. On September 5, 1995, Gary Lauck, the infamous Neo-Nazi publisher and supplier of xenophobic and anti-Semitic publications and merchandise, was taken into custody by German police for violating at least five German anti-Nazi criminal laws.[171] Lauck's arrest was atypical because Lauck is neither German, nor had he ever set foot in Germany. Previously, Lauck had avoided apprehension by remaining in the United States, where "under the First Amendment, his Nazi activities [were] as legal . . . as they are illegal in Germany."[172] However, Lauck was arrested in Hundige, Denmark, while attending an international Neo-Nazi convention. Although Denmark, like the United States, protected these activities on the grounds of freedom of expression, under the weight of a German-sponsored international arrest warrant,[173] Denmark agreed to take Lauck into custody. After several months of extradition hearings, Lauck was taken to Denmark's German border

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[169] Since 1992, Sweden, Belgium, Azerbaijan, Brazil, Cyprus, the Czech Republic, Austria, Italy, Estonia, Lithuania, New Zealand, Romania, Russia, Switzerland, Hungary, and the Netherlands have developed new legal strategies to address hate propaganda. *See* Kathleen Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 803.

[170] *See id.*

[171] *See Gary Lauck, Supplier of Nazi Material, Is Extradited to Germany*, WEEK IN GERMANY, Sept. 8, 1995, at 1.

[172] Scott Canon, *Nebraska Neo-Nazi's Work Creates Friction Between U.S., Germany*, DALLAS MORNING NEWS, Jan. 30, 1994, at 1A.

[173] Germany, through INTERPOL, distributed arrest warrants to 15 European countries where Lauck was thought to have supporters. *See American Neo-Nazi Arrested in Europe*, CHI. TRIB., Mar. 24, 1995, at 3. Likewise, Lauck's arrest was coordinated by a police raid of 80 apartments throughout Germany, confiscating weapons and Neo-Nazi propaganda. *See id.*

where he was immediately arrested.[174] Lauck is currently serving a five-year sentence for "distributing illegal propaganda and Nazi symbols, incitement, encouraging racial hatred and belonging to a criminal group."[175]

The extradition of Lauck, while complete in its legal formality, represents the extent to which countries will ignore a treaty to extradite criminals. Three treaty obligations were violated with this extradition. First, the Danish court disregarded double criminality in allowing the extradition of Lauck to Germany. Until this decision, Denmark, like the United States, protected freedom of expression in extradition cases. While Article 266(b) of the Danish Penal Code makes it a crime to utter racist remarks, the punishment imposed by that law did not exceed one year,[176] and therefore, did not fall within the types of crimes extraditable to Germany. A 1995 amendment to Article 266(b) increased the punishment for these crimes to two years, thus fitting within the provisions of the European Convention on Extradition.[177] This law, however, was not amended until after Lauck's extradition hearing had already begun. If Lauck were arrested today, extradition would easily fit within the legal parameters set out in both Germany and Denmark. Barring retroactivity of the statute, however, double criminality was not met in Lauck's case. While Lauck's actions, in part, may be illegal in two states, the disparity in punishments does not seem to qualify him for extradition.[178]

Second, the political offense exception, while theoretically large in the scope of Neo-Nazi activity, played a surprisingly small role in Lauck's extradition proceedings. This, primarily, was due to a German statutory interpretation excluding hate groups, such as skinheads and Neo-Nazis, from the realm of legitimate party politics.[179] Simply stated, the political offense exception did not apply to Lauck because the charges brought against him were non-political in that they focused primarily on

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[174] *See* Dominik Wichmann, *Dealing with a Conscience of Shame*, CHI. TRIB., Sept. 28, 1995, at 17.

[175] *American Neo-Nazi Arrested in Europe*, *supra* note 173.

[176] *See* Mary Williams Walsh, *Neo-Nazi Tests Denmark's Defense of Free Speech*, L.A. TIMES, July 25, 1995, at 1 ("I think the most [jail time] anybody ever got [under 266(b)] in Denmark was 60 days" (quoting Bjorn Elmquist, Head of the Danish Parliamentary Justice Committee)).

[177] *See id.*

[178] *See generally* Hafen, *supra* note 47, at 192–97.

[179] "Although willing to connect with these far-right political parties, the Skinheads themselves reject the parliamentary road to power. Rather, they aim to achieve their goals by destabilizing society through the direct application of violence and intimida-

the racist elements of the crime and not the political aspects of the crime.

Finally, given the numerous charges Lauck faced in Germany, it is clear that speciality was waived, thus allowing Germany to charge him with crimes for which he was not originally extradited.

Where nations differ on whether a computer crime has been committed, extradition of computer criminals takes place basically on an ad hoc, case by case, basis. As illustrated, nations might stop at nothing to extradite notorious criminals, while wholly disregarding less conspicuous fugitives. Likewise, where only a minority of states protect individual liberties, such as the right of expression and the right of free speech, criminals will flock to these safe havens to escape prosecution. Therefore, in this category of computer crimes where uniform laws will most likely not emerge, ad hoc, unpredictable extradition policies will continue.

C. *Recognized Criminality, Different Standards and Different Punishment*

For certain activities, such as computer hacking, threats to national security, computer stalking, and electronic theft, there is a consensus, though limited, among nations that the behavior should be illegal. Extradition is difficult, however, because there is disagreement as to the proper severity of punishment and as to the details of what is regulated.

1. Computer Hacking

Computer hacking in its simplest form involves illegal entry into a computer system. International computer hacking is quickly becoming a frequent type of crime.[180] Moreover, with step-by-step hacking instructions available on the Internet, a high degree of skill in computer science is no longer required.[181] Accordingly,

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tion." *Text of ADL Report: 'The Skinhead International; A Worldwide Survey of Neo-Nazi Skinheads,'* U.S. Newswire, June 28, 1995, at 4, *available in* LEXIS, News Library, Wires File.

[180] *See, e.g.*, John Markoff, *Arrests in Computer Break-Ins Show a Global Peril*, N.Y. TIMES, Apr. 4, 1990, at A1.

[181] *See* David Johnston, *There Is No Sheriff on the Cyber Frontier*, EDMONTON J., June 18, 1995, at D10, *available in* 1995 WL 7361505.

many countries have enacted legislation criminalizing unauthorized entry. Given the importance of computers in society today, it is not surprising that the vulnerability of this technology is a primary concern for both nations and private enterprises. Anti-hacking legislation in the United States exists at two levels, first, restricting access to the system (pure trespass) and second, restricting the illegal activity once inside the system.

a. *Restricting access to the system (pure trespass).* The Computer Fraud and Abuse Act (CFAA)[182] criminalizes hacking by prohibiting unauthorized, intentional access to a computer to obtain information: (1) relating to the national defense or foreign relations; (2) contained in a financial record of a financial institution or consumer reporting agency; or (3) from any government department or agency.[183] These sections create the "pure trespass violation," in which access alone is a criminal offense. As can be seen from the above categories, the scope of this statute is very broad, extending to almost every computer in the United States. Individuals successfully convicted of the pure trespass violation can face fines and imprisonment up to twenty years.[184]

United States v. Morris was one of two successful prosecutions under the CFAA.[185] In *Morris*, the Second Circuit addressed the release of a computer worm[186] on the Internet, which ultimately damaged over 6,200 computers in the United States.[187] The worm put major businesses and universities, as well as critical government functions, into chaos, and caused millions of dollars of

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[182] Computer Fraud & Abuse Act, 18 U.S.C. § 1030 (1994).

[183] *Id.* § 1030(a)(1)–(3).

[184] *See id.* § 1030(b)–(c). An offense under subsection (a)(1) can result in imprisonment for not more than 10 years. *See id.* § 1030(c)(1)(a). However, when such offense occurs after a conviction for another offense under subsection (a), imprisonment can be for up to 20 years. *See id.* § 1030(c)(1)(b).

[185] 928 F.2d 504 (2d Cir. 1991). Morris was prosecuted under an earlier version of the CFAA in effect from 1986 to 1994. Subsection (a)(5) related to a person who:

> intentionally accesses a Federal interest computer without authorization, and by means of such conduct alters, damages, or destroys any information in any such Federal interest computer, or prevents authorized use of any such computer or information, and thereby causes loss to one or more others of a value aggregating $1,000 or more during any one year period.

U.S. v. Morris, 928 F.2d at 506. *United States v. Sablan*, 92 F.3d 865 (9th Cir. 1996), is the only other successful prosecution under the CFAA. Like Morris, however, Sablan was prosecuted under the earlier version of the CFAA. There have been no successful prosecutions under the current version of the CFAA.

[186] Rogue computer programs, such as worms, will be discussed in *infra* Part II.C.1.b.

[187] *See* Mark Lewyn, *Virus Cleanup: About $96 Million*, USA TODAY, Nov. 17, 1988, at 4B. The centers affected included NASA Ames Laboratory, Lawrence Livermore National Laboratory, SRI International, Massachusetts Institute of Technology, the University of California at both the Berkeley and San Diego campuses, Stanford

damage.[188] According to the court, by infecting computers used by the federal government and financial institutions, Morris's worm "intentionally" accessed those computers without authorization, prevented authorized use of those computers, and caused losses in excess of $1,000.[189]

Although a handful of countries, including Austria, Canada, Germany, and Japan, require some activity or intent to commit an activity beyond the mere trespass, many countries, including Australia, Finland, Israel, the Netherlands, Sweden, and the United Kingdom,[190] follow the U.S. model and criminalize pure trespass.[191] In language very similar to the CFAA, the Australian Crimes Act 1914 criminalizes hacking.[192] The Australian statute, while criminalizing pure trespass, limits coverage to computers owned, leased, or operated by the federal government and data stored therein.[193] Besides information relating to the national defense or foreign relations and financial institutions, the Australian statute also prohibits accessing, with the intent to defraud, information on the existence or identity of a confidential informant, the enforcement of law, the protection of public safety, the personal affairs of any person, trade secrets, and commercial information that could advantage or disadvantage a person.[194] Penalties for unlawful intrusion vary. Pure trespass alone can result in imprisonment up to six months. Unauthorized access with the intent to defraud can result in imprisonment up to two years.[195]

University, the University of Maryland, and the Rand Corporation. *See* Dan Kane, *Sorcerer's Apprentice Meets Less Benign Fate*, NATL L J., Feb. 5, 1990, at 8.

[188] *See* Lewyn, *supra* note 187, at 4B. One expert estimated the damage at $96 million. *See id.*

[189] *See* Kane, *supra* note 187, at 8.

[190] The U.K. Computer Misuse Act (CMA) proscribes use of a computer with the intent: (1) to gain access to any program or data held in any computer; (2) to facilitate the commission of a further offense; or (3) to cause an unauthorized modification of the contents of any computer. Hacking carries a potential penalty of up to six months imprisonment or a fine of £5,000. Computer Misuse Act, 1990, ch. 18, *available in* LEXIS, Engen Library, Statis File.

[191] Generally, the maximum penalties are as follows: Australia—6 months; Finland—6 months; Netherlands—6 months; Sweden—1 year; U.K.—6 months; U.S.—6 months. See Appendix for a Table of Comparison.

[192] *See* Crimes Act, 1914, Part VIA, § 76A-E, *available in* <http://www.barwonwater.vic.gov.au/WWW/is/CommonLaw.html>.

[193] *See id.* § 76A(1). The term "Commonwealth computer" is defined as a computer, a computer system, or a part of a computer system, owned, leased, or operated by any public authority under the Commonwealth. *See id.*

[194] *See id.* §§ 76B(2), 76D(2).

[195] *See id.* § 76A-E.

Dutch law likewise makes unlawful intrusion to a secured computer system a crime. General unauthorized access can result in imprisonment up to six months, whereas unauthorized access to systems serving socially important purposes, such as hospitals, can result in imprisonment up to six years.[196]

Even though the United States, Australia, and the Netherlands criminalize pure trespass into a computer system, this offense could not, by itself, serve as an extraditable offense. Given the diverse attitudes toward the pure trespass violation, locating an equivalent law in most foreign countries is difficult. In addition, all of the Unites States' extradition treaties require the offense to be punishable by a minimum of one year imprisonment. Since the uniform punishment for hacking in Australia and the Netherlands is only six months, that requirement is not met.[197]

b. *Restricting activity once inside the system.* Once illegally inside the system, the hacker can commit a large number of harmful acts, including browsing, altering or deleting files, disabling the system, installing viruses, stealing information, performing unauthorized electronic fund transfers, and generally creating havoc.[198] Damage, if not caused by the hacker directly, is often caused by rogue programs written or distributed by the hacker.

Rogue programs are the class of computer programs designed to harm or disrupt a computer system.[199] These programs include a series of instructions for the computer. Therefore, the computer programmer must specifically design the program to produce harm.[200] The most renowned rogue program is the computer virus. A computer virus is a program that can spread from computer to computer and use each infected computer to propagate more copies, all without human intervention.[201] Several types of viruses exist within the larger category of computer viruses. Be-

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[196] *See* James Daly, *Netherlands, Mexico Chase After Hackers*, COMPUTERWORLD, July 13, 1992, at 14.

[197] *See infra* Appendix.

[198] *See* Robert J. Sciglimpaglia, Comment, *Computer Hacking: A Global Offense*, 3 PACE Y'BOOK INT'L L. 199, 200–01 n.1 (1991) (citing Schulkins, *The Electronic Burglar*, 1 COMPUTER L. & PRAC. 140 (1985); Cangialosi, *The Electronic Underground: Computer Piracy and Electronic Bulletin Boards*, 15 RUTGERS COMPUTER & TECH. L.J. 265 (1989); Soma, Smith, & Sprague, *Legal Analysis of Electronic Bulletin Board Activities*, 7 W. NEW ENG. L. REV. 571 (1985)).

[199] *See* Robert J. Malone & Reuven R. Levary, *Computer Viruses: Legal Aspects*, 4 U. MIAMI BUS. L.J. 125, 127 (1994).

[200] *See id.*

[201] *See* Ann Branscomb, *Rogue Computer Programs and Computer Rogues: Tailoring*

nign viruses are not intended to damage the host computer or its data, but rather are usually created as pranks to disrupt users by displaying a silly message or image on the screen.[202] A malignant virus, on the other hand, is intended to harm the host computer system by altering, changing, or destroying programs and data.[203]

A second type of rogue program is known as a "worm." Worms crawl through networks repeatedly copying themselves, using up storage space, and slowing the invaded computer potentially to a halt.[204]

A third type of rogue program is known as a "time bomb" or a "logic bomb." A time bomb is an infection intended to perform on a specified date or time; a logic bomb executes when a predetermined event occurs. A particular time bomb, for example, was designed to erase all files within the infected computers every Friday the thirteenth.[205] A logic bomb that infected personal computers at Lehigh University was designed to activate and destroy all the files on the computers' hard disks after it replicated four times.[206]

The last type of common rogue program is known as a "Trojan horse." A Trojan horse is an innocent program that contains covertly placed instructions to perform an unauthorized function concurrent with its normal function.[207] Even more harmful, a trojan horse can be programmed to self-destruct, leaving no evidence of its existence except the damage that it caused.[208]

The CFAA provides protection in the United States against rogue programs by criminalizing the action of intentionally or recklessly causing damage to a protected computer.[209] Specifically, subsection 1030(a)(5)(A) proscribes the knowing transmission of

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the Punishment to Fit the Crime, 16 RUTGERS COMPUTER & TECH. L.J. 1, 4 (1990) (citing Howard Rheingold, *Computer Viruses*, WHOLE EARTH REV., Fall 1988, at 106).

[202] *See* Malone & Levary, *supra* note 199, at 129.

[203] *See id.*

[204] *See* Branscomb, *supra* note 201, at 4 n.14. A classic example of the detrimental effects of a worm is the previously discussed Morris case, where the defendant released a worm on the Internet. For a discussion of *United States v. Morris*, see *supra* notes 185–189 and accompanying text.

[205] *See* Malone & Levary, *supra* note 199, at 136. The bomb infected IBM and compatible personal computers in Israel and was triggered to go off on Friday, May 13, 1988, the 40th anniversary of Israel becoming a state. *See id.*

[206] *See id.* at 138.

[207] *See* U.N. CENTER FOR SOCIAL DEV. & HUMANITARIAN AFF., UNITED NATIONS MANUAL ON THE PREVENTION AND CONTROL OF COMPUTER-RELATED CRIME, INT'L REV. CRIM. POL'Y (Nos. 43, 44) at 8, U.N. Doc. ST/ESA/102, U.N. Sales No. E.94.IV.5 (1994).

[208] *See id.*

[209] *See* 18 U.S.C. § 1030(a)(5) (1994). A protected computer includes any computer

a rogue program and the intentional causation of damage as a result of such program.[210] Since rogue programs include instructions for the computer, the intentional damage component would not be difficult to prove. Subsections 1030(a)(5)(B) and (C) criminalize intentional unauthorized access that causes damage. Accordingly, a violation of the CFAA occurs if either a hacker acts directly or if a rogue program affects the operations of a computer or its contents. Penalties for violating this subsection can range from one to ten years in prison, depending upon the perpetrator's computer crime history and whether the offense was an isolated action or in conjunction with other offenses.[211]

The majority of countries criminalize unauthorized access with the intent to alter or damage data, regardless if such damage results.[212] For example, the Australian statute parallel to the CFAA similarly proscribes intentional unauthorized access that destroys, erases, alters, or inserts data, or interferes with or interrupts the use of a government computer.[213] The penalty for this offense is ten years imprisonment.[214] Likewise, the Dutch statute proscribes unauthorized modification of data in a computer, with a penalty of four years imprisonment for violators.[215]

Although the majority of countries criminalize these actions, the lack of legal uniformity in this category of crime poses problems to extradition. In the Morris case, for example, the U.S. and Australian laws would both have applied. Had Morris's worm affected a computer other than a government computer, however, he would have committed a crime only under U.S. law,

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used exclusively by a financial institution or the federal government or in interstate or foreign commerce or communication. *See id.* § 1030(e)(2).

[210] *See id.* § 1030(a)(5)(A).

[211] *See id.* § 1030(c). An offense under subsection (a)(5)(A) or (B) can result in imprisonment for not more than five years, but when such offense occurs after a conviction for another offense under subsection (a), imprisonment can be for up to ten years. An offense under subsection (a)(5)(C) can result in imprisonment for not more than one year, but when such offense occurs after a conviction for another offense under subsection (a), imprisonment can be for up to 10 years.

[212] Generally, the maximum imprisonment penalties are: Australia—10 years; Canada—10 years; Finland—1 year; Germany—2 years; Japan—5 years; Netherlands—4 years; Sweden—2 years; U.K.—6 months; U.S.—5 years. *See infra* Appendix.

[213] *See* Crimes Act, 1914, Part VIA, § 76C, *available in* <http://www.barwonwater.vic.gov.au/WWW/is/CommonLaw.html>.

[214] *See id.*

[215] *See* Daly, *supra* note 196, at 10. Great Britain, Italy, and Switzerland possess legislation making it a criminal offense to spread a computer virus. *See Finland Considering Law Against Spreading Computer Viruses*, Agence France-Presse, Feb. 6, 1997, *available in* 1997 WL 2054584. Finland is currently considering similar legislation. *See id.*

since Australia's protection only extends to government computers. Although the requisite minimum penalties exist in both, this alone is not enough to satisfy the double criminality requirement for extradition.

2. Threats to National Security

Although every nation shares a concern for national security, nations vary as to which actions they criminalize in order to safeguard their national security. This determination is mostly a function of social, political, economic, and technological interests.

In the United States, computer-related threats to national security are primarily regulated by the CFAA. Subsection (a)(1) of this statute prohibits unapproved access to information protected against unauthorized disclosure on account of national defense, foreign relations, or the Atomic Energy Act.[216] Successful prosecution under this statute requires a showing that the accused acted with the intent to injure the United States or to advantage a foreign nation.[217] Similarly, subsection (a)(3) of the CFAA prohibits intentional unauthorized access to a computer of any department or agency of the United States when such access adversely affects the government's use of the computer.[218]

Still, computer criminals have penetrated carefully protected U.S. Defense Department computer systems. A General Accounting Office report estimated that there were approximately 250,000 attempts to penetrate Defense Department computers in 1995.[219] In sixty-five percent of those attacks, the hackers were successful in gaining entry to the computer system.[220]

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[216] *See* 18 U.S.C. § 1030(a)(1) (1994).

[217] *See id.*

[218] *See id.* § 1030(a)(3).

[219] *See* U.S. General Accounting Office, *Information Security: Computer Attacks at Department of Defense Pose Increasing Risks*, Report to Congressional Requesters, May 1996, at 2. In October 1996, the U.S. Department of Defense awarded Frank Jou and five other computer sleuths a $1,000,000 grant to develop software to detect attacks on computer networks. *See Defense Department Hiring Its Own Sleuths to Prevent 'E-Terrorism,'* West's Legal News, Oct. 24, 1996, *available in* 1996 WL 618966.

[220] *See id.* One of the most renowned intrusions into nationally secured information was accomplished by Kevin Poulsen. In December 1992, Poulsen became the first computer hacker indicted on espionage charges when he was accused of stealing classified Air Force communications for a military exercise. *See* Linda Deutsch, *Hacker Charged with FBI Spying, Rigging Contests*, S.F. EXAMINER, Apr. 22, 1993, at A7. The government later dropped the espionage charges against Poulsen in exchange for a

Other countries' laws criminalize a wider variety of acts and information on national security grounds. In Vietnam, for example, Internet users are banned from duplicating or uploading onto the Internet any information on data that may affect the national security and social order.[221] Precisely what information this proscribes, however, remains unclear. Similarly, in South Korea, a man who criticized the government on a computer bulletin board was arrested and could face more than a year in jail under national security laws.[222] The South Korean National Security Law makes it a crime to "support, encourage or praise" North Korea.[223] In Burma, the military regime's State Law and Order Restoration Council outlawed unauthorized possession of computers with networking capabilities.[224] Possessing, obtaining, or sending information on subjects as diverse as state security, the economy, or national culture can result in seven to fifteen years in prison.[225]

Extradition based on a violation of national security would rarely occur, primarily because these infractions would be construed as political offenses. In addition, extradition may be thwarted if it is not provided for in the extradition treaty. For example, in March 1996, federal prosecutors attempted to charge an Argentine student with three felony counts related to hacking into U.S. military computers.[226] The U.S. extradition treaty with Argentina, however, did not provide for his extradition to the United States.[227]

3. Computer Stalking

A number of state and federal statutes criminalize the diverse group of actions that can be committed over the Internet with

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guilty plea on other related offenses. *See U.S. Drops Case of Spying by Computer*, N.Y. TIMES, Nov. 12, 1995, at A26.

[221] *See* Doan Ngoc Thu, *Vietnam: Regulation on Internet Connections*, VIETNAM COURIER, Aug. 31, 1996, *available in* 1996 WL 11777835.

[222] *See Seoul Man Faces Jail Term After Criticizing Government On-line*, Agence France-Presse, Jan. 13, 1997, *available in* 1997 WL 2039417.

[223] *Id.* at 2.

[224] *See* Ted Bardacke, *Burmese Risk Stiff Jail Sentences for Surfing the Internet*, FIN. TIMES (London), Oct. 5, 1996, at 20.

[225] *See id.*

[226] *See* Friedman & Buys, *supra* note 123, at 8. Prosecutors claimed the youth broke into the U.S. Department of Defense, Department of Energy, Naval Command, the Control and Ocean Surveillance Center, the Naval Research Lab, Los Alamos National Laboratory, and NASA computer networks. *See First Internet Wiretap Leads to a Suspect*, N.Y. TIMES, Mar. 31, 1996, at A20.

[227] *See* Friedman & Buys, *supra* note 123, at 8.

regard to stalking or threatening a person. Four states have laws that specifically include electronic communication within a general or telephone harassment statute.[228] Additionally, four states include electronic communication among the types of "unconsented contact" in anti-stalking statutes.[229]

At the federal level, the CDA provides protection against intentional harassment. The Act prohibits: (1) transmitting "any comment, request, suggestion, proposal, image, or other communication which is obscene . . . or indecent;"[230] (2) making "a telephone call or [utilizing] a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity;"[231] and (3) making "repeated telephone calls or repeatedly [initiating] communication with a telecommunications device, during which conversation or communication ensues."[232] Violators are subject to fines and/or imprisonment of up to two years. Until the constitutionality of the CDA is determined, however, this statute remains ineffective.[233]

A second source of federal law is 18 U.S.C. § 875, which makes it unlawful for a person to transmit in interstate or foreign commerce any communication containing: (1) any demand for ransom; (2) any threat to kidnap or to injure any person; or

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[228] *See* ALA. CODE § 13A-11-8(b)(1)(a) (1994) (including "electronic communication" within its proscribed forms of harassing communication); IDAHO CODE § 18-6710(3) (Supp. 1994) (including "transmission of messages, signals, facsimiles, video images or other communication" in its definition of "telephone"); N.H. REV. STAT. ANN. § 644:4(II) (Supp. 1994) (defining "communicates" as "to impart a message by any method of transmission, including but not limited to telephoning or . . . sending . . . any information or material by . . . electronic transmission"); N.Y. PENAL LAW § 240.30 (McKinney Supp. 1995) (including "communication . . . initiated by mechanical or electronic means" as proscribed forms of harassing communications).

[229] *See* MICH. COMP. LAWS § 750.411h(1)(e)(vi) (Supp. 1994); ALASKA STAT. § 11.41.270(b)(3)(f) (Michie Supp. 1994); OKLA. STAT. tit. 21, § 1173(F)(4)(f) (Supp. 1995); WYO. STAT. ANN. § 6-2-506(b) (Cumulative 1996). For an example of the application of Michigan's anti-stalking law, consider the case of Andrew Archambeau. Archambeau was charged with misdemeanor violations of the statute in connection with e-mail messages he sent to a woman he had met through a video dating service. In a two-month period, Archambeau sent the woman approximately twenty unwelcome or threatening messages, as well as ten letters and packages. *See* Gene Barton, Comment, *Taking a Byte Out of Crime: E-Mail Harassment and the Inefficacy of Existing Law*, 70 WASH. L. REV. 465, 471 (1995).

Also, in October 1996, a Texas judge issued the first ever restraining order against an alleged computer stalker. *See* Laurie Wilson, *Restraining Order Issued in Online-Stalking Case*, DALLAS MORNING NEWS, Oct. 15, 1996, at 15A.

[230] 47 U.S.C.A. § 223 (a)(1)(A)(ii) (West Supp. 1997).

[231] *Id.* § 223(a)(1)(C).

[232] *Id.* § 223(a)(1)(E).

[233] *See supra* note 148.

ace, harass, or offend another person.[242] Violators face imprisonment for one year.[243]

If the CDA is found constitutional, extradition will be possible between Australia and the United States because double criminality would exist; the offenses stated in the CDA and the Australian Crime Act are the same, and both mandate punishments of at least one year imprisonment.[244] Until more nations enact statutes outlawing computer stalking, however, extradition of individuals charged with this crime will generally be on an ad hoc, case-by-case basis.

4. Electronic Theft[245]

Electronic theft has permeated the information superhighway. International financial institutions are frequently the targets of computer fraud and embezzlement schemes. Major U.S. banks and corporations reportedly lost $800,000,000 in 1995 from intrusions by hackers.[246] For example, in 1995, Citibank had $10,000,000 siphoned off by Russian hackers in fraudulent transactions.[247]

Three different federal statutes criminalize electronic theft. First, the CFAA has three relevant sections. Subsection (a)(2)(A) prohibits intentional unauthorized access to any computer that contains the financial records of financial institutions, card issuers, or consumer reporting agencies.[248] Subsection (a)(4) makes it unlawful to knowingly and with the intent to defraud, gain unauthorized access to a computer and to obtain anything of value, unless the use of the computer is the only fraud and the use does not exceed $5,000 in a one-year period.[249] Subsection (a)(6) proscribes trafficking in computer passwords or similar access-related information that affects interstate or foreign commerce or involves government computers.[250] Penalties for a vio-

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[242] *See* Crimes Act, 1914, Part VIIB, § 85ZE, *available in* <http://www.barwonwater.vic.gov.au/WWW/is/CommonLaw.html>.

[243] *See id.*

[244] *See supra* notes 143 and 242 and accompanying text.

[245] Although various types of electronic theft exist, this discussion will be limited to theft of monies or goods.

[246] *See* Friedman & Buys, *supra* note 123, at 6.

[247] *See id.* Citibank was able to recover all but $400,000 of the $10,000,000 loss. *See id.*

[248] *See* 18 U.S.C. § 1030(a)(2)(A) (1994).

[249] *See id.* § 1030(a)(4).

[250] *See id.* § 1030(a)(6).

(3) any threat to injure the property or reputation of the addressee or another person.[234] Violators of this offense can be imprisoned for up to twenty years.[235]

This statute has already been employed in the prosecution of two individuals who sent communications over the Internet. First, Matthew Thomas, a nineteen-year-old college student, was found guilty under 18 U.S.C. § 875(c) for sending death threats over e-mail to President Clinton.[236] The second case, although not successful, helped to clarify the application of 18 U.S.C. § 875(c) to Internet communications. Jake Baker, a student at the University of Michigan, was arrested for stalking when he placed three stories on the Internet about fantasies that included rape, torture, and murder.[237] He used the name of a fellow student as the victim's name and sent e-mail to someone in Canada expressing his desire to carry out these fantasies.[238] Baker's case was dismissed, however, because the court determined individuals could not be arrested for their fantasies.[239]

A third federal statute dealing with these issues, subsection (a)(7) of the CFAA, provides fines and imprisonment up to ten years for persons who, with the intent to extort any money or anything of value, transmit to a computer in interstate or foreign commerce any threat to cause damage.[240]

Few nations have joined the United States in enacting legislation specifically applicable to computer stalking. Instead, most countries seem to extend the application of existing laws to cyberspace. For example, in the United Kingdom, the Home Office issued a statement that computer stalking would be subject to the same laws as any other sort of stalking.[241] Australia, however, is one of the few countries other than the United States to enact legislation specific to computer stalking. Section 85ZE of Australia's Crime Act 1914 prohibits any person from knowingly or recklessly using a telecommunications service to men-

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[234] *See* 18 U.S.C. § 875 (1994).

[235] *See id.*

[236] *See* Larrabee, *supra* note 117, at 1A.

[237] *See* U.S. v. Baker, 890 F.Supp. 1375 (E.D. Mich. 1995).

[238] *See* Friedman & Buys, *supra* note 123, at 4.

[239] *See id.* Specifically, the court held that Baker's writings did not constitute a "true threat" and were protected under the First Amendment. U.S. v. Baker, 890 F.Supp. at 1387.

[240] *See* 18 U.S.C. § 1030(a)(7) (1994).

[241] *See* Guy Clapperton, *When the Net Unnerves You*, GUARDIAN (London), Oct. 24, 1996, at 4.

lation of these subsections can include fines and imprisonment up to ten years.[251]

Second, the National Stolen Property Act (NSPA) prohibits the interstate transport of stolen property valued at $5,000 or more and known to be stolen or fraudulently obtained.[252] In *United States v. Jones* the Fourth Circuit determined that the NSPA applied to computer-related crimes.[253] In *Jones*, the defendant altered the accounts payable documents of her employers and thus caused the issuance of checks payable to an improper payee.[254] According to the court, Jones' actions constituted a fraudulent diversion of funds by computer and thus violated the NSPA.[255] A violation of the NSPA can result in a fine and/or imprisonment for up to ten years.[256]

Finally, the federal mail and wire fraud statutes prohibit the use of interstate wire communications and mails to further a fraudulent scheme to obtain money or property.[257] Like the NPSA, these statutes do not directly address crimes committed via a computer. Nonetheless, they have been commonly employed in the prosecution of persons engaging in computer mischief. For example, in 1990 Robert Riggs was indicted on charges of wire fraud for devising a plan to defraud Bell South.[258] Riggs unlawfully accessed Bell South's computer system and then downloaded a text file containing information relating to its enhanced 911 emergency system.[259] Violations of the federal mail and fraud statutes are punishable by fines or imprisonment up to five years, or both.[260] If the violation affects a financial institution, the punishment is a

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[251] *See id.* § 1030(c). An offense under subsections (a)(2)(A) or (a)(6) can result in imprisonment for not more than one year, but when such offense is committed for the purpose of commercial advantage or private financial gain, imprisonment can be for up to five years. *See id.* § 1030(c)(2)(A)–(B). When the offense occurs after the conviction for another offense under subsection (a), imprisonment can be for up to ten years. *See id.* § 1030(c)(2)(C). An offense committed under subsection (a)(4) can result in imprisonment for not more than 5 years, but when such offense occurs after the conviction for another offense under subsection (a), imprisonment can be for up to 10 years. *See id.* § 1030(c)(3)(A)–(B).

[252] *See* 18 U.S.C. § 2314 (1994).

[253] 553 F.2d 351, 356 (4th Cir. 1977).

[254] *See id.*

[255] *See id.*

[256] *See* 18 U.S.C. § 2314 (1994).

[257] *See* 18 U.S.C. §§ 1341, 1343 (1994).

[258] *See* Glenn Baker, *Trespassers Will Be Prosecuted: Computer Crime in the 1990's*, 12 COMPUTER L.J. 61, 85–86 (1993).

[259] *See id.*

[260] *See* 18 U.S.C. §§ 1341, 1343 (1994).

fine of up to $1,000,000 and/or imprisonment for up to thirty years.[261]

A number of countries have included fraud provisions in their computer laws similar to those in the U.S. CFAA. Finnish law provides that "anyone, who with the intention of obtaining unlawful financial benefit or of harming another person, falsifies the end result of data processing either by entering false data into a computer or by otherwise interfering with automatic data processing" commits fraud.[262] Japanese law similarly prohibits computer fraud.[263]

Other countries, such as the United Kingdom and Canada, apply traditional theft statutes to electronic theft.[264] Accordingly, persons who illegally transfer money to their own bank account via a computer are considered to have committed theft.[265]

As can be seen from the previous discussion, slight differences among nations in their laws can often frustrate the extradition of computer criminals. Just as extradition is unpredictable when there is no general consensus on the criminality of the activity, extradition is also unpredictable when nations agree that an activity should be prohibited but disagree as to the details of the criminality.

III. Comprehensive Solutions to Combat Computer Crime

A. *Moving Towards Better Computer Crime Regulation*

The Organization for Economic Cooperation and Development (OECD) initiated the first comprehensive effort to address the inadequacies of existing criminal laws with regard to computer crimes. In 1986, based on a comparative analysis of the substantive law of member states, the OECD suggested the following

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[261] *See id.*

[262] Finnish Penal Code ch. 36, § 1, para. 2, *quoted in* Antti Pihlajamaki, *Computer Crimes and Other Crimes Against Information Technology in Finland*, 64 Rev. Internationale de Droit Penal 275, 279–80 (1993).

[263] *See* Japanese Penal Code art. 246-2, *cited in* Atsushi Yamaguchi, *Computer Crimes and Other Crimes Against Information Technology in Japan*, 64 Rev. Internationale de Droit Penal 433, 444 (1993).

[264] *See* Richard Colbey, *Logged On, Locked Up*, Guardian (London), Nov. 21, 1996, at 15, *available in* 1996 WL 13388519.

[265] *See* Donald Piragoff, *Computer Crimes and Other Crimes Against Information Technology in Canada*, 64 Rev. Internationale de Droit Penal 202, 212 (1993).

list of acts to constitute a common denominator for the differing approaches taken:

> (*a*) The input, alteration, erasure and/or suppression of computer data and/or computer programs made willfully with the intent to commit an illegal transfer of funds or of another thing with value;
> (*b*) The input, alteration, erasure and/or suppression of computer data and/or computer programs made willfully with the intent to commit a forgery;
> (*c*) The input, alteration, erasure and/or suppression of computer data and/or computer programs, or other interference with computer systems, made willfully with the intent to hinder the functioning of a computer and/or telecommunication system;
> (*d*) The infringement of the exclusive right of the owner of a protected computer program with the intent to exploit commercially the program and put it on the market;
> (*e*) The access to or the interception of a computer and/or telecommunication system made knowingly and without the authorization of the person responsible for the system, either (i) by infringement of security measures or (ii) for other dishonest or harmful intentions.[266]

In 1989, the Council of Europe, building on the OECD report, published a minimum list of offenses for which uniform criminal policy had been achieved as well as an optional list of acts regarding which consensus on criminalization had not been reached and recommended that governments take the lists into account when reviewing or initiating their own legislation. The minimum list of offenses recognized computer fraud, computer forgery, damage to computer data or computer programs, computer sabotage, unauthorized access, unauthorized interception, unauthorized reproduction of a protected computer program, and unauthorized reproduction of topography.[267] The optional list included unauthorized alteration of computer data or computer programs, computer espionage, unauthorized use of a computer, and unauthorized use of a protected computer program.[268]

In 1990, the United Nations took additional steps to aid nations in dealing with computer crimes. At the thirteenth plenary

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[266] U.N. OFFICE AT VIENNA, CENTRE FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS, INTERNATIONAL REVIEW OF CRIMINAL POLICY, NOS. 43 AND 44: UNITED NATIONS MANUAL ON THE PREVENTION AND CONTROL OF COMPUTER-RELATED CRIME at 16 (1994) (quoting OECD, *Computer-Related Crime: Analysis of Legal Policy* (1986)).

[267] *See id.* at 16–17.

[268] *See id.*

meeting of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Congress adopted a resolution on computer-related crimes.[269] The resolution called upon Member States to intensify their efforts to combat computer crime by considering the following measures: (1) modernization of national criminal laws and procedures; (2) improvement of computer security and crime prevention measures; (3) adoption of measures to sensitize the public, the judiciary, and law enforcement agencies to the problem and importance of preventing computer-related crimes; (4) adoption of adequate training measures for judges, officials, and agencies responsible for the prevention, investigation, prosecution, and adjudication of economic and computer-related crimes; (5) elaboration of rules of ethics in the use of computers and the teaching of these rules as part of the curriculum and training of informatics; and (6) adoption of policies for the victims of computer-related crimes.[270]

In 1992, the Association Internationale de Droit Penal (AIDP) passed a resolution containing a number of recommendations on advancing current criminal laws. The AIDP recommendations especially stressed precision and clarity in future refinement or enactment of criminal laws aimed at addressing computer-related crimes.[271]

B. *Proposals to Facilitate Extradition*

1. Amendments to U.S. Legislation

At the domestic level, extradition language could be inserted into existing legislation, allowing for more dependable return of international computer criminals. Including such language in domestic statutes would obviate the need for a treaty specifically addressing computer crimes. The proposed language might read:

> The offenses defined herein shall be considered extraditable offenses so long as the Requesting State possesses equivalent legislation and the Requesting State agrees to reciprocate when presented with any similar requests made by the government of the United States.

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[269] *See id.* at 3, 17.
[270] *See id.* at 3.
[271] *See* 64 REV. INTERNATIONALE DE DROIT PENAL 681 (1993).

Language such as this would permit extradition where no treaty exists or where an enumerative treaty does not address computer crimes. Still, a U.S. citizen could not be extradited to a country that did not have equivalent legislation.

The language would thus expand the number of countries that extradite with the United States since a treaty would no longer be required. For example, the Commonwealth Scheme provides for extradition between the members of the British Commonwealth without specific treaties.[272] This scheme links over thirty States, including Great Britain, Australia, New Zealand, Canada, India, and the West Indies. The U.K. Computer Misuse Act, followed by some of the countries in the Commonwealth Scheme, already includes extradition language. Accordingly, the extradition of criminals in other Commonwealth countries is already possible amongst the participants. If such language were incorporated into various U.S. statutes, a number of countries would therefore already exist to and from which extradition for computer crimes would be possible.

In areas where global consensus exists as to the criminality of a particular activity, such as child pornography and pedophilia, the inclusion of extradition language in U.S. legislation could help reduce any uncertainty regarding the apprehension of fugitives abroad. Adding extradition language to these statutes would clarify the existing criminal and extradition requirements and, more importantly, would demonstrate Congressional intent for granting extradition requests more readily.

Extradition language could also be advantageous for crimes where there is recognized criminality but different standards and different punishment, such as hacking, stalking, and electronic theft. For these crimes, extradition language would solidify the grounds on which extradition can be based.

Conversely, the inclusion of extradition language would not be helpful in those areas lacking international agreement on criminality, such as adult pornography and dangerous speech, because extradition cannot occur if the requested country and the requesting country disagree as to whether a behavior should be criminalized. For example, although adding extradition language to the federal obscenity statute would establish double criminality in countries possessing equivalent legislation, it would

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[272] For a discussion of the Commonwealth Scheme, see generally SHEARER, *supra* note 3, at 54–57.

not expand the number of countries willing to extradite for this offense. Similarly, in the category of dangerous speech, extradition would not be perfected to countries wishing to prosecute for speech offenses because the United States does not criminalize most speech.

Finally, in some areas, such as national security, the inclusion of extradition language is wholly improper. National security legislation is a national matter. Accordingly, seeking the inclusion of extradition language in such legislation could offend principals of sovereignty.

2. Amendments to Bilateral Enumerative Extradition Treaties

Given the United States' strong reliance on bilateral treaties as the bases for permissible extradition, the most obvious way to improve the operation of these international agreements would be to amend the substantive and procedural sections of the individual treaties. As was illustrated earlier, most older U.S. extradition treaties rely on enumerative lists of crimes to determine extraditable offenses.[273] Rather than altering these treaties entirely by turning them into eliminative treaties, it would be more efficient simply to amend their enumerative lists to include computer crimes as extraditable offenses.

This technique is illustrated by recent agreements between the United States and other countries in the area of mutual assistance.[274] The following language from a mutual assistance treaty could be used to include computer crimes in extradition treaties:

> Both Contracting Parties agree to provide assistance in investigations, prosecutions, and proceedings concerning . . . the criminal exploitation of children, including commercial dealing in child pornography; . . . [and] [o]ffenses against laws

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[273] *See supra* notes 36–40 and accompanying text.

[274] One such notable treaty is between the United States and the Republic of Korea on Mutual Legal Assistance in Criminal Matters. *See* Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 23, 1993, U.S.-S. Korea, S. TREATY DOC. No. 104-1 [hereinafter U.S.-S. Korea Mutual Legal Assistance Treaty]. *See also* Agreement on Cooperation in Criminal Matters, June 30, 1995, U.S.-Russ., Hein's No. KAV 4518. Although the treaty with Korea does not serve as an extradition treaty and therefore does not require double criminality, much of its framework is applicable to extradition treaties. Indeed, the framework creates several comparisons of operations that suggest that extradition and mutual assistance treaties should either be merged into one treaty or at least be formed simultaneously with each other.

> relating to the protection of computers or computer systems, computer data, or computer security . . . .[275]

This language serves as a broad enough description of computer crime so as not to become antiquated as quickly or as easily as extraditable offenses have been in the past, but there is enough description to allow for dependable extradition hearings based upon the crimes outlined.

3. Multilateral Convention on the Extradition of Computer Criminals

a. *The benefits of a convention.* Extradition law, historically slow to respond to change, has failed to keep up with the advancement of computer crime laws. Development of global or multilateral treaties[276] on extradition would facilitate extradition for computer crimes in two ways.[277] First, it would unite many countries under one broad framework of extradition law. All parties to multilateral treaties would thus have the same notion of what offenses are extraditable, reducing the need for in-depth analysis of double criminality. Second, the large number of participating countries would isolate extradition law from political concerns among member nations.[278] This would aid in the development of an international standard that would not waiver under the constantly changing political climate between governments.[279]

Efforts at such a solution must concentrate on the problems caused by non-uniform laws and inadequate extradition language. As was seen in Part II, computer crimes for which there is a general consensus on both criminality and severity of punishment do not need to be the focus of such a treaty because there

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[275] U.S.-S. Korea Mutual Legal Assistance Treaty, *supra* note 274, annex., S. TREATY DOC. No. 104-1.

[276] Countries with similar interests should consider potential geographic and economic commonalities in forming multilateral extradition agreements, or even a global agreement, just as countries do in the formation of regional trading blocks. *See generally* Joseph L. Brand, Recent Development, *The New World Order of Regional Trading Blocks*, 8 AM. U. J. INT'L L. & POL'Y 163 (1992). The European Convention on Extradition and the Commonwealth Countries' Extradition Scheme are excellent models of the effectiveness of multilateral extradition cooperation. The Council's European Convention on Extradition is the most successful treaty of its kind, accounting for more extraditions than any other. *See* Thomas F. Muther, Jr., Comment, *The Extradition of International Criminals: A Changing Perspective*, 24 DENV. J. INT'L L. & POL'Y 221, 223 (1995).

[277] For a detailed examination of all multilateral treaties in existence, see BASSIOUNI, *supra* note 30, at 59 and SHEARER, *supra* note 3, at 51–67.

[278] This benefit assumes that the less extradition relies on diplomacy, the more reliable it becomes.

[279] *See* SHEARER, *supra* note 3, at 51–52.

are few impediments to extradition for these types of crime. Additionally, actions for which there is a lack of consensus regarding criminality do not warrant inclusion in a convention because differences among nations bar universal extradition. Conversely, actions criminalized by most countries, but criminalized differently by each country, could be usefully included in a multilateral convention because a convention could impose uniformity on the divergent laws. Specifically, hacking and computer stalking, for which greater uniformity in the law presently exists, should serve as the basis for a multilateral convention on computer crime. The creation of such an instrument would provide the basis for international concerted action against computer criminals and the potential elimination or significant curtailing of certain computer crimes.

b. *Proposed convention*

A CONVENTION RELATING TO THE EXTRADITION OF COMPUTER CRIMINALS

The Contracting Parties to this Convention,

***Taking note of* the growing incidence of attacks on governmental and private computer systems in every country;**

***Invite* all States to take all appropriate measures at the national level with a view to the speedy and final elimination of the problem of international computer crime;**

***Urge* all States who have not yet done so to include computer crimes in both their extradition and mutual assistance agreements;**

***Appeal* to all States to adhere to the terms of this Convention in hopes of the total elimination of international computer crime.**

COMMENT: To ensure proper statutory interpretation in the future and that the true intent of the convention is served, the first section should express the purpose of the Convention. In this instance, the purpose would be concerted action against computer criminals. Broad language such as this offers countries numerous methods by which to combat computer crimes, nationally as well as internationally.

Article 1.

Any person or persons who:

1. intentionally access a secured computer system without authorization and with the intent to:

(a) cause damage to that system or the data contained therein; or

(b) alter or modify the system or the data contained therein for the purposes of financial gain; or

2. intentionally use a telecommunication service to menace, harass or stalk another person in such a way as would be regarded by reasonable persons as offensive

commit an offense for the purpose of this Convention.

COMMENT: The Convention must define the elements of computer hacking and computer stalking. Although many countries criminalize these activities already, a uniformly agreed upon definition will provide an example for countries seeking to amend or enact national legislation.

Article 2.

Each Contracting State shall make the offenses set forth in Article 1 punishable by appropriate penalties, including fines and/or imprisonment for at least one year, which take into account the grave nature of those offenses.

COMMENT: The Convention should provide procedural language relating to the punishment each participating state will provide for a violation of the designated offenses. Given the current range of sentences for computer hacking and computer stalking, uniformity with regard to at least the minimum sentence would prove beneficial. A minimum sentence of at least one year would qualify these offenses for extradition in most countries. This Convention provides not only a uniform minimum sentence, but also leaves some discretion to the offended state to decide the maximum punishment.

Article 3.

Upon being satisfied that the circumstances so warrant, any Contracting State in which an alleged offender is present shall, in accordance with its laws, take the offender into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

COMMENT: To ensure the successful apprehension and detainment of accused transnational computer crime offenders until a

hearing, there must be cooperation between the participating states. Additionally, the rights of the accused should be protected.

Article 4.

The provisions of all extradition treaties and arrangements applicable between Contracting States are modified as between Contracting States to the extent that they are incompatible with this Convention.

COMMENT: The Convention should formally recognize that countries already possess numerous extradition treaties, and should thus call for the modification of such agreements. Including language such as this would update eliminative treaties as well as ensure that an extradited criminal cannot assert, given the existence of two treaties, that a violation of his fundamental rights has been committed.

Article 5.

For the purposes of this Convention, and to the extent that any offense mentioned in Article 1 is not listed as an extraditable offense in any extradition treaty between Contracting States, it shall be deemed to be included therein. Contracting States shall undertake to include the offenses listed in Article 1 as extraditable offenses in every extradition treaty concluded here forward.

COMMENT: In the instance of an enumerative treaty, the Convention should recommend that participating states add computer hacking and computer stalking to the list of extraditable offenses. Moreover, the Convention should recommend that the participating states look prospectively, and thus ensure the inclusion of these offenses in agreements concluded in the future.

Article 6.

Contracting States shall afford one another the widest measure of mutual assistance in criminal matters in connection with proceedings brought with respect to the offenses men-

tioned in Article 1. The law of the requested State concerning mutual assistance in criminal matters shall apply in all cases.

COMMENT: Existing mutual assistance treaties should be acknowledged and included in the Convention. The Convention should advocate a reciprocal spirit of assistance in the investigation, pursuit, and apprehension of the accused. Moreover, to avoid future disagreement between participating states, the Convention should designate which jurisdiction's law will apply to criminal proceedings. Most logically, the law of the requested State should apply since the accused is within its territory.

Article 7.

Any dispute between the Contracting States concerning the interpretation or application of this Convention that cannot be settled through negotiation, shall, at their request, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. In the case of a Contracting State making such a reservation, the other Contracting States shall not be bound by the preceding paragraph with respect to them. Such reservation may be withdrawn at any time by notification to the Depository Governments.

COMMENT: To guard against divisive disputes in the future between the Contracting States, the Convention should include an arbitration clause. The International Court of Justice is usually designated in international conventions as the arbitrator. This section should provide for all of the potential situations of disagreement between participating states.

Conclusion

Access to the Internet creates a greater need for international cooperation in the prevention of computer crime. No longer is international crime composed solely of terrorism and drug smuggling; instead, virtually any action taken on-line may be interpreted as criminal, or at least suspect, in some part of the world.

For centuries, extradition has provided the preferred procedural means for enforcing domestic criminal law beyond a nation's jurisdictional limits. Even though bilateral and multilateral treaties establish its existence, extradition is actually a product of diplomacy and foreign relations. Accordingly, it is it difficult to predict whether an individual would be extradited for any particular computer crime. Stronger treaties and a uniformity of computer crime laws must evolve before extradition will ever become a truly effective mechanism for permitting apprehension and prosecution of international computer criminals.

APPENDIX

Table of Comparison: Computer Crimes and Maximum Penalties

	Pure Trespass	Intent to Damage	Intent to Defraud	Computer Stalking
Australia	6 months[a]	10 years[b]	2 years[c]	1 year[d]
Canada	not a crime[e]	10 years[f]	10 years[g]	*
Finland	1 year[h]	1 year[i]	2 years[j]	*
Germany	not a crime[k]	2 years[l]	**	*
Japan	not a crime[m]	5 years[n]	10 years[o]	*
Netherlands	6 months[p]	4 years[q]	4 years[r]	*
Sweden	2 years[s]	2 years[t]	2 years[u]	*
U.K.	6 months[v]	6 months[w]	**	*x
United States	1 year[y]	5 years[z]	5 years[aa]	2 years;[bb] 5 years;[cc] 20 years[dd]

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* State has not enacted computer-specific legislation.

** Law could not be located.

[a] *See* Crimes Act, 1914, Part VIA, § 76B(1), *available in* <http://www.barwonwater.vic.gov.au/WWW/is/CommonLaw.html>.

[b] *See id.* § 76C.

[c] *See id.* § 76B(2).

[d] *See id.* Part VIIB, § 85ZE.

[e] *See* Donald K. Piragoff, *Computer Crimes and Other Crimes Against Information Technology in Canada*, 64 REVUE INTERNATIONALE DE DROIT PENAL 201, 226 (1993).

[f] *See id.* at 208 n.25.

[g] *See id.*

[h] *See* Antti Pihlajamaki, *Computer Crimes and Other Crimes Against Information Technology in Finland*, 64 REVUE INTERNATIONALE DE DROIT PENAL 275, 278 (1993). Petty unauthorized use is punishable by a fine only; aggravated unauthorized use is punishable by a maximum of two years imprisonment. *See id.*

[i] *See id.* at 279. Petty damage is punishable by a fine only. Aggravated damage is punishable by a maximum of four years imprisonment. *See id.*

[j] *See id.* at 280. Petty fraud is punishable by a fine. Aggravated fraud is punishable by a maximum of four years imprisonment. *See id.*

[k] *See* Manfred Mohrenschlager, *Computer Crimes and Other Crimes Against Information Technology in Germany*, 64 REVUE INTERNATIONALE DE DROIT PENAL 319, 338 (1993).

[l] *See id.* at 345. Certain types of computer sabotage are punishable by up to five years imprisonment. *See id.*

[m] *See* Atsushi Yamaguchi, *Computer Crimes and Other Crimes Against Information Technology in Japan*, 64 REVUE INTERNATIONALE DE DROIT PENAL 433, 439 (1993).

[n] *See id.* at 443.

[o] *See id.* at 444.

[p] *See* Henrik W.K. Kaspersen, *Computer Crimes and Other Crimes Against Information Technology in the Netherlands*, 64 REVUE INTERNATIONALE DE DROIT PENAL 471, 490 (1993).

[q] *See id.* at 493.

[r] *See id.*

[s] *See* Nils Jareborg, *Computer Crimes and Other Crimes Against Information Technology in Sweden*, 64 REVUE INTERNATIONALE DE DROIT PENAL 575, 587 (1993).

[t] *See id.*

[u] *See id.* at 581.

[v] *See* Computer Misuse Act, 1990 § 1(3).

[w] *See id.* § 3(7).

[x] *See* Guy Clapperton, *When the Net Unnerves You*, GUARDIAN (London), Oct. 24, 1996, at 4, *available in* WESTLAW, Grdn database. The Home Office issued a statement that computer stalkers would be prosecuted under traditional stalking statutes. *See id.*

[y] Computer Fraud & Abuse Act, 18 U.S.C. § 1030(c) (1994). If the offense occurs after conviction for another crime under 18 U.S.C. § 1030(a), imprisonment can be for up to 10 years. *See id.*

[z] *See id.* If the offense occurs after conviction for another crime under 18 U.S.C. § 1030(a), imprisonment can be for up to 10 years. *See id.*

[aa] *See id.* If the offense occurs after conviction for another crime under 18 U.S.C. § 1030(a), imprisonment can be for up to 10 years. *See id.*

[bb] Communications Decency Act, 47 U.S.C.A. § 223 (West Supp. 1997).

[cc] *See* 18 U.S.C. § 1030(a)(7) (1994).

[dd] *See* 18 U.S.C. § 875 (1994).

ARTICLE

LEGISLATING COMPUTER CRIME

STEPHEN P. HEYMANN*

The advent of computer technology has challenged the adequacy of many areas of existing legislation. As Congress begins to address, through criminal legislation, issues raised by the prevalence of computer technology, distinguishing legislation responsive to the advent of computer technology from legislation designed to promote unrelated moral and economic agendas becomes increasingly important. In this Article, Mr. Heymann provides a guide for recognizing those broad areas where computerization necessitates new criminal legislation. Focusing first on the area of substantive criminal law, he identifies legislative changes necessitated by the increasing centralization of data on computer systems, the intangible nature of computer data, and the speed and scale of computer activities. The author then addresses several procedural and evidentiary anomalies created by the advent of computer technology.

I. THE IMPORTANCE OF DISTINGUISHING REAL NEEDS FOR NEW LEGISLATION FROM EFFORTS TO REOPEN OLD DEBATES

They can be the objects of a crime. They can be tools used in the commission of a crime. They can be the repository of evidence of a crime. After crude and expensive beginnings, they have become ubiquitous in the United States and central to the American economy.

This description applies equally to automobiles and computer systems. Yet Title 18 of the United States Code, which contains the majority of the federal criminal code, is not permeated with laws directed at automobiles, nor rules of procedure designed specifically with automobiles in mind. For the most part, a question of law concerning automobiles is answered simply by an intelligent extrapolation of a more general rule of law or procedure found in the criminal code.

Is it really necessary, then, to draft new federal criminal legislation or amend old legislation to adapt to the increasingly widespread use of computer systems? Or, as was the case with respect to the growth in the use of automobiles, are our current

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substantive and procedural criminal codes sufficiently flexible to adapt? If existing legislation is sufficient, as our legislation was with respect to automobiles, then we must be deeply suspicious that any new legislation directed at "computer crime" is really a guise for promoting a moral or economic agenda unrelated to the advent of computer technology, an agenda that simply would not be saleable if presented in a more open form.

The Communications Decency Act ("CDA"), currently the subject of controversy,[1] merits this concern. The CDA amended an earlier statute (47 U.S.C. § 223) so as to make it a crime to use an interactive computer service to send or display, in a manner available to a person under age eighteen, any communication that depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. Is there something special about interactive computer services that renders our current federal criminal obscenity legislation ineffective? Or, as one prominent commentator has suggested in an open letter to the President, is this computer crime legislation merely a Trojan horse in the battle between legislators who would more closely restrict the access of people of all ages to pornography, and those legislators who would not?[2]

Questioning the appropriateness of legislation apparently directed at "computer crime" should not be limited to hotly contested areas such as pornography, however. In 1952, Congress passed the wire fraud statute, 18 U.S.C. § 1343, to cure a jurisdictional defect that Congress perceived was created by the last dramatic change in public communications, the growth of radio and television as commercial media.[3] Is a new computer fraud

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[1] The Communications Decency Act of 1996, which constitutes Title V of the Telecommunications Act of 1996, was signed into law by the President on February 8, 1996. *See* Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133–35 (1996). The subject of heated debate, the CDA has been ruled unconstitutional by two federal district courts and is presently under review by the Supreme Court. *See* Shea *ex rel.* American Reporter v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), *petition for cert. filed*, 65 U.S.L.W. 3323 (Oct. 15, 1996) (No. 96-595); American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D.Pa. 1996), *prob. juris. noted*, Reno v. American Civil Liberties Union, 117 S.Ct. 554 (Dec. 6, 1996) (No. 96-511).

[2] *See* Michael Godwin, *A Letter to the President: Veto the Telecom Bill* (last modified February 2, 1996) <http://www.eff.org/pub/Publications/Mike_Godwin/godwin_020296_pres.letter> (on file with the *Harvard Journal on Legislation*). Michael Godwin is staff counsel for the Electronic Frontier Foundation.

[3] *See* United States v. LaMacchia, 871 F. Supp. 535, 540 (D. Mass. 1994) (citing H.R. REP. No. 82-388, at 1 (1952)).

statute necessary to complement the mail and wire fraud statutes, giving federal prosecutors jurisdiction over all frauds involving the use of computers? Or would such a statute simply be a vehicle for vastly expanding criminal jurisdiction, as would be a statute criminalizing any fraud in which an automobile was involved?

To rationally consider pending and future federal criminal computer crime legislation, it is important to be able to separate those aspects of proposed legislation that are responsive to the advent of computer technology from those that originate in unrelated and distinct debates about whether particular conduct should be prohibited or whether the government should be empowered with particular investigative tools. This Article seeks to provide a guide for recognizing those broad areas where computerization really necessitates new criminal legislation.[4]

II. The Areas in which Computer Technology Renders Obsolete Established Substantive Criminal Laws[5]

This Article began with a summary of the ways in which a computer system can be involved in a crime. A computer system can be the object of a crime, as when somebody tries to steal information stored on a system, change information stored on a system, or destroy the functional ability of a computer system itself. A computer system can be a tool used to commit a crime, as when a teller embezzles from his bank by manipulating the

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[4] No effort is made in this Article to address the separate, but arguably related, question of when it is appropriate to criminalize behavior arising out of computer technology, and when that behavior should be dealt with through civil enforcement mechanisms. *See generally* Michael P. Dierks, *Computer Network Abuse*, 6 Harv. J.L. & Tech. 307 (1993); Michael C. Gemignani, *What Is Computer Crime, and Why Should We Care?*, 10 U. Ark. Little Rock L.J. 55 (1987-1988); Brenda Nelson, Note, *Straining the Capacity of the Law: The Idea of Computer Crime in the Age of the Computer Worm*, 11 Computer/L.J. 299 (1991).

[5] In this analysis, as in many others in this piece, the author is deeply indebted to Scott Charney and Martha Stansell-Gamm, respectively the Chief and Deputy Chief of the Computer Crime and Intellectual Property Section of the Criminal Division of the United States Department of Justice, with whom the author has spent countless hours discussing computer crime. The three roles a computer can play in a crime are described in Scott Charney, *Computer Crime: Law Enforcement's Shift from a Corporeal Environment to the Intangible, Electronic World of Cyberspace*, 41 Fed. B. News & J. 489, 489 (1994). *See also* Kelly J. Harris, *Computer Crime: An Overview*, Technical Bull. (SEARCH, The Nat'l. Consortium for Just. Info. and Stat., Sacramento, Cal.), 1995 (using the three-part analysis); Xan Raskin & Jeannie Schaldach-Paiva, *Computer Crimes, Eleventh Survey of White Collar Crime*, 33 Am. Crim. L. Rev. 541, 543 (1996) (using the same analysis).

bank's computer records, much as he would have manipulated the bank's double entry paper ledger thirty years earlier. Finally, a computer system simply can be the repository of evidence of a crime, be it electronic mail between co-conspirators or records of illegal transactions. In the area of substantive criminal law, the focus of this section, the first two of these—a computer as the object of a crime and a computer as a tool for crime—are important. The third way a computer can be involved in a crime—as a repository of evidence—is crucial for criminal procedure, the subject of Part III of this Article.

A. *The Computer as the Target of Crime: Confidentiality, Integrity, and Availability*

A criminal targeting a computer system as the object of a crime can compromise the confidentiality of data stored on the computer system, the integrity of that data, and the availability of the computer system.[6] Obviously, criminal threats to these interests are not new. They existed before the advent of computer technology when individuals stored data in handwritten and typewritten records in now aging Steelcase file cabinets. However, the centralization of massive amounts of data, made possible by computers, has increased dramatically the vulnerability of data and its system of storage, necessitating new protective legislation.

Consider for a moment a health management organization's ("HMO's") computer system. It enables the HMO to store hundreds of thousands of pages of patient records on a single computer server. Networking computers to that server greatly enhances the capacity of an HMO's physician to treat her patients by giving her immediate access to all her patients' records wherever she may be. Search tools, similar to the "*find*" command on a word processor, allow the physician to comb rapidly through the voluminous records a particular patient may have to find precisely the information the physician needs.

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[6] *See* COMPUTER CRIMES AND INTELLECTUAL PROPERTY SECTION, CRIMINAL DIV., U.S. DEP'T OF JUSTICE, The Structure of Title 18 Reform 1 (1996) (unpublished manuscript, on file with the Computer Crimes and Intellectual Property Section, Criminal Div., U.S. Dep't of Justice); COUNCIL OF EUROPE, COMPUTER RELATED CRIME, RECOMMENDATION NO. R(89)9 ON COMPUTER RELATED CRIME AND FINAL REPORT OF THE EUROPEAN COMMITTEE ON CRIME PROBLEMS 23–24 (1990).

But these valuable new capacities have created equally unprecedented dangers.[7] Formerly, to view a person's confidential medical records, an intruder first had to break into the offices and then into the file cabinets of each of his target's doctors. He also had to break into the test result storage facilities of the hospitals that treated his target. During each break-in, unless a photocopying machine was readily accessible, the intruder had to steal the records, immediately evidencing his illegal activity.

The centralization of data in electronic form in computers makes that data much more vulnerable to violation than when it was spread out in multiple file cabinets throughout a hospital or across a city.[8] Doors and locks are no longer a barrier. Nor is physical distance, as the data can be accessed swiftly, often invisibly, from anywhere on the planet. The technology of computer access also bypasses the legal protections formerly provided by burglary and larceny statutes. Where the intruder formerly had to break into various physicians' offices to access the information, violating state breaking and entering laws in the process, he now can access the information over the computer network without ever breaking into or entering a single one of the physicians' offices. Similarly, he no longer needs to commit larceny by carrying the records away, since he can transmit perfect electronic copies of the records to his own computer instantaneously.

Just as the centralization of data in networked computers dramatically increases the risk to the confidentiality of that data, so it increases the risk to its integrity. Often, someone who wrongfully gains access to a record can alter it as easily as view it. For someone to change a paper record stored in an individual's Steelcase file cabinet, that person must get into the office, break into the file cabinet, and physically alter the record with correction fluid or an eraser—leaving important signs alerting the owner to check her records.

Because changing a computer record does not require physical entry or the same sort of alteration that changing a physical record requires, the change is far more likely to go unnoticed,

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[7] *See generally* National Information Infrastructure: Draft Principles for Providing and Using Personal Information and Commentary, 60 Fed. Reg. 4362, 4363 (1995) (discussing the increased risk to privacy created by the national information infrastructure).

[8] Furthermore, as more data are centralized on a computer system, the computer system becomes more worthy as a target.

with potentially devastating consequences, as noted in the Senate report on the Computer Fraud and Abuse Act of 1986:

> In 1983, for example, a group of adolescents known as the "414 Gang" broke into the computer system at Memorial Sloan-Kettering Cancer Center in New York. In so doing, they gained access to the radiation treatment records of 6,000 past and present cancer patients and had at their fingertips the ability to alter the radiation treatment levels that each patient received. No financial losses were at stake in this case, but the potentially life-threatening nature of such mischief is a source of serious concern to the Committee.[9]

At the same time that the increasing centralization of data storage in multi-user computer systems is making stored data more vulnerable to discovery and alteration, the risk is increasing that malicious individuals will destroy or otherwise render unavailable entire critical computer storage systems. Growing dependence on computer systems requires protecting their operation from sabotage or reckless interference. Inserting a virus into an HMO's computer system that renders patients' records inaccessible does not merely vandalize the system; it puts at risk the lives of the patients whose records are stored on that system. As highlighted in a report on computer-related crime prepared by the Council of Europe:

> Disturbances in computer and telecommunications systems may have even more negative consequences than mere negative alterations of computer data or programs because of the increasing dependence of modern society on these systems. They play such an important role that the protection of the functioning of the systems is of great interest not only to the owners/users of them, but in many cases also to the public. Hindering the function of important public computer systems, for example military, medical or traffic control computers, or private computers, for example bank or insurance company computers, may not only have great economic consequences, but may also lead to disastrous human consequences.[10]

Within the federal criminal code, Section 1030 of Title 18 provides the primary protection for the confidentiality, integrity, and availability of computer data and systems. Prior to the initial enactment of Section 1030, enforcement actions in response to computer-related crime had to rely on statutory restrictions that

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[9] S. REP. No. 99-432, at 2–3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2480.
[10] COUNCIL OF EUROPE, *supra* note 6, at 46.

were designed for other offenses, such as mail fraud and wire fraud.[11] The new legislation created an offense for unauthorized access to a computer where that access was used to obtain information contained in certain statutorily protected financial records.[12] It also created federal offenses for unauthorized access to a government computer where a defendant thereby accessed classified information in,[13] altered or destroyed data in, or prevented authorized use of, that government computer.[14] Since 1984, the scope of Section 1030 has been expanded along two dimensions. First, Congress has broadened the protection accorded the confidentiality and integrity of data. This is most clearly evident in subsections 1030(a)(2) and 1030(a)(5) of the statute as amended on October 3, 1996.[15] Second, Congress has expanded the range

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[11] The House Report on the 1984 legislation specifically referred to two computer crimes that might have gone unpunished had there not been fortuitous uses of interstate wires in accessing the victim computers. *See* H.R. REP. No. 98-894, at 6 (1984).

[12] *See* 18 U.S.C. § 1030(a)(2) (1984).

[13] *See* 18 U.S.C. § 1030(a)(1) (1984).

[14] *See* 18 U.S.C. § 1030(a)(3) (1984).

By the fall of 1988 the statute already had been amended substantially and this protection had been moved to a new section, 18 U.S.C. § 1030(a)(5) (1986). In a case that probably could not have been prosecuted absent 18 U.S.C. § 1030(a)(5), a graduate student named Robert Morris released a "worm" or "virus" over the Internet. The virus did not cause any permanent damage to hardware or affect the integrity of computer files. Nonetheless, the virus quickly clogged hundreds of computer installations including those at leading universities, military sites, and medical research facilities, causing many systems to crash or become catatonic. *See* United States v. Morris, 928 F.2d 504 (2d. Cir.), *cert. denied*, 502 U.S. 817 (1991).

[15] Sections 1030(a)(2) and (a)(5) state that whoever:

> (2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains—
>
> (A) information contained in a financial institution, or of a card issuer as defined in section 1602(n) of Title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*);
>
> (B) information from any department or agency of the United States; or
>
> (C) information from any protected computer if the conduct involved an interstate or foreign communication;
>
> ***
>
> (5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
>
> (B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
>
> (C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage

of computer systems Section 1030 protects beyond systems used by or for the United States government or financial institutions (which have been protected since the statute's inception) to include systems used in interstate or foreign commerce or communications.[16]

Section 1030 is a computer crime law at its purest. In its original formulation and periodic updating, Congress has focused exclusively on new legislation necessary to respond to our increasing dependence on computer technology as that technology has continued to evolve.

B. *The Computer System as a Tool of Criminal Activity*

Computer-related crime takes the form not only of crimes in which a computer itself or the data it contains is the target, but also of crimes in which a person uses a computer system to further another, traditional criminal act.[17] For the most part, the federal criminal code already adequately covers crimes, such as the bank teller's embezzlement, in which a criminal uses a computer merely as a tool. There are, however, two categories of federal criminal laws that Congress must supplement or amend as a result of developing computer technology.

1. Protection of Intangible Interests

The first category encompasses those criminal laws that protect a citizen's interests in physical objects—a type of interest that, in the computer era, is being replaced by comparable inter-

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[commits an offense].

[16] *See* 18 U.S.C. § 1030(e)(2). "Protected Computer" is defined by section 1030(e)(2) as a computer—

> (A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or
>
> (B) which is used in interstate or foreign commerce or communications.

[17] *See* Steve Shackelford, *Computer-Related Crime: An International Problem in Need of an International Solution*, 27 TEX. INT'L L.J. 479, 483 (Spring, 1992); *Federal Guidelines for Searching and Seizing Computers*, 56 Crim. L. Rep. (BNA) 2023, 2026 (1994).

ests in intangible or virtual surrogates. Two examples, drawn from legislative fixes made in 1996, will serve to make this point. The Hobbs Act, 18 U.S.C. § 1951, is the federal extortion statute. As presently codified, it criminalizes the actions of anyone who in any way or degree obstructs, delays, or affects commerce by committing or threatening physical violence to any person or property as part of a plan to commit extortion. Threatening to destroy critical hard-copy files in furtherance of a plan to extort a business would be a crime under that statute. But would a computer age version of the same crime—encrypting an HMO's patient records and offering the encryption key only in exchange for money—be a violation of the same prohibition of the Hobbs Act?[18] The threat of harm is as real as it would be were the perpetrator to place a bomb on the computer's hard drive and demand money for instructions to defuse the bomb. Nevertheless, it is unclear whether computer data, alone, is "property" within the meaning of the statute or whether encrypting it without permission is "physical violence."[19]

The problem of fitting electronic impulses into statutes designed with physical objects in mind is not merely academic. While the issue has not engendered litigation in the context of the Hobbs Act, it has in the context of the National Stolen Property Act, 18 U.S.C. § 2314. That statute prohibits the transportation, transmission, or transfer in interstate or foreign commerce of any goods, wares, or merchandise, knowing the same to have been stolen, converted, or taken by fraud. Courts are divided as to whether intellectual property stored in computer files constitutes goods, wares, or merchandise under the Act.[20]

In the case of both the Hobbs Act and the National Stolen Property Act, the replacement of physical records and objects

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[18] This example is modeled after one found in *The Structure of Title 18 Reform*, *supra* note 6, at 17.

[19] This particular ambiguity has been addressed in the most recent revisions to 18 U.S.C. § 1030 by the addition of subsection 1030(a)(7), which proscribes extortion based on a threat to cause damage to a statutorily protected computer system.

[20] *Compare* United States v. Brown, 925 F.2d 1301 (10th Cir. 1991) (holding that a computer program was intangible intellectual property, and as such did not constitute goods, wares, or merchandise within the meaning of the Act) *with* United States v. Riggs, 739 F. Supp. 414 (N.D. Ill. 1990) (finding that the proprietary information contained within a text file constituted goods, wares, or merchandise within the purview of the Act).

Interstate transfer of stolen intellectual property is now directly addressed by the Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488 (1996) (codified at 18 U.S.C. §§ 1821–1839), responding in part to the Tenth Circuit's holding in *Brown*.

with electronic computer data threatened to create dangerous loopholes in statutes that have been relied on for decades to protect people's property. Congress recognized the need to pass legislation to maintain the status quo, and did. As citizens' interests in physical objects continue to be replaced by comparable interests in intangible and virtual surrogates, Congress must continue to amend and supplement legislation where necessary if present statutory protections are to remain effective.

2. Situations in which the Speed and Scale of Computer Activity Makes a Minor Danger a Major Threat

The second category of federal criminal laws that Congress must supplement or amend consists of those laws directed at conduct the impact of which is significantly magnified by the availability of computer technology. The ability of computers to perform a task millions of times in the period that it takes a human to perform the same task only once dramatically increases the harm that a particular action can cause. Conduct whose harm was restricted by the limits of human ability to a point that did not merit criminal punishment may not be so limited once a computer is introduced.

The indictment of David LaMacchia is a case in point.[21] The present copyright statute, 17 U.S.C. § 506, requires that copyright infringement be for commercial advantage or private financial gain in order to be criminal.[22] According to the indictment in the LaMacchia case, the defendant set up two servers—computers that store files that other computers on a network can access. He then invited users of the Internet to transmit copyrighted software to one server and to freely take copies of copyrighted software from the other, all without a fee.

When violating a copyright meant that the violator photocopied the copyrighted work page by page in his local library, the social cost of this conduct arguably was so small as to not merit criminal liability. By placing the copyrighted material on an Internet server, however, LaMacchia allegedly enabled millions of dollars of copyrighted software to be copied and distributed for free within a matter of days. Because LaMacchia did not charge a fee, the current criminal copyright statute did not bar

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[21] *See* United States v. LaMacchia, *supra* note 3.
[22] *See* 17 U.S.C. § 506(a)

his activities. Computer technology, however, made possible harm to the software copyright holders at a rate unimaginable when physical copies had to be reproduced mechanically.[23]

III. Issues of Criminal Procedure that Require Revisiting

Although Congress has enacted or proposed substantive legislation creating new crimes in response to computer technology on a number of occasions, to date there have been comparatively few reforms to the procedural and evidentiary rules governing investigations and proceedings using computer-generated evidence. Nonetheless, if procedural and evidentiary rules are to effect the same balances between government and citizens that existed before the spread of computer technology, they must compensate for four anomalies caused by the following factors: the non-physical "cyberspace" networked computers create, the multiple and mixed means by which people use computers as communication devices, powerful cryptography, and the way in which computers store data, compared with physical storage of the same information.

A. *Search Warrants for Files Stored in Cyberspace*

The procedural law of search and seizure is solidly grounded in a tangible, physical view of the world that carves up jurisdiction geographically. Networking creates an incorporeal "cyberspace" in which the current rules of criminal procedure governing search and seizure lose their coherence.[24] This anomaly is particularly important in the provision of search warrants. Federal Rule of Criminal Procedure 41, which governs the issuance of search warrants, permits a federal magistrate judge to authorize a search only for things located within his judicial district at the time the warrant is sought.[25] For tangible objects, such as

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[23] On August 4, 1995, Senators Leahy and Feingold introduced legislation that would make conduct such as LaMacchia's criminal. *See* S. 1122, 104th Cong., 1st Sess. § 2 (1995). The legislation was referred to the Judiciary Committee but has not been enacted in any form.

[24] *See generally Federal Guidelines for Searching and Seizing Computers*, *supra* note 17, at 2047–50; Alex White & Scott Charney, *Search and Seizure of Computers: Key Legal and Practical Issues*, Technical Bulletin (SEARCH, The National Consortium for Justice Information and Statistics, Sacramento, California), 1995.

[25] *See* Fed. R. Crim. P. 41(a).

records located in a Steelcase file cabinet in the corner of an individual's office, complying with this rule may be inconvenient, but it never is a bar to obtaining a valid warrant.

A computer user, however, can store his intangible records anywhere on a network or, frequently, on a computer other than his own located anywhere on the Internet.[26] As a result, it may be impossible to know in advance of seeking a warrant the district in which a target is storing his records.[27] Even if investigators observe a suspect accessing his records from a computer located within the district, under the current rules, it is not clear whether a warrant for those records would be valid if the files turn out to be stored on a networked computer outside the district.[28]

A statutory fix to the Rules of Criminal Procedure would ameliorate, but might not solve, the problem. The Fourth Amendment requires that a warrant describe with particularity the place to be searched.[29] If a target can store records anywhere in the United States from his networked computer, a searcher needs an equally broad warrant to look lawfully for the records from the networked computer. However, it is debatable whether a judge could issue such a warrant without violating the Fourth Amendment's specificity requirement.[30]

Whether a judge could issue such a warrant might depend on available technology. The Fourth Amendment assures that the ratio of evidence found to private materials examined during a search will be high. As the Supreme Court described in *Maryland v. Garrison*, 480 U.S. 79 (1987):

> The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is

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[26] Whether a warrant is necessary to search particular directories and files on privately networked computer systems and systems connected to the Internet depends on a variety of factors. For example, a warrant probably would not be necessary to search for a file intentionally stored in a directory made available to the public over the Internet, but probably would be necessary to search for the same file if it were stored in a non-public directory on the same computer system.

[27] *See Federal Guidelines for Searching and Seizing Computers*, *supra* note 17, at 2047.

[28] *See* Charney, *supra* note 5, at 490.

[29] The Fourth Amendment requires that "no warrants shall issue, but upon probable cause, . . . *and particularly describing the place to be searched*, and the persons or things to be seized." *See* U.S. CONST. amend. IV (emphasis added).

[30] *See, e.g.*, Stanford v. State of Texas, 379 U.S. 476 (1965) (declaring that the Fourth Amendment prohibits general warrants giving inferior officials roving commissions to search where they please).

> probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide ranging exploratory searches the Framers intended to prohibit.[31]

An investigator is unlikely to be able to obtain a valid warrant giving him blanket authority to search the contents of unspecified computers connected to the Internet for evidence of a crime. Were technology sufficiently advanced, however, a warrant might authorize an investigator to send a bot, or robot computer program, out over the Internet to report back solely the existence and locations of specified files used by the target of the investigation. These files would then be subject to search by the investigator.[32]

B. *The Extent of Procedural Protection of Communications between Computers*

In addition to allowing file sharing and storage at remote locations, networking permits communication among computers or, more to the point, among people at their computers. Some of the forms in which this communication can take place cross lines that we have used to delineate procedural protections accorded different traditional forms of communication. As a result of this anomaly, it is necessary to ask not only such basic questions as what is the reasonable expectation of privacy in a piece of electronic mail, but also, to what extent must we change the categories we have used to think about search and seizure of communications to adapt to computer technology.

At the most fundamental level, what is a reasonable expectation of privacy in a communication between computers?[33] Typically, a piece of electronic mail forwarded over or between networks will reside on a computer server until it is delivered.

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[31] 480 U.S. at 84.

[32] The scope of a warrant might also depend on the number of computers on which a target could have stored his files. If, for example, the target only had access to computers connected by a local area network, an investigator might be able to get a valid warrant to search all of the computers on that network. Just as a warrant may issue for a house rather than a particular room in a house, there may be occasions when it is appropriate to issue a warrant for a network rather than a single computer connected to that network.

[33] *Cf.* Ryan Reetz, Note, *Warrant Requirement for Searches of Computerized Information*, 67 B.U. L. REV. 179, 199–206 (1987) (discussing the expectation of privacy of records stored on a third party's computer system).

A system administrator who has access to the electronic mail maintains the computer server, and may even be expected to access it if, for example, an individual forgets his account password. Does this mean that there is no reasonable expectation of privacy in a piece of electronic mail, just as there would be no reasonable expectation of privacy in a postcard lying on a table in the entry of a dormitory?[34] While perhaps "unreasonable" in light of technological realities, is that expectation of privacy nonetheless real and one that should be honored?[35]

Presuming that the expectation of privacy of communications over a computer network is reasonable, what procedural safeguards should be in place to protect them? For example, what procedural safeguards should be accorded a piece of electronic mail with an attached voice message? At present, different procedural protections are accorded a piece of electronic mail that has not been opened and a piece of voice mail that has not been opened. Under 18 U.S.C. § 2703, electronic mail can be obtained with a search warrant, while access to voice mail is controlled by 18 U.S.C. §§ 2511–2522 and requires the entry of an electronic surveillance order. It does not make sense to accord different procedural protections to a piece of electronic mail and a piece of electronic mail to which a voice message has been attached. Yet that is the natural result of trying to fit this new form of communication into our current, rigid categories of protection.

Similarly, since the time of the Vietnam War protests, we have accorded more procedural protections with respect to searches of publishers than to searches of individual speakers.[36] The pur-

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[34] *See generally Federal Guidelines for Searching and Seizing Computers*, *supra* note 17 at 2030.

[35] Legislation previously has extended protection for communications for which there is arguably no reasonable expectation of privacy. For example, courts have held that the radio portion of a cordless telephone call is not protected by the Fourth Amendment, stressing that a purchaser of a cordless telephone knows, or should know, that a cordless telephone conversation is vulnerable to being overheard on a radio. Nonetheless, the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 202(a), 108 Stat. 4279 (1994), extended the definition of "wire communications" in 18 U.S.C. § 2510, the wiretap statute, protecting the privacy of the radio portion of telephone calls made over cordless telephones. *See* Clifford S. Fishman & Anne T. McKenna, *Wiretapping and Eavesdropping* § 3:19 (1995).

[36] The Privacy Protection Act of 1980 § 2101, 42 U.S.C. § 2000aa(a) (1980) creates this additional procedural protection. It protects, among other things, "any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." *Id.*

pose has been to prevent someone who disseminates material to the public from being searched for unpublished material that may be relevant to a pending criminal case when the publisher is not herself suspected of participating in a crime.[37] Any networked computer, however, may hold material intended for publication.[38] Consequently, targets of investigations with networked computers inadvertently are receiving a level of procedural protection intended for much narrower circumstances. This protection, backed by the possibility of civil sanctions, can inhibit investigators from conducting legitimate searches.[39]

C. *Cryptography and the Fifth Amendment*

The third procedural anomaly computer technology creates involves cryptography.[40] Easily used and virtually unbreakable encryption programs are widely available,[41] enabling not only citizens to protect their private matters and businesses to protect commercial transactions, but also criminals to conceal impenetrably their communications and records. Prior to computer technology, criminals had to conceal their communications and records physically. To avoid being overheard, they had to travel to isolated locations to talk. To conceal their records, they physically had to hide them in locations that could be subject to searches, or clothe them in private codes often recognizable by experts.

Now, computer technology readily enables criminals to encrypt their files and communications[42] to a level that, absent a

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[37] *See* S.REP. No. 96-874, at 4 (1980), *reprinted* in 1980 U.S.C.C.A.N. 3950, 3951.

[38] *See* American Civil Liberties Union v. Reno, *supra* note 1, at 834–38 (discussing manners in which information is published over the Internet).

[39] The threat of sanctions is very real, as the United States Secret Service found in Steve Jackson Games Inc. v. United States Secret Service, 816 F. Supp. 432 (W.D. Tx. 1993), *aff'd on other grounds*, 36 F.3d 457 (5th Cir. 1994) (where Steve Jackson Games, the target of a seizure in violation of the Privacy Protection Act, was awarded actual damages of $51,040 against the Secret Service and United States).

[40] The debate over encryption policy involves important political, economic, and national security issues. While these considerations may outweigh the criminal procedural consideration described below, they should nonetheless be considered in the search for a sensible, overall policy.

[41] One such program, PGP or Pretty Good Privacy, developed notoriety when its author, Philip Zimmerman, was targeted in a federal investigation after the program was made available on the Internet. *See, e.g.*, Sandy Shore, *Feds Target Software Expert Who Developed Code to Encrypt Data*, L.A. TIMES, Aug. 14, 1994, at B3.

[42] The same problem has evolved in telephony where readily producible, digital encryption chips for telephones threaten to prevent law enforcement agents from being

key in the criminal's possession, can be deciphered only after prolonged periods of time on the fastest and most expensive computers, if at all. The key is a lengthy (and thus generally impossible to guess) binary number that is used by a decryption algorithm to unlock the message or record. Obtaining the key from the target of an investigation, however, creates political, practical, and constitutional problems.[43]

Prior to computer encryption, investigators could search and seize records and communications upon a judicial finding of probable cause. While investigators still may search and seize records and communications in this manner, encryption can render the records and communications useless in their hands. Advocating the storage of encryption keys with an escrow agent so that they can be obtained by a search warrant has proven so unpopular as to be politically infeasible.[44] Nevertheless, it is impossible, as a practical matter, to obtain a key from a target by consent or subpoena. A target will not continue to use a wiretapped telephone once he is asked for the encryption key. Similarly, he is likely to hide or destroy an encryption key for records that he knows contain inculpatory information. In addition, to the extent that producing an encryption key links a target to incriminating records, it may be necessary to give the target "act-of-production" immunity in order to compel his production of the key,[45] thus implicating Fifth Amendment protections in addition to the Fourth Amendment protections that previously safeguarded his rights.[46]

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able to monitor telephone calls, even with lawfully obtained wiretap orders. *See generally* Mark I. Koffsky, Comment, *Choppy Waters in the Surveillance Data Stream: The Clipper Scheme and the Particularity Clause*, 9 HIGH TECH L.J. 131 (1994).

[43] *See generally* Philip R. Reitinger, *Compelled Production of Plaintext and Keys*, 1996 U. CHI. LEGAL F. 171 (1996).

[44] In the summer of 1994, the Clinton Administration ended its unsuccessful promotion of the Clipper Chip, which was intended as a way to let people scramble their electronic conversations but to retain law-enforcement agencies' ability to conduct court-authorized wiretaps. *See, e.g.*, John Markoff, *Gore Surfs Stance on Chip Code*, N.Y. TIMES, July 21, 1994, at D1; *see generally* Steven Levy, *Battle of the Clipper Chip*, N.Y. TIMES, June 12, 1994, § 6, at 46.

[45] Although the contents of a record may not be privileged, the act of producing it may be, as where a witness would incriminate himself by turning a record over and implicitly admitting personal possession of it. *See* United States v. Doe, 465 U.S. 605 (1984). To obtain the record in the face of an assertion by a witness of his Fifth Amendment privilege in that circumstance, a prosecutor must obtain a statutory order of use immunity for the witness under the general immunity statute, 18 U.S.C. §§ 6001–6005. *See generally United States Attorneys Manual* § 9-23.215 (1996), *reprinted in The Department of Justice Manual* 9-486 (Aspen Law and Business (1996)).

[46] Philip Reitinger analyzes the Fifth Amendment implications extensively in *Compelled Production of Plaintext and Keys, supra* note 43.

Once the encryption key is produced under the order of immunity, all records and communications examined as a result of disclosing that encryption key might be the fruits of that compelled testimony and, as a result, not admissible in evidence against him.

D. *Authentication of Computer Records*

Finally, the way in which communications are sent and stored on computers, in contrast to the way in which they traditionally have been sent and stored on paper, engenders new evidentiary issues of authentication requiring resolution. Before an exhibit can be admitted into evidence, it must be shown to be relevant and authentic.[47] Authentication, governed by Federal Rules of Evidence 901–903, involves establishing that an exhibit is what it purports to be. The cornerstone of authentication has been the identification of the exhibit by the offering witness on the basis of distinctive characteristics by which the witness can recognize the exhibit and establish that the exhibit is what its proponent claims.[48] Where exhibits are tangible or are reproductions of physical objects, this generally can be done with ease and accuracy. However, where the exhibits are reconstructions of electronic impulses stored in or transmitted over computer systems, the pedigree of the exhibits cannot be assured so readily.

For example, a witness can authenticate a letter by establishing that she recognizes the signature as that of the author and that the paper document has not been altered in any way since the witness received it. If the author will not admit to a piece of electronic mail, by contrast, how must it be authenticated? Even if the message came from a particular account, it does not necessarily follow that the account holder sent the message.[49] Furthermore, the manipulation of electronic data, unlike paper, is not detectable by the eye.[50]

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[47] *See* Thomas A. Mauet, *Fundamentals of Trial Techniques* 162 (2d ed. 1988).

[48] *See* FED. R. EVID. 901.

[49] *See* Council of Europe, Strasbourg, France, *Recommendation Number R(95)13 Concerning Problems of Criminal Procedural Law Connected with Information Technology and Explanatory Memorandum* 41–42 (1995) (contrasting paper documents and electronic data storing the same text).

[50] Computer technology has created substantive as well as procedural issues of authentication. For example, it now may be impossible to tell sometimes whether a sexually explicit picture of a minor originated with the abuse of a child or the computer

IV. Additional Investigative Tools Needed to Address Computer Crime

Procedural changes necessitated by computer technology are not the only tools needed to address the unique problems created by computer-related crime. Transnational coordination of law enforcement efforts and expanded accountability for computer-related crime are also required to address this new form of crime.

A. *An International Problem Requiring an International Solution*

Computer-related crime is an international problem requiring an international solution.[51] The intruder threatening an HMO's records examined at the beginning of this Article could attack an HMO's network in Massachusetts as easily from another country as from another state. The search warrant target described in the procedural section of this Article could store his records as easily on a server in Finland as on one in Ft. Worth.

To address computer crime there must be coordinated law enforcement between countries at a speed and to a degree never before maintained (or even envisioned). Currently, a criminal can move evidence of a computer-based crime around the world literally at the speed of light. At the same time, investigators searching for that evidence must rely on treaties that, even in their most expeditious form, can require weeks or even months to effectuate a search across international borders. Furthermore, for that search to take place, many treaties require "dual criminality"—that is, the alleged conduct must be a crime both in the requesting country and in the country where the search or arrest is to be conducted. To the extent that computer crimes are not legislated outside the United States, investigators must look toward often ineffectual surrogates as a basis for extending cases

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manipulation of a photograph of an adult. To assure that this evidentiary problem does not jeopardize child pornography prosecutions, Congress passed the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3026–31, which criminalizes the mailing, transportation, receipt, and distribution of visual depictions of sexually explicit conduct as long as the depictions appear to involve a minor. *See* 18 U.S.C. § 2252A(a) and 2256(8)(B) & (C).

[51] This is a slight modification of Steve Shackelford's appropriately named article, *Computer-Related Crime: An International Crime Problem in Need of an International Solution*, *supra* note 17.

across international borders, just as they had to turn to wire and mail fraud to prosecute cases in the United States before the enactment of 18 U.S.C. § 1030 a decade ago. Accordingly, we must pursue treaties that recognize the need for rapid, transnational cyberspace searches for evidence of certain computer-related crimes and encourage legislation outside the United States necessary to support such treaties.

B. *Instrumental Crimes*

Lastly, the sheer size of the Internet prevents its meaningful patrol by law enforcement. There are presently tens of millions of computers connected to the Internet and fewer than fifty agents assigned to the F.B.I.'s three specialized computer crime squads. If conduct such as on-line distribution of child pornography is going to be prohibited, Internet service providers may need to be held accountable at some level for World Wide Web sites on their systems. Just as financial reporting laws, such as 31 U.S.C. §§ 5311–5330, put banks on the front line of the war against drugs by making them liable if suspicious transactions take place at their business locations and they fail to report them, so it may be necessary to make Internet service providers liable if they fail to report suspicious transactions at Web sites that they provide.[52]

V. CONCLUSION

Unlike the automobile, the unique properties of computers and computer networks do necessitate new legislation. The debates concerning this legislation, can, and should, separate proposals necessitated by the unique, new characteristics of computers and those driven by unrelated moral and economic objectives. Where it can be established that the unique characteristics of computers necessitate new legislation or procedural rules, we should move expeditiously to address these issues without unnecessarily modifying the moral and economic objectives already embodied in our criminal codes and procedures.

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[52] The strong, countervailing argument is that while banks process transactions and, therefore, must know the content of those transactions, Internet service providers do not need to read materials made available over their networks in order to provide communications services.

ARTICLE

E-MAIL AND THE WIRETAP LAWS: WHY CONGRESS SHOULD ADD ELECTRONIC COMMUNICATION TO TITLE III'S STATUTORY EXCLUSIONARY RULE AND EXPRESSLY REJECT A "GOOD FAITH" EXCEPTION

MICHAEL S. LEIB*

In 1986, Congress passed the Electronic Communications Privacy Act of 1986, thereby revamping the Title III wiretap laws to bring new technologies that send and receive electronic communication, such as electronic mail, into the statutory framework of the laws governing wiretaps. However, Congress gave electronic communication less protection from government interception than it affords wire and oral communication. In particular, Congress did not include a statutory suppression remedy for electronic communication seized in violation of Title III's provisions. In this Article, the author argues that this discrimination threatens the growth of emerging electronic technologies, creates formalistic distinctions in the law, and discourages law enforcement from vigilantly applying the provisions of Title III. Furthermore, the author argues that Congress, in its revisions of Title III, included confusing language that clouded the status of the "good faith" exception to the exclusionary rule for Title III violations involving wire and oral communication. The author concludes that Congress should revisit Title III, especially the statutory exclusionary rule, to provide a suppression remedy for illegal interception of electronic communication and to reject explicitly any "good faith" exception for both constitutional and statutory violations of Title III.

Suppose that one day the Attorney General is out of Washington, D.C., on a business trip and an application for an intercept order comes into the Attorney General's office for immediate approval. In the Attorney General's absence, the Executive Assistant to the Attorney General reviews the application and decides that the Attorney General would have approved the application. Because every intercept order must be approved by a legally empowered official[1] and the Executive Assistant is not

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[1] 18 U.S.C. § 2516(1) (1994).

legally empowered to provide this approval,[2] the Assistant places the Attorney General's initials on a memorandum instructing an authorized Assistant Attorney General to approve the application. Without reading the application, the Assistant Attorney General follows orders and approves the application. Out in the field, the Assistant U.S. Attorney who had requested the approval believes he now has permission to proceed and convinces a judge to approve the order. An intercept order is issued, although no law enforcement official with the legal authority to approve the application has actually done so.

Some may assume that the Department of Justice is too cautious to let something like this happen. Nevertheless, it has happened. In *United States v. Giordano*,[3] the Supreme Court addressed the scenario described above and used the statutory exclusionary rule found in sections 2515 and 2518(10)(a) of the Title III wiretap laws[4] to suppress the evidence obtained through the intercept order. The statutory exclusionary rule included in Title III assures that any substantive violation of Title III, whether a violation of a codified constitutional requirement, as outlined by the Supreme Court, or a violation of a purely statutory requirement, results in suppression of the wiretap evidence. Title III's statutory exclusionary rule thus provides greater protection than is required by the Supreme Court's judicially created exclusionary rule. Therefore, although the violation in *Giordano* was not constitutional in nature, the Court excluded the evidence obtained in violation of Title III under the statutory exclusionary rule.

If the same events were to happen in 1997 and the intercepted communication were an electronic mail ("e-mail") message,[5] the

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[2] *Id.*

[3] 416 U.S. 505 (1974).

[4] 18 U.S.C. §§ 2515, 2518(10)(a). Title III includes 18 U.S.C. §§ 2510–2522 (1994).

[5] "Electronic mail," commonly known as "e-mail," is a type of private communication that is conducted between computers over public and private telephone lines. E-mail is sent via the Internet, a group of information resources connected by thousands of computer networks all over the world. *See* HARLEY HAHN AND RICK STOUT, THE INTERNET COMPLETE REFERENCE 2, 29 (1994). All of the networks understand programs written under a set of rules, or protocols, called TCP/IP ("Transmission Control Protocol" and "Internet Protocol"). *See id.* at 29–30. Typically, the sender of an e-mail message types a message into a computer, which transmits the message over the telephone lines through a modem. The message is sent to a gateway computer where the message is broken down into packets and sent onto the Internet. Each packet is marked with the destination address of the intended recipient and with a code marking the packet's sequence number within the message. The packets travel separately from Internet computer to Internet computer until they reach their destination. Individual

evidence obtained from the interception would not be suppressed. Electronic communication,[6] such as e-mail, is not given the same protection afforded to "wire" communication,[7] such as a telephone call, or to "oral" communication.[8] For instance, whereas wire and oral communication have the additional protection of the statutory exclusionary rule, electronic communication is afforded only the protection of the judicially crafted exclusionary rule. Thus, an electronic communication obtained in violation of a purely statutory requirement will not be suppressed, even though it goes to the heart of Title III, although a wire or oral communication would be suppressed.[9] Such distinctions create a number of problems. First, as technologies improve, people will be reluctant to use them to the fullest extent if old technologies have greater legal protection against government intrusion. Second, the discrimination creates undesirable formalistic distinctions between wire, oral, and electronic communication. Third, government officials do not have to be as vigilant in complying with the letter of the law when intercepting electronic communication because a purely statutory violation will not result in suppression.[10]

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packets in a single message may travel through different computers. *See id.* The U.S. highway system provides the best analogy. If one path is congested, a packet will take a different road. At each rest stop, or in this case at each computer, the packet gets a traffic update. It will travel the path of least resistance, but the attached address ensures that all of the packets will eventually arrive at the correct address. When they arrive, the packets line up in sequence. The message is reassembled and placed into the recipient's e-mail box on a network computer. The recipient can call into that computer and read the message. *See id.* at 29–31; *see also* S. REP. No. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557.

[6] Electronic communication is defined in 18 U.S.C. § 2510(12) as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—(A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device." *Id.* § 2510(12).

[7] Wire communication is defined in 18 U.S.C. § 2510(1) as "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication." 18 U.S.C. § 2510(1). "Aural transfer" is defined as "a transfer containing the human voice at any point between and including the point of origin and the point of reception." *Id.* § 2510(18).

[8] Oral communication is defined in 18 U.S.C. § 2510(2) as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." *Id.* § 2510(2).

[9] *See infra* text accompanying notes 103–105.

[10] Statutory criminal and civil remedies, however, would still be available to a defendant under 18 U.S.C. §§ 2511 and 2520. *See infra* note 21.

The original sponsors of the legislation that brought electronic communication under the auspices of Title III did not intend any of these negative effects. In 1985, Senator Patrick Leahy (D-Vt.) and Congressman Robert Kastenmeier (D-Wis.) set out to protect new technologies[11] under the then existing wiretap laws.[12] At the time, the wiretap statutes did not cover electronic communication, which rendered such communication vulnerable to interception by both the government and private parties.[13] As a result, companies were losing millions of dollars a year to "electronic espionage."[14] The lawmakers wanted to give electronic communication the same protection already afforded other forms of communication.[15]

In 1986, Congress revised the wiretap laws via the Electronic Communications Privacy Act ("ECPA").[16] The new law gave electronic communication protections that corresponded closely to the protections already given wire and oral communication in 1968.[17] However, in order to procure Department of Justice support and assure passage of the ECPA,[18] Congress agreed not to add electronic communication to the statutory exclusionary rule. Instead, Congress added a new section, 18 U.S.C. § 2518(10)(c), providing for suppression only under the judicially created exclusionary rule.[19]

Section 2518(10)(c), as written, has created two unfortunate results. First, taken in conjunction with the failure to add electronic communication to the statutory exclusionary rule found in 18 U.S.C. §§ 2515 and 2518(10)(a), this section prevents elec-

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[11] Of particular concern were cordless phones, e-mail, pagers, cellular radio, computer conferencing, and electronic bulletin boards. *See* OFFICE OF TECHNOLOGY ASSESSMENT, ELECTRONIC SURVEILLANCE AND CIVIL LIBERTIES 3 (1985) [hereinafter OTA REPORT].

[12] 18 U.S.C. §§ 2510–2520 (1982).

[13] *See The Electronic Communications Privacy Act: Hearings on H.R. 3378 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong. 1 (1985) (statement of Congressman Robert Kastenmeier).

[14] *See* Jeffrey Rothfeder, *Putting Electronic Eavesdroppers Outside the Law*, BUS. WK., Sept. 29, 1986, at 87. Senator Leahy went so far as to say that "[i]f the [ECPA] is not passed, we may as well tell corporations that we've outlawed locks and security alarms on their doors." *Id.* Business overwhelmingly supported passage of the ECPA, with such corporations as AT&T, General Electric, and IBM lending their support. *See* S. REP. No. 99-541, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3560.

[15] *See infra* notes 117–119 and accompanying text.

[16] Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified in scattered sections of 18 U.S.C.).

[17] *See infra* notes 74–91 and accompanying text.

[18] *See infra* notes 110–121 and accompanying text.

[19] 18 U.S.C. § 2518(10)(c) (1994). *See infra* notes 104–105 and accompanying text.

tronic communication from enjoying the protections of Title III's statutory exclusionary rule.[20] Electronic communication, even if illegally intercepted, is subject only to the Fourth Amendment exclusionary rule,[21] whereas wire and oral communication enjoy much broader protection.

Second, because section 2518(10)(c) was drafted poorly, it has created uncertainty as to whether the "good faith" exception to the judicially crafted exclusionary rule, as announced in *United States v. Leon*,[22] applies to the statutory exclusionary rule as well. Prior to the ECPA, courts ruling on the issue agreed that the "good faith" exception did not apply to violations of Title III.[23] The treatment of electronic communication in the new law, however, confused the issue for all forms of communication.

A "good faith" exception would be dangerous. In cases like *Giordano*, the government could argue that suppression is an inappropriate remedy because, although the government violated Title III, it acted in "good faith." In fact, if a "good faith" exception to the statutory exclusionary rule had existed in 1974, the Supreme Court might have found in *Giordano* that because the Assistant U.S. Attorney who requested the interception believed he had permission to file the application and relied, in "good faith," upon a neutral judge's order, suppression was not necessary. A "good faith" exception would, therefore, reduce the incentive of law enforcement to act vigilantly in applying each provision of Title III.[24]

Congress should revisit section 2518(10)(c), as well as the statutory exclusionary rule. By eliminating this section and adding electronic communication to the statutory exclusionary rule, Congress would end, at least in part, the discriminatory treatment of electronic communication, as compared to that given wire and oral communication, thereby increasing the attractiveness of new technologies. Law enforcement's ability to combat crime would not change, but law enforcement agencies would

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[20] *See infra* notes 103–105 and accompanying text.

[21] A private individual or government official who illegally intercepts an electronic communication is still subject to criminal and civil sanctions. *See* 18 U.S.C. §§ 2511(4). Section 2520(a) provides that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of [Title III] may in a civil action recover from the person or entity which engaged in that violation." *Id.* § 2520(a).

[22] 468 U.S. 897 (1984).

[23] *See infra* Part III.B.1–.2.

[24] *See infra* Part III.C.

have to be as careful in applying Title III to electronic communication as they currently must be with wire and oral communication. In addition, eliminating section 2518(10)(c) would end the confusion as to the "good faith" exception, although Congress should also add an explicit statement to section 2515 to make it clear that the "good faith" exception does not apply to violations of Title III.

I. BACKGROUND

A. *The Supreme Court Applies the Fourth Amendment to Government Wiretapping*

In 1914, the Supreme Court announced that in order to protect people against illegal governmental searches and seizures, any evidence gathered in violation of the Fourth Amendment would be excluded.[25] Yet the question of what constituted a "search" or "seizure" remained open in eavesdropping cases. In *Olmstead v. United States*,[26] the Supreme Court ruled that, as long as the government did not enter the defendant's home or office, an interception of communication obtained from warrantless taps placed on the defendant's telephones was not a "search," making any evidence obtained thereby admissible. The Court reasoned that "[t]he intervening wires are not part of his house or office any more than are the highways along which they are stretched."[27] The majority understood the Fourth Amendment to relate only to *physical* searches.[28]

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[25] Weeks v. United States, 232 U.S. 383 (1914). Some members of the Court have argued that the Fourth Amendment mandates the exclusionary rule. Justice Brennan took this position throughout his years on the Court. *See* Stone v. Powell, 428 U.S. 465, 509 (1976) (dissenting opinion) ("[A]s a matter of federal constitutional law, a state court *must* exclude evidence from the trial of an individual whose Fourth . . . Amendment rights were violated.") (emphasis added). In recent years, however, a majority of the Court has reasoned that the exclusionary rule is a *judicially* created remedy aimed at deterring future Fourth Amendment violations and is not mandated by the Fourth Amendment itself. *See, e.g., Leon*, 468 U.S. at 905–06. For a good discussion of the history of the Fourth Amendment exclusionary rule, see Terri A. Cutrera, Note, *The Constitution in Cyberspace: The Fundamental Rights of Computer Users*, 60 U. MO.-K.C. L. REV. 139, 144–47 (1991).

[26] 277 U.S. 438 (1928).

[27] *Id.* at 465.

[28] *See* H.R. REP. NO. 99-647, at 16–17 (1986); *see also* California v. Ciraola, 476 U.S. 207, 213 (1986) (holding that warrantless aerial observation of marijuana field in backyard does not violate Fourth Amendment because no physical invasion occurred and no reasonable expectation of privacy existed in a backyard that could be viewed by any passing aircraft).

In a famous dissent, Justice Brandeis argued that privacy—which he defined as "the right to be let alone"[29]—is itself a right, and, therefore, "[i]t is . . . immaterial where the physical connection with the telephone wires . . . was made."[30] He observed that:

> Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home . . . . Can it be that the Constitution affords no protection against such invasions of individual security?[31]

In Justice Brandeis's opinion, a violation of the Fourth Amendment could occur even in the absence of a physical search.[32]

In 1967, the Court incorporated Justice Brandeis's reasoning and overruled *Olmstead* in *Katz v. United States*.[33] The Court looked to the nature of the privacy interest instead of focusing on whether or not a physical entry had occurred:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[34]

Also in 1967, in *Berger v. New York*,[35] the Court struck down as unconstitutional a New York statute authorizing government eavesdropping because it did not provide sufficient protective procedures. The Court stated that certain minimum standards of particularity were necessary to insure that any wiretap or eavesdropping order does not leave too much discretion to the law enforcement agent making the interception.[36] The Court held that the Fourth Amendment allows a court to authorize an interception only if the government has probable cause to believe a "particular offense has been or is being committed"[37] and if it has described particularly the conversations sought.[38] Further-

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[29] *Olmstead*, 277 U.S. at 478.
[30] *Id.* at 479.
[31] *Id.* at 474.
[32] *See id.* at 478.
[33] 389 U.S. 347, 351 (1967) (stating that government tap on phone booth is subject to Fourth Amendment protections).
[34] *Id.* at 351.
[35] 388 U.S. 41 (1967).
[36] *See id.* at 59.
[37] *Id.* at 58.
[38] *See id.* at 59.

more, the order must limit the time frame of the interception,[39] and notice must be provided to the party being searched unless the government can prove that exigent circumstances exist.[40]

B. *The Omnibus Crime Control and Safe Streets Act of 1968*

The Supreme Court decisions in *Katz* and *Berger* led Congress to pass Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("1968 Act"),[41] which had a dual purpose. First, Congress aimed to protect the privacy of wire and oral communications. Second, it set up uniform rules regarding the authorization of interceptions.[42] The 1968 Act accomplished these goals by outlawing private interception,[43] while also providing an elaborate structure of rules for government interception of wire and oral communication.[44]

Title III sets out detailed requirements with which the government must comply in order to obtain a court order for electronic

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[39] *See id.* at 59–60 (holding unconstitutional the statute's failure to provide for termination after the conversation sought is seized, as well as the ease with which extensions could be granted without a showing of present probable cause).

[40] *See id.* at 60.

[41] Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 2510–2520 (1994)). The Senate Report accompanying Title III stated that "Title III was drafted to meet [the *Berger*] standards and to conform with *Katz* . . . ." S. REP. No. 90-1097, at 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

[42] S. REP. No. 90-1097, at 66, *reprinted in* 1968 U.S.C.C.A.N. at 2153.

Prior to Title III, there was already an existing federal statute in effect which restricted private and government interceptions. In 1968, section 605 of the Federal Communications Act, formerly 47 U.S.C. § 605 (1964), provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person." *Id.* at 67, *reprinted in* 1968 U.S.C.C.A.N. at 2154. Passed in 1934, in light of *Olmstead*, the Communications Act and the Supreme Court decisions interpreting the Act, *see, e.g.*, Nardon v. United States, 308 U.S. 338 (1939) (holding that under section 605, evidence obtained by wiretapping and all fruits derived therefrom must be excluded), "effectively prevented the use in both Federal and State courts of intercepted communications by wiretapping, as well as the fruits thereof." S. REP. No. 90-1097, at 68, *reprinted in* 1968 U.S.C.C.A.N. at 2155. Recognizing that wiretap evidence was essential in certain law enforcement investigations, especially those aimed at organized crime, Congress, in Title III, allowed wiretap evidence gathered lawfully to be admissible. *See id.* at 70, *reprinted in* 1968 U.S.C.C.A.N. at 2157 ("The major purpose of Title III is to combat organized crime."); Larry Downes, *Electronic Communications and the Plain View Exception: More "Bad Physics,"* 7 HARV. J.L. & TECH. 239, 253–54 (1994).

[43] *See* 18 U.S.C. § 2511(1) (1994).

[44] In 1968, Congress specifically declined to cover the interception of text, digital, or machine communication. S. REP. No. 99-541, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3559. Since the 1968 law only covered communications that could be "aurally" intercepted, electronic surveillance of electronic communication was unregulated until the ECPA was passed in 1986. *See* OTA REPORT, *supra* note 11, at 19–20.

surveillance;[45] it also outlines the procedures the government must follow before and after making an interception.[46] For instance, an application to a federal judge requesting permission to set up electronic surveillance can only be filed for certain types of felony offenses enumerated in Title III's section 2516[47] and must be approved by a senior official in the Department of Justice.[48] Furthermore, the application must include "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued."[49] This statement must specify the particular offense and provide a "particular description of the nature and location of the facilities" from which an interception will be made.[50]

A court may only approve an application for a wiretap of wire, oral, or electronic communication if the judge finds that "there is probable cause for belief that an individual is committing, has committed, or is about to commit" one of the enumerated offenses in section 2516;[51] that "communications concerning that offense will be obtained through such interception";[52] and that the facilities from which the communications will be intercepted "are being used or are about to be used" in the commission of such offense.[53] If a judge decides to grant permission for interception, the order must disclose the identity of the person whose communications are to be intercepted,[54] the nature and location

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[45] *See* 18 U.S.C. § 2518.

[46] For a detailed discussion of Title III rules, including the rules governing electronic communication, see Adam B. Cohen, *Project: Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994: Electronic Surveillance*, 83 GEO. L.J. 769 (1995).

[47] *See* 18 U.S.C. § 2516(1).

[48] *See id.* Prior to the ECPA, the only officials allowed to approve an application were the Attorney General or any Assistant Attorney General specially designated by the Attorney General. 18 U.S.C. § 2516(1) (1982). The list was expanded in 1986 to include the "Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any Acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General." 18 U.S.C. § 2516(1) (1994).

[49] 18 U.S.C. § 2518(1)(b) (1994).

[50] *Id.* The application need only identify the general location, not the specific room or phone. *See* United States v. Lambert, 771 F.2d 83, 91 (6th Cir. 1985).

[51] 18 U.S.C. § 2518(3)(a). The Fourth Circuit has stated that probable cause exists when "there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of crime and will be present at the time and place of the search." United States v. Suarez, 906 F.2d 977, 984 (4th Cir. 1990).

[52] 18 U.S.C. § 2518(3)(b).

[53] *Id.* § 2518(3)(d).

[54] *See id.* § 2518(4)(a).

of the communications facilities as to which interception is authorized,[55] and a description of the types of communications sought and the particular offense to which the communication relates.[56] The order must also state the period of time during which interception is allowed.[57]

C. *The Electronic Communications Privacy Act of 1986*

By the mid 1980s, the computer had become a pervasive tool in the world of communications.[58] An increasing number of telephone calls were being digitalized,[59] and personal computer sales were skyrocketing.[60] It was unclear whether the Fourth Amendment covered some, or even any, of the new technologies.[61] What

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[55] *See id.* § 2518(4)(b).

[56] *See id.* § 2518(4)(c).

[57] *Id.* § 2518(4)(e). The statute also sets forth additional requirements with which the government must comply both during and after the interception. For example, the government must minimize eavesdropping on communications unrelated to the impetus for and scope of the court order, such as communications unrelated to a crime, and, in the absence of stated reasons, must seal the recordings of the intercepted communications to prevent alterations. *See id.* §§ 2518(5), 2518(8)(a).

[58] Robert W. Kastenmeier et al., *Communications Privacy: A Legislative Perspective*, 1989 WIS. L. REV. 715, 718 (1989).

[59] *See* Downes, *supra* note 42, at 255 (technological breakthroughs in telecommunications, the breakup of AT&T's monopoly, and digitalized phone signals over fiber-optic cable and radio left Title III outdated); OTA REPORT, *supra* note 11, at 29 ("contents of phone conversations that are transmitted in digital form . . . are *not* clearly protected by existing statutory and constitutional prohibitions . . . .").

[60] By 1986, manufacturers were shipping over 3 million personal computers a year, down from a high of 5 million in 1984, at a retail value of nearly $3 billion. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 1297 (1988).

[61] In 1984, Senator Leahy asked the Attorney General whether he believed that interceptions of electronic communication were covered by the federal wiretap laws. The Criminal Division of the Department of Justice sent a letter back stating that the wiretap laws did not cover electronic communications and, therefore, the only protection was that afforded by the Fourth Amendment. The letter also stated that the Department of Justice was unsure which types of communication might have a reasonable expectation of privacy and, therefore, receive Fourth Amendment protection. S. REP. No. 99-541, at 3–4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557.

No case has ever dealt directly with the issue of whether an e-mail message, which is quite vulnerable to interception, has enough of a "reasonable expectation of privacy" to require the government to obtain a warrant. *See* H.R. REP. No. 99-647, at 22 (1986) (arguing that the Fourth Amendment would probably require some kind of warrant). *But see* David J. Loundy, *E-law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 113 (1993) (arguing that because computer systems operators have control over the messages, users cannot reasonably protect their privacy and therefore have no reasonable expectation of privacy under the Fourth Amendment).

This Article does not resolve whether e-mail—or any other electronic communication—would be granted Fourth Amendment protection. The scope of the Article extends only to the following topics: (1) whether Congress should give the same protection to

was perfectly clear, however, was that Title III, as written in 1968, did not cover electronic communication.[62] According to Senator Leahy, the new technologies "left communications privacy law where Einstein's insights left Newtonian physics."[63] Without Title III protection, and with Fourth Amendment protection in doubt, the government conceivably could have intercepted an e-mail message without obtaining a warrant. Certainly, no legal prohibition prevented private individuals, who are not affected by the Fourth Amendment,[64] from eavesdropping.[65] Congress took notice.

When the predecessor bill[66] to the ECPA was introduced into Congress, Congressman Kastenmeier stated:

> These new modes of communication have outstripped the legal protection provided under statutory definitions bound by old technologies. The unfortunate result is that the same technologies that hold such promise for the future also enhance the risk that our communications will be intercepted by either private parties or the Government.[67]

As a result of the omission of electronic communication from the 1968 Act, "communications between two persons were subject to widely disparate legal treatment depending on whether the message was carried by regular mail, electronic mail, an analog phone line, a cellular phone, or some other form of electronic communications system."[68]

The consequences of this legal omission were great. In the business context, a rival corporation could intercept electronic

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electronic communication as is given other forms of communication; and (2) whether a "good faith" exception applies to the statutory exclusionary rule in Title III.

[62] *See* OTA REPORT, *supra* note 11, at 46; *see also* United States v. Seidlitz, 589 F.2d 152, 157 (4th Cir. 1987) (computer transmission is not protected by Title III); Martha M. Hamilton, *Senate Eyes Wiretap Act Loopholes; Bill Seeks to Update Privacy Protections*, WASH. POST, Sept. 11, 1986, at E1.

[63] *Bill Unveiled to Patch Data Holes in Privacy Law*, WASH. NEWSLETTER (Data Communications), Oct. 1985, at 25.

[64] *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (Fourth Amendment applies only to government action and not to the actions of private individuals); Peter J. Gardner, *Arrest and Search Powers of Special Police in Pennsylvania: Do Your Constitutional Rights Change Depending on the Officer's Uniform?*, 59 TEMPLE L.Q. 497, 505 (1986).

[65] Joanne Goode & Maggie Johnson, *Putting out the Flames: The Etiquette and Law of E-Mail*, ONLINE, Nov. 1, 1991, at 61 ("Before the ECPA there was no privacy protection at all for e-mail.").

[66] H.R. 3378, 99th Cong. (1985).

[67] *The Electronic Communications Privacy Act: Hearings on H.R. 3378 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong. 1 (1985).

[68] Kastenmeier et al., *supra* note 58, at 720.

communications, such as e-mail, without repercussion.[69] In fact, by the mid 1980s, companies were losing millions of dollars a year to "electronic espionage."[70] In addition, because e-mail is stored and, therefore, more easily invaded than a telephone call,[71] providers of the new communications became concerned that customers would be discouraged from using the new technology for fear of interception.[72] Law enforcement agencies worried about potential exposure to liability.[73]

The ECPA solved many of these problems by adding "electronic communication" to the substantive provisions of the 1968 Act, giving protection to electronic communication where Title III already protected wire and oral communication.[74] The ECPA also added a definition of "electronic communication" that covered most communications "not carried by sound waves and [which] cannot fairly be characterized as containing the human voice."[75] Finally, the ECPA amended the "intercept" definition, which until 1986 included only "aural" interceptions,[76] to include the "aural or other acquisition" of "wire, electronic, or oral communication."[77] Thus, the revised Title III protected data transmissions and other electronic communications for the first time.

The ECPA also granted protection to messages held in electronic communications storage, which previously were unprotected.[78] An e-mail message is often retained in the files of the

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[69] *See* Rothfeder, *supra* note 14, at 87.

[70] *See id.*; *see also* S. REP. No. 99-541, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3560.

[71] *See infra* notes 122–126 and accompanying text.

[72] Kastenmeier et al., *supra* note 58, at 719–20; *see also* Russell S. Burnside, Note, *The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies*, 13 RUTGERS COMPUTER & TECH. L.J. 451, 459 (1987).

[73] *See* Kastenmeier et al., *supra* note 58, at 720; H.R. REP. No. 99-647, at 19 (1986); *see also* Malley v. Briggs, 475 U.S. 335, 339 (1986) (holding that police officer can be held liable for violating defendant's civil rights even if magistrate approves arrest warrant, if no police officer of reasonable competence would have requested the warrant).

[74] Pub. L. No. 99-508, § 101(c), 100 Stat. 1848, 1851–52 (1986) (codified in scattered sections of 18 U.S.C.).

[75] S. REP. No. 99-541, at 14, *reprinted in* 1986 U.S.C.C.A.N. at 3568. For the ECPA's definition of "electronic communication," *see supra* note 6.

[76] 18 U.S.C. § 2510(4) (1982) (defining intercept as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."). "Aural" here refers to the ability to hear the contents of the communication. *See also* United States v. New York Tel. Co., 434 U.S. 159, 167 (1977) (holding that pen registers do not "intercept" because the devices only disclose the telephone numbers that have been dialed and not the content of the communications).

[77] 18 U.S.C. § 2510(4) (1994).

[78] *See id.* § 2510(17) (defining electronic storage as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission

e-mail service provider[79] for administrative purposes.[80] Without a statutory scheme requiring the government to obtain a warrant before reading these stored messages, the government probably would be able to access the stored communications without court approval.[81] In analogous situations, records kept by a third party, such as copies of personal checks held by a bank, have been deemed the property of the third party and, therefore, not protected by the Fourth Amendment.[82] The rationale is that a person who communicates information to a third party takes the risk that the information will be given to government authorities.[83]

The 1986 Act deals with the stored communication problem by outlawing most private access to stored electronic communication[84] and by requiring the government to obtain a search warrant prior to retrieving electronic communications stored with the service provider for 180 days or less.[85] In this regard, stored electronic communication is treated much like regular mail sent via the United States Postal Service.[86] However, communication

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thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication").

[79] A service provider is the individual or company who operates the gateway computer through which an e-mail subscriber sends messages onto and retrieves messages from the Internet. Examples of service providers include Prodigy, America Online, and CompuServe (though all three provide additional services as well). Other electronic service providers, instead of providing Internet access, provide individuals with access to databases such as Westlaw and Lexis. *See* Jessica R. Friedman, *Defamation, in* Alan H. Bomser et al., *A Lawyer's Ramble Down the Information Superhighway*, 64 FORDHAM L. REV. 794, 796 n.561 (1995).

[80] *See* OTA REPORT, *supra* note 11, at 4. The e-mail message is kept in the computer of the e-mail provider even after the message is retrieved by the addressee (and often even after the addressee has deleted the message from his or her own e-mail mailbox) in order to protect against system failure. H.R. REP. NO. 99-647, at 22 n.34 (1986).

[81] *See* Cutrera, *supra* note 25, at 151.

[82] *See* OTA REPORT, *supra* note 11, at 50 (citing United States v. Miller, 425 U.S. 435 (1976) (holding that a customer has no standing under the Fourth Amendment to object to bank disclosing financial information). Congress reversed the result in *Miller* in the Right to Financial Privacy Act, 12 U.S.C. § 3401. H.R. 647, 99th Cong. at 23 n.40 (1986)); *see also* Cutrera, *supra* note 25, at 151–52.

However, it is important to the analysis to determine whether the third party is the owner of the material or the temporary custodian of the records. If the third party is merely the temporary custodian, then the defendant would be able to invoke the Fifth Amendment to keep the evidence from being used against him or her. OTA REPORT, *supra* note 11, at 50; United States v. Guterma, 272 F.2d 344, 346 (2d Cir. 1959) (defendant can invoke Fourth and Fifth Amendment to quash subpoena of records held by third party where third party did not have access to safe where information was kept and there was no evidence that defendant turned records over to become part of third party's files).

[83] *See* Cutrera, *supra* note 25, at 152 (citing Securities and Exchange Comm. v. O'Brien, 467 U.S. 735, 743 (1984)).

[84] *See* 18 U.S.C. § 2701 (1994).

[85] *See id.* § 2703(a).

[86] *See* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING 26:11 (2d ed. 1995). The postal laws forbid the government from opening a letter

stored for more than 180 days has less protection, for the government may then obtain the communication through a warrant,[87] an administrative subpoena, a grand jury subpoena, or a court order.[88] Although the warrant procedure requires probable cause,[89] the other procedures do not. No factual justification need be given to obtain the material through a subpoena,[90] and for a court order, the government need only show "specific and articulable facts showing that there are reasonable grounds" to believe the communications are relevant to an ongoing criminal investigation.[91]

D. *Electronic Communication Is Given Less Protection from Government Interception than Wire and Oral Communication*

Although the new law protected e-mail and other forms of electronic communication from private interception, when it came to government interception, the law gave less protection to electronic communication than to wire and oral communication.[92] For example, the ECPA added a section to Title III that allowed federal officials to request an intercept order for electronic communications "when such [an] interception may provide or has provided evidence of *any Federal felony*."[93] The wide latitude given the government to intercept electronic communication stands in stark contrast to the controls Congress placed on investigations involving wire and oral communication, which are restricted to an enumerated list of crimes, such as bribery, racketeering, and money laundering.[94] In addition, whereas Title III requires an application for a wire or oral interception to be authorized by certain Justice Department officials in Washington, D.C.,[95] inter-

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without a search warrant or the permission of the addressee. *See* 39 U.S.C. § 3623(d) (1988); Ronald L. Plesser & Emilio W. Cividanes, *Discovery and Other Problems Related to Electronically Stored Data and Privacy*, 415 PLI/PAT (Practicing Law Institute; Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series) 277 (Sept. 1995).

[87] *See* 18 U.S.C. § 2703(b)(A).

[88] *Id.* § 2703 (b)(B). Under this section, prior notice must be given to the customer whose communication is being retrieved. *Id.* Notice may be delayed until after retrieval under exigent circumstances. *Id.* § 2705.

[89] *See* 18 U.S.C. § 2703(b)(A).

[90] FISHMAN & MCKENNA, *supra* note 86, at § 26:11.

[91] 18 U.S.C. § 2703(d).

[92] *See* Kastenmeier et al., *supra* note 58, at 727–28, 735; Burnside, *supra* note 72, at 502.

[93] 18 U.S.C. § 2516(3) (emphasis added).

[94] *Id.* § 2516(1). The ECPA added a number of new crimes for which wire and oral interception is allowed. Pub. L. No. 99-508, § 105(a), 100 Stat. 1848, 1855–56 (1986).

[95] 18 U.S.C. § 2516(1) (including the "Attorney General, Deputy Attorney General,

cept applications for electronic communications need only be approved by "[a]ny attorney for the Government," which includes, among others, a United States Attorney, or an authorized Assistant United States Attorney.[96]

Furthermore, the Stored Wire and Electronic Communications section of the ECPA[97]—which is separate from Title III—grants stored electronic communication less protection against governmental intrusion than its wire counterpart.[98] Specifically, Congress made it easier for the government to retrieve stored electronic communication than to retrieve other forms of stored communication. Under the stored communications provisions, the government can obtain certain stored electronic communications through a search warrant, subpoena, or court order;[99] it does not have to comply with the rigorous procedures required to obtain a Title III intercept order,[100] which is required for stored wire communications[101] such as voice mail.[102]

Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General . . . .").

The ECPA significantly expanded the number of officials who could approve an application for an intercept order for wire or oral communication. Congressman Kastenmeier explained the expanded list of officials by stating that "[t]he purpose of supervisory review is better served by having a trained professional review the work of field investigators rather than relying on a seat of the pants judgment by an assistant attorney general untrained in criminal law." Kastenmeier et al., *supra* note 58, at 737. However, the enumerated list is still restricted to officials based in Washington, D.C. If Congressman Kastenmeier's rationale is genuine, it is surprising that the law did not allow authorized Assistant U.S. Attorney approval for a wire or oral wiretap application, which the ECPA did allow for electronic communication. 18 U.S.C. § 2516(3).

[96] 18 U.S.C. § 2516(3). Section 2516(3) granted this authority to "[a]ny attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure)." Federal Rule of Criminal Procedure 54(c) defines that term as the Attorney General, any U.S. Attorney, or any authorized Assistant Attorney General or Assistant U.S. Attorney. FED. R. CRIM. P. 54(c); *see also* FISHMAN & MCKENNA, *supra* note 86, § 8:4 n.30. However, the Department of Justice, in a deal with Congress, promised to get Washington, D.C., approval of all applications for interception of electronic communication for three years after enactment of the ECPA. UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, Vol. IIIa, at 9-7.110 (1992); S. REP. NO. 99-541, at 28 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3582.

[97] 18 U.S.C. §§ 2701–2711.

[98] *Id.* § 2703.

[99] *See supra* notes 84–91 and accompanying text.

[100] 18 U.S.C. §§ 2516, 2218.

[101] Because the Title III definition of "wire communication" includes "any electronic storage of [wire] communication," *id.* § 2510(1), the retrieval of stored wire communication is governed by Title III rather than by section 2703, which deals only with the storage of electronic communication. Conversely, the Title III definition of "electronic communication" does not include stored electronic communication, *id.* § 2510(12), and, therefore, such stored communication is governed by the Stored Wire and Electronic Communications section of the ECPA. *Id.* §§ 2701–2711.

[102] The Office of Technology Assessment defined voice mail as "a computer-based

Finally, and for the purposes of this Article most importantly, the ECPA did not amend the statutory exclusionary rule found in 18 U.S.C. §§ 2515 and 2518(10)(a) so as to include electronic communication. The statutory exclusionary rule provides for the exclusion of wire or oral wiretap evidence if law enforcement violates any "central" provision of Title III, even if the violation is purely statutory and suppression is not required by *Katz* and *Berger*.[103] However, because the ECPA did not add electronic communication to the statutory exclusionary rule, when electronic communication is involved, the defendant can seek suppression only through the judicially created exclusionary rule.[104] Thus, when electronic communication is involved and no constitutional violation occurs, the defendant may seek only civil and criminal sanctions against offending government officials,[105] whereas a defendant fighting an interception of wire and oral communication can make use of the statutory exclusionary rule as well.

As technology improves, the discrimination between types of communication will become more and more problematic. First, people may become reluctant to use new technologies if the

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system designed to digitize voice from an analog signal for the purposes of relaying short messages or instructions . . . [M]essages can be stored and forwarded, edited, retrieved, or distributed to a list of users." OTA REPORT, *supra* note 11, at 47. For a brief but excellent description of voice mail, with references to additional materials, see Thomas R. Greenberg, *E-mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute*, 44 AM. U. L. REV. 219, 221 n.8 (1994).

[103] Section 2515 reads the same today as it did when it was passed in 1968:

> Whenever any *wire or oral* communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515 (emphasis added). Section 2518(10)(a) reads:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any *wire or oral* communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval
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> . . . .

18 U.S.C. § 2518(10)(a) (emphasis added).

[104] *See* FISHMAN & MCKENNA, *supra* note 86, § 22:7. Congress made this point quite clear by adding a new section, 2518(10)(c), to Title III. This section states that "the remedies and sanctions described in [Title III] with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of [Title III] involving such communications." 18 U.S.C. § 2518(10)(c).

[105] *See supra* note 21; Kastenmeier et al., *supra* note 58, at 727–28.

government can intercept their communications more easily. For business or personal matters, the telephone will be safer. Second, the line-drawing creates formalistic distinctions that lack a sound policy basis. Finally, the government will have less incentive to comply diligently with the requirements of Title III if no statutory suppression remedy exists. The next section will explore these problems in more detail.

II. Electronic Communication and the Statutory Exclusionary Rule

A. *Why Congress Gave Electronic Communication Less Protection*

Congress may have given electronic communication a lower level of protection because it truly believed that such communication deserved less protection, given its susceptibility to private interception.[106] After all, in 1986 Congress explicitly excluded the radio portion of a cordless telephone communication[107] from Title III protection[108] for the stated reason that, because such communication can be intercepted easily, it is inappropriate to make its interception a criminal offense.[109] However, Congress's decision more likely stems from the Justice Department's opposition to the legislation as originally introduced.[110] In return for Justice Department support,[111] Congress agreed to the lower level of protection, including the exclusion of electronic communication from the statutory exclusionary rule.

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[106] *See infra* notes 122–126 and accompanying text.

[107] Congress did protect cellular phones by including them in the definition of wire communication. 18 U.S.C. § 2510(1) (1988).

[108] The definition of wire communication in 1986 did "not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit." 18 U.S.C. § 2510(1) (1988). The definition of electronic communication also excluded cordless telephone communication. *Id.* § 2510(12)(A). For a detailed discussion of the discriminatory treatment the ECPA gave cordless phone communications compared with mobile phone communications, see Timothy R. Rabel, Comment, *The Electronic Communications and Privacy Act: Discriminatory Treatment for Similar Technology, Cutting the Cord of Privacy*, 23 J. Marshall L. Rev. 661 (1990).

[109] S. Rep. No. 99-541, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3566. The Digital Telephony Bill of 1994, enacted into law on October 25, 1994, finally gave protection to cordless phones by deleting the discriminatory language in § 2510(1). Pub. L. No. 103-414, § 202, 108 Stat. 4279, 4290–91 (1994).

[110] 42 Cong. Q.: Almanac 88 (1986).

[111] *Id.*

According to Congressman Kastenmeier, only bills with Justice Department support had any chance of passage during the Reagan Administration,[112] and the Department had made it quite clear that it believed electronic communication should be given a lower level of protection. In a hearing before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, James Knapp, Deputy Assistant Attorney General for the Criminal Division, stated that the Department "believe(s) the interception of electronic mail should include some but not all of the procedural requirements of Title III."[113] Specifically, he stated that the Department "strongly oppose[s] . . . the inclusion of any new statutory exclusionary remedy."[114] Knapp justified the Department's preference for a lower level of protection by stating that the "level of intrusion with aural communications is greater than the level of intrusion with electronic mail or computer transmissions."[115] However, he also admitted that the Department wished to make interception "less burdensome on law enforcement authorities."[116]

In contrast to the final version, the predecessor bill to the ECPA, H.R. 3378, treated wire and electronic communication exactly the same.[117] It did not include section 2518(10)(c), which makes criminal and civil sanctions the sole remedy for nonconstitutional violations of Title III involving electronic communication, thereby precluding the use of the statutory suppression remedy for such violations.[118] In fact, upon the introduction of

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[112] Kastenmeier et al., *supra* note 58, at 733–34.

[113] *The Electronic Communications Protection Act: Hearings on H.R. 3378 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong. 230 (1986). Among other proposals, Knapp opposed requiring approval for an intercept application from specific Washington, D.C. personnel, instead supporting the notion that "[w]ithin the Department [of Justice] we should require supervisory approval in the field by internal regulation." *Id.* at 233. In addition, Knapp conveyed the Department of Justice's belief that for electronic communication, the law should "not require that there be a showing that all other investigative procedures have failed or are unlikely to succeed or are too dangerous before an order can be obtained." *Id.* Knapp also suggested that a magistrate, not just an Article III judge, should be able to approve an application, and that, unlike with wire and oral communication, no annual reports on the usage of the new law should be required. *Id.*

[114] *Id.* at 232.

[115] *Id.* at 233.

[116] *Id.* at 234.

[117] Title III would have been amended by striking the word "wire" and substituting "electronic" everywhere in Title III. H.R. 3378, 99th Cong. § 101(c) (1985). The definition of "electronic communication" would then have been expanded to cover all communication already covered by the definition of "wire," as well as all communication now covered in the ECPA under "electronic communication." *Id.* § 101(a).

[118] *Id.*

the predecessor bill, Congressman Kastenmeier stated that "Congress needs to act to ensure that the new technological equivalents of telephone calls, telegrams, and mail are afforded *the same* protection provided to conventional communications."[119]

Nevertheless, with regard to the statutory exclusionary rule, the Justice Department got its way.[120] The sponsors had to compromise in order to gain Justice Department support for the bill. According to the Senate Report accompanying the ECPA, "[t]he purpose of [section 2518(10)(c)] is to underscore that, *as a result of discussions with the Justice Department*, the Electronic Communications Privacy Act does not apply the statutory exclusionary rule contained in [T]itle III . . . to the interception of electronic communications."[121]

B. *Adverse Consequences of Giving Electronic Communication Less Protection from Government Interception*

In acceding to Department of Justice demands and providing electronic communication with less protection than that afforded wire and oral communication, Congress created a number of potentially harmful consequences. First, this discrimination threatens the growth of new technologies. Second, within the context of the statutory exclusionary rule, Congress created formalistic distinctions between modes of communication that make the availability of the statutory suppression remedy hinge on arbitrary factors. Finally, the unavailability of the statutory exclusionary rule for electronic communication creates a situation in which law enforcement officials can be less vigilant in their application of Title III when electronic communication is involved.

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[119] *The Electronic Communications Privacy Act: Hearings on H.R. 3378 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong. 2 (1985) (emphasis added).

[120] As described in Part I.D, the Justice Department was able to get significant concessions in other areas as well. According to one news account on June 24, 1986, the day after the House voted for the first time to approve the ECPA (the final conference version was approved in October, 1986), "[t]he [ECPA] picked up major support from the federal law enforcement community, with provisions making it easier to obtain court-approved wiretaps." Mary Thornton, *House Votes to Revise Wiretap Law to Restrict Electronic Surveillance*, WASH. POST, June 24, 1986, at A4.

[121] S. REP. NO. 99-541, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577 (emphasis added).

1. Threats to the Growth of Emerging Technologies

Congress's acquiescence in weakening the proposed electronic communication provisions of the ECPA was short-sighted and poses a significant threat to the growth of new technologies. By giving electronic communication less protection from interception than wire and oral communication, Congress runs the risk of forcing those who value privacy to use older forms of communication.

E-mail messages, by their very nature, are already less private than many other forms of communication. Typically, an e-mail message, which originates in the computer of the sender, travels through many computers before reaching its final destination.[122] At each computer, the operator of the computer system can access the message.[123] In addition, when the service provider receives the message, the system computer stores a copy of that message and retains it, even after retrieval by the intended recipient.[124] As a result, "[e]-mail is less secure, and in many ways more dangerous, than sending your personal or business messages on a postcard."[125] According to one commentator, "[p]robably the best privacy advice for the moment, particularly if you are using e-mail, is to send no message you wouldn't want all the world to see—because it just might."[126]

E-mail is an important technology whose vulnerability to interception makes it that much more important to give it strong legal protection from interception. The benefits of e-mail can be seen every day in the workplace. E-mail minimizes "telephone tag," reduces the problems posed by communication between different time zones, allows employees to find co-workers who have expertise on particular issues, and enables companies to put

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[122] Elsa F. Kramer, *The Ethics of E-Mail Litigation Takes On One of the Challenges of Cyberspace*, RES GESTAE, Jan. 1996, at 24; *Internet in Congress: Hearings Before the House Comm. on Administration*, 103d Cong. 4–5 (1994) (available in 1994 WL 232746 (F.D.C.H.)) [hereinafter *Internet in Congress*] (testimony of Wayne Rash, Jr.); Andre Bacard, *E-mail Privacy FAQ* (last modified Sept. 1, 1996) (<http://www.well.com/user/abacard/email.html>).

For a discussion of how e-mail works, see *supra* note 5.

[123] Kramer, *supra* note 122, at 24; *Internet in Congress*, *supra* note 122, at 5 (noting that one option is for the sender to encrypt the message); Bacard, *supra* note 122.

[124] Loundy, *supra* note 61, at 103.

[125] Bacard, *supra* note 122; *see also E-Mail Has Same Security Level as a Postcard: Ontario Information and Privacy Commissioner Produces E-Mail Policy Guidelines*, CANADA NEWSWIRE, Feb. 15, 1994.

[126] Naaman Nickell, *Online Privacy Is One Flaming Issue*, ARIZ. REPUBLIC, Nov. 14, 1994, at E2.

together teams of the best people without regard to location.[127] For private use, it permits people to communicate more easily—at less cost—with others around the globe. Recognizing the importance of e-mail and other electronic technologies, Congress passed the ECPA precisely to curb the vulnerability of electronic communication, believing that protection from interception would encourage the development and use of new technologies. By putting e-mail in the same position as wire and oral communication with respect to private interception, Congress hoped to give businesses more confidence in the technology and to spur the rapid growth of new technologies generally.[128]

Yet with respect to government interception of electronic communication, Congress actually gave such communication far less protection than it had previously afforded wire and oral communication.[129] Because electronic forms of communication, such as e-mail, are already vulnerable technologies, giving them weaker protection against government interception threatens to drive away those users who seek privacy. Therefore, although the ECPA was a step in the right direction, Congress needs to revisit Title III to assure that electronic communication is given equal treatment, thereby protecting and promoting the growth of new technologies.

Electronic communication's vulnerability to interception is not a sound reason for giving it less protection from government interception, especially since Congress placed electronic communication in the same position as wire and oral communication with respect to private interception. In fact, the OTA Report prepared for Congress in 1985 stated that simply "because a communication may be more readily overheard does not necessarily mean that investigative authorities should be able to intercept it with less authorization."[130] If anything, the ease with which electronic communication may be intercepted justifies

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[127] Michelle C. Kane, *Electronic Mail and Privacy*, 369 PLI/Pat (Practicing Law Institute; Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series) 419, 438 (Oct.-Nov. 1993).

[128] In a statement entered into the Congressional Record prior to passage of the ECPA, Congressman Kastenmeier stated: "Without legislation addressing the problems of electronic communications privacy, emerging industries may be stifled." The uncertainty over whether certain communications are truly private "may unnecessarily discourage potential customers from using such systems." 131 CONG. REC. 24396, 24396 (1985).

[129] *See supra* Part I.D.

[130] OTA REPORT, *supra* note 11, at 37 (discussing whether digital phone calls should be given less protection by Congress than analog phone calls).

strong protections against government intrusions. Judge Richard Posner once suggested that "the enormous power of the government makes the potential consequences of its snooping . . . far more ominous than those of . . . a private individual or firm."[131] It is for precisely this reason that the government must comply with the Fourth Amendment, while private citizens are not bound by such restrictions.[132] In fact, the Supreme Court has also acknowledged the comparatively greater danger posed by government activity, writing: "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[133] It is thus problematic for Title III to give equal protection to electronic communication from private interception but less protection against the more invasive governmental intrusion.

Furthermore, private citizens already fear governmental intrusions. In 1994, seventy-six percent of Americans disapproved of wiretapping generally.[134] When these same citizens send an e-mail message, using a private password and sending the message directly to the intended recipient, they have a false sense of security that the government will not intercept their communication.[135] Nevertheless, if and when users realize that e-mail is more easily intercepted by the government—and that this power is being used—those private citizens who fear governmental intrusions will likely reject electronic communication for all but the most impersonal of messages.

As of January, 1996, thirty-seven percent of U.S. households (35.1 million) had a personal computer; of those, fifty-three percent (18.75 million) had at least one modem.[136] In fact, by mid-

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[131] Richard Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 176 (1979), *cited in* H.R. Rep. No. 99-647, at 18–19 (1986).

[132] *See supra* note 64 and accompanying text.

[133] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 392 (1971) (permitting plaintiff to sue federal agent for damages from warrantless search upon proof of injuries).

[134] BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, at 168 (1996) (response to question: "Everything considered, would you say that you approve or disapprove of wiretapping?").

[135] Miranda Ewell, *Working: Employees, Note: It's Unsafe to Stash Those Secrets in E-Mail*, NEWS TRIB., Apr. 20, 1994, at D1. "Much like a telephone, the user of E-mail trusts that her message will be delivered through the system unmodified and only to the person she intends to receive the message." Steven B. Winters, *Do Not Fold, Spindle or Mutilate: An Examination of Workplace Privacy in Electronic Mail*, 1 S. CAL. INTERDISCIPLINARY L.J. 85, 93 (1992).

[136] *Computer Use @ Home, @ School Just the Stats*, SANTA FE NEW MEXICAN, Jan. 19, 1996, at 5 (special section).

1996, home-computer sales were estimated to have overtaken business personal computer sales.[137] The computer is no longer just a business tool, and its growth, to this point, has been extraordinary.[138] To encourage these growing technologies, Congress must to give electronic communication the same level of protection that it gives other forms of communication. In some cases, in order to equalize the protections given wire, oral, and electronic communication, it may make sense to reduce the level of protection given wire and oral communication to the level currently given electronic communication. In other cases, the reverse will be true. By equalizing treatment, no one type of technology will have an advantage over others, thus eliminating any possibility that growth in new technologies will be stunted. A discussion of how best to equalize each of numerous wiretap provisions is beyond the scope of this Article, which makes a specific recommendation only with regard to the statutory exclusionary rule: electronic communication should be added to section 2515, which currently provides a statutory suppression remedy only for wire and oral communication. The rationale for making this addition will be discussed in the following two sections.

2. Formalistic Distinctions

By treating electronic communication differently than it treated other forms of communication, Congress made possible formalistic distinctions that are especially glaring in the context of the statutory exclusionary rule. Because electronic communication receives less protection against government interception, whether evidence is admitted at trial could depend upon whether the communication is defined under the ECPA as "electronic" or as "wire" or "oral." In order to avoid the statutory exclusionary rule

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[137] *Id.*

[138] Anywhere from 35 to 50 million people now use e-mail. *Id.*; *see also* Marc Peyser & Steve Rhodes, *When E-Mail Is Ooops-Mail*, NEWSWEEK, Oct. 16, 1995, at 82. By the end of the decade, home e-mail users will grow to more than 20 million, with another 70 million using e-mail at work. *Business E-Mail Users to Hit 70 Million by End of Decade*, COMM. TODAY, Nov. 2, 1995, *available in* 1995 WL 10454963; *see also* John W. Frees, *Small Firm Helps AT&T Cure Program Headache*, BUSINESS FIRST-COLUMBUS, Jan. 15, 1996, at 6 (more than 90 million people by the turn of the century will use e-mail). Projections indicate that as many as 60 billion e-mail messages will be transmitted in the year 2000. *See* Greenberg, *supra* note 102, at 221 n.7 (citing Scott Dean, *E-Mail Forces Companies to Grapple With Privacy Issues*, CORP. LEGAL TIMES, Sept. 1993, at 11).

and increase the likelihood that an intercepted communication will be admitted into evidence, the Justice Department has a motive to argue that an intercepted communication is "electronic" whenever possible. In contrast, defendants have an incentive to argue that a communication is "wire" or "oral" so that the statutory exclusionary rule will apply.

The facts of *United States v. Giordano*[139] illustrate the significance of this definitional distinction. In *Giordano*, the district court issued an intercept order even though proper authorization for the wiretap application had not been received from an authorized Justice Department employee, as required by the 1974 version of section 2516(1).[140] Since probable cause existed to issue the order, no Fourth Amendment violation occurred. Nevertheless, the Court suppressed the evidence obtained from the interception, reasoning that "[t]he issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III."[141] Using the statutory exclusionary rule in 2518(10)(a), the court suppressed the evidence since the government had violated a "central" provision of Title III.[142] If these events happened today in a situation involving e-mail, the Court could not suppress the evidence under Title III, for the violation was not constitutional in nature and electronic communication is not covered by Title III's statutory suppression remedy.[143]

The very distinction between "electronic" and "wire" or "oral" communication can be specious. For instance, if *any* part of a communication qualifies as "wire" or "oral," as defined by sections 2510(1) and 2510(2),[144] then that entire communication is considered "wire" or "oral" for Title III purposes, even if it is predominantly electronic.[145] Thus, if a communication contains

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[139] 416 U.S. 505 (1974).

[140] In 1974, 18 U.S.C. § 2516(1) stated in part that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge," for a Title III intercept order. Neither the Attorney General nor a specially designated Assistant Attorney General authorized the wiretap application at issue in *Giordano*. The ECPA amended section 2516(1) to include more officials. *See supra* notes 95–96 and accompanying text.

[141] *Giordano*, 416 U.S. at 524.

[142] *Id.* at 526. On the same day that *Giordano* was decided, the Supreme Court handed down another ruling in which it stated that technical errors in applying Title III do not require suppression. *See infra* text accompanying notes 178–179.

[143] 18 U.S.C. §§ 2515, 2518(10)(a) (1994).

[144] For definitions of wire and oral communication, see *supra* notes 7–8.

[145] 18 U.S.C. § 2510(12). For a definition of electronic communication, see *supra* note 6.

both aural elements, such as voice mail,[146] and electronic elements, such as e-mail, the entire communication is treated as a "wire" communication,[147] which means that the statutory exclusionary rule applies. However, if the communication contains *only* an e-mail message, it is considered "electronic,"[148] and the suppression remedy is not available.[149] As technology improves and types of communication are more often combined, the significance of this definitionally based distinction will only grow, making availability of the statutory exclusionary rule increasingly arbitrary since its application will turn on a mere fortuity: the presence—or absence—of an element that can be defined as "wire" or "oral."

In addition, since the definition of "wire communication" encompasses an "aural transfer,"[150] which is defined as "a transfer containing the human voice . . . .,"[151] it is unclear whether a telephone call composed completely of a computer-generated voice would be categorized as "wire" or "electronic."[152] Although admittedly a relatively minor issue, "this human/machine voice dichotomy demonstrates how easily the smallest technological advance can render obscure a statute that accords different standards of protection to similar communication technologies."[153]

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[146] Voice mail is a "wire communication" because Title III incorporates "any electronic storage of [wire] communication" in its definition of "wire communication." 18 U.S.C. § 2510(1).

[147] According to the Senate Report, "the term 'wire communication' means the transfer of a communication which includes the human voice at some point." S. REP. No. 99-541, at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3566.

[148] *Id.* at 14, *reprinted in* 1986 U.S.C.C.A.N. at 3568 ("[c]ommunications consisting *solely* of data . . . are electronic communications.") (emphasis added).

[149] This dichotomy can be seen in the "fax dilemma." With the technology that exists today, some fax machines can also be used as telephones. If party *A* calls party *B*, reports that a fax is being sent, and then presses a button and with the same phone connection sends the fax, the communication would probably be considered "wire" since part of the message was "an aural transfer made in whole or in part through" wires. 18 U.S.C. § 2510(1). Because it is "wire" communication, the Stored Wire provision in section 2703 is inapplicable and the government would need a Title III intercept order to secure that communication. If, however, party *A* hung up the phone and redialed before sending the fax, the second communication, having no aural component, would be considered "electronic" and the government would need only a search warrant or, after 180 days, a subpoena or court order to retrieve the message. *Id.* §§ 2510(12), 2703.

[150] *Id.* § 2510(1).

[151] *Id.* § 2510(18).

[152] *See* Burnside, *supra* note 72, at 495.

[153] *Id.* at 496. One case in which discriminatory treatment made definitions all important was Steve Jackson Games, Inc. v. United States Secret Service, 36 F.3d 457 (5th Cir. 1994). In that case, the government had seized a system provider's computers, which contained unread e-mail messages. The issue was whether the government could be sued under section 2520 of Title III, where statutory damages are the greater of

3. Vigilance and the Statutory Exclusionary Rule

The statutory exclusionary rule found in section 2515 of Title III, which requires law enforcement agencies to comply with each provision of Title III in order to be able to use the evidence gathered, provides a significant restraint on government power. Congress aimed to ensure judicious government use of its intercept powers and vigilance in applying each provision of Title III. The Senate Report accompanying the 1968 Act expressly stated that "Section 2515 . . . imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter."[154] Congress deemed this sanction necessary "to guarantee that the standards of the new chapter [would] sharply curtail the unlawful interception of wire and oral communications."[155]

The same policy goal applies to electronic communication. Users of electronic communication have an interest in ensuring that the government be as diligent in applying the provisions of Title III when intercepting e-mail as when intercepting wire and oral communication. Since Congress considered a suppression remedy necessary to reduce unlawful interceptions of wire and oral communication, it would be sound policy for Congress to similarly curtail unlawful interceptions of electronic communication.

Importantly, while adding electronic communication to the statutory exclusionary rule would end certain formalistic distinctions and require full adherence to the law by law enforcement, it would not harm any government interest. If the government has a legitimate need to intercept e-mail, the revised law would still allow it to obtain the communication. However, the sanction for noncompliance with statutory requirements of Title III would

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$100 a day for each day of the violation or $10,000 per violation, or whether it could only be sued under section 2707 of the weaker Stored Wire and Electronic Communications provisions of the wiretap laws, where statutory damages are actual damages, with a $1,000 minimum. The Fifth Circuit held that an e-mail message in storage, not yet read by the addressee, could not be "intercepted" under Title III, *id.* at 462, and, therefore, suit could only be brought under section 2707. *See* Nicole Giallonardo, Steve Jackson Games v. United States Secret Service*: The Government's Unauthorized Seizure of Private E-Mail Warrants More than the Fifth Circuit's Slap on the Wrist*, 14 J. MARSHALL J. COMPUTER & INFO. L. 179, 183–93 (1995) (arguing that unread e-mail messages are still in transit and, therefore, subject to Title III provisions). If the communication had contained an "aural" component, the court would have been forced to rule that the communication was "wire" and not "electronic" and, therefore, Title III damages would have applied.

[154] S. REP. No. 90-1097, at 96 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2184.

[155] *Id.*, *reprinted in* 1968 U.S.C.C.A.N. at 2185.

be the same as that for wire and oral communication. Furthermore, the Supreme Court has already ruled that mere technical errors in applying Title III do not require suppression.[156] Only violations of provisions that are "central" to the statutory scheme result in the exclusion of evidence.[157] Hence, suppressing illegally seized evidence will assure privacy protections without compromising legitimate law enforcement needs.

By providing the same remedies for violations of Title III regardless of the mode of communication used, Congress will encourage compliance with the law by government authorities, end formalistic distinctions, and help spur growth in new technologies. Congress should end the discriminatory treatment of technologies that are fast becoming essential components of everyday life and assure that private communications remain so regardless of the medium in which they occur.

III. Is There a "Good Faith" Exception to the Exclusionary Rule for Title III Violations?

To this point, this Article has discussed the benefits of equalizing the status of electronic communication with that of wire and oral communication and, more specifically, the benefits of providing electronic communication with the statutory suppression remedy found in Title III. However, excluding electronic communication from the statutory exclusionary rule had an additional consequence still undiscussed. Although the main effect of new subparagraph 18 U.S.C. § 2518(10)(c) was to exclude electronic communication from the statutory exclusionary rule, the section was poorly drafted, thus giving rise to significant confusion regarding the applicability of the "good faith" exception to the statutory exclusionary rule for wire and oral communication. Whereas prior to the ECPA courts were unanimous in refusing to apply the "good faith" exception to the statutory exclusionary rule in Title III cases,[158] today courts differ significantly on the issue. As with the discriminatory treatment of electronic communication, a "good faith" exception threatens to

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[156] United States v. Chavez, 416 U.S. 562, 579 (1974) (suppression not required where the approving official was misidentified on the application, but the Attorney General had in fact approved the application).

[157] *Id.*; *see also infra* text accompanying notes 178–179.

[158] *See* James G. Carr, The Law of Electronic Surveillance § 6.3A (1995), *infra* Part III.B.2.

reduce the vigilance with which government officials comply with the requirements of Title III. Congress should revisit the Title III statutory exclusionary rule and make it clear that the "good faith" exception to the Fourth Amendment exclusionary rule does not, and should not, apply to *any* Title III case.

A. *History of the "Good Faith" Exception*

In 1978, the Supreme Court began the move toward introducing a "good faith" exception into the Fourth Amendment exclusionary rule. In *Franks v. Delaware*,[159] the Court ruled that a defendant may challenge the truthfulness of factual statements made by police officers in an affidavit accompanying a request for a search warrant. However, the Court held that any evidence seized would be excluded only if the government knew that the information was false or offered it in reckless disregard for the truth.[160]

The Court expressly created a "good faith" exception to the exclusionary rule six years later in *United States v. Leon*.[161] Holding that the exclusionary rule of *Weeks*[162] was judicially created, not mandated by the Fourth Amendment,[163] the Court stated that the exclusionary rule is "designed to deter police misconduct rather than to punish the errors of judges and magistrates."[164] With this distinction in mind, the Court ruled that "evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate . . . should be admissible."[165] In *Leon*, a neutral magistrate had approved an officer's application for a search warrant based on information from a confidential informant. The district court, finding that the application did not support the requisite probable cause, suppressed the evidence seized. The Supreme Court, however, reversed, concluding that the officers acted reasonably in relying on the magistrate's finding of probable cause.[166]

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[159] 438 U.S. 154 (1978).
[160] *Id.* at 171.
[161] 468 U.S. 897 (1984).
[162] Weeks v. United States, 232 U.S. 383 (1914).
[163] *Leon*, 468 U.S. at 906.
[164] *Id.* at 916.
[165] *Id.* at 913.
[166] *Id.*

B. *Does the "Good Faith" Exception Apply to Title III?*

The facts in *Leon* did not involve wiretapping. Because Title III contains its own exclusionary rule, independent of that required by *Weeks*, the role of the *Leon* "good faith" exception is unclear when wire or oral evidence is gathered in violation of Title III. Courts and commentators are split into three schools of thought as to whether such evidence must be suppressed where the violations are in good faith. The first view is that *Leon* applies to all Title III cases.[167] The second is that *Leon* applies to violations of Title III that amount to violations of provisions codifying constitutional law but not to violations of purely statutory proportions.[168] The final, and most compelling, view is that *Leon* does not extend to any Title III cases.[169] The following section aims to show that Congress did not intend for the "good faith" exception to apply to such cases.

1. Title III's Suppression Requirements Before *Leon*

In passing Title III, Congress aimed to protect citizens' privacy rights in their communications, while also providing government officials with a uniform structure to govern the interception of wire and oral communication.[170] As a result, while many of the 1968 provisions were drafted to meet the Supreme

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[167] *See* United States v. Moore, 41 F.3d 370, 376 (8th Cir. 1994); United States v. Malekzadeh, 855 F.2d 1492, 1497 (11th Cir. 1988); United States v. Bellomo, No. 96 CR 430, 1997 WL 20841, at *4 (S.D.N.Y. Jan. 17, 1997); United States v. Stevens, 800 F. Supp. 892, 904 n.22 (D. Haw. 1992) (stating that even if wiretap order was approved with insufficient probable cause, suppression not appropriate in light of the good faith exception); United States v. Gambino, 741 F. Supp. 412, 415 (S.D.N.Y. 1990). Other courts, although not expressly applying a "good faith" analysis to Title III cases, have expressed a willingness to do so. *See, e.g.*, United States v. Ojeda Rios, 875 F.2d 17, 23 (2d Cir. 1989) (stating that although *Leon* would not be applicable to Title III's sealing requirement, which has a separate exclusionary structure, importing Fourth Amendment analysis, including *Leon*, "might be justified in the case of section 2518(10)(a)." (dictum)), *vacated on other grounds*, 495 U.S. 257 (1990); United States v. Ruggiero, 824 F. Supp. 379, 400 (S.D.N.Y. 1993), *aff'd sub nom.* United States v. Aulicino, 44 F.3d 1102 (2d Cir. 1995) (dictum) (stating that even if court lacked probable cause, suppression of evidence is not proper if agent's reliance on the warrant was objectively reasonable); United States v. Millan, 817 F. Supp. 1072, 1078 (S.D.N.Y. 1993) (dictum).

[168] United States v. Ambrosio, 898 F. Supp. 177, 187–89 (S.D.N.Y. 1995); United States v. Ferrara, 771 F. Supp. 1266, 1304 (D. Mass. 1991); *see also* CARR, *supra* note 158, § 6.3A.

[169] United States v. McGuinness, 764 F. Supp. 888, 897 n.2 (S.D.N.Y. 1991) (dictum) ("It is doubtful . . . whether the *Leon* exception applies to wiretaps, since the exclusionary rule for wiretaps is explicitly commanded by statute, 18 U.S.C. § 2518(10)(a), while the exclusionary rule for ordinary searches is a judicial gloss on the Fourth Amendment's general prohibition of unreasonable searches.").

[170] S. REP. No. 90-1097, at 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

Court requirements set out in *Katz* and *Berger*,[171] other provisions regulating the interception of oral and wire communication furnished additional protections that the Constitution did not require.[172] For example, Congress created a suppression remedy for defendants whose communications were obtained in violation of one of the statutory provisions of Title III.[173] If the statutory exclusionary rule had never been passed, courts would have still been required to exclude evidence obtained in violation of the Fourth Amendment.[174] However, the statutory exclusionary rule found in Title III provided defendants with greater protection than that afforded by the Fourth Amendment by covering violations of Title III that were purely statutory.

For the first fifteen years after passage of Title III, the Supreme Court adhered to this view, holding that Title III required suppression for a violation of Title III even when the Fourth Amendment did not. In *United States v. Giordano*,[175] the Court determined that independent statutory violations of Title III merit suppression under sections 2515 and 2518(10)(a). As discussed in Part I.B, *supra*, the Court in *Giordano* held that a wiretap not authorized by a proper official violated Title III. The wiretap clearly did not violate the Fourth Amendment, since the government and the court had probable cause to believe that intercepted communications would result in evidence of an ongoing crime. But Justice White, writing for the Court, stated that "[t]he issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III."[176] Justice White concluded that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the

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[171] For example, 18 U.S.C. § 2518(5) (1994) requires the government to minimize the interception of communications not authorized by the intercept order and 18 U.S.C. § 2518(3)(b) requires the judge, before issuing an order, to find that probable cause exists to believe that a wiretap will result in obtaining particular communications that refer to a particular crime.

[172] *See* United States v. Ferrara, 771 F. Supp. 1266, 1287 (D. Mass. 1991). For example, 18 U.S.C. § 2516(1) allows only particular officials to approve an application for an intercept order.

[173] 18 U.S.C. § 2515.

[174] *See* Weeks v. United States, 232 U.S. 383 (1914); Katz v. United States, 389 U.S. 347 (1967).

[175] 416 U.S. 505 (1974).

[176] *Id.* at 524.

employment of this extraordinary investigative device,"[177] even if there was not a violation of the Fourth Amendment.

On the same day that the Court handed down *Giordano*, it announced in *United States v. Chavez*[178] that a purely technical error in an application that did not go to the "central" provisions of Title III would not result in suppression. In that case, the approving official was misidentified on the application, though the Attorney General had, in fact, approved the application. The Court interpreted *Giordano* as applicable only to "central" or "functional" safeguards of Title III.[179] The two cases together provided a basic Title III framework that was separate from Fourth Amendment analysis.

From 1968 until 1984, Title III suppression motions were analyzed using a three-step process suggested by *Giordano* and *Chavez*. First, the court asked if there was a violation of any of the provisions of Title III. If there was a violation, the next step was to ask whether the violation infringed upon the defendant's Fourth Amendment rights. If so, suppression was in order under Title III, since the constitutional requirements were codified in and were "central" to Title III. Third, if the violation was purely statutory, the court had to determine whether the violated provision was "central" to the statutory scheme. If so, it was suppressed under sections 2515 and 2518(10)(a).[180]

2. Title III's Exclusionary Rule After the Introduction of *Leon*'s "Good Faith" Exception

The three-part analysis suggested by *Giordano* and *Chavez* was used regularly until the Court decided *Leon* in 1984. After

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[177] *Id.* at 527.

[178] 416 U.S. 562 (1974).

[179] *Id.* at 578. If the officers are found to have acted in bad faith, that may be grounds for suppression even if the violation was not of a "central" provision. United States v. Chun, 503 F.2d 533, 542 (9th Cir. 1974).

[180] For an example of this procedure, see United States v. Chun, 386 F. Supp. 91 (D. Haw. 1974), in which the court found that the government had violated 18 U.S.C. § 2518(8)(d). After finding that this violation did not implicate the Fourth Amendment, the court ruled that the violated provision was "central" to Title III's statutory suppression scheme and thus suppressed the evidence. *Id.* at 96. Although the Supreme Court ruled in 1977 that a similar violation of § 2518(8)(d) did not violate a "central" provision of Title III, United States v. Donovan, 429 U.S. 413, 439 (1977), *Chun* is still representative of how courts analyzed Title III violations, as the Supreme Court did approve of the overall approach used by the Ninth Circuit in *Chun*, 503 F.2d 533, 540 (9th Cir. 1974), which was the same approach used by the district court on remand, 386 F. Supp. 91 (D. Haw. 1974). *See Donovan*, 429 U.S. at 431.

Leon, courts had to decide whether the "good faith" exception to the exclusionary rule, now applicable to Fourth Amendment analysis, was also applicable to Title III violations. Prior to passage of the ECPA, every court to address this question decided that *Leon* did not apply to Title III violations.[181] From 1984, when *Leon* was handed down, until 1986, when the ECPA was passed, it was clear, therefore, that there was no "good faith" exception to the statutory exclusionary rule found in section 2515, either for statutory violations or for constitutional violations of Title III.

The compelling case against applying the "good faith" exception to Title III is twofold. First, the Supreme Court has previously held that the suppression remedy for Title III violations turns on the provisions of Title III and not on the judicially created exclusionary rule.[182] Since there was no "good faith" exception in section 2515 or section 2518(10)(a), a court could not create one absent an express legislative directive.[183] Second, in 1968, Congress clearly stated that the statutory exclusionary rule should be read coextensively with then-existing Fourth Amendment analysis. In the Senate Report accompanying the legislation, the Senate noted that the statutory exclusionary rule "largely reflects existing law . . . . There is . . . however, no intention to . . . press the scope of the suppression role beyond present search and seizure law."[184] The "existing law" that Title III reflected in 1968 did not include a "good faith" exception, since *Leon* did not become law until 1984. Therefore, Congress's intention in 1968 could not have been to include a "good faith" exception.

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[181] CARR, *supra* note 158, at § 6.3A; *see* United States v. Spadaccino, 800 F.2d 292, 296 (2d Cir. 1986) (in analyzing Connecticut's wiretap law, the court held that "in determining such matters as the nature of the rights to be protected, the conduct that constitutes a statutory violation, and the remedy warranted by a violation, it is appropriate to look to the terms of the statute and the intentions of the legislature, rather than to invoke judge-made exceptions to judge-made rules."); United States v. Orozco, 630 F. Supp. 1418, 1521–22 (S.D. Cal. 1986); County of Oakland v. City of Detroit, 610 F. Supp. 364, 369–70 n.10 (E.D. Mich. 1984) ("The good faith exception has only been applied to the *judicially created* fourth amendment exclusionary rule . . . Congress did not provide for a good faith exception [to § 2515].").

[182] *See* United States v. Giordano, 416 U.S. 505, 524 (1974).

[183] *Orozco*, 630 F. Supp at 1522 ("Congress has not in the wake of the *Leon* decision attempted to modify [section 2515].").

Whereas the Fourth Amendment exclusionary rule is judicially created, Title III's remedy is statutory and, therefore, a major exception comparable to *Leon*, which weakens the rights of the accused, would need to come from Congress.

[184] S. REP. NO. 90-1097, at 96 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185.

Judge Irving of the Southern District of California recognized the primacy of the statutory suppression remedy, which gives defendants greater protection than the Fourth Amendment, in *United States v. Orozco*,[185] where he noted that Congress, in 1968, had characterized section 2515 as an integral part of the Title III "system of limitations to protect privacy."[186] Judge Irving concluded that "Congress did not intend to bind the § 2515 remedy to whatever the state of search and seizure law is at the time of the interception."[187] Section 2515 is part of a statutory scheme, and if Congress wants to change that scheme, it has the option of amending Title III to provide for an express "good faith" exception.[188]

3. What Effect Does the ECPA Have on Whether the "Good Faith" Exception Applies to Title III?

Since 1986 and the passage of the ECPA, courts have differed significantly, taking three different approaches to the issue of whether a "good faith" exception applies to the statutory exclusionary rule in Title III. First, many courts have either applied, or suggested in dicta that they might apply, a "good faith" exception to the statutory exclusionary rule.[189] All but two of these courts relied solely on *Leon*, without even mentioning sections 2515 and 2518(10)(a). Unfortunately, by not discussing the statutory suppression remedy, the rulings fail to give insight into why the courts ignored the Supreme Court's command in *Giordano* that "[t]he issue does not turn on the judicially fashioned exclusionary rule . . . but upon the provisions of Title III."[190] Perhaps these courts believed that, in contrast to purely statutory violations like the one in *Giordano*, violations of constitutional proportions should undergo Fourth Amendment analysis, which includes exceptions to the exclusionary rule. This possibility will be explored later in this section.

The other two courts did mention the statutory exclusionary rule. In the first case, *United States v. Ojeda Rios*,[191] the court

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[185] 630 F. Supp. 1418.
[186] S. REP. No. 90-1097, at 96 (1968), *reprinted in* 1968 U.S.C.C.A.N. at 2185.
[187] *Orozco*, 630 F. Supp. at 1522 n.9.
[188] *Id.* at 1522.
[189] *See supra* note 167.
[190] United States v. Giordano, 416 U.S. 505, 524 (1974).
[191] 875 F.2d 17 (2d Cir. 1989), *vacated on other grounds*, 495 U.S. 257 (1990).

stated in dicta that *Leon* might apply to cases falling under section 2518(10)(a) but did not give a rationale for this statement.[192] In the second case, *United States v. Moore*,[193] the Eighth Circuit offered two reasons for holding that *Leon* applies to Title III cases. First, the court maintained that section 2518(10)(a), which reads in part, "[i]f the motion is granted,"[194] gives the trial judge the discretion to suppress evidence. Second, the court said that the 1968 Senate Report accompanying the Title III legislation reported that the statutory exclusionary rule was meant to apply existing Fourth Amendment principles.

Both rationales are unconvincing. First, the language of section 2518(10)(a) does not require a finding that judges have discretion; the Eighth Circuit did not cite a Supreme Court case so holding,[195] and the history of Title III would appear to hold otherwise. However, even if the judge does have some discretion, that alone does not lead to the conclusion that Congress meant to give judges enough latitude to apply a "good faith" exception. Second, as already discussed, although the statutory exclusionary rule was meant to incorporate existing Fourth Amendment principles, the "good faith" exception to the exclusionary rule was not part of "existing" law in 1968.[196]

The second approach used by courts since 1986 is to apply *Leon* only to violations of Title III provisions that codify constitutional law. These courts believe that Congress provided a partial "good faith" exception to the statutory exclusionary rule when it passed the ECPA in 1986. The controversy focuses on the language and legislative history of section 2518(10)(c), the provision added by Congress to make it clear that electronic communication does not enjoy the benefits of the statutory exclusionary rule. Section 2518(10)(c) reads:

> The remedies and sanctions described in [Title III] with respect to the interception of electronic communications are

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[192] *Id.* at 23.

[193] 41 F.3d 370, 376 (8th Cir. 1994).

[194] 18 U.S.C. § 2518(10)(a) (1994) (reading in part: "Any aggrieved person . . . may move to suppress the contents of any wire or oral communication . . . on the grounds that—(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval . . . . If the motion is granted, the contents of the intercepted . . . communication . . . shall be treated as having been obtained in violation of this chapter.").

[195] *Moore*, 41 F.3d at 376.

[196] *See supra* notes 184–187 and accompanying text.

> the only judicial remedies and sanctions for nonconstitutional violations of [Title III] involving such communication.[197]

Some courts have tried to show that since the subparagraph sets up a different analysis for constitutional and nonconstitutional violations of Title III when electronic communication is involved, wire and oral communication also get a different analysis depending on whether the violation is of a constitutional magnitude or is purely statutory in nature.

This argument was advanced in *United States v. Ferrara*.[198] In *Ferrara*, the court distinguished two types of provisions in Title III: those intended to codify judicially announced requirements of the Fourth Amendment and those intended to supplement Fourth Amendment protections. If the government violates one of the constitutionally based provisions, the *Ferrara* court would apply a Fourth Amendment analysis, including evolving exceptions to the exclusionary rule, such as the "good faith" exception in *Leon*.[199] If, however, the violation was of a purely statutory provision, then the court would subject the evidence "to the more static exclusionary provisions of the statute, sections 2515 and 2518(10)."[200] In the case before the court, the government had failed to tell the judge pertinent information that went to the particularity requirement contained in section 2518(11)(a)(ii).[201] Since the particularity requirement is constitutional in nature,[202] the court looked to Fourth Amendment case law and applied *Franks v. Delaware*.[203] In the court's opinion, *Franks* did not require suppression.[204] Had the violation been of a subparagraph that did not codify constitutional principles, however, the court would have applied sections 2515 and 2518(10)(a)[205] and, provided that the violated section was "central" to the statutory scheme of Title III, suppressed the evidence.

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[197] 18 U.S.C. § 2518(10)(c).

[198] 771 F. Supp. 1266 (D. Mass. 1991).

[199] *Id.* at 1273.

[200] *Id.* (stating that under statutory analysis, suppression is not required if (1) the government did not violate a "central" statutory provision, *and* (2) the error was both inadvertent and not a deliberate effort to mislead the court).

[201] *Id.*; 18 U.S.C. § 2518(11)(a)(ii) requires the government, in applying to intercept an oral communication without identifying the location that is to be tapped, to specify why such identification is impractical.

[202] *See supra* notes 37–38 and accompanying text.

[203] 438 U.S. 154 (1978).

[204] *Ferrara*, 771 F. Supp. at 1273.

[205] *Id.*

The *Ferrara* court also invoked *Giordano* to support the application of (evolving) Fourth Amendment analysis to violations of Title III that rise to a constitutional level.[206] In *Giordano*, the Court stated that for a purely statutory violation, only the statutory exclusionary rule of Title III applies and not the Fourth Amendment's judicially created exclusionary rule.[207] Justice Powell explicitly argued in a concurrence and dissent backed by three other justices that "[t]o the extent that the statutory requirements for issuance of an intercept order are nonconstitutional in nature, the exclusionary rule adopted to effectuate the Fourth Amendment does not pertain to their violation."[208] The *Ferrara* court opined that "[t]he clear implication of these remarks is that for statutory requirements which *are* constitutional in nature, the judicially fashioned exclusionary rule must be applied."[209]

The court in *United States v. Ambrosio*[210] applied a similar analysis. The court believed that "Congress, in an effort to keep the wiretap statute in line with the new developments in Fourth Amendment law, amended subsection 2518(10) in 1986 to add a paragraph limiting the statute's remedies and sanctions to nonconstitutional violations of the chapter."[211] The court concluded that for constitutional violations, courts should apply Fourth Amendment analysis, including its "good faith" exception. The *Ambrosio* court then applied *Leon* to admit evidence that was arguably gathered under a court order not supported by probable cause.[212]

Supporters of this position point to the House Report that accompanied the first version of the ECPA that passed the House. With regard to section 2518(10)(c), the report stated that:

> In the event that there is a violation of law of a constitutional magnitude the court involved in a subsequent criminal trial will apply the existing constitutional law with respect to the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 652 (1961);

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[206] *Id.* at 1299–1300.

[207] United States v. Giordano, 416 U.S. 505, 524 (1974).

[208] *Id.* at 558; *see also* United States v. Donovan, 429 U.S. 413, 432 n.22 (1977) (in speaking about purely statutory violations, the Court, without holding whether constitutional violations would be governed by Title III or by the judicially created exclusionary rule, stated: "The availability of the suppression remedy for these statutory, as opposed to constitutional, violations . . . turns on the provisions of Title III rather than the judicially fashioned exclusionary rule . . . .").

[209] *Ferrara*, 771 F. Supp. at 1299.

[210] 898 F. Supp. 177, 180–89 (S.D.N.Y. 1995).

[211] *Id.* at 187.

[212] *Id.* at 189.

Massachusetts v. Sheppard, 104 S.Ct. 3424 [468 U.S. 981] (1984); *United States v. Leon*, 104 S.Ct. 3405 [468 U.S. 897] (1984).[213]

By referring to *Leon*, the report can be read to imply that there was to be a "good faith" exception for violations of constitutional proportions. At least one expert has taken this view, stating that "[a]s a result of the amendment of section 2518(10) in 1986, whereby subsection (c) was added to that section, Congress has incorporated the good faith exception for violations *of a constitutional magnitude*."[214]

This interpretation, however, is mistaken. Congress did not intend different suppression remedies to apply to different provisions of Title III. To understand Congress's intent, the history of section 2518(10)(c) must be viewed in the light in which it was passed. Congress passed the ECPA primarily to protect new technologies that the 1968 Act did not cover.[215] Yet, "[a]s a result of discussions with the Justice Department,"[216] the statutory exclusionary rule was not extended to these new technologies. Section 2518(10)(c) was created only "to underscore that . . . the [ECPA] does not apply the statutory exclusionary rule . . . to the interception of electronic communications."[217] Section 2518(10)(c) had nothing to do with the "good faith" exception or with distinguishing violations of a constitutional magnitude from those that were purely statutory in nature. All Congress tried to do in section 2518(10)(c) was to clarify that section 2515 does not provide a statutory exclusionary remedy for electronic communication.

When wire and oral communications are involved, section 2515 provides for greater exclusion than Fourth Amendment analysis requires. For electronic communication, Congress obviously could not have provided less exclusion than required by the Supreme Court. However, in order to satisfy the Justice Department, Congress decided to provide electronic communication with only the minimum required protection—the judicially crafted exclusionary rule. Section 2518(10)(c) was added

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[213] H.R. No. 99-647, at 48 (1986).

[214] CARR, *supra* note 158, § 6.3A (emphasis added).

[215] S. REP. No. 99-541, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3559 ("the law must advance with the technology to ensure the continued vitality of the fourth amendment").

[216] *Id.* at 23, *reprinted in* 1986 U.S.C.C.A.N. at 3577.

[217] *Id.*

to make it clear that electronic communication only enjoys this minimum level of protection *and no more.* Since Congress wanted to give no greater protection than necessary, the "good faith" exception, which allows in more evidence, certainly applies when electronic communication is involved. Read in this light, the House Report confirms that, for electronic communication, a violation of constitutional proportions should invoke Fourth Amendment analysis, including a "good faith" exception to the judicially created exclusionary rule, whereas for nonconstitutional violations, there is no exclusionary protection at all. At least one expert agrees, suggesting that section 2518(10)(c) "more-or-less explicitly renders *Leon* applicable to the interception of *electronic communications*."[218] No statutory language or legislative history implies that section 2518(10)(c) extends *Leon* to non-electronic communication.

Perhaps the greatest weakness of the *Ferrara/Ambrosio* analysis is the absurd result that would follow from applying different exclusionary principles to the provisions of Title III that codify constitutional mandates than to those that provide extra statutory protections. Under the *Ferrara* analysis, if there is a violation of a "central" statutory provision that is nonconstitutional in nature, the court must suppress the evidence under section 2515. However, if the violation rises to a constitutional level, suppression is not required if the government acted in "good faith." Thus a more significant violation, one that is constitutional in nature, will more often result in evidence being admitted at trial than a violation of a less important provision. "[T]he scope of the exclusionary rule contained in [Title III] must be interpreted by the courts according to the principles of statutory construction" and not by the judicially created exclusionary rule.[219] Typical statutory analysis provides that a court should not interpret a statute to lead to an absurd result.[220] Even on today's Court, where the "plain meaning" of statutes is of primary importance,[221] members

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[218] FISHMAN & MCKENNA, *supra* note 86, at § 22:5 (a) (emphasis added).

[219] Hussong v. Warden, Wisconsin State Reformatory, 623 F.2d 1185, 1187 (7th Cir. 1980) (holding that habeas review is permissible for violations of the statutory exclusionary rule, because Title III incorporated existing Fourth Amendment principles, and in 1968, habeas review was available for violations of search and seizure principles, though that was no longer the case in 1980).

[220] United States v. Turkette, 452 U.S. 576, 580 (1981) ("absurd results are to be avoided").

[221] *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 577 (2d ed. 1995).

of the Court still invoke the absurd result doctrine.[222] According to Justice Stanley Reed:

> There is, or course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.[223]

In the case of section 2518(10)(c), the statutory language does not suggest that the "good faith" exception should be applied to constitutional violations of Title III where wire and oral communication is concerned. The subparagraph only refers to electronic communication. Therefore, the "plain meaning" of the statute does not support the results in *Ferrara* and *Ambrosio*. Even if it did, the absurd result doctrine would trump.

This leads us to the third, and last, approach—that no "good faith" exception exists for any Title III violation involving wire or oral transmissions. The Department of Justice, the Clinton administration, and many members of Congress seem to hold this view. In its most recent attempt to pass counterterrorism legislation, the Clinton administration sent S. 761 to Congress.[224] The bill, which was never reported out of committee,[225] con-

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[222] For example, in Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989), Chief Justice Rehnquist and Justice O'Connor joined Justice Kennedy's concurrence, which stated:

> Where the language of a statute is clear in its application, the normal rule is that we are bound by it . . . . Where the plain language of the statute would lead to "patently absurd consequences," . . . that "Congress could not *possibly* have intended," . . . we need not apply the language in such a fashion . . . . [T]his narrow exception . . . demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way.
>
> This exception remains a legitimate tool . . . where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone.

Id. at 470–71 (citing, among others, Rector, Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

[223] United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) (citations omitted).

[224] *The Omnibus Counterterrorism Act of 1995*, S. 761, 104th Cong. (1995).

[225] Bill tracking, *available in* LEXIS, Legis Library, BLT 104 File.

tained a provision that would have amended section 2515 to allow evidence to be admitted in court even if there was a violation of Title III, unless the defendant could show that there was bad faith on the part of government officials.[226] In testimony before the Senate Committee on the Judiciary regarding a similar provision in H.R. 2703,[227] Deputy Attorney General Jamie S. Gorelick told the Committee that "[c]urrent law contains a statutory exclusionary rule which dates back to 1968. Thus, constitutional law in the area of wiretaps has been frozen at a point in time thirty years in the past."[228] Under this view, *Leon* has not been incorporated into Title III.[229]

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[226] S. 761, 104th Cong. § 805 (as of May, 1995). Senate bill 761 would have amended § 2515 so that the exclusionary rule "shall not apply to the disclosure by the United States in a criminal trial or hearing before a grand jury of the contents of a wire or oral communication, or evidence derived therefrom, unless the violation of this chapter involved bad faith by law enforcement." *See also Electronic Communications Provisions of the Administration Counterterrorism Proposal: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) [hereinafter *Senate Judiciary Counterterrorism Hearings*].

Critics of the government proposal argued that showing bad faith is a nearly impossible undertaking for the defendant, because evidence will almost always be in the possession of the officers, and that technical defects are already excused by the courts. *The Omnibus Counterterrorism Act of 1995 and the Counterterrorism Prevention Act of 1995: Hearings on S. 761 and S. 735 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995), *available in* Federal News Serv., 1995 WL 10386595 (prepared testimony of James X. Dempsey, Deputy Director on Behalf of the Center for National Security Studies); *see also The Clinton Administration's Proposal on Counterterrorism Intelligence Gathering: Hearings Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Donald M. Haines, Legislative Counsel of the American Civil Liberties Union).

A later version of a similar House bill, H.R. 2703, sponsored by Rep. Henry Hyde (R-Ill.), struck the "bad faith" language, and replaced it with language that would have put the burden on the government to show "good faith." Under that version of the bill, evidence would have been admitted in court, even if gathered in violation of Title III, "if any law enforcement officers who intercepted the communication or gathered the evidence derived therefrom acted with the reasonably objective belief that their actions were in compliance with Title III." H.R. 2703, *The Comprehensive Antiterrorism Act of 1995*, H.R. 2703, 104th Cong. § 305 (as introduced in the House on Dec. 5, 1995), *available at Thomas* (last modified April 16, 1997) <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR02703:>.

Though the Administration feels that with a Republican Congress, they "would certainly be able to achieve the extension of the *Leon* standard to wiretaps," *Counter-Terrorism Legislation: Hearings on H.R. 1710 Before the House Comm. on the Judiciary*, 104th Cong. 248–49 (1995) (witness, Deputy Attorney General Jamie Gorelick) (LEXIS, News Library, Curnws File, until June 1997, then Arcnws File), the counterterrorism legislation that passed the House did not contain the *Leon* extension. *See* 142 CONG. REC. 34, H2175 (1996) (Barr amendment striking "good faith" exception in H.R. 2703).

[227] *The Comprehensive Antiterrorism Act of 1995*, H.R. 2703, 104th Cong. § 305 (as of May, 1995).

[228] *Senate Judiciary Counterterrorism Hearings*, *supra* note 226 (statement of Jamie S. Gorelick, Deputy Attorney General).

[229] *See* Michael A. Froomkin, *The Metaphor is the Key: Cryptography, the Clipper*

Congress knew about *Leon* when it revised Title III in 1986; it chose not to include an express "good faith" exception in the ECPA.[230] In the two years between the decision in *Leon* and the passage of the ECPA, each of the three courts considering the issue declined to apply a "good faith" exception to wiretap cases.[231] In addition, James Knapp, former Deputy Assistant Attorney General for the Criminal Division, stated in hearings before Congress, just seven months before final passage of the ECPA, that "a provision should be included in Title III providing for a reasonable good faith exception to the exclusionary rule in Title III cases comparable to that which the Supreme Court created in *United States v. Leon*, 104 S. Ct. 3430 (1984) for constitutional violations."[232] Despite the fact that Congress accepted many of Mr. Knapp's recommendations, including the exclusion of electronic communication from the statutory exclusionary rule found in Title III,[233] Congress chose not to follow this recommendation, which would have overruled the judicial interpretations. Congress's silence is the clearest sign of its intent.[234] There is no "good faith" exception to the statutory exclusion of evidence gathered in violation of any "central" provision of Title III.

Chip, and the Constitution, 143 U. PA. L. REV. 709, 897 n.335 (1995) (section 2515 "is unaffected by the growing body of exceptions the Supreme Court has placed on the constitutional exclusionary rule, such as good faith exceptions."); *The Comprehensive Antiterrorism Act of 1995: Hearings Before the House Comm. on the Judiciary*, 104th Cong. (1995) (testimony of James P. Fleissner, Assistant Professor of Law, Mercer University School of Law) (LEXIS, News Library, Curnws File until June 1997, then Arcnws File) (stating that an amendment in H.R. 1710, § 305, also introduced in the 1st Session of the 104th Congress, "would bring the exclusionary rule for violations of the various procedures in Title III into conformity with the exclusionary rule articulated by the Supreme Court for violations of the fourth amendment").

[230] Congress also revisited Title III in 1994, again choosing not to include an express "good faith" exception. *Communications Assistance for Law Enforcement Act of 1994*, Pub. L. No. 103-414, 108 Stat. 4279 (codified in scattered sections of 18 U.S.C.).

[231] *See supra* note 181.

[232] *The Electronic Communications Privacy Act of 1985: Hearings on H.R. 3378 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong. 244 (1986).

[233] *See supra* notes 113–121 and accompanying text.

[234] *See* Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). *But see* Fogerty v. Fantasy, Inc., 114 S. Ct. 1023, 1030–33 (1994) (rejecting *Lorillard* rule where there was not a settled construction of the statute prior to congressional reenactment). For a discussion of canons of statutory construction regarding congressional silence, see ESKRIDGE & FRICKEY, *supra* note 221, at 814.

C. *Should There Be a "Good Faith" Exception to the Statutory Exclusionary Rule?*

Congress should resolve the difference of opinion in the lower courts as to whether *Leon* applies to the statutory exclusionary rule. Because the Supreme Court hears so few cases,[235] Congress should not leave resolution of this question to the courts. In addition, if the issue were to arise before the Supreme Court, the Court would likely base its ruling on the "plain meaning" of the statute, or on what the congressional intent was, rather than on whether it is sound policy to have a "good faith" exception. Congress is in a much better position to state clearly its intent and to resolve the dilemma in a way that best fulfills the purpose of Title III. In so doing, Congress should resist the Clinton administration's calls for a "good faith" exception and should amend section 2515 to make clear that there is no such exception in Title III.

The history of the judicially crafted "good faith" exception shows that the exception is applied mainly when officers rely on a faulty warrant through no mistake of their own.[236] A "good faith" exception to the statutory exclusionary rule might be appropriate if it were confined to situations where law enforcement officials complied fully with every Title III requirement, before and after interception; applied for an intercept order thinking there was probable cause; and a judge mistakenly approved an order that lacked probable cause.

However, this is not the type of "good faith" exception that courts have applied to Title III. Instead, courts have applied a "good faith" exception where the law enforcement officials themselves have violated Title III. For instance, in *United States v. Ambrosio*,[237] the defendant complained that a law enforcement official had left out material facts in his affidavit accompanying the application for an intercept order, thus violating 18 U.S.C.

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[235] In the 1994 term, the Supreme Court ruled on only 86 cases. *The Statistics*, 109 HARV. L. REV. 340, 340 (Nov. 1995).

[236] *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 108–09 (2d ed. 1992). For example, in Arizona v. Evans, 115 S. Ct. 1185 (1995), a court clerk had failed to remove a quashed warrant from computer records. When an officer stopped a car for a routine traffic violation and the officer's computer showed the driver had an outstanding warrant, the officer arrested the driver. Pursuant to a search, he found marijuana in the car. Allowing the marijuana to be admitted as evidence, the Court held that the exclusionary rule does not apply to an unlawful search based on a reasonable, but mistaken, good faith belief that a warrant was outstanding. *Id.* at 1192–94.

[237] 898 F. Supp. 177, 188–89 (S.D.N.Y. 1995).

§ 2518(1)(b), which requires "a full and complete statement of the facts and circumstances relied upon by the applicant."[238] The court stated that, following the rationale in *Franks*, suppression should only be required when the defendant can show that the affiant deliberately or with reckless disregard omitted material facts.[239] Therefore, even if the *Ambrosio* court had found that the agent knew of the material facts, it would have suppressed the evidence only if "the omitted information was '*clearly critical* to the probable cause determination.'"[240] On the other hand, a straight Title III analysis, without a "good faith" exception, would require suppression if the judge found that without the material facts, the affidavit was not a "full and complete statement of the facts and circumstances relied upon by the applicant," as required by section 2518(1)(b).

The "good faith" proposals put forth by the Clinton administration and by certain members of Congress would go even further than *Ambrosio* in admitting evidence obtained in violation of Title III. The exceptions found in the various counterterrorism bills[241] would apply to all provisions of Title III, including those provisions that regulate the conduct of the government before and after an interception is made.[242] For example, if an agent acting in "good faith" fails to tell the judge about a previous application for an intercept order involving the same persons or places as in the current application, as required by 18 U.S.C. § 2518(1)(e),[243] the Clinton proposal would not require suppression. Assuming that an agent will almost always act in "good faith," the exception would swallow the rule. Instead,

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[238] 18 U.S.C. § 2518(1)(b) (1994).

[239] *Id.* at 188–89.

[240] *Id.* at 189 (emphasis added) (citing Rivera v. United States, 928 F.2d 592, 604 (2d Cir. 1991)).

[241] *See supra* notes 224–229 and accompanying text.

[242] *The Omnibus Counterterrorism Act of 1995 and the Counterterrorism Prevention Act of 1995: Hearings on S. 761 and S. 735 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (LEXIS, News Library, Curnws File, until June 1997, then Arcnws File) (prepared testimony of James X. Dempsey, Deputy Director, Center for National Security Studies). Examples of post-interception requirements are the sealing requirements in section 2518(8)(a) and the notice provisions of section 2518(8)(d).

[243] 18 U.S.C. § 2518(1)(e) ("Each application shall include . . . (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application.").

Congress should require law enforcement to be vigilant in complying with each provision of Title III.

The Supreme Court has already made considerable concessions to law enforcement interests. In *United States v. Chavez*,[244] the Court ruled that, absent bad faith on the part of law enforcement, technical violations of statutory provisions that are not "central" to the purpose of the statute will not result in suppression.[245] In *United States v. Donovan*,[246] the Court ruled that violation of two statutory provisions did not require suppression because the provisions were not "central" to the statutory purpose of guarding against unwarranted electronic surveillance.[247] These concessions already significantly erode the suppression remedy.

Since 1968, the Department of Justice has used its wiretapping powers in a limited manner,[248] and "the quality of work by those responsible for obtaining and executing Title III orders is done in a professional manner."[249] Nevertheless, further encroachment into the suppression remedy is unwarranted and a threat to the privacy interests that were "an overriding congressional concern"[250] when enacting Title III in 1968. The Senate Report which accompanied Title III noted that "a suppression rule is necessary and proper to protect privacy . . . it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications."[251] In order to ensure the continued vitality of this protection, it is important for Congress to require law enforcement agencies to be vigilant in their application of each Title III

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[244] 416 U.S. 562 (1974).

[245] *Id.* at 572, 574–76.

[246] 429 U.S. 413 (1977).

[247] The two provisions were 18 U.S.C. § 2518(1)(b)(iv), which requires the government to include in an intercept application all suspects whose communications they expect to intercept, and 18 U.S.C. § 2518(8)(d), which requires that the government provide the judge with a post-intercept list of all individuals whose communications were intercepted and whose names were not in the intercept application.

[248] In 1992, 340 court orders were issued under Title III. *The Comprehensive Antiterrorism Act of 1995: Hearings on H.R. 1710 Before the House Comm. on the Judiciary*, 104th Cong. 313 (1995) (LEXIS, News Library, Curnws File, until June 1997, then Arcnws File) (testimony of James P. Fleissner, Assistant Professor, Mercer University School of Law) (citing BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993, at 475, 490 (1994)) [hereinafter House Antiterrorism Hearings].

[249] House Antiterrorism Hearings at 313 (testimony of James P. Fleissner, Assistant Professor, Mercer University School of Law).

[250] Gelbard v. United States, 408 U.S. 41, 48 (1972).

[251] S. REP. No. 90-1097, at 41 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185.

requirement. As one court has put it, "[s]uppression [serves] the deterrent purpose of the Title III exclusionary rule by placing the initial burden of ensuring compliance with the statute where it belongs: on the Justice Department."[252]

To provide reasonable privacy protection to citizens, it is important to require vigilance in complying with the statutory commands of Title III. An agent could be acting in "good faith" without truly acting with "vigilance." A strong Title III suppression remedy assures this continued vigilance and the continued protection of both law enforcement interests and the privacy of individual citizens.

V. CONCLUSION

Laws are designed to affect behavior.[253] Our tax laws are designed to spur growth and encourage home building, charity, and family values. Our environmental laws are aimed at encouraging recycling and ending toxic waste dumping in our oceans. Similarly, the constitutional protections guaranteed by the Fourth Amendment are aimed at restraining government, which, if left alone, might abuse its power. The wiretapping laws complement this goal.

By excluding electronic communication from the statutory exclusionary rule found in sections 2515 and 2518(10)(a) of Title III, Congress reduced the incentive on law enforcement to take precautions to ensure compliance with every provision of Title III when electronic communication is involved. Similarly, a "good faith" exception to the statutory exclusionary rule also reduces the incentive for law enforcement agents to be vigilant in applying Title III. An agent, acting in "good faith," could honestly forget to comply with every Title III provision. If there is no "good faith" exception, however, the agent would have to be especially careful to follow every Title III requirement in order to ensure the admissibility of intercepted communications. The Supreme Court already pardons mere technical errors. Further encroachment would be harmful.

Congress must revisit Title III. By eliminating section 2518(10)(c) and adding electronic communication to the statu-

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[252] United States v. Ward, 808 F. Supp. 803, 808 (S.D. Ga. 1992).

[253] *See* Merrell Dow Pharm. v. Thompson, 478 U.S. 804, 828 (1986) (Brennan, J., dissenting) ("Congress passes laws in order to shape behavior.").

tory exclusionary rule, Congress would force law enforcement officials to be as thorough in their application of Title III when electronic communication is involved as they must be when intercepting wire or oral communication. Additionally, giving electronic communication the same level of protection as other forms of communication would end formalistic distinctions and encourage the growth of emerging technologies. Finally, Congress should make it clear that there is no "good faith" exception to the statutory exclusionary rule.

E-mail is becoming increasingly popular. By the turn of the century, other new technologies will have arrived. The statutory exclusionary rule found in Title III is the people's guarantee that government will comply vigilantly with all Title III provisions. To encourage the growth of the new technologies and confidence in e-mail, Congress should act to give this same guarantee to electronic communication and resist any attempts at further eroding this important protection.

ARTICLE

THE CRIMINALIZATION OF VIRTUAL CHILD PORNOGRAPHY: A CONSTITUTIONAL QUESTION

DEBRA D. BURKE*

Child pornography is not constitutionally protected speech. In excepting such speech from protection, First Amendment jurisprudence has focused upon the harm inflicted upon its minor participants. Technological advances, however, now have obviated the need to use minors in the production of child pornography. In response, Congress amended the definition of child pornography under federal criminal law so as to include materials that only appear to depict minors engaging in sexually explicit conduct. This Article discusses the constitutionality of this new statutory definition. The author concludes that the provisions amending the definition of illegal child pornography to include that which is advertised as being real and that which is composed using identifiable minors are constitutionally sound, but that the inclusion of visual depictions that merely appear to be made with minors is constitutionally suspect.

> [F]reedom of press is not the freedom for the thought you love the most. It's freedom for the thought you hate the most.
>
> —Larry Flynt[1]

Child pornography is a growing national concern. In 1995, federal investigative agencies presented more child pornography cases than in any previous year, while the annual increase in cases filed was the highest in ten years.[2] Technological advances have only exacerbated the problem. In addition to the threat of pedophiles stalking children on-line,[3] the growth of

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[1] *CNN Showbiz Today: Celebrity Screening of The People Versus Larry Flynt* (CNN cable television broadcast, Dec. 3, 1996) (transcript on file with author).

[2] *See Child Pornography Prevention Act of 1995: Hearings on S. 1237 Before the Senate Comm. on the Judiciary*, 104th Cong. (1996) (statement of Kevin DiGregory, Deputy Assistant Attorney General, Department of Justice) [hereinafter *1996 Hearings*]. The fact that pornography is so lucrative exacerbates the volume of trafficking in such material. *See Effect of Pornography on Women and Children: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong. 142 (1984) (statement of Daniel S. Campagna, Assistant Professor of Criminal Justice, Appalachian State University [hereinafter *1984 Hearings*].

[3] *See, e.g.*, Barbara Kantrowitz, *Child Abuse in Cyberspace*, NEWSWEEK, Apr. 18, 1994, at 40; Michael Meyer, *Stop! Cyberthief!*, NEWSWEEK, Feb. 6, 1995, at 36, 37;

Internet usage has resulted in a proliferation of on-line child pornography.[4]

Not only have computers facilitated the distribution of child pornography, they have also revolutionized its creation. No longer are children needed in the production of child pornography. Through a technique known as *morphing*,[5] the image of a *Penthouse* Pet can be scanned into a computer,[6] then transformed fairly inexpensively[7] through animation techniques into the im-

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Sandy Rovner, *Molesting Children by Computer*, WASH. POST, Aug. 2, 1994, at 15. Commercial on-line service providers, as well as the National Center for Missing and Exploited Children, encourage parents to educate their children on safety rules for cyberspace. *See Teach Your Children Well*, U.S. NEWS & WORLD REP., Jan. 23, 1995, at 60.

[4] *See, e.g.*, *Man Arrested After Retrieving Child Pornography by Computer*, N.Y. TIMES, May 19, 1995, at A16; Daniel Pearl, *On-Line: Government Tackles a Surge of Smut on the Internet*, WALL ST. J., Feb. 8, 1995, at B1; John Schwartz, *Sex Crimes on Your Screen*, NEWSWEEK, Dec. 23, 1991, at 66; Mike Snider, *FBI Probes On-line Child Pornography*, USA TODAY, Jan. 23, 1995, at 1D; Mike Snider & Tom Curley, *On-line Services Join Porn Battle*, USA TODAY, Sept. 15, 1995, at 3A; Kara Swisher, *On-line Child Pornography Charged as 12 Are Arrested*, WASH. POST, Sept. 14, 1995, at A1. A recent study conducted by a Carnegie Mellon research team suggested that pedophilic and hebephilic pornography was widely available in every state through computer networks. *See* 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 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849, 1914 (1995). Pedo/Hebephilia represented over 15% of the downloaded files examined. *See id.* at 1891. Arguably, computers have become the primary means of distributing child pornography. *See* John C. Scheller, Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 990 (1994). *See also Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearings on S. 892 Before the Senate Committee on the Judiciary*, 104th Cong. 57 (1995) (statement of Barry F. Crimmins, Investigative Journalist, Lakewood, Ohio) ("computers and modems have created an anonymous 'Pedophile Superstore'").

Distribution of child pornography over computer networks is international in scope. *See* Scott Dean, *Cyberspace: The Final Frontier*, PA. L.J., Apr. 12, 1993, at A-1; Jordana Hart & Monica Young, *Child Pornography via Computer Is Focus of Federal Sweep*, BOSTON GLOBE, Mar. 7, 1993, at 48; Vic Sussman, *Policing Cyberspace*, U.S. NEWS & WORLD REP., Jan. 23, 1995, at 54, 56.

[5] "Morphing" is short for "metamorphosing," a technique that allows a computer to fill in the blanks between dissimilar objects in order to produce a combined image. *See* SCOTT ANDERSON, MORPHING MAGIC 2–3 (1993). For a demonstration of morphing, see *3D Volume Morphing* (May 15, 1996) <http://www-graphics.stanford.edu/tolis/morph.html>; Michael Giles, *Morphs For All* (May 15, 1996) <http://www.physics.oberlin.edu/students/ mgiles/morph/Morph.html>. Morphing, or "reanimation technology," will pose other new legal issues as well, such as the existence of a post mortem right of publicity. *See* Bruce Weber, *Why Marilyn and Bogie Still Need a Lawyer*, N.Y. TIMES, Mar. 11, 1994, at B18.

[6] The process of scanning or digitizing allows the picture to be downloaded and stored in binary form. *See* David J. Loundy, *E-Law 2.0: Computer Information Systems Law and System Operator Liability Revisited*, MURDOCH ELECTRONIC J.L. nn.130–32 (1994) (available at <http://gopher.eff.org>).

[7] While Hollywood's renditions in such notable films as *Terminator 2: Judgment Day* and *Jurassic Park* represent expensive and sophisticated computer-generated animations, morphing software is available today for under $200. *See 1996 Hearings*, *supra*

age of a child.[8] This computer-generated pornography, or *virtual child pornography*, can be customized to suit specific sexual preferences and used to alter non-obscene pictures of existing children. It also can be created imaginatively from adult pornography.[9]

In response to this technological development, Congress passed the Child Pornography Prevention Act of 1996,[10] which amends existing federal law to include computer-generated child pornography within the definition of child pornography if: (a) its production involved the use of a minor engaging in sexually explicit conduct; (b) it depicts, or appears to depict, a minor engaging in sexually explicit conduct; (c) it has been created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or (d) it is promoted or advertised as depicting a minor engaging in sexually explicit conduct.[11] While the Supreme Court has determined that child pornography does

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note 2, (statement of Sen. Hatch); David B. Johnson, Comment, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 314–15 (1994); Mike Snider, *New Morphing Software Shapes the Future of Video Graphics*, USA TODAY, June 20, 1995, at 8D.

[8] *See* Gary L. Gassman, *Moot Court Competition Bench Memorandum: Sysop, User and Programmer Liability: The Constitutionality of Computer Generated Child Pornography*, 13 J. MARSHALL J. COMPUTER & INFO. L. 481, 486 (1995); Johnson, *supra* note 7, at 314–16; Henry J. Reske, *Computer Porn a Prosecutorial Challenge*, 80 A.B.A.J., Dec. 1994, at 40. The graphics software both combines the image of the child's face with the adult's body and allows for erasure of pubic hair and reduction in breast or genital size to create a realistic portrait of child pornography. *See 1996 Hearings*, *supra* note 2 (statement of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families).

[9] *See 1996 Hearings*, *supra* note 2 (statement of Sen. Hatch). The future of virtual sex, which would incorporate sensory capacities along with enhanced visual imaging, is astounding. *See* Ronald K.L. Collins & David M. Skover, *The Pornographic State*, 107 HARV. L. REV. 1374, 1381–82 (1994); HOWARD RHEINGOLD, VIRTUAL REALITY 347–52 (1991); Kara Swisher, *See Me, Feel Me, Touch Me, Um, Peel Me: Virtual Reality's Dirty Secret*, WASH. POST, July 11, 1993, at F1, F6.

[10] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 121, 110 Stat. 3009 (1996). The final version of the Act, which was attached to H.R. 3610, is contained in H.R. REP. NO. 104-863, at 28–34 (1996). The application of the Act is not necessarily limited to virtual child pornography. The new definition of child pornography includes all "apparent" child pornography, however it is produced. *See Nabakov Cocktail*, VANITY FAIR, Jan. 1997, at 92, 125–126 (discussing the statute's potential impact on the remaking of *Lolita* using a minor with adult body doubles for sex scenes).

[11] The Act also adds section 2252A, which prohibits the knowing transportation, receipt, distribution or reproduction for distribution of child pornography—as defined under section 2256—in interstate or foreign commerce. As originally proposed, the Act did not include in its definition a visual depiction that was created, adapted or modified so as to appear that an identifiable minor was engaging in sexually explicit conduct. *See* S. 1237, 104th Cong. (1995), *reprinted in* 141 CONG. REC. S13,543 (daily ed. Sept. 13, 1995). The Judiciary Committee adopted that provision as an amendment. *See* S. REP. NO. 104-358, (1996).

not enjoy constitutional protection,[12] this decision assumed the use of actual children in the production of the pornography. In light of the inclusion of virtual child pornography in the new statute, the issue is now whether Congress can criminalize the possession and distribution of childless child pornography without infringing upon First Amendment freedoms. This paper will discuss the law that impacts child pornography and will examine the constitutionality of the criminalization of virtual child pornography.

I. The Constitutional Framework

A. New York v. Ferber *and its Implications*

New York v. Ferber examined the constitutionality of a New York criminal statute prohibiting persons from knowingly promoting sexual performances by minors by distributing materials that depict such performances, even if the materials were not legally obscene.[13] In upholding the statute, the Court concluded that states were "entitled to greater leeway in the regulation of pornographic depictions of children"[14] for five reasons.

First, the Court found the prevention of sexual exploitation and abuse of children to be a "government objective of surpassing importance"[15] because it recognized the harm to the physiological, emotional, and mental health of the child.[16] The second reason given by the Court was that a state legitimately could conclude that sexual abuse is linked to the distribution of child

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[12] *See* New York v. Ferber, 458 U.S. 747 (1982). The Court has determined that some speech lies outside of First Amendment protection and thus may be circumscribed. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement to imminent lawless activity); New York Times v. Sullivan, 376 U.S. 254 (1964) (libel); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

[13] *See Ferber*, 458 U.S. at 749. The films at issue were of young boys masturbating. *See id.* at 752. The statute defined minors as children under the age of 16. *See id.* at 749. For a complete discussion of the case, see Joan S. Colen, Note, *Child Pornography: Ban the Speech and Spare the Child?*, 32 DEPAUL L. REV. 685 (1983); Robert Warner Ferguson, Note, *Constitutional Law—A New Standard for the State's Battle against Child Pornography*—New York v. Ferber, 19 WAKE FOREST L. REV. 95 (1983); Donald C. Massey, Note, *No First Amendment Protection for the Sexploitation of Children*, 29 LOY. L. REV. 227 (1983); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 141 (1982).

[14] *Ferber*, 458 U.S. at 756.

[15] *Id.* at 757.

[16] *See id.* at 758.

pornography. The third justification emphasized the integral role that the advertising and selling of child pornography plays in the production of such materials, "an activity [that is] illegal throughout the Nation."[17] Fourth, the Court concluded that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis,"[18] and that the "First Amendment interest is limited to that of rendering the portrayal somewhat more 'realistic' by utilizing or photographing children."[19] Fifth and finally, the Court held that creating another classification of speech outside of First Amendment protection, that is, nonobscene child pornography, was not incompatible with earlier decisions,[20] particularly when the class of materials "bears so heavily and pervasively on the welfare of children *engaged* in its production."[21]

In holding that child pornography did not enjoy First Amendment protection, the Court placed it on the same level as obscene adult pornography,[22] yet altered the definition somewhat. Obscenity that is not protected under the First Amendment[23] is defined in *Miller v. California*[24] by a conjunctive inquiry into "(a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [in sex]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[25]

The *Ferber* Court adjusted the *Miller* formulation by stipulating that the trier of fact (1) did not need to find that the material appeals to the prurient interest of the average person, (2) is not required to find that the sexual conduct portrayed be done in a

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[17] *Id.* at 761.
[18] *Id.* at 762.
[19] *Id.* at 763.
[20] *See supra* note 12.
[21] *Ferber*, 458 U.S. at 764 (emphasis added).
[22] *See* Osborne v. Ohio, 495 U.S. 103, 140 (1990) (Brennan, J., dissenting) ("*Ferber* did nothing more than place child pornography on the same level of First Amendment protection as obscene adult pornography, meaning that its production and distribution could be proscribed.").
[23] *See* Roth v. United States, 354 U.S. 476, 485 (1957). Even prior to *Roth*, the Court had suggested that obscenity was not constitutionally protected speech. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
[24] 413 U.S. 15 (1973).
[25] *Id.* at 24 (citations omitted).

patently offensive manner, and (3) need not consider the material at issue as a whole.[26] While the definition of unprotected child pornography is not exact and to a degree shares the same difficulty in consistent application as that of *Miller*,[27] the Court suggested that the statute at issue in *Ferber* is directed at the "hard core of child pornography"[28] and that permissible educational, medical, or artistic works would amount to little more than "a tiny fraction of the materials within the statute's reach."[29]

The *Ferber* Court found that suppression of this speech was justified by the state's compelling interest in protecting its children from sexual abuse,[30] an interest that complements an overall constitutional framework favoring statutory provisions that promote and protect the interests of children.[31] Even so, the *Ferber*

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[26] *See Ferber*, 458 U.S. at 764. Alternatively stated, a trier of fact must find (1) that the individual visual depiction, in isolation, appeals to the prurient interest of some person; (2) that the sexual conduct portrayed is either patently or latently offensive; and, (3) that the individual visual depiction, in isolation, lacks serious literary, artistic, political or scientific value. *See* United States v. Reedy, 632 F. Supp. 1415, 1421 (W.D. Okla. 1986), *aff'd*, 845 F.2d 239 (10th Cir. 1988). Because one picture of a child engaged in sexual conduct is exploitative and a permanent recordation, the work need not be considered as a whole and can be evaluated in isolation under the third prong of the *Miller* test. *See* Samuel T. Currin & H. Robert Showers, *Regulation of Pornography—The North Carolina Approach*, 21 WAKE FOREST L. REV. 263, 312 (1986). Also, community standards are irrelevant given that what is at issue is the sexual exploitation of a child. *See* Rimm, *supra* note 4, at 1902 n.116.

[27] *See* Ferguson, *supra* note 13, at 117; Todd J. Weiss, Note, *The Child Protection Act of 1984: Child Pornography and the First Amendment*, 9 SETON HALL LEGIS. J. 327, 341 (1985). *See also* Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 108–11 (1996) (arguing that the ambiguity of the *Miller* test threatens to become intolerable in cyberspace).

[28] *Ferber*, 458 U.S. at 773.

[29] *Id.* The statute analyzed in *Ferber* thus survived plaintiffs' overbreadth challenge. *See id.* at 766–74. For a discussion of the overbreadth doctrine as applied to child pornography legislation, see Robert R. Strang, Note, *"She Was Just Seventeen . . . And the Way She Looked Was Way Beyond [Her Years]": Child Pornography and Overbreadth*, 90 COLUM. L. REV. 1779 (1990) (arguing that while the First Amendment requires that distributors be allowed a mistake of age defense, it permits producers to be held strictly liable as to the age of the performers). Even if visual material had some serious societal value, its protection would still have to be weighed against any harm done to the child. *See* Jeffrey J. Kent & Scott D. Truesdell, *Spare the Child: The Constitutionality of Criminalizing Possession of Child Pornography*, 68 OR. L. REV. 363, 390 (1989).

[30] *See Ferber*, 458 U.S. at 777–78 (Stevens, J., concurring) ("The character of the State's interest in protecting children from sexual abuse justifies the imposition of criminal sanctions against those who profit, directly or indirectly, from the promotion of such films."). The *Ferber* Court observed that sexually exploited children had difficulty developing healthy relationships later in life, had sexual dysfunctions, and had a tendency to become sexual abusers as adults. *See id.* at 758 n.9 (citing numerous psychological studies).

[31] For example, the Court developed the concept of variable obscenity, whereby the government can prohibit the dissemination of protected speech to minors in order to protect their well-being. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639–40 (1968)

Court restricted this new category of unprotected expression to laws aimed at works that "visually depict sexual conduct by children below a specific age"[32] wherein the conduct proscribed is suitably limited and described.[33]

Thus, the *Ferber* category of unprotected expression is by its terms limited to visual depictions of actual minors engaged in sexually explicit conduct.[34] The Court expressly noted that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[35] Further, in questioning whether visual depictions of children performing sexual acts or lewdly exhibiting their genitals would ever constitute an important part of any serious work, the Court suggested that if it were necessary for literary or artistic value, there are alternatives to the use of a child.[36] Either a person over the statutory age who looked younger could be used[37] or a "simulation outside of the prohibition of the statute"[38] could be employed. That the Court envisioned the performance of actual children within its definition of child pornography is further intimated by a subsequent decision that defined the scienter requirement for a violation of federal child pornography law as

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(state can prohibit the sale to minors of material defined to be obscene on the basis of its appeal to them, whether or not it would be obscene to adults); FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (FCC can regulate the broadcast of nonobscene indecent speech because broadcasts are uniquely accessible to children); Sable Communications v. FCC, 492 U.S. 115 (1989) (FCC can regulate transmission of indecent dial-a-porn messages provided the means chosen are carefully tailored); Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (FCC can channel indecent speech to the hours between 10:00 in the evening and 6:00 in the morning). There are four recognizable governmental interests in the protection of children: (1) the state's interest in the health, safety, morals, and general welfare of its citizens, (2) its independent interest in the well-being of its youth under its *parens patriae* and police powers, (3) the state's interest in supporting the parents's right to raise their children, and (4) the state's interest in safeguarding and strengthening familial relationships. *See* William Green, *Children and Pornography: An Interest Analysis in System Perspective*, 19 VAL. U. L. REV. 441, 444 (1985).

[32] *Ferber*, 458 U.S. at 764.

[33] *See id.* The Court also cautioned that laws criminalizing child pornography would have to recognize some element of scienter. *Id.* at 765.

[34] *See* ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 596–98 (1986) [hereinafter 1986 AG REPORT].

[35] *Ferber*, 458 U.S. at 764–65.

[36] *See id.* at 762–63.

[37] *See id.* Sexual materials using participants who are not minors but who look like minors or are made to appear youthful have been referred to as "pseudo child pornography" or "teasers." *See* 1986 AG REPORT, *supra* note 34, at 618 n.459.

[38] *Ferber*, 458 U.S. at 763.

including either an actual or constructive knowledge of the actors' minority.[39]

The Supreme Court thus far has unequivocally defined child pornography in terms of child participation. In *Ferber*, the Court repeatedly used language such as "the use of children," "sexual abuse," "lewd sexual conduct," and "children engaged in its production,"[40] while it characterized the production of child pornography as "an activity illegal throughout the nation."[41] Nevertheless, in its 1996 legislation Congress expanded the definition to include visual depictions that only *appear* to involve the participation of minors.[42] Because the *Ferber* Court suggested to pornographers that simulations outside the statutory prohibition would be permissible,[43] the issue is whether or not Congress constitutionally can include a simulation in the category of unprotected speech, and if so, to what degree. In other words, did the Court concentrate its ruling in *Ferber* on participation because the New York statute was thus limited, or did the Court, notwithstanding the statute, define child pornography in terms of participation as a matter of constitutional law?

B. Osborne v. Ohio*: Less than Unprotected Speech*

Eight years after *Ferber*, the Supreme Court in *Osborne v. Ohio*[44] was confronted with an Ohio statute that criminalized the possession and viewing of child pornography.[45] The issue pre-

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[39] For a discussion of the scienter requirement under federal law and the case of *United States v. X-Citement Video*, 115 S. Ct. 464 (1994) (holding that a federal statute prohibiting the knowing transportation, receipt, distribution, or reproduction of a visual depiction involving the use of a minor engaging in sexually explicitly conduct imposed a specific scienter requirement), see *infra* notes 88–92 and accompanying text.

[40] *Ferber*, 458 U.S. at 748–49, 758, 760, 762, 764, 777.

[41] *Id.* at 761. Prior to enacting the 1996 legislation, Congress apparently incorporated the actual use of minors in its definition of child pornography, since it followed Recommendation 37 of the 1986 Report by the Attorney General's Commission on Pornography and enacted a statute that required producers, retailers, and distributors of sexually explicit depictions to maintain records to verify the actors' ages. *See* Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4486 (codified at 18 U.S.C.A. § 2257 (1991 & Supp. 1996)).

[42] *See supra* note 11 and accompanying text.

[43] *See Ferber*, 458 U.S. at 763.

[44] 495 U.S. 103 (1990).

[45] *See id.* at 106–07. The statute proscribed a person from possessing photographs of a minor, who was not the person's child or ward, in a state of nudity, absent certain exceptions. However, as interpreted by the Ohio Supreme Court, the statute narrowly applied only to nudity consisting of a lewd exhibition or involving a graphic focus on the genitals. *See id.* at 113.

sented was akin to that in *Stanley v. Georgia*[46] with respect to obscenity. In *Stanley*, the Court held that a Georgia statute that punished the private possession of obscene materials violated the First and Fourteenth Amendments to the Constitution.[47] The Court stressed the privacy interests of Stanley and his right "to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home."[48] Even though the material at issue was concededly obscene,[49] the interests advanced by Georgia in suppressing it—that is, a fear unsubstantiated by empirical evidence that exposure would lead to deviant sexual behavior or crimes of sexual violence,[50]—did not override privacy considerations.

In contrast, in *Osborne* the Court found that Ohio did advance reasons that outweighed any privacy interest associated with the possession of child pornography.[51] The Court concluded that three interests supported Ohio's criminalization of private possession. First, the Court followed *Ferber* in recognizing that the materials produced by child pornographers permanently recorded the victims' abuse, which would result in continuing harm to the child victims by haunting them for years to come.[52] Second, because evidence suggested that pedophiles use child pornography to seduce children, the Court reasoned that the state could legitimately encourage the destruction of child pornography by banning its possession.[53] Third, the Court found that it was reasonable for the state to conclude that production would decrease if demand decreased as a result of penalizing possession.[54] While

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[46] 394 U.S. 557 (1969).

[47] *See id.* at 568.

[48] *See id.* at 565; *accord*, United States v. Reidel, 402 U.S. 351, 356 (1971) ("Their rights to have and view that material [obscenity] in private are independently saved by the Constitution.").

[49] *See Stanley*, 394 U.S. at 559 n.2.

[50] *See id.* at 566–67. Other interests asserted by Georgia included the right to protect the minds of its citizens from obscenity and the need to curb the distribution of pornography through prohibiting its possession. *See id.* at 565, 567.

[51] For a discussion that frames the issue and examines the decisions of lower courts prior to the Supreme Court's pronouncement in *Osborne*, see Josephine R. Potuto, Stanley + Ferber = *The Constitutional Crime of At-Home Child Pornography Possession*, 76 KY. L.J. 15 (1987–88); Susan G. Caughlan, Note, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187 (1987); Adam W. Smith, Note, *Taking* Ferber *a Step Further:* Stanley *Loses in the Battle Against Child Pornography*, 14 OHIO N.U. L. REV. 157 (1987).

[52] *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990).

[53] *See id.*

[54] *See id.* at 109–10. The Court opined that since much of the child pornography market had been driven underground as a result of *Ferber*, it had become difficult, if

penalizing the possession of adult obscenity also would likely decrease demand and encourage its destruction, the State's overriding interest in the context of child pornography, that is, protecting the physical and psychological health of minors,[55] is absent with respect to adult obscenity.

The Court's primary emphasis in *Osborne* centered on the possible exploitation of children as *victims* in the production of pornography.[56] The gravity of its concern for the exploitative use of children not only justified the criminalization of the dissemination of child pornography,[57] but its possession as well.[58] Again, as in *Ferber*, the Court stressed the *actual abuse* of the child in the production of child pornography, suggesting that the essence of the definition involved the employment of minors in its production. The question then remains, did the Court concentrate its ruling in *Osborne*, as in *Ferber*, on participation because the Ohio statute was thus limited, or did the Court, notwithstanding the statute, define child pornography in terms of participation as a matter of constitutional law? *Osborne* suggests there is something more pernicious about child pornography than obscenity. Is it the conduct involved? Or is it the fact that the State's interest in suppression is greater with respect to child pornography than with respect to obscenity?[59]

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not impossible, to solve the child pornography problem by only attacking its production and distribution. *See id.* at 110.

[55] *Id.* at 109 (citing *Ferber*, 458 U.S. at 756–58).

[56] *See Osborne*, 495 U.S. at 143 (Brennan, J. dissenting) ("At bottom the Court today is so disquieted by the possible exploitation of children in the *production* of the pornography that it is willing to tolerate the imposition of criminal penalties for simple *possession*.") (emphasis added). This interest was placed in stark contrast to one of the interests advanced by Georgia in *Stanley*, characterized by the *Osborne* Court as "a paternalistic interest in regulating [one's] mind." *Id.* at 109.

[57] Even under *Stanley*, the Court did not recognize a right to *receive* obscenity for personal use. *See, e.g.*, United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974); United States v. 12 200-Ft Reels of Super 8mm Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973); United States v. Reidel, 402 U.S. 351 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971) (plurality opinion). Likewise, the receipt of child pornography for personal use was punishable under federal law even before *Osborne*. *See, e.g.*, United States v. Bevacqua, 864 F.2d 19 (3d Cir. 1988); United States v. Marchant, 803 F.2d 174 (5th Cir. 1986); United States v. Andersson, 803 F.2d 903 (7th Cir. 1986). *See also* Kathleen M. Dorr, Annotation, *Validity and Construction of 18 U.S.C.A. §§ 371 and 2252(a) Penalizing Mailing or Receiving, or Conspiring to Mail or Receive, Child Pornography*, 86 A.L.R. FED. 359 (1988).

[58] As of 1994, 26 states have passed laws prohibiting the possession of child pornography. *See* Johnson, *supra* note 7, at 319 n.69 (listing statutory citations).

[59] For a discussion of the state's interest in regulating obscene speech and child pornography, see *infra* notes 104–193 and accompanying text.

II. FEDERAL CHILD PORNOGRAPHY LEGISLATION

A. *Historical Development*

Federal legislation prohibits the sexual exploitation of children, defined in part as utilizing a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction[60] of such conduct with the requisite knowledge that it was or would be transported in interstate or foreign commerce.[61] The statute has been amended several times since it was originally enacted as the Sexual Exploitation of Children Act in 1977.[62]

The Act was passed pursuant to Congressional findings that child pornography and prostitution had become highly organized multi-million-dollar industries that exploited thousands of children in the production of pornography.[63] In addition to penalizing the commercial production and dissemination of any visual or print medium of minors under sixteen years of age engaging in sexually explicit conduct, the Act also extended the prohibition of the Mann Act[64] to the interstate transportation of juvenile males and females for the primary purpose of prostitution, and added a wide range of sexual acts to that law's prohibitions.[65]

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[60] Visual depiction has been defined under federal law as including undeveloped film. *See* United States v. Smith, 795 F.2d 841, 846–47 (9th Cir. 1986). It has also been defined as including reproductions of photographs or pictures. *See* United States v. Porter, 709 F. Supp. 770, 774 (E.D. Mich. 1989), *aff'd*, 895 F.2d 1415 (6th Cir. 1990).

[61] 18 U.S.C. § 2251 (1991 & Supp. 1996). Section 2252 further defines Section 2251 by providing that a person knowingly transports, ships, receives, or distributes a visual depiction if the production involved the use of a minor engaged in sexually explicit conduct and the depiction was of such conduct. Both sections have withstood overbreadth and vagueness challenges. *See, e.g.*, United States v. Reedy, 632 F. Supp 1415, 1416 (W.D. Okla. 1986), *aff'd*, 845 F.2d 239 (10th Cir. 1988). *See generally* Ralph V. Steep, Annotation, *Validity, Construction, and Application of 18 USCS § 2251, Penalizing Sexual Exploitation of Children*, 99 A.L.R. FED. 643 (1990).

[62] Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251–2253 (1991 & Supp. 1996). *See generally* 50 AM. JUR. 2d *Lewdness, Indecency, and Obscenity* § 27 (1995). Federal laws prohibiting the transportation of obscene material by mail, common carrier, and private conveyance were used to pursue pornographers prior to this enactment. *See* 18 U.S.C. §§ 1461, 1462, 1465 (1994).

[63] *See Ferber*, 458 U.S. at 749 n.1 (citing S. REP. No. 95-438, at 5 (1977)). For a discussion of the history of the Act, see Gregory Loken, *The Federal Battle against Child Sexual Exploitation: Proposals for Reform*, 9 HARV. WOMEN'S L.J. 105, 110–13 (1986).

[64] White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (1994)). The Act was found to be a proper exercise of Congress's Commerce Clause power. *See* Caminetti v. United States, 242 U.S. 470 (1917).

[65] For a discussion of the Mann Act and its 1977 amendment, see Loken, *supra* note 63, at 108–10.

Unfortunately, the 1977 Act proved to be of limited practical value to federal law enforcement officials.[66] In response to the law's deficiencies and the Supreme Court's decision in *Ferber*, Congress passed the Child Protection Act of 1984.[67] The 1984 Act eliminated the previous requirement that the material be considered obscene under *Miller* before its production, dissemination or receipt could be found criminal[68] and raised the age limit of protection from sixteen to eighteen years.[69] Because so much of the trafficking in child pornography was not for-profit, Congress in the 1984 Act eliminated the requirement that the production or distribution be for the purpose of sale.[70] Given the *Ferber* Court's mention of limits on the category of child pornography and its subsequent observation that the "nature of the harm requires that the state offense be limited to works that *visually* depict sexual conduct,"[71] Congress replaced the phrase "visual or print medium" with the phrase "visual depiction."[72] It further refined the definition of sexual conduct by substituting the term "lascivious" for "lewd" in order to clarify that the depiction did not have to meet the obscenity standard in order to be unlawful.[73] In 1986 the Act was further amended to ban

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[66] *See* 1986 AG REPORT, *supra* note 34, at 604. Only one person was convicted under the Act's production prohibition. *See id.*

[67] Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984). For a discussion of the Act, see generally Weiss, *supra* note 27.

[68] *See* United States v. Reedy, 632 F. Supp. 1415, 1420 (W.D. Okla. 1986), *aff'd*, 845 F.2d 239 (10th Cir. 1988) ("Thus, there can be no doubt Congress intended to remove even the hint that the obscenity standard is a part of Section 2251(a).").

[69] Child pornography today consists of visual depictions of children under the age of 18, notwithstanding that the age limit may have been 16 when the pictures were taken. *See* United States v. Bateman, 805 F. Supp. 1053 (D.N.H. 1992).

[70] *See* United States v. Andersson, 803 F.2d 903, 906 (7th Cir. 1986) (Congress intended to extend coverage to those individuals who distributed prohibited materials without commercial motive). *See also* United States v. Smith, 795 F.2d 841, 846 (Congress did not intend to exempt nondistributing producers and users from the scope of the statute).

[71] *Ferber*, 458 U.S. at 764.

[72] *Smith*, 795 F.2d at 846 n.3 (prohibition of written materials raised First Amendment questions).

[73] *See* United States v. Arvin, 900 F.2d 1385, 1388 (9th Cir. 1990); United States v. Dost, 636 F. Supp 828, 830–31 (S.D. Cal. 1986), *aff'd*, 813 F.2d 1231 (9th Cir. 1987), *aff'd sub nom.* United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987). The Supreme Court subsequently upheld the Act's 1984 amendments, which raised the age of majority to 18 and substituted the term "lascivious" for "lewd" in defining the illegal exhibition of the genitals of children, against a constitutional challenge of vagueness and overbreadth. *See* United States v. X-Citement Video, 115 S. Ct. 464, 468 (1994). The 1984 Amendment also added stiffer penalties along with criminal and civil forfeiture provisions. *See* Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2252(b), 2253, 2254 (1991 & Supp. 1996)).

the production and use of advertisements for child pornography[74] and to add a civil remedy for personal injuries incurred as a result of the production of child pornography.[75]

In response to evidence that computer networks played a substantial role in the exchange of child pornography,[76] Congress also passed the Child Protection and Obscenity Enforcement Act of 1988,[77] which made it unlawful to use a computer to transport, distribute, or receive child pornography.[78] That act imposed record keeping and disclosure requirements on the producers of certain sexually explicit materials.[79] Apparently in response to *Osborne*, an amendment criminalized the possession of three or more pieces of child pornography.[80] Then, in 1994, federal child pornography law was amended again to punish the production or importation of sexually explicit depictions of a minor and to provide for mandatory restitution for the victims of child pornography.[81]

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[74] *See* Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251(c) (1991 & Supp. 1996)).

[75] *See* Child Abuse Victims Rights Act of 1986, Pub. L. No. 99-591, 100 Stat. 3341-75 (codified as amended at 18 U.S.C. § 2255 (1991 & Supp. 1996)).

[76] *See generally Computer Pornography and Child Exploitation Act: Hearings on S. 1305 Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong. (1985); *Child Protection and Obscenity Enforcement Act and Pornography Victims Protection Act of 1987: Hearings on S. 704 and S. 2033 Before the Senate Committee on the Judiciary*, 100th Cong. (1988) [hereinafter *1988 Hearings*]. The Attorney General's Commission on Pornography also had recommended that legislation be enacted to prohibit the exchange of child pornography through computer networks. *See* 1986 AG REPORT, *supra* note 34, at 628. *See also* Patricia N. Chock, Note, *The Use of Computers in the Sexual Exploitation of Children and Child Pornography*, 7 COMPUTER L.J. 383 (1987).

[77] Pub. L. No. 100-690, 102 Stat. 4486 (1988) (codified as amended at 18 U.S.C. § 2252 (1991 & Supp. 1996)). For a discussion of the Act, see Scheller, *supra* note 4, at 1009–11.

[78] The Act also added a new section that prohibited the buying, selling, or otherwise obtaining of temporary custody or control of children for the purpose of producing child pornography. *See* 18 U.S.C. § 2251A (1991 & Supp. 1996).

[79] Such a provision had been recommended by the Attorney General's Commission on Pornography. *See* 1986 AG REPORT, *supra* note 34, at 618. One court, however, recently held that the statute could not constitutionally be applied to producers of covered visual images of adults because the harsh paperwork and penalty provisions would place an undue burden on protected expression. *See* American Library Assoc. v. Barr, 794 F. Supp. 412 (D.D.C. 1992), *aff'd in part, rev'd in part*, 33 F.3d 78 (D.C. Cir. 1994).

[80] *See* Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, 104 Stat. 4818 (1990) (codified as amended at 18 U.S.C. § 2252(a)(4) (Supp. 1996)). "Possession" has been interpreted to include both actual and constructive possession. *See* United States v. Layne, 43 F.3d 127 (5th Cir. 1995); *see also* United States v. Bateman, 805 F. Supp. 1053, 1056 (D.N.H. 1992) (holding that possession of child pornography cannot be criminalized retroactively).

[81] *See* Child Sexual Abuse Prevention Act of 1994, Pub. L. No. 103-322, 108 Stat.

In reviewing the development of federal statutory law, particularly the 1984 amendment that substituted the words "visual depiction" for "visual or print medium," Congress, too, defined child pornography in terms of the actual participation and abuse of minors as victims in its production.[82] However, in 1996 Congress amended the law to incorporate computer-generated or virtual child pornography within the statute's definitions and proscriptions.[83] The 1996 amendment represents a change in direction and an attempt to define child pornography not in terms of the harm inflicted upon the child, but rather as an evil in and of itself. Whether or not the evil is sufficiently compelling to withstand First Amendment challenge is yet to be determined.[84]

B. *The Statute as Interpreted*

Federal law that criminalizes the production, distribution, receipt and possession of visual depictions of minors engaging in sexually explicit conduct must have some element of scienter on the part of the defendant.[85] In *United States v. X-Citement Video*,[86] the Supreme Court ruled that the provision of the federal statute that prohibited the *knowing* transportation, shipment, receipt, distribution, or reproduction of a visual depiction involving the use of a minor engaging in sexually explicit conduct[87] imposed a scienter requirement as to the sexually explicit nature of the material and the age of the performers.[88] While the Court did not

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2036 (1994) (codified at 18 U.S.C. §§ 2258, 2259 (Supp. 1996)). For an analysis of the Act, see H.R. REP. No. 103-469 (1994).

[82] Perhaps Congress previously believed that its ability to define child pornography more expansively was limited by the Court's pronouncements in *Ferber* and *Osborne*.

[83] *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208 § 121, 110 Stat. 3009 (1996) (codified at 18 U.S.C. §§ 2252A, 2256).

[84] *See* discussion *infra* notes 148–193 and accompanying text.

[85] The same constitutional constraint applies to state law. *See Osborne*, 495 U.S. at 112–15; Ferber, 458 U.S. at 765. *See generally* 50 AM. JUR. 2d *Lewdness, Indecency, and Obscenity* § 28 (1995). *See also* Smith v. California, 361 U.S. 147, 154–55 (1959) (holding that statutes cannot make dissemination of obscenity a strict liability offense).

[86] 115 S. Ct. 464 (1994). The case involved the conviction of a video wholesale business and its operator for shipping films in interstate commerce featuring Traci Lords, "who had a successful career in 'adult' films before becoming an adult." *Id.*

[87] 18 U.S.C. § 2252 (1991 & Supp. 1996).

[88] *See X-Citement Video*, 115 S. Ct. at 467. The overwhelming majority of lower federal courts also had interpreted the statute as imposing some form of scienter requirement with respect to the knowledge of both the sexually explicit nature of the materials and the age of the participants. *See, e.g.*, United States v. Brown, 25 F.3d 307, 309 (6th Cir. 1994); United States v. Colavito, 19 F.3d 69, 71 (2d Cir. 1994); United States v. Gendron, 18 F.3d 955, 960 (1st Cir. 1994); United States v. Prytz, 822 F. Supp. 311, 321 (D.S.C. 1993), *aff'd without opinion*, 35 F.3d 557 (4th Cir. 1994);

elaborate on the statute's precise scienter requirement, most lower federal courts have construed the statute, like its obscenity counterpart,[89] to mandate not a knowledge of the illegality of the materials *per se*, but only of the general nature and character of the materials.[90]

How such a scienter requirement will be applied to virtual child pornography is perplexing. Since the age of the performers in the pre-morphed version will likely be over eighteen years, there would be no actual underage participants.[91] Even in cases wherein a minor has been morphed from an innocent pose to a sexually explicit one, how can the scienter requirement apply to the computer generated sexually explicit conduct? In both situations the requisite knowledge requirement of *X-Citement Video* (knowledge that underage performers are being used to create sexually explicit material) is missing, since it has been created

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United States v. Kempton, 826 F. Supp. 386, 388–89 (D. Kan. 1993); United States v. Brown, 862 F.2d 1033, 1036 (3d Cir. 1988). Only the Ninth Circuit had found the statute unconstitutional. *See* United States v. X-Citement Video, 982 F.2d 1285 (9th Cir. 1992). The Ninth Circuit previously had construed the statute such that "knowingly" only applied to the transportation, shipment, or receipt, not to the depicted subjects's minority. *See* United States v. Thomas, 893 F.2d 1066 (9th Cir. 1990). It has been argued that this is the grammatically appropriate construction. *See* Craig Hoffman, *When Worldviews Collide: Linguistic Theory Meets Legal Semantics in* United States v. X-Citement Video, Inc., 73 WASH. U. L.Q. 1215 (1995); Jeffrey P. Kaplan & Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 WASH. U. L.Q. 1223 (1995). Jurists, however, attempt to save a statute, if possible, through a constitutional reading of its provisions. *See, e.g.*, *X-Citement Video*, 982 F.2d at 1292–97 (Kozinski, J., dissenting in part) (arguing for a constitutional interpretation that incorporates a reckless state of mind as the scienter requirement).

In the absence of an express statutory scienter requirement, courts may read such a requirement into the statute in order to uphold it. *See infra* note 90.

[89] *See* 18 U.S.C. §§ 1460–1469 (1994). The Supreme Court has interpreted the federal obscenity statute as requiring a general knowledge of the contents of the materials distributed and the character and nature of those materials, not their legal status. *See* Hamling v. United States, 418 U.S. 87 (1974), *aff'g* 481 F.2d 307 (9th Cir. 1973) (5-4 decision).

[90] *See, e.g.*, United States v. Schmeltzer, 20 F.3d 610, 611 (5th Cir. 1994); United States v. Cochran, 17 F.3d 56, 59 (3d Cir. 1994); United States v. Knox, 32 F.3d 733, 753–54 (3d Cir. 1994); United States v. Long, 831 F. Supp. 582, 585–86 (W.D. Ky. 1993) (memorandum opinion). Some courts have characterized the statute's scienter requirement as being either an actual knowledge of the performer's age or a recklessness with regard to the person's age. *See, e.g.*, United States v. Gifford, 17 F.3d 462, 473 (1st Cir. 1994); United States v. Burian, 19 F.3d 188, 191 (5th Cir. 1994). In *Osborne v. Ohio*, 37 Ohio St. 3d 249, 253 (1988), the Ohio Supreme Court read a recklessness requirement into the state child pornography law.

[91] The 1996 Amendment added a section to the statute that tracks the language of section 2252 in providing for the punishment of any person who knowingly mails, transports, ships, receives, or distributes child pornography, defined in section 2256 as including visual depictions that appear to be of a minor engaging in sexually explicit conduct. H.R. REP. No. 104-863, at 30–31 (1996).

independent of reality. The technology of virtual child pornography arguably has turned the statute's prohibition into a constitutionally impermissible strict liability offense.[92]

Another controversial area of federal child pornography legislation centers on the phrase "sexually explicit conduct." The statute defines sexually explicit conduct as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or a *lascivious exhibition* of the genitals or pubic area of any person.[93] Whether or not a visual depiction of a minor constitutes a lascivious exhibition is a question of fact[94] that primarily considers six factors:

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.[95]

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[92] *See Ferber*, 458 U.S. at 765 (criminal responsibility may not be imposed without some element of scienter on the part of the defendant). Simulated child pornography previously has been introduced into evidence as being probative of the scienter required with respect to the possession of actual child pornography. *See, e.g.*, United States v. Layne, 43 F.3d at 127, 131, 134 (5th Cir. 1995), *cert. denied*, 115 S. Ct. 1722 (1995). But that limited use is a far cry from making the simulated material an actual offense.

[93] *See* 18 U.S.C. § 2256(2) (1991 & Supp. 1996). "Lascivious exhibition" was substituted for "lewd exhibition" under the 1984 amendments to insure that the proscription was not limited to obscenity. *See supra* note 73 and accompanying text. For other purposes, most courts have considered the terms to be synonymous. *See, e.g.*, United States v. Reedy, 845 F.2d 239, 241 (10th Cir. 1988); United States v. Wiegand, 812 F.2d 1239, 1243–44 (9th Cir. 1987); United States v. Long, 831 F. Supp. 582, 587 (W.D. Ky. 1993). Only one court considered the definition prior to the 1984 substitution. *See* United States v. Numbers, 740 F.2d 286 (4th Cir. 1984), *aff'g* 567 F. Supp. 87 (D. Md. 1983) (lewd conduct has a generally well-recognized meaning). The Supreme Court has held that neither the term "lewd" nor the term "lascivious" is unconstitutionally vague. *See, e.g., X-Citement Video*, 115 S. Ct at 472 (claim that "lascivious" is unconstitutionally vague is insubstantial); Miller v. California, 413 U.S. 15, 25 (1973) ("lewd" is a common-sensical term).

[94] *See* United States v. Arvin, 900 F.2d 1385, 1388 (9th Cir. 1990). The jury does not need expert testimony to make the determination as to whether or not a visual depiction is lascivious. *See id.* at 1389–90.

[95] United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986). Other factors can be relevant, and a visual depiction need not implicate all of the factors. *See id.* at 832.

As applied, the factors defining lasciviousness are not characteristics of the child photographed, but rather of the attitude of the photographer anticipating a viewer's response,[96] since children are not necessarily mature enough to strike a sexually provocative pose purposefully.[97] Nudity is neither a sufficient condition for a finding of lasciviousness,[98] nor is it a necessary one.[99] In one case, *United States v. Knox*, a videotape of children dancing in abbreviated attire, in which the camera zoomed in to display a close-up view for an extended period of time of their genital area, qualified as a lascivious exhibition, notwithstanding that the genital and pubic area were covered by clothing.[100]

Followed, United States v. Villard, 885 F.2d 117, 122 (3d Cir. 1989), *aff'g* 700 F. Supp 803 (D.N.J. 1988); *Arvin*, 900 F.2d at 1391; *Knox*, 32 F.3d at 746.

[96] *See Wiegand*, 812 F.2d at 1244; *accord*, United States v. Wolf, 890 F.2d 241, 245–46 (10th Cir. 1989). The perceived intentions of the creator play a significant role in the sexual arousal value of pornography for the viewer as well. *See* MICHAEL J. GOLDSTEIN & HAROLD S. KANT, PORNOGRAPHY AND SEXUAL DEVIANCE 32–33 (1973) (reviewing literature on effects of pornography).

[97] *See Arvin*, 900 F.2d at 1391. As such, the pictures at issue can be contrasted with the way in which a child ordinarily sits or reclines. *See Dost*, 636 F. Supp. at 833; *see also* United States v. Freeman, 808 F.2d 1290, 1291–92 (8th Cir. 1987) (video tape of 16-year-old pregnant girl wearing only a see-through orange scarf where camera zoomed in for a close-up shot of her genitals was a lascivious depiction).

[98] *See* Osborne v. Ohio, 495 U.S. 103, 138 (1990); *see also* United States v. Mr. A., 756 F. Supp. 326, 329 (E.D. Mich. 1991) (nude pictures taken by parents held not intended to arouse sexual cravings of a voyeur); Faloona by Fredrickson v. Hustler Magazine, 607 F. Supp. 1341, 1345, 1355 n.44 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986) (nude pictures of children that appeared in a *Sex Atlas*, which did not depict them engaging in sexual conduct or performing any sexual activity, did not become child pornography by virtue of their publication in *Hustler*). One of the pictures in *Faloona* showed the child holding her vagina open. *See 1988 Hearings*, *supra* note 76, at 297 n.963. Deciding before the specification of the *Dost* factors regarding lascivious exhibition as a form of sexual conduct, the court seemed to look for a lack of sexual activity to support its finding that no sexual conduct was depicted in the original photos.

[99] With respect to pictures of boys, an erection, likewise, is neither a necessary nor a sufficient condition for a finding of lasciviousness, since a court must consider the totality of the circumstances. *See* United States v. Villard, 885 F.2d 117, 123–24 (3d Cir. 1989).

[100] *See* United States v. Knox, 977 F.2d 815 (3d Cir. 1992). The district court also had found a lascivious exhibition, but in doing so had incorrectly interpreted the pubic area as including the upper thigh. *See* United States v. Knox, 776 F. Supp. 174, 180 (M.D. Pa. 1991). The appeals court rejected that definition but found that clothed gyrations could constitute such an exhibition. *See Knox*, 977 F.2d at 819–20. After that decision, the Supreme Court vacated the opinion in light of the position asserted by the Solicitor General, who argued that the language of the statute required the genital or pubic area exhibited to be somewhat visible through the child's clothing. *See* United States v. Knox, 510 U.S. 939 (1993). On remand, the Third Circuit again concluded that non-nude visual depictions, such as the ones at issue in the case, could qualify as lascivious exhibitions without rendering the statute unconstitutionally overbroad. *See* United States v. Knox, 32 F.3d 733, 737 (3d Cir. 1994). The court concluded "that a 'lascivious exhibition of the genitals or pubic area' of a minor necessarily requires only

Even using the previously enumerated six factors for guidance, the standard for lascivious exhibition is not crystal clear.[101] It seems obvious, however, that posing a child in the same manner as a Penthouse Pet or a Playboy Centerfold would in most cases constitute illegal lascivious exhibition. The justification for what would be an otherwise protected depiction if the subject was an adult is that such a depiction is a "brutal breach of trust."[102] The harm Congress attempted to eradicate with its child pornography statute is the harm in treating children as sexual objects in order to arouse pedophiles, and in creating a permanent record of such an embarrassing and humiliating experience to the detriment of the mental health of the children.[103] Is that harm present if instead of posing a child as an adult centerfold, Miss May is morphed to the image of a child?

III. A Constitutional Analysis of the Criminalization of Virtual Child Pornography

A. *Virtual Child Pornography under* Miller *and* Ferber

Some child pornography, real or virtual, could constitute obscenity under the *Miller* test.[104] Currently, child pornography consisting of sexually explicit verbal descriptions, not visual depictions, arguably is subject to the *Miller* test,[105] as is pseudo-

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that the material depict some 'sexually explicit conduct' by the minor subject which appeals to the lascivious interest of the intended audience." *Id.* at 747.

[101] With respect to lewd exhibition, Justice Brennan argued that the term was too vague to serve as a workable limitation. *See Osborne*, 495 U.S. at 137–38 (Brennan, J., with Marshall, J., and Stevens, J., dissenting) (concluding "Michelangelo's 'David' might be said to have a 'graphic focus' on the genitals, for it plainly portrays them in a manner unavoidable to even a casual observer. Similarly, a painting of a partially clad girl could be said to involve a 'graphic focus,' depending on the picture's lighting and emphasis, as could the depictions of nude children on the friezes that adorn our courtroom. Even a photograph of a child running naked on the beach or playing in the bathtub might run afoul of the law, depending on the focus and camera angle.").

[102] United States v. Villard, 700 F. Supp 803, 811 (D.N.J. 1988), *aff'd*, 885 F.2d 117 (3d Cir. 1989). As such, it is not a "less severe form of child pornography." *Id.*

[103] *See* United States v. Knox, 32 F.3d 733, 750 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 897 (1995).

[104] *See* Potuto, *supra* note 51, at 18 n.16.

[105] *See* Green, *supra* note 31, at 462 (citing Note, *Child Pornography: A New Exception to the First Amendment*—New York v. Ferber, 10 Fla. St. U. L. Rev. 684, 696–97 (1983)); S. Rep. No. 372, at 13 (1992). Likewise, obscenity can consist solely of verbal representations. *See* Kaplan v. California, 413 U.S. 115 (1973) (companion case to *Miller*). *But see* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 100 (1973) (Brennan, J., dissenting) ("Surely we have passed the point where the mere written description of sexual conduct is deprived of First Amendment protection.").

child pornography, or visual depictions of children over the age of eighteen who are made to appear younger.[106] While magazines such as *Playboy* and *Penthouse*, even *Hustler*, enjoy constitutional protection, a similar publication with actual children as models would most likely constitute illegal child pornography. In fact, child pornography laws were arguably passed in order to close the gap between obscene publications and those that visually depicted minors engaging in sexual conduct, which if adults engaged in would be protected expression.[107]

But what of a virtual child centerfold? If the sexual abuse is absent because the lascivious exhibition is of an adult morphed to appear as a child, arguably the depiction would not be covered by *Ferber*. Would it be obscene anyway and unprotected under *Miller*? In other words, would the average person, applying contemporary community standards, find that such an image of a child appeals to the prurient interest, is patently offensive, and lacks serious value?

While a virtual child centerfold image may be patently offensive,[108] what of a portrayal such as the one at issue in *Knox*,[109] of virtual girls dancing in abbreviated attire in which the camera focuses on the clothed genital areas? With no simulation of sex acts, no nudity, and no real minors, such a depiction should not be considered patently offensive, even if the viewer thought the performance was by minors.

The test for prurient appeal would center on whether or not the materials would appeal to the average member of the intended and probably recipient sexually deviant group—pedophiles.[110] Expert testimony on the issue is permissible, but not

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[106] *See* 1986 AG REPORT, *supra* note 34, at 405 n.70.

[107] *See* T. Christopher Donnelly, Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REFORM 295, 303 (1979). Protecting children therefore requires more than obscenity laws. *Id.*

[108] The *Miller* Court offered the following guidance in defining patent offensiveness: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller*, 413 U.S. at 25. On the other hand, *Ferber* did not require child pornography to be patently offensive. *See Ferber*, 458 U.S. at 764.

[109] *See supra* note 103 and accompanying text.

[110] *See* Mishkin v. New York, 383 U.S. 502, 508–09 (1966), *reh'g denied*, 384 U.S. 934 (1966). *Followed*, Pinkus v. United States, 436 U.S. 293 (1978); Hamling v. United States, 418 U.S. 87 (1974) (considering whether the prurient appeal should be based upon the response of average person or the average intended recipient, if the material was targeted at a deviant group). This issue had been presented to the Court before. The Court declined to resolve it at the time, finding the materials at issue not to be obscene under any permissible standard. *See* Manual Enterprises v. Day, 370 U.S. 478,

required,[111] since the jury may consider whether or not the material had a capacity to appeal to their prurient interest, defined as a shameful or morbid interest in sex.[112] If neither Playboy nor Playgirl are considered to appeal to their respective genders' prurient interest in sex, it seems odd that their morphed versions could be held as appealing to the prurient interest of a pedophile, unless there is just something inherently more shameful or morbid about such materials. Imputing such an intrinsic feature, however, impermissibly injects an average person's view into the determination.

In addition to proving patent offensiveness and prurient appeal, *Miller* requires that the material, taken as a whole, lack serious literary, artistic, political or scientific value as judged from an *objective* standard.[113] *Ferber* suggested that it would be unlikely that pornographic depictions of actual children would often constitute a valued literary, scientific or educational work;[114] however, the Court also noted in *Ferber*, that the statute at issue was aimed at "hard-core" pornographic depictions.[115] Some virtual child pornography, unaccompanied by sex abuse, has some

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482 (1962). The books at issue in *Mishkin* involved sado-masochism, fetishism, and homosexuality. *See Mishkin*, 383 U.S. at 505. It had been argued that such materials could not be considered erotic since they would elicit "disgust" in the average person. *See id.* at 508.

[111] *See* United States v. Cross, 928 F.2d 1030, 1050 (11th Cir. 1991) (citing federal obscenity law precedent); *see also* St. John v. State of N.C. Parole Comm'n, 764 F. Supp. 402, 413 (W.D.N.C. 1991) (adjustment made to *Miller* test for such pornography did not require that "particularly repulsive and offensive sexually explicit material be judged only by deviant members of the community"), *aff'd without opinion*, 953 F.2d 639 (4th Cir. 1992) (adjustment made to *Miller* test for such pornography did not require that "particularly repulsive and offensive sexually explicit material be judged only by deviant members of the community").

[112] *See* Ripplinger v. Collins, 868 F.2d 1043, 1053 (9th Cir. 1989); *see also* Roth v. United States, 354 U.S. 476, 487 n.20 (1957); Currin & Showers, *supra* note 26, at 295–99 (discussing concept of prurient appeal).

[113] *See* Pope v. Illinois, 481 U.S. 497, 500–01 (1987). Tinges of redeeming value will not save the work. *See Miller*, 413 U.S. at 25 n.7 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication."); *see also* United States v. Schein, 31 F.3d 135, 137 (3d Cir. 1994) (videotapes of homosexual acts that are otherwise obscene are not works containing social value simply because the participants wear condoms and remind viewers from time to time to have safer sex).

[114] *See Ferber*, 458 U.S. at 762–63.

[115] *See id.* at 773; *see also X-Citement Video*, 115 S. Ct. at 475 (Scalia, J., and Thomas, J., dissenting) ("Let us be clear about what sort of pictures are at issue here. They are not the sort that will likely be found in a catalog of the National Gallery or the Metropolitan Museum of Art . . . . What is involved, in other words, is not the clinical, the artistic, nor even the risque, but hard-core pornography."); *The Supreme Court 1981 Term*, *supra* note 13, at 149 ("Seen against the background of the Court's overbreadth analysis, this limitation suggests that *Ferber* should not be read to give a green light to states to prohibit distribution of all material depicting sexual conduct by

value under *Miller* when viewed as a whole, especially since *Ferber* concentrated on abuse in holding the value prong of *Miller* as being irrelevant.[116] In other words, while there is no value in a work wherein even one or two depictions record child abuse, such will not be the case if the work was, in whole or in pertinent part, computer generated.

Therefore, *Miller* will not suppress all child pornography, be it virtual or real. But if *Ferber* constitutionally extended the class of unprotected speech only to that which visually depicts actual children, virtual child pornography would still be protected speech: not necessarily obscene under *Miller* and not "child pornography" under *Ferber*. Is *Ferber* so limited? The answer appears to be yes.

In creating a new category of unprotected expression, the Court seemed to limit its parameters to actual participation by minors,[117] not as a matter of statutory interpretation,[118] but as a matter of constitutional law. Constitutionally, conduct can be regulated more than speech, even if it is coupled with expressive elements.[119] It is altogether possible that the *Ferber* Court created child pornography as a separate category of unprotected expression precisely because criminal conduct—child molestation and abuse—was intricately involved in creating the expression.[120] In *Ferber* the Court characterized the production of child

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children."). *But see* United States v. Knox, 32 F.3d 733 (3d Cir. 1994) (clothed minors dancing can constitute illegal child pornography).

[116] Suppression of speech was justified in order to prevent the harm that occurred during the production of child pornography. *See* Colen, *supra* note 13, at 710.

[117] Introducing what became the 1996 legislation, Senator Hatch apparently recognized that, as interpreted, federal child pornography law did not include virtual child pornography. *See* 141 CONG. REC. S13,542 (daily ed. Sept. 13, 1995) (statement of Sen. Hatch) ("Today, however, visual depictions of children engaging in any imaginable forms of sexual conduct can be produced entirely by computer, without using children, thereby placing such depictions outside the scope of federal law.").

[118] *See* Roth v. United States, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) ("I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals.").

[119] The government may regulate conduct that embodies both speech and nonspeech elements if the regulation furthers an important or substantial governmental interest that is unrelated to the suppression of free expression, provided that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968); *see also* Barnes v. Glen Theater, 501 U.S. 560 (1991) (nude dancing); Bowers v. Hardwick, 478 U.S. 186 (1986) (sodomy).

[120] In his dissent in *X-Citement Video*, Justice Scalia analyzed what he thought to be an acceptable scienter requirement for the federal child pornography statute to statutory rape laws, which clearly criminalize conduct. *See X-Citement Video*, 115 S. Ct at 475 (Scalia, J., and Thomas, J., dissenting). ("It is no more unconstitutional to make persons who knowingly deal in hard-core pornography criminally liable for the

pornography as an illegal activity, observing that "[I]t has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an *integral part of conduct* in violation of a valid criminal statute."[121] Not only would child pornography statutes be aimed at the regulation of sexual performances by children,[122] but the conduct constitutionally would be what makes the expression illegal, and the statute a valid regulation. As the First Circuit stated, "the fact that the material shows a child engaging in sexually explicit activity is not a secondary, or jurisdictional, aspect of the crime. It is the moral and criminal heart of the matter."[123]

If *Ferber* constitutionally limits child pornography as a class of unprotected expression to actual visual depictions of illegal conduct,[124] then the 1996 legislation that draws virtual pornography into that category constitutes an unconstitutional regulation of speech based on its content. Virtual child pornography, which is not obscene, is nothing more than an imaginative idea. However repulsive, however disgusting to majoritarian beliefs, ideas constitute protected speech.[125]

"Private fantasies are not within the [federal child pornography] statute's ambit,"[126] nor can they be constitutionally. Ideas

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underage character of their entertainers than it is to make men who engage in consensual fornication criminally liable (in statutory rape) for the underage character of their partners.").

[121] *Ferber*, 458 U.S. at 761–62 (quoting Giboney v. Empire Storeage & Ice Co., 336 U.S. 490, 498 (1949)) (emphasis added). In other words, the distribution of child pornography was an integral part of its production, which amounts to illegal conduct. *See The Supreme Court 1981 Term*, *supra* note 13, at 137–38.

[122] Child pornography statutes are so interpreted. *See generally* William B. Johnson, Annotation, *Validity, Construction, and Application of Statutes or Ordinances Regulating Sexual Performance by Child*, 21 A.L.R. 4th 239 (1983). Lewdness statutes also expressly regulate conduct, not speech. *See generally* 50 AM. JUR. 2D *Lewdness, Indecency, and Obscenity* § 1 (1995).

[123] United States v. Gendron, 18 F.3d 955, 959 (1st Cir. 1994).

[124] That such is the case, at least with respect to nonidentifiable minors, is further evidenced by the Supreme Court's approval of simulations in *Ferber*. *See 1996 Hearings*, *supra* note 2, at 2 (statement of Professor Frederick Schauer, Kennedy School of Government, Harvard University). The Court arguably could have reached the same result in *Ferber* by concentrating on the noncommunicative nature of the material. *See The Supreme Court 1981 Term*, *supra* note 13, at 148.

[125] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) (protecting flag burning); Gooding v. Wilson, 405 U.S. 518 (1972); (statute criminalizing certain speech held too broad and overinclusive); Roth v. United States, 354 U.S. 476, 484 (1957). *See* discussion *supra* notes 50–54 and accompanying text to see how *Stanley v. Georgia* might determine whether virtual child pornography is obscene.

[126] United States v. Wiegand, 812 F.2d 1239, 1245 (9th Cir. 1987). The First Amendment precludes the state from controlling the moral content of a person's

quintessentially are protected under the Constitution, unless they are transformed into speech that *incites imminent lawless activity*.[127] Words that advocate illegal activity are protected so long as they fall short of incitement.[128] It is unlikely that virtual child pornography *incites* pedophiles, as defined under Constitutional law, to abuse and molest children.[129] Virtual child pornography may encourage, promote, persuade, or influence pedophiles to engage in illegal activity with children,[130] it may validate their illegal activity,[131] and it may assist in their illegal activity,[132] but the conduct is neither sufficiently imminent nor impelling to constitute incitement. As such, nonobscene virtual child pornography, which does not record a criminal act being perpetrated against an actual child, should constitute protected expression.

B. *The Regulation of Virtual Child Pornography*

1. An Overview

Protected speech does not automatically preclude governmental regulation. If a statute, however, singles out for regulation

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thoughts. *See Stanley*, 394 U.S. at 565 ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

[127] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (overruling Whitney v. California, 274 U.S. 357 (1927)). For a discussion of the *Brandenburg* incitement standard as a category of unprotected speech, see Staughton Lynd, Comment, Brandenburg v. Ohio*: A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151 (1975). Classifying words that incite imminent lawless activity as unprotected speech seems grounded in the state's interest in controlling crowd behavior and punishing the arousal of a crowd to commit criminal activity. *See* Herceg v. Hustler Magazine, 814 F.2d 1017, 1023 (5th Cir. 1987); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words that by their very utterance inflict injury or tend to incite an immediate breach of the peace are not protected).

[128] *See* Kingsley Int'l Pictures v. Regents of the Univ. of State of New York, 360 U.S. 684 (1959) (plurality opinion); *Herceg*, 814 F.2d at 1017; Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992) (memorandum opinion); *see also* Paris Adult I Theatre v. Slaton, 413 U.S. 49, 111 (1973) (Brennan, J., dissenting) ("[T]hematic obscenity—obscenity which might persuade the viewer or reader to engage in 'obscene' conduct—is not outside the protection of the First Amendment.").

[129] Pedophiles tend to utilize a long seduction process. *See* Chock, *supra* note 76, at 405.

[130] *See generally 1984 Hearings*, *supra* note 2, at 135–53 (discussing, in various parts, the book "How to Have Sex with Kids"). Furthermore, that the materials might be sexually arousing does not translate into incitement. *See id.* at 136 (Sears catalogue might be erotic and arousing to pedophiles).

[131] *See* ANN WOLBERT BURGESS, CHILD PORNOGRAPHY AND SEX RINGS 84–85 (1984); JULIAN WHETSELL-MITCHELL, RAPE OF THE INNOCENT: UNDERSTANDING AND PREVENTING CHILD SEXUAL ABUSE 200 (1995).

[132] *See infra* notes 164–166 and accompanying text.

certain speech based upon its content, then the regulation is subject to a strict scrutiny review.[133] "The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[134] In comparison, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[135] The intermediate level of scrutiny is appropriate for regulations aimed at speech combined with nonspeech, or conduct elements,[136] and for regulations aimed at the secondary effects of speech.[137] The recently enacted federal statute that criminalizes virtual child pornography appears, however, to be a content-based regulation.[138]

Although there are only limited interests that may permissibly encroach upon the fundamental freedom of speech,[139] the Court recognized a compelling interest existed in protecting the physical and psychological well-being of minors.[140] Child pornography that uses children in its production undoubtedly harms the physical and psychological well-being of minors, subjecting the child to the sexual abuse[141] while permanently recording it.[142]

Thus far the compelling interest asserted centers upon the particularized harm to the individual child, not upon a general

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[133] *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992).

[134] Sable Communications v. FCC, 492 U.S. 115, 126 (1989). *See also* Roe v. Wade, 410 U.S. 113, 155 (1973).

[135] Turner Broadcasting System, Inc., v. FCC, 114 S. Ct. 2445, headnote 6 (1994).

[136] *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968). For a discussion of the test to be applied for the validity of regulations in such cases, see *supra* note 123.

[137] *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 49 (1986).

[138] The statute cannot be justified without reference to the content of the speech. *See id.* at 48.

[139] *See* Smith v. California, 361 U.S. 147, 155 (1959) (citing Roth v. United States, 354 U.S. 476, 488 (1957)).

[140] *See* New York v. Ferber, 458 U.S. 747, 756–57 (1992); Osborne v. Ohio, 495 U.S. 103, 109 (1990); Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

[141] Participation in child pornography can lead to prostitution. *See 1984 Hearings*, *supra* note 2, at 145; Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 33–34 (1985); David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 544–45 (1981); James A. Inciardi, *Little Girls and Sex: A Glimpse at the World of the "Baby Pro,"* 5 DEVIANT BEHAVIOR 71–78 (1984), *reprinted in Child Pornography and Pedophilia: Hearings Before the Perm. Subcomm. on Investigations of the Senate Comm. on Gov'tal Affairs*, 99th Cong. 90–97 (1985)). Participation can also lead to feelings of depression, alienation, and anxiety. *See* 1986 AG REPORT, *supra* note 34, at 613.

[142] The recording of the abuse is comparable to a distinct separate harm. *See* Patricia Hunt & Margaret Baird, *Children of Sex Rings*, 69 CHILD WELFARE 195, 201–02 (1990).

harm to society, as is apparently the case with obscenity.[143] There is no particularized harm in virtual child pornography, except the privacy interests at stake in virtual child pornography that has permanently recorded the simulated participation of an identifiable minor.[144] In contrast, there is no compelling privacy interest in virtual child pornography in which there is no identifiable minor, or alternatively, no minor at all.[145]

The Court, however, has hinted that nonobscene adult sexually explicit speech does not enjoy the same First Amendment protection as that afforded other, more valuable, speech.[146] If nonobscene virtual child pornography likewise is considered to be low value speech,[147] then the compelling interests advanced to suppress it may not need to be that compelling.

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[143] *See* Burke *supra* note 13, at 126–31; Colen, *supra* note 13, at 686–87, 694; Currin & Showers, *supra* note 26, at 313; Green, *supra* note 31, at 461; Strang, *supra* note 29, at 1798; Weiss, *supra* note 27, at 353.

[144] *See 1996 Hearings*, *supra* note 2 (statement of Professor Frederick Schauer); *see also id.* (testimony of Bruce A. Taylor, President and Chief Counsel of the National Law Center for Children and Families). In such a case, the child's *image* still would be recorded. *See* United States v. Knox, 32 F.3d 733, 749 (3d Cir. 1994) ("Since the child's image is permanently recorded, the pornography may haunt him or her for a lifetime because the child will be aware that the offensive photography or film is circulating through the masses.").

[145] *See* Rimm, *supra* note 4, at 1857–58 ("If technology advances, as it surely will, to allow the creation of pornographic images that do not depict actual children, this justification for prohibiting the dissemination of these images may no longer be compelling."). *See also* Anne Wells Branscomb, *Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information Superhighway Reveal a Threat to the Stability of Society?*, 83 GEO. L.J. 1935, 1946 (1995) ("Some have questioned the legality of computer-generated images of children in sexual poses or of morphed images of adults rendered to appear childlike on the computer screen. I believe that to establish that such images are illegal, it is necessary to show beyond question that the viewing of these images of children in questionable poses or in compromising circumstances is dangerous to the welfare of children.") (footnote omitted).

[146] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (finding nude dancing as a constitutionally protected form of expression is "within the outer perimeters of the First Amendment, though . . . only marginally so."); FCC v. Pacifica Found., 438 U.S. 726, 743 (1978) ("While some of these references [to excretory and sexual organs and activities] may be protected, they surely lie at the periphery of First Amendment concern."); Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) ("[I]t is manifest that society's interest in protecting [erotic materials that have some arguably artistic value] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ."); *see also* Melanie Ann Martin, Note, *Constitutional Law—Non-Traditional Forms of Expression Get No Protection: An Analysis of Nude Dancing Under* Barnes v. Glen Theater, Inc., 27 WAKE FOREST L. REV. 1061, 1079–80 (1992). For a critique of such a values-based approach to free speech and the suggestion of an alternative analysis based upon the harm that flows from the speech, see O. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech? On Replacing Values and Categories in First Amendment Jurisprudence*, 34 AM. BUS. L.J. 1 (1996).

[147] *But see Pacifica*, 438 U.S. at 761 (Powell, J., concurring in part) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on

2. Assertable Interests that May Justify Suppression

Three distinct interests, extrapolated from the Congressional findings offered in support of the 1996 legislation,[148] may be sufficiently compelling to justify the criminalization of virtual child pornography. First, pedophiles and child sexual abusers use real or virtual child pornography to stimulate and whet their own sexual appetites, which arguably results in the viewer becoming desensitized to the pathology of the exploitation of children.[149] That pedophiles use child pornography to become sexually aroused,[150] however, does not translate into sexual abuse; not all pedophiles become child molesters.[151] While pornography may play a greater role in the life of a pedophile than other members of society,[152] that fact alone does not support the conclusion that pedophiles will act on their desires. There may be a strong correlation between the consumption of pornography and the perpetration of sexual crimes against children;[153] however, there is not necessarily a causal relationship.[154] In fact, viewing virtual

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the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection.").

[148] *See* H.R. REP. No. 104, at 28–29 (1996).

[149] *See id.*

[150] *See 1996 Hearings*, *supra* note 2 (statement of Dr. Victor Cline, Professor Emeritus of Psychology, University of Utah). *See also* BURGESS, *supra* note 56, at 86–87 (discussing the uses of child pornography and erotica by pedophiles).

[151] *See* SETH L. GOLDSTEIN, THE SEXUAL EXPLOITATION OF CHILDREN: A PRACTICAL GUIDE TO ASSESSMENT, INVESTIGATION AND INTERVENTION 21 (1987). Relative to normal males subject to similar stimuli involving adults, pictures of children and descriptions of sexual activities involving children produce greater sexual arousal among child molesters. *See* VERNON L. QUINSEY & MARTIN L. LALUMIERE, ASSESSMENT OF SEXUAL OFFENDERS AGAINST CHILDREN 15 (1996).

[152] *See* WHETSELL-MITCHELL, *supra* note 131, at 210–11. Pedophiles are usually collectors of child pornography. *See id.* at 200–02; *see also* BURGESS, *supra* note 131, at 84–85; DANIEL S. CAMPAGNA & DONALD L. POFFENBERGER, THE SEXUAL TRAFFICKING IN CHILDREN: AN INVESTIGATION OF THE CHILD SEX TRADE 30–31 (1988).

[153] *See 1984 Hearings*, *supra* note 2, at 94; S. REP. No. 102, at 372. (1992). Pornography tends to be found in the possession of child molesters as well. *See 1996 Hearings*, *supra* note 2 (testimony of Bruce A. Taylor); *1988 Hearings*, *supra* note 76; 1984 Hearings, *supra* note 2, at 62. Child pornography also has been involved in day-care sexual abuse cases. *See* Deborah Bybee & Carol T. Mowbray, *Community Response to Child Sexual Abuse in Day Care Settings*, 74 FAMILIES SOC'Y 268, 275 (1993). Although possession of child pornography correlates with crimes against children, that correlation alone does not necessarily imply causation.

[154] Pedophilia is a complicated disorder lacking a simple explanation for its cause. *See* WHETSELL-MITCHELL, *supra* note 131, at 37–52. Likewise, to assume that child pornography causes pedophiles to molest children, and to suggest that child pornography be eradicated as a solution to such criminal behavior, is too simplistic a response.

child pornography may produce the opposite effect and alleviate the desire to pursue actual children.[155]

A correlation between crime and adult pornography has not been sufficiently compelling to support either civil rights-based legislation designed to expand the category of obscene speech[156] or the criminalization of the private possession of obscenity.[157] To suppress virtual child pornography on the grounds that it may lead to the victimization and abuse of children is too tenuous a link under First Amendment jurisprudence.[158] "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of the law, not abridgment of the rights of free speech."[159]

A second interest that can be advanced in support of the criminalization of virtual child pornography is that it may be used to seduce children into sexual activity.[160] The danger that children can be coerced into such activity by viewing other child participants is just as great whether the molester uses pictures of actual children or computer-generated images.[161] Child pornography is often used by pedophile offenders to entice children by lowering their inhibitions and to instruct them in various sexual practices.[162] The *Osborne* court specifically cited the use

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[155] *See* Carlin Meyer, *Reclaiming Sex from the Pornographers: Cybersexual Possibilities*, 83 GEO. L.J. 1969, 1999–2003 (1995); *see also 1984 Hearings*, *supra* note 2, at 327 (statement of John Money, Professor of Psychology and Pediatrics) (stating that pornography actually can prevent antisocial behavior in certain circumstances).

[156] Supporters proposed this legislation in an effort to characterize pornographic speech as a violation of women's civil rights. A court, however, ruled unconstitutional one ordinance that included material presenting women as sexual objects or in positions of sexual subordination within its definition of pornography. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986).

[157] *See* Stanley v. Georgia, 394 U.S. 557 (1969).

[158] In other words, the state's compelling interest would not be in the prevention of the direct harm caused to the child as in actual child pornography, but rather in the consequential harm that the viewer of child pornography may cause to children as a result of the viewing. *See* Potuto, *supra* note 51, at 25–27. In 1992, several congressmen proposed legislation that would have allowed a cause of action against producers, distributors, exhibitors, renters, or sellers of child pornography based upon such consequential harm. *See* S. 1521, 102d Cong. (1992) (Pornography Victims' Compensation Act of 1992). The bill, as amended, was reported favorably out of committee, but Congress did not enact it into law. *See* S. REP. No. 372 (1992).

[159] Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 689 (1959) (quoting Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., & Holmes, J., concurring)).

[160] *See* H.R. REP. No. 863, at 28 (1996).

[161] *See id.* at 29.

[162] *See 1996 Hearings*, *supra* note 2 (statement of Dr. Victor Cline, Emeritus Professor of Psychology, University of Utah) (describing cycle of pornography as including using child pornography for sex education and to convince children that sex

of child pornography to seduce children as a valid state interest in support of the Ohio law that criminalized private possession.[163]

Furthermore, computer-generated child pornography more efficiently achieves this end, since innocent pictures of a child's friends can be morphed to make it appear as though they have engaged in such activity, thus generating even greater peer pressure. A morphed image of the child's own likeness also could be used to blackmail the child into silence or sexual submission.[164] In such cases, there is a victim,[165] and the nexus between abuse and child pornography is stronger than in the case where pornography is merely used to stimulate and encourage the pedophile to action. On the other hand, adult pornography is also used in this manner.[166] Such use has not yet justified its suppression. Perhaps the more efficient the use, the more compelling the state's interest in suppression, but that argument is tenuous.[167]

The state can assert a third, more general interest that concentrates on the deleterious effect upon all children that results from the sexualization and eroticization of minors through any form of child pornographic images.[168] Arguably, the objectification of

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is acceptable and desirable); *1988 Hearings*, *supra* note 76, at 32 (testimony of H. Robert Showers, Executive Director, National Obscenity Enforcement Unit, Criminal Division, U.S. Department of Justice); *1984 Hearings*, *supra* note 2, at 129 (statement of Dr. Ann Burgess, Professor of Psychiatric Mental Health Nursing); CAMPAGNA & POFFENBERGER, *supra* note 152, at 118; WHETSELL-MITCHELL, *supra* note 131, at 200–04; 1986 AG REPORT, *supra* note 34, at 649–50; Chock, *supra* note 76, at 386.

[163] *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990); *see also* discussion *supra* notes 55–59 and accompanying text.

[164] *See 1996 Hearings*, *supra* note 2 (statement of Kevin DeGregory, Deputy Assistant Attorney General). Blackmail is another recognized use of child pornography by pedophiles. *See* CAMPAGNA & POFFENBERGER, *supra* note 152, at 118.

[165] *See* Johnson, *supra* note 7, at 330. Even if the attempt at seduction fails, the exposure to pornography could harm some children. *See 1984 Hearings*, *supra* note 2, at 110–11.

[166] *See* 1986 AG REPORT, *supra* note 34, at 411–12 n.74; MacKinnon, *supra* note 141, at 38. In his dissent in *Osborne*, Justice Brennan acknowledged this fact. *See Osborne*, 495 U.S. at 143 n.18 (Brennan, J., dissenting); *see also* Caughlan, *supra* note 51, at 210 (although states have an interest in preventing this solicitation, criminalizing private possession may not decrease opportunity for child abuse since research indicates pedophiles are just as likely to use adult pornography to lure children).

[167] *Osborne*, however, can be distinguished from *Stanley* since actual abuse was involved in the child pornography at issue in the former. Virtual child pornography does not record actual abuse. If child pornography can be banned on the basis of its use in the seduction process, then *Stanley* would no longer be viable. *Stanley* allowed adult obscene materials, which can also be used to seduce children, to be possessed privately. Of course, the *Stanley* Court did not address the use of obscenity to seduce children, and Georgia did not advance that possibility as a legitimate state interest.

[168] H.R. REP. No. 863, at 29 (1996).

children as instruments of sexual gratification has a detrimental effect on the moral fiber of society as a whole.[169] The physiological, emotional and psychological harms caused by actual child pornography trespass against the dignity of the child.[170] If this dignity were viewed in a collective sense, then that same trespass would occur with virtual child pornography. That children collectively should not be treated as sexual objects is arguably a rationale for the decision in *Knox*.[171] The children who danced were not victimized in a physical sense, but the photographer victimized them in the sense that he intended them to be viewed as sexual objects.[172] Although a similar argument with respect to the objectification of women by pornography was not a sufficiently compelling state interest to justify its suppression,[173] children are members of society, whose welfare the state has a compelling interest to protect.[174]

Moreover, while the court implied that obscenity is not protected speech because it fails to convey ideas,[175] just below the surface of the obscenity cases is a second justification for suppression: obscenity has a tendency to deprave social values as

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[169] *See* Donnelly, *supra* note 107, at 301. Nevertheless, the *Ferber* Court only acknowledged that using children as actual *subjects* was harmful to children and society as a whole, not viewing children as sexual *objects*. *See Ferber*, 458 U.S. at 758 n.9 (citing S. REP. No. 95-438, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 40).

[170] *See* United States v. Wiegand, 812 F.2d 1239, 1245 (9th Cir. 1987).

[171] *See supra* note 103 and accompanying text; *see also* United States v. Cross, 928 F.2d 1030 (11th Cir. 1991). In *Cross*, the defendant and his co-conspirator persuaded parents to allow their children to be photographed nude by posing as a film producer who was casting for children to appear in an educational documentary involving an aboriginal dance sequence in New Guinea. *See id.* at 1035 n.7. The defendant also misled the photographer into believing that the former was a legitimate independent film producer. *See id.* at 1036. The producer then cropped the photos to highlight the girls' nude torsos, and close-up photos of adult female genitalia were added. *See id.* at 1036. The Eleventh Circuit found the pictures created from the children's conduct constituted child pornography under federal law, holding the following: "[W]e are of the opinion that the photographs taken or planned involved 'lewd exhibition of the genitals or pubic area'. We reach this conclusion despite the obvious fact that the photographs did not portray the models as sexually coy or inviting, and the Tampa photographer who had been duped by Cross did not knowingly or intentionally exhibit the girls in lewd poses." *Id.* at 1042–43 n.34.

[172] *See* Gassman, *supra* note 8, at 494–95. One of the factors considered in the definition of lascivious exhibition is whether or not the picture is designed to elicit a sexual response in the viewer. *See* United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986).

[173] *See* American Booksellers Ass'n, v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986).

[174] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944).

[175] *See* Roth v. United States, 354 U.S. 476, 484 (1957); *see also* Herceg v. Hustler Magazine, 814 F.2d 1017, 1026 (5th Cir. 1987) (Jones, J., concurring in part, dissenting in part).

well.[176] That there is some greater holistic societal interest in the suppression of child pornography is evidenced by the fact that its importation constitutionally can be prohibited regardless of whether or not U.S. citizens have been abused.[177] This moral degradation argument, which abhors the treatment of children as sex objects, proves neither sufficiently verifiable nor compelling on its own to justify the ban on speech.

While eradicating the sexual exploitation of children is most certainly a compelling state interest, "the means must be carefully tailored to achieve those ends."[178] Criminalizing virtual child pornography will not achieve the end of stemming the tide of sexual abuse absent evidence of a causal relationship between its use and exploitation.[179] Even if a causal relationship could be established, its suppression certainly could be considered constitutionally underinclusive and not carefully tailored since adult pornography can be used as well to seduce children. The Court warns that ceaseless vigilance is the watchword to prevent the erosion of the freedoms of speech and of the press. "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."[180] As technology presents greater challenges to the preservation of fundamental freedoms, opening the door to the punishment of virtual crimes,[181] based upon a fear that actual

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[176] *See* Fort Wayne Books v. Indiana, 489 U.S. 46, 78 (1989) (Stevens, J., dissenting); *Roth*, 354 U.S. at 502 (Harlan, J., concurring in part, dissenting in part); Near v. Minnesota, 283 U.S. 697, 716 (1931). *But cf.* Stanley v. Georgia, 394 U.S. 557 (1969) (private possession cannot be criminalized simply because it might result in antisocial conduct).

[177] *See* United States v. Harvey, 2 F.3d 1318 (3d Cir. 1993); United States v. Nolan, 818 F.2d 1015 (1st Cir. 1987). *See also* Scheller, *supra* note 4, at 1000–01. The Third Circuit, however, was willing to apply federal law extraterritorially because Congress has the power to punish the wrongful *conduct* of its citizens in receiving or importing the material. *See id.* at 1329.

[178] Sable Communications v. FCC, 492 U.S. 115, 126 (1989).

[179] *See* Ronald W. Adelman, *The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237*, 14 MARSHALL J. COMPUTER & INFO. L. 483 (1996) (link between child pornography and acts of child sexual abuse must be based on facts rather than speculation in order for the criminalization of computer-generated child pornography to be constitutional). Moreover, even though the federal government passed more stringent child pornography laws in the 1980s, reported child sexual assaults continue to increase substantially. *See 1988 Hearings*, *supra* note 76, at 239.

[180] Roth v. United States, 354 U.S. 476, 488 (1976).

[181] *See* Julian Dibbell, *A Rape in Cyberspace*, VILLAGE VOICE, Dec. 21, 1993, at 36; *see also* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 217 (1995) (discussing virtual violence).

crimes will occur, or that society as a whole will degenerate, is frightful.

This is not to say that arguments in favor of some provisions of the 1996 legislation are not strong. The provision in the act, which allows child pornography to be defined as such without regard to whether it is real or virtual if it is advertised as being an actual visual depiction of a minor engaging in sex,[182] most likely would be constitutionally sound. Since nonobscene speech can be considered obscene and unprotected if it is pandered as such,[183] then there appears no reason why similarly pandered virtual child pornography should not be treated as actual.

Furthermore, the Supreme Court recognized that the commercial exploitation of sex debases the welfare of the community.[184] This recognition, coupled with the fact that commercial speech does not enjoy full First Amendment protection[185] and false advertising enjoys none,[186] should justify the regulation of virtual pornography being touted as actual, which is legitimately a category of unprotected speech.

In addition to having more power to regulate commercial speech, Congress should have greater leeway with respect to the visual depictions of identifiable minors.[187] Pictures of identifiable minors, which are morphed to depict sexually explicit conduct, still form "a permanent record" of the children's alleged participation resulting in a harm that is further "exacerbated by their circulation."[188]

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[182] *See* H.R. REP. No. 104-863, at 30 (1996) (to be codified at 18 U.S.C. § 2256 (8)(D)).

[183] *See* Ginzburg v. United States, 383 U.S. 463 (1966).

[184] *See Ferber*, 458 U.S. at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials . . . ."); Paris Adult Theatre v. Slaton, 413 U.S. 49, 57–58, 63 (1973); *see also Miller*, 413 U.S. at 34–36 (discussing commercial exploitation of obscene materials). Of course, much of child pornography is traded, not sold. That also may become the case with adult obscenity and its exchange using the Internet. *See generally* Joel Garreau, *Bawdy Bytes: The Growing World of Cybersex*, WASH. POST, Nov. 29, 1993, at A1, A10; Joshua Quittner, *Vice Raid on the Net*, TIME, Apr. 3, 1995, at 63; Gerard Vand der Leun, *Twilight Zone of the Id*, TIME, Spring 1995, at 36 (special edition); *X-Rated: The Joys of CompuSex*, TIME, May 14, 1984, at 83. Whether or not such practices can be considered commercial in a broader sense, however, is debatable.

[185] *See, e.g.*, Cincinnati v. Discovery Network, 507 U.S. 410 (1993); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Virginia Bd. of Pharmacy v. Virginia Consumers Council, 425 U.S. 748 (1976).

[186] *See* Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 563–64 (1979).

[187] *See 1996 Hearings*, *supra* note 2 (statement of Professor Frederick Schauer, Kennedy School of Government, Harvard University). For the definition of "identifiable minor" under the 1996 Act, see *supra* note 11.

[188] *Ferber*, 458 U.S. at 759. *But see Osborne*, 495 U.S. at 143 n.18 (Brennan, J., dissenting) (discussing the state's interest in destroying the permanent record of the

Furthermore, the Court in *Osborne* expressly listed the use of child pornography in the seduction process as a valid reason for the state to encourage the destruction of such materials by criminalizing their private possession;[189] pictures of identifiable minors uniquely can be employed most perniciously to this end.[190] Falsified depictions trounce the privacy interests of the children and could justify the criminalization of virtual child pornography in which a "visual depiction has been created, adapted, or modified to appear that *an identifiable minor* is engaging in sexually explicit conduct."[191] On the other hand, as balanced against free speech interests, perhaps tort law, specifically the tort of false light,[192] is sufficient to protect the minors' interests.[193]

IV. CONCLUSION

The provisions of the 1996 Act that include (1) virtual child pornography advertised as real and (2) virtual child pornography made with identifiable minors as both being within the definition of a category of unprotected speech would probably survive strict scrutiny review. The state's interests, however, in suppressing visual depictions that only *appear* to be of a minor engaging in sexually explicit conduct—the arguments that such depictions (1) will arouse pedophiles to abuse children, (2) will be used, like adult pornography, to seduce children, and (3) will debase society through the treatment of children as sex objects—are not sufficiently compelling nor narrowly tailored to withstand First Amendment challenges.

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victim's abuse). Brennan went on to declare that "I do not believe that the law is narrowly tailored to this end, for there is no requirement that the State show that the child was abused in the production of the materials or even that the child knew that a photograph was taken. Even if the State could recover all copies of the offensive picture, which seems highly unlikely, I do not see how a candid shot taken without the minor's knowledge can 'haun[t]' him or her in the years to come when there is no indication that the child is even aware of its existence." (citation omitted)

[189] *See Osborne*, 495 U.S. at 111.

[190] *See supra* notes 160–163 and accompanying text.

[191] H.R. REP. No. 104-863, at 30 (1996) (to be codified at 18 U.S.C. § 2256(8)(C)) (emphasis added).

[192] *See generally* RESTATEMENT (SECOND) OF TORTS § 652E (1981). An analysis of virtual child pornography as a civil wrong in tort law is beyond the scope of this paper. It should just be noted that the cause of action would be the same if the images of adults were morphed to make it appear as if they were falsely engaging in lewd conduct. The amount of damages, of course, would likely be greater if the depiction involved a child.

[193] *See* Caughlan, *supra* note 51, at 209 (discussing harm flowing from publication of actual child pornography).

A reading of the statute that permits the government to prosecute based only upon the strong *appearance* of a statutory violation and then shifts the burden to the defendant to prove that the depiction is neither real, nor advertised as being real, nor of an identifiable minor, should withstand scrutiny. Despite its substantial chilling effect upon speech, such a proscription should be constitutionally sound since the subject matter of the statute is the welfare of children and the speech may be considered low value.[194] It is currently difficult to distinguish actual child pornography from virtual child pornography; in a short time it may be impossible.[195] This development would preclude the government from ever being able to bear its burden of proving a violation beyond a reasonable doubt if the definition of child pornography was limited to visual depictions of actual children engaging in sexually explicit conduct.[196]

There is precedent for allowing such remedial measures in the face of an insurmountable prosecutorial challenge. For example, *Miller* rejected as unworkable prior jurisprudence that suggested that prosecutors needed to establish that a work was "utterly without redeeming social value"[197] before it could be classified as obscenity.[198] Moreover, prohibiting the importation of child pornography, which utilizes children not identifiable as U.S. citizens, is permissible in part because the works' true origin would be impossible to ascertain.[199] Likewise, the difficulty in determining whether or not child pornography has moved in interstate commerce is independent justification for the crimi-

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[194] *See supra* notes 150–151 and accompanying text.

[195] *See 1996 Hearings*, *supra* note 2 (statement of Professor Schauer, Kennedy School of Government, Harvard University). One of the Congressional findings offered in support of the 1996 legislation recognized this technological reality. *See* H.R. REP. No. 104-863, at 28 (1996); *see also* Kathy Sawyer, *Is It Real or Is It . . . ? Digital-Imaging Fiction Leaves No "Footprints"*, WASH. POST, Feb. 21, 1994, at A3.

[196] *See 1996 Hearings*, *supra* note 2 (testimony of Bruce Taylor, President and Chief Counsel of the National Law Center for Children and Families); Johnson, *supra* note 7, at 329. Prior to the 1996 legislation the government would have to disprove that visual depictions were computer generated if the defendant offered evidence of such. *See* United States v. Nolan, 818 F.2d 1015 (1st Cir. 1987). *See also* United States v. Kimbrough, 69 F.3d 723 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1547 (1996) (jury instructions sufficient to allow fact finder to conclude, if it so believed, that depictions had been altered and were not of actual children).

[197] Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (plurality opinion). *See also* Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (plurality opinion); Roth v. United States, 354 U.S. 476, 484 (1957).

[198] *See Miller*, 413 U.S. at 24.

[199] *See* United States v. Nolan, 818 F.2d 1015 (1st Cir. 1987). Visual depictions made in the United States could be sent abroad for reproduction, and subsequently, be exported back to the United States. *See id.* at 1016 n.1.

nalization of private possession, particularly given the interests at stake.[200] Establishing some form of scienter may still be problematic, though a form of recklessness might suffice.[201]

A compelling state interest in protecting real children from real abuse may support such a shift in the burden of proof, but it is not clear that this is the law's limited purpose. If, instead, the purpose is to suppress outright visual depictions that only appear to be of a minor engaging in sexually explicit conduct, then the law will not withstand constitutional challenge. In this case Larry Flynt[202] and Justice Holmes[203] are right: freedom is for the *thought* you hate.

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[200] *See* Kent, *supra* note 29, at 370–71 (discussing difficulty of establishing that clearly pornographic depictions of children had moved in interstate commerce).

[201] *See supra* notes 85–92 and accompanying text.

[202] *See* CNN Broadcast, *supra* note 1.

[203] *See* United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.").

NOTE

THE COMMUNICATIONS DECENCY ACT: CONGRESSIONAL REPUDIATION OF THE "RIGHT STUFF"

VIKAS ARORA*

The Communications Decency Act of 1996 generated a national debate regarding the proper role of government in the regulation of indecent Internet communications. This Note offers a philosophical analysis of that debate, from the legislative history of the Act through the upcoming Supreme Court review of a judicial panel's decision that certain provisions of the Act are unconstitutional. The author concludes that Congress acted imprudently in passing the Communications Decency Act of 1996, and beseeches Congress to refrain from any future attempts to regulate the Internet.

As "the world's largest computer network,"[1] the Internet[2] brings communications technology one step closer to achievement of a world without borders. on-line services, such as electronic mail ("e-mail"), bulletin board services ("BBS"), and the World Wide Web ("WWW"), offer interactive computer users fora in which they may communicate with one another rapidly and relatively inexpensively.[3] By providing access to cyberspace,[4] or the "information superhighway,"[5] the Internet furnishes a new arena in

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[1] JOHN R. LEVINE & CAROL BAROUDI, THE INTERNET FOR DUMMIES 9 (1993). It is estimated that by the year 1998, 100 million people around the world will be using the Internet. *See* Sean Adam Shiff, *The Good, the Bad and the Ugly: Criminal Liability for Obscene and Indecent Speech on the Internet*, 22 WM. MITCHELL L. REV. 731, 734 (1996).

[2] An individual accesses the Internet by either employing a modem on a personal computer to connect via a telephone line to a computer network that is linked to the Internet, or utilizing a computer that is connected directly to a network linked to the Internet.

[3] For a detailed explanation of the most common methods of Internet communications, see *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 834–38 (E.D. Pa. 1996) (explaining the characteristics of and differences among one-to-one messaging, one-to-many messaging, distributed message databases, real time communication, real time remote computer utilization, and remote information retrieval).

[4] William Gibson was the first to employ the term "cyberspace," describing it as "[a] consensual hallucination experienced daily by billions of legitimate operators, in every nation . . . ." WILLIAM GIBSON, NEUROMANCER 51 (1984).

[5] Then Senator Al Gore (D-Tenn.) popularized the term "information superhighway." *See* Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062 n.3 (1994).

which Americans can exercise their First Amendment right to free speech.[6] Threatening to quash the remarkable promise this revolution in communications has for speakers with Internet access, citizens and government officials alike have sought to "purify" the Internet[7] by prohibiting the transmission and/or display of "obscene," "indecent," and "patently offensive" content.

The constitutional concern implicated by the availability of pornography on the Internet is how, if at all, the government may regulate the Internet to arrest the communication of "indecent" and "obscene" material.[8] Until recently, Internet operators and users exercised self-regulation through formal agreements or informal arrangements.[9] In 1995, however, based in part on a study finding that pornographic images were rampant on the Internet,[10] one U.S. Senator made it his personal cause to cleanse the Internet of any and all "indecent" content.[11]

This Note presents a philosophical analysis of that Senator's war on on-line indecency, which achieved a short-lived victory when President Clinton signed the Communications Decency Act of 1996 (CDA, or "Act") into law on February 8, 1996. Part

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[6] *See id.* at 1086 (noting that interactive computer communications will bolster the free speech interests of users); *see also Regulating the Internet: Should Pornography Get a Free Ride on the Information Superhighway? A Panel Discussion*, 14 CARDOZO ARTS & ENT. L.J. 343, 353 (1996) (statement of Mike Godwin, Staff Counsel, Electronic Frontier Foundation) ("This really is the first time in history that the power of a mass medium has been in the hands of potentially everybody. This is an immense opportunity for an experiment in freedom of speech and democracy.").

[7] *See, e.g.*, 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statement of Sen. Biden (D-Del.)) ("[S]ome of the information traveling over the Internet is tasteless, offensive, and downright spine-tingling.").

[8] Because obscene computer communications were illegal prior to enactment of the CDA, this Note focuses solely on government regulation of "indecent" or "patently offensive" on-line material. *See infra* notes 13–17 and accompanying text.

[9] *See* Shiff, *supra* note 1, at 733.

[10] *See* 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 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995) (finding that 83.5% of computer images surveyed on the Internet were pornographic). While Rimm's study sparked a flurry of media attention, his findings ultimately were discredited because he (1) did not subject his study to peer review, (2) employed a flawed methodology, (3) possibly plagiarized his findings, and (4) wrote a handbook instructing individuals on how to become lucrative pornographers. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 55–56 (1996).

[11] *See* 141 CONG. REC. S8090 (daily ed. June 9, 1995) (statement of Sen. Exon (D-Neb.)) ("There has been nothing that has concerned me more in my 8 years as Governor of Nebraska and my 17 years of having the great opportunity to serve my state in the Senate; there is nothing I feel more strongly about than this piece of legislation . . . .").

I of this Note examines the legislative history of this extraordinary statute. Part II outlines the Congressional and public debate surrounding passage of the CDA as a conflict between utilitarian and libertarian philosophies. Part III turns from this legislative and popular polarization to detailed analyses of the opinions rendered by two judicial panels declaring certain provisions of the CDA unconstitutional, as well as a brief comment on what the Supreme Court will consider in its review. In light of these opinions, Part IV reexamines the debate surrounding the CDA, suggesting that Congress imprudently acted upon communitarian motivations rather than upholding traditional liberal values. Part V offers a concluding remark, beseeching Congress to uphold First Amendment rights in the face of competing claims of the common good, and thus to refrain from any future attempt to regulate the Internet.

I. The Legislative History of the CDA

A. *The CDA as Enacted into Law*

President Clinton signed the Telecommunications Act of 1996[12] into law on February 8, 1996. The CDA,[13] which forbids the

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[12] Pub. L. No. 104-104, 110 Stat. 133–145 (codified as amended at 47 U.S.C. § 223 (1934)). Congress passed the Telecommunications Competition and Deregulation Act "[t]o promote competition in various sectors of the communications industry, including broadcast, cable, satellite, wireless, long distance, and local telephone service." 142 Cong. Rec. S687 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings (D-S.C.)).

[13] Pub. L. No. 104-104, 110 Stat. 133–145 (to be codified at 47 U.S.C. § 223(a)–(h) (1995)). The sections prohibiting indecent and patently offensive on-line communications provide the following:

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

knowing creation and distribution of "indecent" and "patently offensive" communications over computer networks to minors, constituted a part of section 502 of Title V of the new law. By amending section 223 of Title 47 of the United States Code with the CDA, Congress sought both to extend prohibitions on communicating harassment, indecency, and obscenity to "telecommunications devices"[14] and to render unlawful patently offensive displays and transmissions made via "interactive computer services."[15] In response to the concerns both of technology advocates alleging that the threat of liability would inhibit Internet use and development and of access providers proclaiming that monitoring the Internet would be an impossible task,[16] Congress aimed the CDA only at providers of indecent and patently offensive content.[17] In order to maximize the CDA's deterrent value, Con-

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persons under 18 years of age, or

(B) 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

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(a), (d) (1995).

[14] A modem is a "telecommunications device."

[15] The CDA references § 230(e)(2) for the definition of "interactive computer service." *See* 47 U.S.C. § 223(h)(2) (1995). Section 230(e)(2) defines "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." 47 U.S.C. § 230(e)(2) (1995). The CDA defines "access software" in 47 U.S.C. § 223(h)(3) (1995).

[16] *See, e.g., Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearings on S. 892 Before the Senate Committee on the Judiciary, 104th Cong.* 72–73 (1996) [hereinafter *Cyberporn Hearing*] (statement of William W. Burrington, Assistant General Counsel and Director of Government Affairs, America Online, Inc., and Chairman of the Online Policy Committee, Interactive Services Association) ("[O]nline service providers cannot police and be aware of the specific content of each communication, and yet they are penalized [by the original draft of the CDA] for transmitting certain communications.").

[17] *See* H.R. CONF. REP. NO. 104-458, at 190 (1996) (stating that the purpose of the CDA was "to target the criminal penalties of new sections 223(a) and (d) at content providers who violate this section and persons who conspire with such content providers, rather than entities that simply offer general access to the Internet and other online content"); *see also* 142 CONG. REC. S714 (daily ed. Feb. 1, 1996) (statement of Sen. Exon) ("In general, the legislation is directed at the creators and senders of obscene and indecent information."). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(e)(3) (1995).

gress specified that violators of the Act would be liable for "each intentional act of posting" such content, rather than each circumstance of access by a minor.[18]

As passed, the CDA provides the following three groups with statutory defenses to criminal liability: access service providers,[19] "innocent" employers,[20] and individuals who, in good faith, take "reasonable, effective, and appropriate actions" to restrict access by minors to offending material.[21] Furthermore, the CDA exempts from criminal and civil liability any person who in good faith asserts one of the three affirmative defenses.[22] However, if

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[18] *See* H.R. CONF. REP. No. 104-458, at 189–90 (1996).

[19] *See* 47 U.S.C. 223(e)(1) (1995), which provides that:

> No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

This defense is not available to a conspirator of a content provider or an access provider that explicitly advertises the availability of indecent and obscene communications on its service, *see* 47 U.S.C. § 223(e)(2) (1995), nor may it be claimed by an individual providing access to his own system or network, *see* 47 U.S.C. § 223(e)(3) (1995). Senator Exon's rationale for including this defense was that "[a]n online service that is providing such [access] services is not aware of the contents of the communications and should not be responsible for its contents." 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statement of Sen. Exon).

[20] See 47 U.S.C. 223(e)(4) (1995), which states that:

> No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

[21] See 47 U.S.C. § 2223(e)(5) (1995), which provides that:

> It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person—
>
> (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or
>
> (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

According to the House Conference Committee, prosecutors must construe the good faith defense broadly "to avoid impairing the growth of online communications . . . ." *See* H.R. CONF. REP. No. 104-458, at 190 (1996).

[22] See 47 U.S.C. § 223(f)(1) (1995), providing that:

> No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise

an alleged violator of the CDA fails, in good faith, to assert one of the statutory defenses and is found to have sent "indecent" or "patently offensive" on-line material, that person is subject to a fine set in accordance with Title 18 of the United States Code, a two year prison sentence, or both.[23]

Congress drafted the CDA expansively, expressly providing that the Act preempted state law as applied to commercial entities and their activities, nonprofit libraries, and colleges and universities.[24] Because the Department of Justice already had statutory authorization to police the transmission of obscenity and child pornography by computer,[25] Congress gave CDA enforcement powers to that.[26] Ultimately, Congress passed the CDA as a legislative compromise designed to remedy the alleged abundance of pornography on the Internet without stifling the growth and use of interactive computer technology.[27]

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to restrict or prevent the transmission of, or access to, a communication specified in this section.

Senators Exon and Coats (R-Ind.) revised the CDA to allow this defense in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995), in which the court held Prodigy liable as a publisher for a libelous comment about Stratton posted on its service. *See* 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statement by Sen. Coats) (explaining that the CDA's intent "is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable"). The House Conference Committee explicitly stated that it was overturning *Stratton*. *See* H.R. CONF. REP. No. 104-458, at 191 (1996).

[23] *See supra* note 13 at § 223(d). As originally drafted, the penalty for a violation of the CDA was to be a $10,000 fine and/or a maximum six-month prison sentence. *See* Cannon, *supra* note 10, at 58. The change which occurred in conference committee had the effect of placing enforcement of the CDA in the hands of the Department of Justice, rather than the Federal Communications Commission, as originally proposed by Senator Exon. *See infra* note 26 and accompanying text.

[24] *See* 47 U.S.C. § 223(f)(2) (1995). However, the Act did provide that any state or local government could enact and enforce "complementary oversight, liability, and regulatory systems, procedures, and requirements," so long as they were not inconsistent with the CDA. *See id.*

[25] *See* 18 U.S.C. § 1465 (1995) (criminalizing the distribution over computer networks of obscene and other pornographic materials harmful to minors); 18 U.S.C. § 2252 (1995) (prohibiting the illegal solicitation of a minor using a computer network); 18 U.S.C. § 2423(b) (1995) (barring the illegal luring of a minor into sexual activity through computer conversations).

[26] As originally drafted, Congress had given the Federal Communications Commission (FCC) enforcement authority over the CDA. *See Original Exon Proposal, infra* note 28.

[27] Even the Senator who introduced the CDA repeatedly affirmed that he both recognized the Internet's communicative potential and supported its use as an informative and educational tool. *See, e.g.*, 141 CONG. REC. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon) ("There has not been anything that I think is more exciting that has ever been developed than the information superhighway and what it is going to do to make more information and more education readily accessible to any who seek it."). Congress sought to prevent the diminution of Internet use due to parents fearing

B. *Proceedings in the Senate*

1. The Act as Formulated by Senators Exon and Coats

On February 1, 1995, Senator James Exon (D-Neb.) introduced legislation to "extend the standards of decency which have protected telephone users to new telecommunications devices."[28] Citing the need to protect children and families from indecent communications, Senator Exon heralded his bill as a measure necessary to prevent the information superhighway from becoming a "red light district."[29] In an attempt to capitalize upon Congressional interest in passing comprehensive telecommunications reform legislation,[30] Senator Exon proposed the CDA as an amendment to the Federal Telecommunications Act of 1934.[31]

On March 23, 1995, the Senate Committee on Commerce, Science, and Transportation passed a telecommunications reform package,[32] which included Senator Exon's amendment to section 223 of the Federal Communications Act.[33] In response to censure from the Department of Justice, opposition from First Amendment advocates, and criticism from pro-family and anti-pornography groups,[34] Senator Exon, with Senator Daniel Coats (R-

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that their children would be exposed to indecent on-line material. *See* 141 CONG. REC. S8339 (daily ed. June 14, 1995) (statement of Sen. Exon).

[28] S. 314, 104th Cong. (1995). *See* 141 CONG. REC. S1920 (daily ed. Feb. 1, 1995) [hereinafter *Original Exon Proposal*]. Senator Exon later refined his original proposal with two amendments. *See* 141 CONG. REC. S8120 (daily ed. June 9, 1995); 141 CONG. REC. S8328 (daily ed. June 14, 1995).

[29] *See* 141 CONG. REC. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon). The fact that children were seen as "the computer experts in our Nation's families" heightened concern over easy access to indecent on-line content. *See* 141 CONG. REC. S8332 (daily ed. June 14, 1995) (statement of Sen. Coats).

[30] Sen. Exon noted that the CDA necessarily deserved consideration given the Senate's interest in updating legislation governing the telecommunications industry. *See* 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon) ("Just as we modernize the rules which apply to the telecommunications industry, we need to modernize the rules which apply to the use of their products and their services that are going to be distributed in a form that we never even imagined previously.").

[31] 47 U.S.C. § 223 (1995).

[32] *See* S. REP. NO. 104-23 (1995).

[33] *See id.* at 59–60.

[34] *See* 141 CONG. REC. S8088–89 (daily ed. June 9, 1995) (statement of Sen. Exon) (informing the Senate that he had made revisions to his original draft of the CDA "in response to concerns raised by the Justice Department, the pro-family and anti-pornography groups, and the First Amendment scholars"). Senator Leahy (D-Vt.) commended Senator Exon for his efforts, stating that "[t]he revisions made by Senator Exon reflect a diligent and considered effort by him and his staff to correct serious problems that the Department of Justice, I, and others have pointed out with this section of the bill." 141 CONG. REC. S8340 (daily ed. June 14, 1995) (statement of Sen. Leahy).

Ind.), revised the CDA.[35] Senator Exon introduced this updated version of the CDA on June 9, 1995.[36] Aware that the CDA lacked broad support,[37] Senator Exon made available to his colleagues a blue book containing examples of pornography downloaded from the Internet.[38] Perhaps more than the inflammatory rhetoric employed by Senator Exon and the other CDA sponsors, the contents of the blue book swayed disinclined Senators eventually to vote in favor of the Act.[39]

2. The Alternatives Offered

In response to Senator Exon's campaign against on-line indecency, two Senators introduced alternative legislation designed to address the alleged problem. These proposals prevented the Senate from debating the CDA in a vacuum, but rather to consider the Act in relation to both a bill calling for a more rigorous form of governmental regulation and one recommending a more passive legislative response.

a. *Senator Grassley's Protection of Children from Computer Pornography Act.* On June 7, 1995, Senator Charles Grassley (R-Iowa) launched a campaign against the CDA by introducing the Protection of Children from Computer Pornography Act ("PCCPA").[40] Senator Grassley, and his conservative cospon-

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[35] The Senators' modifications primarily revised the original statute's affirmative defense provisions. *See* Cannon, *supra* note 10, at 65.

[36] *See* 141 CONG. REC. S8087 (daily ed. June 9, 1995). Senators Coats, Byrd (D-W. Va.), and Heflin (D-Ala.) cosponsored the new version of the CDA. *See* 141 CONG. REC. S8386 (daily ed. June 14, 1995).

[37] *See* Cannon, *supra* note 10, at 64 ("At first, support for the CDA was uncertain."). For statements of Senatorial opposition to the CDA, see 141 CONG. REC. S8346 (daily ed. June 14, 1995) (statement of Sen. Levin (D-Mich.); *id.* at S8345 (statement of Sen. Biden); *id.* at S8334 (statement of Sen. Feingold (D-Wis.)).

[38] *See* 141 CONG. REC. S8089 (daily ed. June 9, 1995) (statement of Sen. Exon).

[39] *See* Cannon, *supra* note 10, at 64.

[40] S. 892, 104th Cong. (1995) (introduced by Sen. Grassley). The PCCPA provided, in relevant part, the following:

> (b)(2) TRANSMISSION BY REMOTE COMPUTERS FACILITY OPERATOR, ELECTRONIC COMMUNICATIONS SERVICE PROVIDER, OR ELECTRONIC BULLETIN BOARD SERVICE PROVIDER.-A remote computer facility operator, electronic communications service provider, or electronic bulletin board service provider who, with knowledge of the character of the material, knowingly-
>
> (A) transmits or offers or attempts to transmit from the remote computer facility, electronic communications service, or electronic bulletin board service provider a communication that contains indecent material to a person under 18 years of age; or
>
> (B) causes or allows to be transmitted from the remote computer facility,

sors,[41] objected to the CDA's defenses, which they felt would allow crafty pornographers to escape criminal liability. The PCCPA sought to amend 18 U.S.C. § 1464,[42] by making it a crime both for a content provider knowingly or recklessly to transmit, or to attempt to transmit, indecent material to minors, and for an on-line service provider[43] knowingly or recklessly to transmit indecent communications to a minor via the Internet or an electronic bulletin board.[44] Perhaps because it threatened to crush on-line service providers with potentially limitless liability and failed to offer as much compromise as did the revised CDA submitted by Senators Exon and Coats, Senator Grassley's bill received little serious consideration from other members of the Senate.

b. *Senator Leahy's Child Protection, User Empowerment and Free Expression in Interactive Media Study Act.* Opposing Senator Exon's Act, Senator Patrick Leahy (R-Vt.) introduced The Child Protection, User Empowerment and Free Expression in Interactive Media Study Act ("FEIMSA") as a rival amendment to the CDA.[45]

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electronic communications service, or electronic bulletin board a communication that contains indecent material to a person under 18 years of age or offers or attempts to do so,

shall be fined in accordance with this title, imprisoned not more than 5 years, or both.

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

S. 892, 104th Cong. (1995), *reprinted in* 141 CONG. REC. S7923 (daily ed. June 7, 1995).

[41] Senators Bob Dole (R-Kan.), Dan Coats (R-Ind.), Mitch McConnell (R-Ky.), Richard Shelby (R-Ala.), and Don Nickles (R-Okla.) cosponsored the PCCPA. *See* 141 CONG. REC. S7922–23 (daily ed. June 7, 1995); *see also* 141 CONG. REC. S8084 (daily ed. June 9, 1995) (statement of Sen. Dole in support of Sen. Grassley's proposed amendment).

[42] This statutory provision regulates the broadcast of obscene language. *See* 18 U.S.C. § 1464 (1995).

[43] Note that in contrast to the CDA, which only applies to content providers, Senator Grassley's proposed bill also would have held on-line access providers liable for the indecent communications of content providers.

[44] *See* 141 CONG. REC. S7922 (daily ed. June 7, 1995).

[45] S. 714, 104th Cong. (1995), *reprinted at* 141 CONG. REC. S8395–96 (daily ed. June 14, 1995); *see also* 141 CONG. REC. S5548 (daily ed. Apr. 7, 1995) (statement of Sen. Leahy) (discussing S. 714). Senator Leahy proposed S. 714 as an amendment to an

The proposed bill ordered the Department of Justice to conduct a study on what, if any, legislation concerning pornography and the Internet was necessary given existing criminal laws prohibiting the distribution of obscenity and child pornography via computers.[46] Pending the results of the study, Senator Leahy recommended that Congress refrain from legislating against indecency on the Internet.[47]

In response to Senator Exon's accusation that the FEIMSA was an irresponsible attempt to "punt" legislative authority to the Department of Justice,[48] Senator Leahy characterized Senator Exon's proposal not only as a punt,[49] but also as the result of

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amendment to S. 652 proposed by Senator Gorton (R-Wash.). *See* 141 CONG. REC. S8395–96 (daily ed. June 14, 1995). Senator Leahy's revised section, entitled Report on Means of Restricting Access to Unwanted Material in Interactive Telecommunications Systems, read as follows:

> (1) REPORT.-Not later than 150 days after the date of the enactment of this Act, the Attorney General shall submit to the Committees on the Judiciary of the Senate and the House of Representatives a report containing-
>
> (A) an evaluation of the enforceability with respect to interactive media of current criminal laws governing the distribution of child pornography by means of computers;
>
> (B) an assessment of the Federal, State, and local law enforcement resources that are currently available to enforce such laws;
>
> (C) an evaluation of the technical means available-
>
> (i) to enable parents to exercise control over the information that their children receive by interactive telecommunications systems so that children may avoid violent, sexually explicit, harassing, offensive, and other unwanted material on such systems;
>
> (ii) to enable other users of such systems to exercise control over the commercial and noncommercial information that they receive by such systems so that such users may avoid violent, sexually explicit, harassing, offensive, and other unwanted material on such systems; and
>
> (iii) to promote the free flow of information, consistent with the values expressed in the Constitution, in interactive media; and
>
> (D) recommendations on means of encouraging the development and deployment of technology, including computer hardware and software, to enable parents and other users of interactive telecommunications systems to exercise the control described in clauses (i) and (ii) of subparagraph (C).
>
> (2) CONSULTATION.-In preparing the report under paragraph (1), the Attorney General shall consult with the Assistant Secretary of Commerce for Communications and Information.

See id.

[46] *See infra* note 100 and accompanying text.

[47] *See* 141 CONG. REC. S8339–40 (daily ed. June 14, 1995) (statement of Sen. Leahy).

[48] *See* 141 CONG. REC. S8339 (daily ed. June 14, 1995) (statement of Sen. Exon). Senator Exon also charged the Clinton Administration and the Department of Justice, both of whom had expressed hesitation to enactment of the CDA, with attempting to punt the protection of children from on-line indecency. *See* 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon).

[49] *See* 141 CONG. REC. S8342 (daily ed. June 14, 1995) (statement of Sen. Leahy). This part of Senator Leahy's retort was directed primarily at Senator Exon's original draft of the CDA, which would have given the FCC the authority to enforce the provisions of the CDA.

hasty legislative decision-making.[50] In contrast to Senator Exon's characterization of the Internet as an imminent threat to children and families,[51] Senator Leahy encouraged his fellow Senators to enact a statute that reflected an understanding of the relatively new interactive medium and gave thoughtful consideration to whether governmental regulation of the content of that medium was a prudent course of legislative action.[52] Even though Senator Leahy's wait-and-see approach may have been eminently reasonable, the FEIMSA died on the Senate floor in light of the prevailing sentiment that the legislature had to act in order to protect children from on-line material akin to the contents of Senator Exon's blue book.

3. Overwhelming Senate Approval of the Act

Ultimately, the Senate rejected the proposals put forth by Senators Leahy and Grassley, choosing instead to adopt the revised CDA. The Senate added the Act to its version of the telecommunications reform bill on June 14, 1995.[53] The following day, the Senate passed the Telecommunications Competition and Deregulation Act.[54] The CDA had withheld Senate scrutiny[55] and was ripe for consideration by the House.

C. *Reaction to the Act in the House of Representatives*

After Senators Exon and Coats introduced their revised version of the CDA, Speaker of the House Newt Gingrich (R-Ga.) proclaimed his opposition to the Act, denouncing it as an uncon-

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[50] *See* 141 CONG. REC. S8342 (daily ed. June 14, 1995) (statement of Sen. Leahy).

[51] *See supra* note 29 and accompanying text.

[52] *See* 141 CONG. REC. S8331 (daily ed. June 14, 1995) (statement of Sen. Leahy) ("I am trying to protect the Internet, and make sure that when we finally have something that really works in this country, that we do not step in and screw it up, as sometimes happens with Government regulation.").

[53] By a vote of 84 to 16, the Senate approved amending the Senate telecommunications bill by adding the CDA. *See* 141 CONG. REC. S8347 (daily ed. June 14, 1995).

[54] S. 652 passed by a vote of 81 to 18. *See* 141 CONG. REC. S8570 (daily ed. June 16, 1995).

[55] This is perhaps due in part to the fact that the Act was promoted as a means to protect children from obscenity and child pornography. *See* 143 CONG. REC. S742 (daily ed. Jan. 28, 1997) (statement of Sen. Leahy) ("All 100 Senators, no matter where they are from, would agree that obscenity and child pornography should be kept out of the hands of children and that those who sexually exploit children or abuse children should be vigorously prosecuted."). However, as stated earlier, criminal statutes prosecuting such acts by use of a computer previously existed. *See supra* note 25.

stitutional and ineffective means of protecting children from indecent on-line material.[56] The House initially rejected the CDA in favor of the Internet Freedom and Family Empowerment Act[57] ("IFFEA") proposed by Representatives Chris Cox (R-Cal.) and Ron Wyden (D-Ore.).[58] Finding the Internet to be a powerful informative and educational communications medium,[59] the House attached the IFFEA, which heralded the merits of a regulation-free Internet, to its version of the telecommunications bill. The

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[56] On a television show aired June 20, 1995, Speaker Gingrich proclaimed that the CDA "is clearly a violation of free speech and it's a violation of the right of adults to communicate with each other. I don't agree with it and I don't think it is a serious way to discuss a serious issue . . . ." Center for Democracy and Technology, *Gingrich Says CDA Is a "Clear Violation of Free Speech Rights"* (visited Apr. 24, 1997) <http://www.cdt.org/ policy/freespeech/ging_oppose.html> (reprinting Gingrich's comment from the *Progress Report*, a program broadcast on June 20, 1995 on National Empowerment Television).

[57] The Cox/Wyden Amendment, first introduced June 30, 1995, sought to amend Title II of the Communications Act of 1934 by adding the following policy in an amended section 230:

> (b) POLICY.-It is the policy of the United States-
>
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
>
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
>
> (5) to ensure vigorous enforcement of criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

H.R. 1978, 104th Cong. (1995) (enacted).

[58] *See* 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statements of Reps. White (R-Wash.), Markey (D-Mass.), Goodlatte (R-Va.), Fields (R-Tex.), and Lofgren (D-Cal.)), *id.* at H8470 (statements of Reps. Wyden, Barton (R-Tex.), and Danner (D-Mo.)), *id.* at H8469 (statement of Rep. Cox (R-Cal.)).

[59] In their proposed Act, Representatives Cox and Wyden listed the following findings to be included in § 230 of Title II of the Communications Act of 1934:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
>
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

H.R. 1978, 104th Cong. (1995) (enacted).

House passed the Cox/Wyden Amendment overwhelmingly, with a 420 to 4 vote.[60]

Overcoming this early opposition, the House ultimately passed the CDA as part of its version of the Telecommunications Act.[61] After months of negotiation, the conference committee[62] decided to recommend inclusion of both the CDA and the IFFEA in the final version of the Telecommunications Act of 1996.[63]

The effect of the House's addition of the IFFEA was not as significant as critics of the CDA may have hoped; the IFFEA merely declared a governmental policy and did not expressly forbid governmental regulation of the Internet. Furthermore, it specifically stated that "[n]othing in this section shall be construed to impair the enforcement of section 223,"[64] which was the provision CDA had been proposed to amend. Inclusion of the IFFEA in the final legislation adopted as part of the telecommunications reform package of 1996 thus may not have had any substantive effect on the CDA in particular or on-line indecency in general. However, it did represent an effort to foster a pro-technology legislative spirit. Members of the House likely added the IFFEA as a symbol meant to portray the CDA-enacting Congress as allies of the use and development of the information superhighway.

Congress passed the CDA—perhaps the outcome of undemocratic legislative decision-making[65] or the result of ideologically conservative election-year politics[66]—as part of the telecommunications industry reform package on February 1, 1996.[67] One

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[60] *See* 141 CONG. REC. H8478–79 (daily ed. Aug. 4, 1995).

[61] *See* 141 CONG. REC. H10,000 (daily ed. Oct. 12, 1995).

[62] The members of the conference committee included Senators Exon and Gorton (R-Wash.), co-sponsors of the CDA. Senator Leahy and Representatives Cox and Wyden were not named to the committee, although Rep. White (R-Wash.), who co-sponsored the Cox/Wyden amendment was so designated. *See* Cannon, *supra* note 10, at 91.

[63] *See supra* note 13.

[64] *See* 47 U.S.C. § 230(d)(1) (1995).

[65] *See* Electronic Frontier Foundation, *Statement on 1996 Telecommunications Regulation Bill: Your Constitutional Rights Have Been Sacrificed for Political Expediency*, 2–3 (Feb. 1, 1996) <http://www.eff.org/pub/Censorship/Exon_bill/cda_960201_eff.statement> (noting that there were no public hearings on the legislation, that no conference committee report or final bill text was made available to the public until after passage, and that Congress voted for passage only one day after the bill was voted out of conference).

[66] *See id.* at 1 ("Congress demonstrates once more their willingness to abandon their most sacred responsibilities—the protection of the U.S. Constitution and Bill of Rights—in order to expedite legislation that sacrifices individual, family and community rights in its rush to win the support of telecom industry giants as well as the religious right, during an election year.").

[67] *See* 142 CONG. REC. S687 (daily ed. Feb. 1, 1996). The House and Senate gave

week later, amid vigorous contestation concerning the prudence of regulating Internet content, President Clinton signed the Act into law.[68]

II. The CDA Debate: Utilitarianism vs. Libertarianism

The CDA did not obtain Congressional approval without controversy. Both within the halls of the Capitol and throughout the media, government officials, members of both anti-pornography and pro-technology groups, and lay citizens vigorously debated the propriety of the legislation. Immediately upon introduction of the bill, advocates of the CDA adopted a viewpoint that was in polar opposition to that of their opponents. Neither side disputed the existence of indecent material on the Internet, but each adopted a different approach as to what, if anything, the government needed to do about what CDA proponents considered a serious problem warranting Congressional attention. The sides in the debate embraced two traditional philosophies that seemed to inspire their respective standpoints. Attacking on-line indecency on utilitarian grounds, advocates of the CDA were unable sufficiently to justify their position to their libertarian counterparts, who remained steadfast in their opposition to the Act.

A. *Utilitarian Support for the CDA*

Acknowledging it as a potential abridgment of First Amendment rights, proponents of the CDA consistently claimed that they were championing the Act for the compelling interest of protecting children from pornographic material.[69] Underlying the

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their final approval on February 6, 1996. *See* 142 Cong. Rec. S915 (daily ed. Feb. 6, 1996); 142 Cong. Rec. H1231 (daily ed. Feb. 6, 1996).

[68] *See supra* note 13 and accompanying text.

[69] Some contend that this justification may have been a guise for instituting anti-pornography, pro-family value mandates into cyberspace. *See* Glen O. Robinson, *The "New" Communications Act: A Second Opinion*, 29 Conn. L. Rev. 289, 315 (Fall 1996) ("The semi-official mantra of contemporary censorship is that it is necessary to protect the children. I think this is mostly a convenient cover for a deeper objection to what many see as cultural coarseness in public images and communications."); *Regulating the Internet*, *supra* note 6, at 373 (statement of Nadine Strossen, Professor of Law, New York Law School, and President, American Civil Liberties Union) ("[M]any who advocate cyber-censorship are not genuinely doing so to protect children, but instead are hiding behind an alleged concern for children. What they are really trying to do is deny access to these words and images for adults as well.").

proponents' assertions was a Benthamite utilitarian calculus,[70] which certified that more people were harmed than were benefited by the existence of indecent material on the Internet. CDA advocates argued that the pain inflicted on children and families through awareness of or access to indecent on-line communications outweighed the combined pleasure of downloaders desirous of such material and of the interests of the providers of such allegedly indecent material. Thus, in more familiar terms, the CDA's intended benefit of protecting children would more than compensate for its incidental cost of forcing adults to forego access to indecent on-line material.[71]

Underlying the quantitative utilitarian calculus[72] made by CDA advocates was a qualitative argument against indecency *per se*. Waging a war against indecency, proponents asserted that material appealing to this base desire was of lesser moral worth than the educational and informative communications transmitted over the Internet. With this rationale, proponents of the CDA employed the utilitarian rhetoric of John Stuart Mill,[73] who, paradoxically, may have been the key ideological motivator of some

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[70] *See* JEREMY BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION 3 (Oxford 1823) (1789) ("An action then may be said to be conformable to the principle of utility . . . when the tendency it has to augment the happiness of the community is greater than any it has to diminish it."). An advocate of act utilitarianism, Bentham advocated examining acts in isolation to assess whether they maximize happiness. To determine what is right for a community—a fictitious body whose interest is measured by the sum of the pain-pleasure calculations of the individuals making it up, *see id.*—Bentham would perform a hedonistic calculus, adding up pleasures and subtracting pains, taking into account intensity, duration, certainty, propinquity, fecundity, purity, and extent. *See id.* at 30.

[71] *See Pornography on the Internet, Straight Talk from the Family Research Council* (radio broadcast July 3, 1996) ("So here we are saying to the unique and special class of children which we as a people, as a society, care and understand need to have special needs and interests, we are going to require that adults—what a surprise—that adults act in responsible ways to make sure that when they engage in conversations or transmit material that is patently offensive and that the subject of which deals with sexual and excretory functions, and you do not direct that or engage in that kind of conversation with children.") (statement of Colby May, Senior Counsel, Office of Governmental Affairs, American Center for Law and Justice).

[72] *See* 141 CONG. REC. S9017 (daily ed. June 26, 1995) (statement of Sen. Grassley) (commenting on the Rimm study, *see supra* note 10, by remarking "[W]ith so many graphic images available on computer networks, I believe Congress must act and do so in a constitutional manner to help parents who are under assault in this day and age. There is a flood of vile pornography, and we must act to stem this growing tide, because, in the words of Judge Robert Bork, it incites perverted minds.").

[73] *See* JOHN STUART MILL, UTILITARIANISM (George Sher ed., Hackett Publishing Co. 1979) (1861). Mill expanded on Bentham's quantitative hedonism by distinguishing between higher and lower pleasures. According to Mill, of two pleasures, if all who have experienced both prefer one, it is the higher or nobler one. *See id.* at 8. Thus, in the present case, pornography must be assumed to be less preferred than any and all "decent" on-line communications.

of their opponents. CDA advocates implied that indecent communications were socially worthless and potentially destructive, and may have felt that those who took pleasure in accessing such material were inferior human beings.[74] Even after conceding that free expression was a valid concern, utilitarians favored the CDA under both this qualitative comparison establishing indecency as socially valueless speech and a quantitative calculus proving net harm to the American population.

B. *Libertarian Opposition to the CDA*

Motivated by what they viewed as the sanctity of First Amendment free speech rights, the CDA's opponents challenged the utilitarian proposition that indecent speech was worthy of lesser protection than other forms of speech. Contending that the CDA was both overbroad and vague, these civil libertarians decried the Act as an impermissible affront to core First Amendment values.[75] As to the assertion made by their utilitarian adversaries that indecency was harmful to children and families, the libertarian opponents to the CDA refused to respond directly. Instead, they insisted that regardless of the harm allegedly caused by indecent material, it was not the government's role to censor on-line content providers. Finally, the Act's libertarian rivals maintained that only the free market should regulate cyberspace, so that the Internet industry can flourish and thus respond to the increasing demand for screening and blocking technologies.

1. Civil Liberties and the Marketplace of Ideas

In the wake of Senator Exon's initial proposal of the CDA, the American Civil Liberties Union (ACLU) issued a statement condemning the Act as a censorial piece of governmental legislation which, if enacted, would annul the promise of the Internet

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[74] Mill employed the idea of a sophisticated humanity to distinguish between higher and lower pleasures. *See id.* at 10 ("It is better to be a human dissatisfied, than a pig satisfied. It is better to be Socrates dissatisfied than a fool satisfied.").

[75] Not only does the CDA abridge free speech rights, it also may be seen as violative of the First Amendment right of parents and children to receive information and acquire knowledge. *See* Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923); *see also* Pyler v. Doe, 457 U.S. 202, 221 (1982) (highlighting both "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child").

as a breakthrough forum for First Amendment expression.[76] Although the ACLU extolled the particular communicative potential of the Internet, as civil libertarians, the focus of the group and its supporters was the merit of unrestricted free expression more generally. Implicitly invoking John Stuart Mill's philosophy with respect to the value of free thought and open discussion,[77] the civil libertarians decried the CDA not only as unconstitutional, but also as a socially divisive[78] governmental barrier to the "marketplace of ideas" lauded by Justice Oliver Wendell Holmes.[79]

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[76] *See* ACLU Cyber-Liberties Alert, *Fight Online Censorship! Axe The Exon Bill!*, (visited Apr. 24, 1997) <http://www.eff.org/pub/Censorhip/Exon_bill/aclu_s314_hr1004.statement> ("The ACLU opposes the restrictions on speech imposed by this legislation [the CDA] because they violate the First Amendment's guarantee of free expression. Forcing carriers to pre-screen content violates the Constitution and threatens the free and robust expression that is the promise of the Net."). Although, as enacted, the CDA explicitly exempts carriers from liability, the ACLU insisted that the CDA sweeps broadly against a wide array of communications involving sexual expression—material that is and should be constitutionally protected. *See id.*; *see also* 143 CONG. REC. S742 (daily ed. Jan. 28, 1997) (statement of Sen. Leahy) ("Giving full-force to the First Amendment on-line would not be a victory for obscenity or child pornography. This would be a victory for the First Amendment and for American technology.").

[77] *See* JOHN STUART MILL, ON LIBERTY 50 (David Spitz ed., Norton Critical Editions 1975) (1859) ("Not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil; there is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices, and truth itself ceases to have the effect of truth, by being exaggerated into falsehood."). Mill outlined the following four reasons why freedom of expression was valuable: a silenced opinion may be true; a silenced opinion may contain a portion of the truth, which may supplement the prevailing opinion; without vigorous contestation, individuals who disdain the opinion cannot do so on rational grounds; and eliminating one opinion from the public forum weakens the strength of the free expression doctrine on which allegedly truthful convictions depend for their communication. *See id.* at 50–51. However, of special relevance to the CDA given its purpose of protecting children and families, Mill did restrict his comments to mature adults. *See id.* at 11 ("We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury.").

[78] *See Regulating the Internet*, *supra* note 6, at 366–67 (statement of Nadine Strossen, Professor of Law, New York Law School and President, American Civil Liberties Union) ("It is not surprising that if you give the government license to suppress any sexually suggestive or explicit material, whether it is labeled as obscene, pornographic, or indecent, the government will disproportionately enforce the law against expression of and about those individuals and groups who are relatively unpopular and relatively marginalized in our society.").

[79] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

The civil libertarians devoted much of their efforts to demonstrating that the CDA was overbroad.[80] They argued that even assuming the protection of children from allegedly indecent material distributed over the Internet was a legitimate and compelling governmental interest, the CDA was neither a narrowly tailored nor an effective means to achieving that end.[81] The civil libertarians reasoned that this overbreadth would chill Internet users from employing protected, albeit indecent, speech because of a fear of liability.[82] In legislative debate over the CDA, some members of Congress had expressed this concern, conjecturing that the CDA might be read to prohibit great works of literature[83] or discussions of sex, sexuality, and sexuality transmitted diseases.[84] Although proponents of the CDA insisted that prosecutors would not enforce the CDA against such on-line communications,[85] the

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[80] *See* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984) (defining the overbreadth doctrine); New York v. Ferber, 458 U.S. 747, 772 (1982) (same).

[81] *See* 142 CONG. REC. S1180 (daily ed. Feb. 9, 1996) (statement of Sen. Leahy) ("[T]he Communications Decency Act tramples on the free speech rights of all Americans who want to enjoy this medium. This legislation sweeps more broadly than just stopping obscenity from being sent to our children."). Later, Senator Leahy opined that "[b]anning indecent material from the Internet is like using a meat cleaver to deal with the problems better addressed with a scalpel." *Id.* at S1181. *See also* 141 CONG. REC. S19,185 (daily ed. Dec. 22, 1995) (statement of Sen. Feingold) ("Mr. President, these measures [the CDA], although perhaps well-intended, are poorly targeted to the stated problem. And they will do very little to protect children. If signed into law however, it is very clear that this legislation will be very effective at censoring constitutionally protected speech . . . ."). The fact that the CDA would not impact indecency placed on the Internet by foreigners necessarily limited the Act's potential for eliminating such on-line content. *See, e.g.*, Edmund L. Andrews, *Smut Ban Backed for Computer Net*, N.Y. TIMES, Mar. 24, 1995, at A1 ("[A] company might set up a computer in Denmark to dispense nude pictures, and people in the United States would be able to tap into that computer as easily as two college students communicate from opposite sides of campus.").

[82] *See* Rep. Anna Eshoo (D-Cal.), *Nanny on the Net* (Jan. 5, 1996) (visited Apr. 24, 1997) <http://www.eff.org/pub/Censorship/Exon_bill/eshoo_010596_cda.article> ("Banning this material doesn't protect minors and adults—but it does have a chilling effect on political and social discussion in a free society.").

[83] *See id.* ("Great works of literature like *Ulysses* or *Catcher in the Rye* could be banned from the Net, as could individual conversations that include profane comments or deal with mature topics that may be considered unsuitable for children. This is the cyberspace equivalent of book burning and should be rejected outright.").

[84] *See* 142 CONG. REC. H1174 (daily ed. Feb. 1, 1996) (statement of Rep. Pelosi (D-Cal.), suggesting that discussion of HIV-related issues would be chilled due to the CDA); 141 CONG. REC. S19,186 (daily ed. Dec. 22, 1995) (statement of Sen. Feingold, expressing concern that Internet sites dealing with issues such as sexuality, AIDS, reproductive health, prostate cancer, and the prevention of child abuse would be captured by the plain language of the CDA); 141 CONG. REC. S8335 (daily ed. June 14, 1995) (statement of Sen. Feingold, remarking that on-line discussion groups about sexual and physical abuse, sexually transmitted diseases, and other "mature" topics may be banned by the CDA).

[85] *See* 142 CONG. REC. H1175 (daily ed. Feb. 1, 1996) (statement of Rep. Goodlatte

civil libertarians maintained both that the Act as written reached such speech and that the Act nevertheless would curb the expression of constitutionally protected speech by on-line content providers.[86]

The civil libertarians also objected to the CDA on the grounds that it was unconstitutionally vague.[87] By employing the term "indecency"[88] in the context of a new communications medium,[89] Congress provided an undefined guideline[90] on precisely what

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(R-Va.) (stating that the worry of an on-line chilling effect was an "unjustified hue and cry"). In addition, the conference committee maintained that works of serious educational and artistic value would not be prohibited by the CDA. *See* H.R. CONF. REP. No. 104-458, at 189 (1996).

[86] *See* 143 CONG. REC. S742 (daily ed. Jan. 28, 1997) (statement of Sen. Leahy) ("[A] vague ban on patently offensive and indecent communications may make us feel good but threatens to drive off the Internet and computer networks an unimaginable amount of valuable political, artistic, scientific, health, and other speech."). Although Senator Leahy expressed disapproval of the CDA's vagueness, by focusing on the threat of valuable speech being chilled, Senator Leahy more precisely invoked the overbreadth doctrine.

[87] *See* Grayned v. City of Rockford, 408 U.S. 104 (1972). In *Grayned*, the Court outlined the following concerns, parallel to those raised by the civil libertarians in declaring the CDA unconstitutionally vague:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers or arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."

Id. at 108–09 (citations omitted).

[88] *See* 141 CONG. REC. S19,185 (daily ed. Dec. 22, 1995) (statement of Sen. Feingold) ("Use of the word or definition for 'indecency' makes this legislation overly broad, capturing speech that I do not think many Senators intend or wish to prohibit."). Although Senator Feingold here alludes to the overbreadth doctrine, his statement resonates more strongly with the contention that the CDA is unconstitutionally vague.

[89] *See* 141 CONG. REC. S17,963 (daily ed. Dec. 5, 1995) (statement of Sen. Feingold) ("We know how the FCC has defined indecency for broadcast, but it is unclear what would be indecent on computer networks."). *But see* 141 CONG. REC. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon) ("Certainly, what we are trying to do here is to only craft and put into law some of the provisions that have been in existence for a long, long time, way back to 1934, to make sure that the same restrictions that were necessary and have been placed into law, and have been held constitutional time and time again by the courts, have a role to play in the new Internet system and how that Internet system reacts . . . .").

[90] *See Interactive Working Group Report to Senator Leahy, Parental Empowerment, Child Protection, & Free Speech in Interactive Media* 4 (July 24, 1995) <http://www.cdt.org/cda/iwgrept.txt> ("Neither the Congress nor the Supreme Court have ever established

material it was seeking to prohibit. Alongside the worry that such vagueness would lead to the reduction of acceptable speech to the level of minors[91] was the concern that because the definition of indecency is dependent upon the community in which it occurs,[92] labeling on-line material indecent would require the difficult determination of which community's standards apply.[93] Fearing that the most restrictive community would determine the standard for the entire nation,[94] civil libertarians argued that the Act's vagueness would effectuate as much of a restriction on free speech as would its overbreadth.[95]

2. Politics and the Public/Private Distinction

In the tradition of Robert Nozick's belief in the propriety of a minimal state,[96] many opponents of the CDA questioned the legitimacy of government intervention in the realm of family affairs.[97] Perhaps fearing a slippery slope culminating in a "Big Brother"[98]

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a single definition for what constitutes 'indecent' material. The FCC has offered different definitions for indecency depending on the communications medium.").

[91] *See* Denver Area Educational Television Consortium v. FCC, 116 S. Ct. 2374, 2393 (1996) (suggesting that the First Amendment prevents the government from reducing the speech rights of adults to the level of children).

[92] *See* Cannon, *supra* note 10, at 86–87.

[93] *See* Michael Johns, *The First Amendment and Cyberspace: Trying to Teach Old Doctrines New Tricks*, 64 U. CIN. L. REV. 1383, 1395–1405 (discussing options of which community standards apply in making an obscenity determination in cyberspace, including the local or state community of either the content provider or the downloader, the national community, and the virtual community of cyberspace participants).

[94] *See* 143 CONG. REC. S742 (daily ed. Jan. 28, 1997) (statement of Sen. Leahy) ("In short, the Internet censorship law leaves in the hands of the most aggressive prosecutor in the least tolerant community the power to set standards for what every other Internet user may say on-line.").

[95] The vagueness and overbreadth doctrines are doctrinally similar. Although, the Court most often has attempted to distinguish the two, *see, e.g.*, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), it also has acknowledged the close association between the two. *See* Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983) ("We have traditionally viewed vagueness and overbreadth as logically related and similar doctrines.") (citations omitted).

[96] *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 149 (1974) ("The minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights.").

[97] *See* 142 CONG. REC. S1181 (daily ed. Feb. 9, 1996) (statement of Sen. Leahy) ("[A]t some point we ought to stop saying the Government is going to make a determination of what we read and see, the Government will determine what our children have or do not."). *But see Regulating the Internet*, *supra* note 6, at 349 (statement of Mike Godwin, Staff Counsel, Electronic Frontier Foundation) ("The fact is, while there are people who are quite willing to be laissez-faire about economic regulation, they want to have plenty of big government when it comes to social legislation.").

[98] *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1965).

government, these libertarians argued adamantly that the CDA not only amounted to government censorship of what children and families ought to view on the Internet, but also interfered in the private sphere by stripping parents of responsibility over their children and turning over that duty to the government.[99] Noting that existing statutes outlawed the most egregious Internet transmissions,[100] CDA opponents posited that using existing technology,[101] parents were in a better position to oversee the on-line activities of their children than was the government. In addition to being a more effective screening mechanism, parental supervision would secure the private sphere from unnecessary and invasive governmental intrusion.

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[99] *But see Pornography on the Internet, Straight Talk from the Family Research Council*, (visited Apr. 24, 1997), *available at* <http://www.eff.org/pub/Censorship/Internet_censorship_bills/960703_frc_radioshow.transcript> (radio broadcast, July 3, 1996) (statement of Kristi Hamrick, moderator) ("What we are in essence saying is that we are free to pollute our cultural environment, and parents have to buy the gas masks.").

[100] *See* 143 CONG. REC. S742 (daily ed. Jan. 28, 1997) (statement of Sen. Leahy) (noting that child pornographers, child molesters, and disseminators of obscene materials may be prosecuted without the CDA "under longstanding Federal criminal laws that prevent the distribution over computer networks of obscene and other pornographic materials harmful to minors, under 18 U.S.C. sections 1465, 2252, and 2423(a); that prohibit the illegal solicitation of a minor by way of a computer network, under 18 U.S.C. section 2252; and that bar the illegal luring of a minor into sexual activity through computer conversations, under 18 U.S.C. section 2423(b)"); 141 CONG. REC. S17,964 (daily ed. Dec. 5, 1995) (statement of Sen. Feingold) ("Obscenity, child pornography, and solicitation of minors via the Internet is already a violation of criminal law and is being aggressively prosecuted by the Department of Justice."); *see also* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996) (affirming conviction for operation of obscene computer bulletin board). *But see* 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon) ("Unfortunately, the current laws, which clearly protect young and old users from harassment and obscenity and indecency, are woefully out of date with this new challenge and this new opportunity.").

[101] *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 839–42 (E.D. Pa. 1996) (describing Cyber Patrol and Surfwatch, two screening software programs available for purchase by parents desiring to censor their children's access to certain on-line materials); *see also* Center for Democracy and Technology & People for the American Way, *Memorandum re: Constitutional Analysis of "Communications Decency Act"* (Mar. 21, 1995) <http://www.eff.org/pub/Censorship/Exon_bill/cdt_pfaw_ cda.analysis> ("In sharp contrast to older media, government content regulation [of the Internet] is simply not necessary in order to shield children from possibly inappropriate information."). However, CDA proponents have argued that screening software is only partially effective at screening indecent material, and perhaps unfairly burdens parents with spending "their hard-earned money to ensure that cyberporn does not flood into their homes through their personal computers." *Cyberporn Hearing*, *supra* note 16, at 2 (statement of Sen. Grassley).

3. Economics and the Free Market

Libertarian opponents to the CDA also objected to the Act as a form of undesirable governmental intervention into the free market.[102] First, they worried that the Act would cripple the computer interactive service industry by creating economic uncertainty.[103] Even if the industry were to survive the enactment of the CDA, opponents argued that the economic incentive to innovate screening technologies would be eradicated.[104] The free market theory enlightened CDA opponents to the idea that the further development and supply of Internet screening or blocking technologies depended upon the force of consumer demand.[105] As an alternative to excessive regulation of the Internet, these libertarians advocated a more passive government that would best protect children and secure First Amendment freedoms[106] by allowing market forces free reign over the Internet industry.[107]

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[102] *See generally* MILTON & ROSE FRIEDMAN, FREE TO CHOOSE (1980).

[103] *See* Electronic Frontier Foundation, *supra* note 65, at 2 ("New multi-billion dollar industries currently based in the U.S., such as Internet services, on-line publishing, and digital commerce, face economic uncertainty just as they begin to hit their stride, as investors, stockholders, and customers evaluate the negative impact of censorship on the value of their product and their company.").

[104] *See id.* at 3 ("The fundamentalist lobby and the CDA sponsors have 'spun' this legislation as 'protecting children from pornography,' when in fact it does not address pornography at all, and actually removes the incentives to develop improved filtering and labeling services.").

[105] *See Letter from Interactive Working Group to Senator Larry Pressler, Chairman of Senate Commerce Committee, and Senator Exon* (visited Apr. 24, 1997), *available at* <http://www.eff.org/pub/Censorship/Exon_bill/iwg_pressler_030295_s314.letter> ("Market signals already indicate to those of us who are building the Information Superhighway that users want choice of programming and control over the materials to which their children are exposed . . . . We plan to devote intensive effort toward developing comprehensive solutions to the problems raised by S. 314. Desirable solutions will take advantage of the empowering potential of new technology for increased user control over programming and information content.").

[106] *See* 141 CONG. REC. S17,964 (daily ed. Dec. 5, 1995) (statement of Sen. Feingold) ("I urge the conferees to err on the side of caution and to protect First Amendment rights of Internet users. Such a goal is not inconsistent with our overriding objective of protecting children. Technology exists now to allow parents to screen out materials they find objectionable for their children.").

[107] *See* Statement by Rep. Ron Wyden (D-Ore.) (visited Apr. 24, 1997) *available at* <http://www.eff.org/pub/Censorship/Exon_bill/wyden_0196_cda.statement> ("The proper role of government in protecting our children against cyberporn is to support efforts by the marketplace to create such software and other filtering technologies.").

C. *Significance of the Utilitarian/Libertarian Divide*

Although it would have been desirable for Congress to have effectuated a compromise between utilitarian and libertarian values by applying a balancing approach to on-line indecency, such a solution seems to have eluded the national legislative body. Because of Congress's inability to represent adequately either philosophical framework, the issue of indecent on-line material became a spirited ideological controversy in the public forum.

Categorizing the battle surrounding the CDA as a rift between utilitarians and libertarians is not merely an exercise in philosophical folly. Not only does it reflect the fact that legislative decision-making involves compromise among competing ideological frameworks, it also demonstrates the manner in which public debate inevitably tends toward seeming polarization. Perhaps what is most remarkable, however, is the extent to which the CDA's proponents and opponents were not completely at odds; after all, the utilitarians acknowledged the salience of First Amendment free speech values and the libertarians recognized the import of protecting children. What seems to have separated the two camps was the relative weight they accorded these two societal concerns, and their respective beliefs as to the role of government in addressing these interests.

While both the utilitarians and the libertarians proffered compelling justifications for their points of view, the libertarians ultimately emerged as the victors of the debate. Fervently believing the CDA to be an unconstitutional legislative mandate, some libertarian individuals and groups sought judicial review of the Act and, thus far, seem to have received judicial validation. Without denying the validity of utilitarian arguments that on-line indecency may be a net societal harm and that indecency may be a base desire unworthy of dissemination into cyberspace, the two judicial panels who have spoken on the constitutionality of the CDA have relied extensively on libertarian arguments in justifying their decisions.

III. Judicial Review of Constitutional Challenges to the CDA

Perhaps aware that its constitutionality was questionable, Congress included a section within the CDA providing for expedited

judicial review for facial constitutional challenges to the Act.[108] Raising the question of whether the CDA violated the First Amendment, two sets of plaintiffs brought suits against Attorney General Janet Reno, seeking to enjoin enforcement by the Department of Justice of the Act's prohibitions on indecent communications over telecommunications devices and patently offensive displays and transmissions made by way of interactive computer services. In lengthy opinions, two three-judge panels granted plaintiffs' preliminary injunctions, each holding at least one provision of the CDA unconstitutional.

A. American Civil Liberties Union v. Reno[109]

On the same day President Clinton signed the Telecommunications Act of 1996 into law, the American Civil Liberties Union (ACLU)[110] filed a complaint in the United States District Court

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[108] § 561 of the Act provides, in pertinent part, the following:

> (a) THREE-JUDGE DISTRICT COURT HEARING-Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.
>
> (b) APPELLATE REVIEW-Notwithstanding any other provision of law, an 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 made by this title . . . .

Pub. L. No. 104-104, § 561, 110 Stat. 56 (1996).

[109] 929 F. Supp. 824 (E.D. Pa. 1996). The case brought against the Department of Justice by the American Library Association, Inc. was consolidated with *ACLU v. Reno*. *See id.* at 826 n.3. The following corporations and professional organizations joined as co-plaintiffs in that action: Freedom to Read Foundation; America Online, Inc.; Society of Professional Journalists; Microsoft Network; Newspaper Ass'n of America; Association of Publishers, Editors, and Writers; Association of American Publishers, Inc.; Compuserve, Inc.; Commercial Internet Exchange Ass'n; Netcom Online Communications Services, Inc.; Prodigy Services Corp.; American Soc'y of Newspaper Editors; Interactive Services Ass'n; Microsoft Corp.; American Booksellers Ass'n; American Booksellers Found. for Free Expression; Wired Ventures, Inc.; OpNet, Inc.; Hotwired, Inc.; Health Sciences Libraries Consortium; Apple Computer, Inc.; Citizens Internet Empowerment Coalitions; Families Against Internet Censorship; Interactive Digital Software Ass'n; Magazine Publishers of America; and the National Press Photographers Ass'n. *See id.*

[110] The following advocacy groups and individuals were co-plaintiffs in the action: Human Rights Watch; Electronic Privacy Info. Center; Electronic Frontier Found.; Journalism Education Ass'n; Computer Professionals for Soc. Resp.; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh d/b/a Justice on Campus; Brock Meeks d/b/a Cyberwire Dispatch; John Troyer d/b/a The Safer Sex Page; Jonathan Wallace d/b/a The Ethical Spectacle; and Planned Parenthood Fed'n of America. *See id.* at 826 n.2.

for the Eastern District of Pennsylvania, claiming that the CDA provisions criminalizing the transmission of indecent and patently offensive material over the Internet were unconstitutional. One week later, District Judge Ronald L. Buckwalter[111] granted plaintiffs' request for a temporary restraining order (TRO) enjoining enforcement of the CDA's indecency provision.[112] In striking a balance between the likelihood that plaintiffs would prevail on the merits and the injury to the plaintiffs if the TRO were not granted,[113] Judge Buckwalter noted that plaintiffs would be unable to ascertain what conduct the statute prohibited because the statutory term "indecent" was unconstitutionally vague.[114]

Three months later, the three-judge panel[115] that had been convened to adjudicate the ACLU's claim that the CDA was unconstitutional on its face issued three opinions in support of its grant of plaintiffs' request for a preliminary injunction against enforcement of the CDA.[116] The panel prefaced its opinion with a

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[111] Judge Buckwalter heard plaintiffs' motion sitting alone, pursuant to 28 U.S.C. § 2284(b), which provides, in relevant part, the following:

> In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows: . . . .
>
> (3) A single judge may conduct all proceedings except the trial . . . He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction . . . .

28 U.S.C. § 2284(b) (1996).

[112] *See* American Civil Liberties Union v. Reno, No. CIV. A. 96-963, 1996 WL 65464, at *4 (E.D. Pa. Feb. 15, 1996) (enjoining 47 U.S.C. § 223(a)(1)(B)(ii), *see supra* note 13).

[113] Judge Buckwalter took this balancing approach from CHARLES A. WRIGHT, ARTHUR R. MILLER, & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2948.3. Judge Buckwalter concluded that plaintiffs had raised objections "which are fair grounds for this litigation." *See* 1996 WL 65464 at *2, *citing* Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) ("[When] the balance of hardship tips decidedly toward plaintiff . . . it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."). Judge Buckwalter explicitly refused to declare the "patently offensive" provision of the CDA unconstitutionally vague. *See id.* at *3.

[114] *See id.* at *4 ("It is, of course, impossible to define conduct with mathematical certainty, but on the other hand, it seems to me that due process, particularly in the arena of criminal statutes, requires more than one vague, undefined word, 'indecent.'").

[115] The three-judge panel consisted of Chief Judge Dolores K. Sloviter of the U.S. Court of Appeals for the 3d Circuit, and Judges Ronald L. Buckwalter and Stewart Dalzell, both of the U.S. District Court for the Eastern District Court of Pennsylvania.

[116] The panel treated the indecent and patently offensive provisions as one for the purpose of adjudicating the preliminary injunction request, deferring consideration of the differences between the two sections to "the final judgment stage if it becomes relevant." 929 F. Supp. at 851.

lengthy findings of fact section in which it presented a summary of the evidentiary hearings undertaken to develop "a clear understanding of the exponentially growing, worldwide medium that is the Internet."[117] Following this recitation, the panel presented its conclusions of law.[118] In their supporting opinions, the members of the panel rendered three distinct rationales guiding their collective decision to grant plaintiffs' preliminary injunction request.[119]

1. Lead Opinion of Chief Circuit Judge Dolores K. Sloviter

After reviewing the standard for granting a preliminary injunction,[120] Chief Judge Sloviter noted that because the CDA was a content-based restriction on constitutionally protected speech,[121] it was subject to strict scrutiny.[122] Chief Judge Sloviter expressed an initial concern that the provisions of the CDA prohibiting indecent and patently offensive on-line communications would criminalize "valuable literary, artistic or educational information of value to older minors as well as adults."[123] However, she ultimately conceded that the government had a compelling inter-

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[117] *Id.* at 830. The panel made their findings in light of the novel legal issues presented by "application of the First Amendment jurisprudence and due process requirements to this new and evolving method of communication." *Id.*

[118] *See id.* at 849.

[119] All three judges concluded that the CDA provisions violated the First Amendment right of adults to engage in sexually explicit communications with other adults. In addition, two of the three judges concluded that the CDA provisions were unconstitutionally vague.

[120] *See* 929 F. Supp. at 851 (lead opinion of Chief Judge Sloviter) ("To obtain a preliminary injunction, plaintiffs must establish that they are likely to prevail on the merits and that they will suffer irreparable harm if injunctive relief is not granted. We also must consider whether the potential harm to the defendant from issuance of a temporary restraining order outweighs the possible harm to the plaintiffs if such relief is denied, and whether the granting of injunctive relief is in the public interest.") (citations omitted).

[121] Indecent, or "patently offensive," speech is constitutionally protected. *See, e.g.*, Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

[122] Thus, the government has to meet its burden of proof and demonstrate both that the CDA served a compelling governmental interest and that it chose means narrowly tailored to achieve that end. *See Sable*, 492 U.S. at 126; *see also* Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2459 (1994).

[123] 929 F. Supp. at 852, *citing* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–13 (1975) ("[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.") (citations omitted). Chief Judge Sloviter used the examples of the play "Angels in America," news articles on female genital mutilation, *National Geographic* photographs, and informative material offered by Stop Prisoner Rape or the Critical Path AIDS project as valuable material potentially within the reach of the CDA. *See id.* at 853.

est in protecting minors from certain on-line material.[124] Thus, she promptly turned to a discussion of the second prong of the strict scrutiny test—whether the means employed were narrowly tailored to achievement of this legitimate end.

Noting that compliance with the CDA via assertion of the statutory defenses would be either technologically impossible[125] or prohibitively expensive,[126] Chief Judge Sloviter concluded that the CDA would chill the expression of constitutionally protected, albeit "indecent," speech.[127] Chief Judge Sloviter implicitly found the CDA to be both unconstitutionally vague[128] and substantially overbroad,[129] observing that the CDA gave providers of indecent on-line content the constitutionally impermissible choice between not expressing protected speech and criminal prosecution.[130]

Because the viability of the statutory defenses depended upon the indecency provision she already had found to be vague, Chief Judge Sloviter concluded that Congress had not narrowly tailored the CDA.[131] After noting that Congress should have focused on supporting the development of screening technologies rather than forcing content providers to abridge their right to free expression,[132] Chief Judge Sloviter closed by granting plaintiffs their request for a preliminary injunction.[133]

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[124] *See id.* at 853. However, just one sentence earlier, Chief Judge Sloviter asserted that the government's alleged interest in protecting minors from exposure to indecent on-line materials may not have been sufficiently compelling. *See id.* ("I am far less confident than the government that its quotations from earlier cases in the Supreme Court signify that it has shown a compelling interest in regulating the vast range of online material covered or potentially covered by the CDA.").

[125] Chief Judge Sloviter pointed to the lack of technology available to content providers on newsgroups, mail exploders, or chat rooms who want to screen for the age of individuals accessing their communications. *See id.* at 854.

[126] *See id.* (noting that "non-commercial and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification . . .").

[127] *See id.*

[128] *See id.* at 855 ("The scope of the CDA is not confined to material that has a prurient interest or appeal, one of the hallmarks of obscenity, because Congress sought to reach farther. Nor did Congress include language that would define patently offensive or indecent to exclude material of serious value.").

[129] *See id.* ("[T]he terms would cover a broad range of material from contemporary films, plays and books showing or describing sexual activities . . . to controversial contemporary art and photographs showing sexual organs in positions that the government conceded would be patently offensive in some communities.").

[130] *See id.*

[131] *See id.* at 856.

[132] *See id.* at 857.

[133] Chief Judge Sloviter believed that plaintiffs would prevail on the merits of their argument that the CDA provisions they challenged are facially invalid under the First and Fifth Amendments. *See id.*

2. Supporting Opinion of District Judge Ronald L. Buckwalter

Invoking Supreme Court precedent,[134] Judge Buckwalter also concluded that given its overbreadth, the CDA could not survive the applicable strict scrutiny standard.[135] On this point, Judge Buckwalter concurred with Chief Judge Sloviter, finding that the provisions and defenses of the Act were unconstitutional given that "technology as it currently exists . . . cannot provide a safe harbor for most speakers on the Internet . . . ."[136] Although he deemed the CDA unconstitutional, Judge Buckwalter expressly advised Congress that a more narrowly tailored statute regulating constitutionally protected speech over the Internet could withstand strict scrutiny.[137]

In his discussion of the Act's vagueness, Judge Buckwalter stated that the statute not only infringed on First Amendment rights, but also violated the due process requirements of the Fifth Amendment.[138] Judge Buckwalter reviewed the two principal dangers of a vague legislative mandate—insufficient notice and unbridled prosecutorial discretion—and noted that statutes implicating the First Amendment warranted a higher level of judicial scrutiny.[139] Judge Buckwalter found that the government's mere reliance on the Supreme Court's holding in *Pacifica Foundation v. FCC*[140] was untenable, as it vitiated plaintiffs' vagueness claim.[141] Instead, he maintained that the CDA's vagueness could have been cured only by either an explicit statutory definition of the term "indecent" or an FCC regulation defining the term in the particular

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[134] *See id.* at 858, *citing* Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989). *See also* Denver Area Educational Television Consortium v. FCC, 116 S. Ct. 2374 (1996) (invalidating FCC requirement that indecent programming on leased-access cable channels be scrambled until subscribers specifically request de-scrambling in writing).

[135] *See* 929 F. Supp. at 858 (supporting opinion of Judge Buckwalter).

[136] *Id.* at 859.

[137] *See id.*, *citing* Ginsberg v. New York, 390 U.S. 629, 636 (1968).

[138] The Act implicates due process considerations because it imposes criminal sanctions. *See id.*

[139] *See id.* at 860–61. What bothered Judge Buckwalter most about the Act was that according to him, it was simply unfair. *See id.* at 861.

[140] 438 U.S. 726 (1978) (defining broadcast indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs").

[141] Judge Buckwalter read the *Pacifica* decision narrowly, suggesting that "the Court did not consider a vagueness challenge to the term 'indecent,' but considered only whether the Government had the authority to regulate the particular broadcast at issue . . . ." 929 F. Supp. at 862. The *Pacifica* Court explicitly stated that future decisions regarding indecent communications would have to consider the specific medium being regulated. *See Pacifica*, 438 U.S. at 748.

context of the cyberspace medium.[142] According to Judge Buckwalter, what Congress had failed to do was consider the particular medium regulated by the CDA in order to determine just what materials would be "patently offensive as measured by contemporary community standards for the broadcast medium."[143]

In defense of the CDA, the Government suggested that plaintiffs' fears of prosecution for displaying material of artistic, literary, or public health value were unjustified. Judge Buckwalter, however, disagreed. Because he posited that it was unlikely that there was a single "national standard or nationwide consensus as to what would be considered 'patently offensive,'"[144] Judge Buckwalter feared that content providers would be unable to discern the bounds of the national standard Congress obviously sought to impose. Thus, Judge Buckwalter reasoned that the free expression of Internet users would be chilled.[145] Furthermore, Judge Buckwalter found the Government's assertion that prosecutors would only enforce the CDA against allegedly "pornographic" material unconvincing in light of the CDA's sweeping language.[146] In conclusion, Judge Buckwalter highlighted the need for more concrete definitions in a statute imposing criminal sanctions[147] and regulating a new technology.[148] He held that Congress's failure to be clear both rendered the CDA unconstitutional and represented an irresponsible abdication of its duty to draft legislation carefully "tailored to its goal and sensitive to the unique characteristics of, in this instance, cyberspace."[149]

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[142] *See* 929 F. Supp. at 861–63.

[143] *Pacifica*, 438 U.S. at 732.

[144] *See* 929 F. Supp. at 863.

[145] *See id.*

[146] *See id.* ("Unlike in the obscenity context, indecency has not been defined to exclude works of serious literary, artistic, political or scientific value, and therefore the Government's suggestion that it will not be used to prosecute publishers of such material is without foundation in the law itself."). Judge Buckwalter determined that granting prosecutors unfettered discretion in enforcing the CDA was a violation of due process. *See id.* at 864. Furthermore, Judge Buckwalter noted that the CDA's good faith defense did not save the Act from potentially being enforced arbitrarily because the defense was too vague. *See id.* ("[T]he statute itself does not contain any description of what, other than credit card verification and adult identification codes—which we have established remain unavailable to most content providers—will protect a speaker from prosecution.").

[147] *See id.* at 865.

[148] *See id.* ("In statutes that break into relatively new areas, such as this one, the need for definition of terms is greater, because even commonly understood terms may have different connotations or parameters in this new context.").

[149] *Id.* at 865.

3. Supporting Opinion of District Judge Stewart Dalzell

In contrast to the other two members of the panel, Judge Dalzell read *Pacifica* as providing a constitutionally permissible definition of indecency for use in any medium, so that Congress's codification of *Pacifica* in section 223(d) of the CDA did not suffer from vagueness.[150] Judge Dalzell further contended that even if the statutory defenses were unavailable to many on-line content providers, this objection "relate[d] to the (over)breadth of [the] statute, and not its vagueness."[151] According to Judge Dalzell, the panel should have denied plaintiffs' request for a preliminary injunction on vagueness grounds because the plaintiffs were unlikely to prevail on the merits of such a claim.[152]

Although expressing some doubts as to the legitimacy of plaintiffs' fear of prosecution for valuable, but indecent, on-line speech, Judge Dalzell noted that as written, the CDA could be read to reach such expression.[153] Furthermore, given that different communities may have different indecency standards, plaintiffs could justifiably fear prosecution.[154] Judge Dalzell reached this conclusion through his observation that although Congress may have intended only to regulate pornography over the Internet, the CDA provoked both "hyperbolic" and "very real" fears of prosecution against those expressing indecent, but constitutionally protected, ideas on-line.[155]

In the final section of his opinion, Judge Dalzell undertook a medium-specific analysis[156] through which he concluded that the "CDA is unconstitutional and that the First Amendment denies Congress the power to regulate protected speech on the Internet."[157] Seeking to forge the "proper fit" between First Amendment values

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[150] 929 F. Supp. at 868–69 (supporting opinion of Judge Dalzell).

[151] *See id.* at 870, *citing Sable*, 424 U.S. 115 (1989).

[152] *See id.* at 867.

[153] *See id.* at 871 ("[E]ven though it is perhaps unlikely that the Carnegie Library will ever stand in the dock for putting its card catalogue online, or that the Government will hale the ACLU into court for its online quiz of the seven dirty words, we cannot ignore that the Act could reach these activities.").

[154] *See id.*

[155] *See id.*

[156] This is because the Supreme Court has consistently held that different media require different First Amendment analyses. *See, e.g.*, *Pacifica*, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems."); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) ("Different communications media are treated differently for First Amendment purposes.") (Blackmun, J., concurring).

[157] 929 F. Supp. at 872.

in light of the new on-line communications medium, Judge Dalzell reviewed Supreme Court decisions on indecency in broadcast,[158] dial-a-porn,[159] and cable television.[160] As a result of his examination, Judge Dalzell proffered his conclusion that "Congress may not regulate indecency on the Internet at all."[161] Judge Dalzell praised the Internet as a democratizing vehicle[162] deserving the highest protection possible from any content-based speech regulation,[163] which undoubtedly would have an adverse effect on the use and development of the information superhighway. Because he believed that the CDA would inevitably destroy all of the "substantive, speech-enhancing benefits that have flowed from the Internet,"[164] Judge Dalzell joined his colleagues in refusing to sustain the CDA, thereby effecting the first judicial decree holding the Act unconstitutional.

B. Shea, On Behalf of The American Reporter v. Reno[165]

One week after filing a complaint on February 8, 1996,[166] Joe Shea filed a motion requesting a preliminary injunction barring application of section 223(d) of the CDA. As an editor, publish-

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[158] *See Pacifica*, 438 U.S. 726. Judge Dalzell interpreted *Pacifica* narrowly, holding that it did not apply to the Internet given that cyberspace was "an abundant and growing resource," unlike the broadcasting frequencies before the *Pacifica* Court. *See* 929 F. Supp. at 877.

[159] *See Sable*, 492 U.S. 115 (narrowing *Pacifica* by invalidating a ban on dial-a-porn, holding that it was overly broad and stepped beyond the state interests of protecting minors from exposure to pornography).

[160] *See Turner*, 114 S. Ct. 2445 (further narrowing *Pacifica* by refusing to adopt the broadcast rationale for cable television, a distinctly different communications medium).

[161] 929 F. Supp. at 877.

[162] *See id.* at 881 (characterizing the Internet as "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen"). Judge Dalzell echoed this statement in the penultimate sentence of his opinion, in which he stated, "Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects." *Id.* at 883.

[163] *See id.* at 881. Judge Dalzell applauded the Government for seeking to protect children from obscenity and child pornography through the enforcement of existing laws criminalizing the transmission of such material over the Internet. *See id.* at 883. However, he asserted that "the Government's permissible supervision of Internet content stops at the traditional line of unprotected speech." *Id.* at 883.

[164] *See id.* at 878. Specifically, the CDA would raise barriers to entry, eliminate the diversity of on-line content by imposing tremendous costs on providers seeking to comply with the Act's dictates, disturb the equality among speakers due to such expenses, and decrease the number of speakers by chilling speech. *See id.* at 878–79.

[165] 930 F. Supp. 916 (E.D.N.Y. 1996).

[166] For a copy of the complaint, see West's Legal News, *Criminal Justice: Obscenity*, July 31, 1996, *available at* 1996 WL 427610.

er, and part-owner of an electronically distributed newspaper, Mr. Shea asserted that the provision was both vague and substantially overbroad. In a July 29, 1996 decision, a three-judge panel[167] held that Mr. Shea had demonstrated a likelihood of success on the merits of his claim that the ban on displaying "patently offensive" sexually explicit material over the Internet was unconstitutionally overbroad.[168] Although the panel expressly rejected plaintiff's alternative claim that section 223(d) was unconstitutionally vague,[169] it found that criminalizing "patently offensive" communications necessarily would threaten some constitutionally protected speech between adults.[170] In addition, the panel found that providers of patently offensive Internet content would be unable to assert any of the available affirmative defenses, given that the content providers' ability to comply with the defense requirements was dependent on the actions of third parties, whose cooperation the statute did not mandate.[171]

In its consideration of plaintiff's claim, the panel began by noting that previous vagueness challenges to the government's use of a "patently offensive" indecency standard had been unsuccessful.[172] Given that section 223(d) incorporated language identical to that used in previous statutes, the panel postulated that Mr. Shea would be unlikely to succeed on this claim. The panel further concluded that the use of the phrase "in context" in section 223(d) similarly followed constitutional precedent, and thus its inclusion could not support plaintiff's vagueness claim.[173] In response to plaintiff's assertion that the inclusion of a notion of community standards made the indecency definition

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[167] The three-judge panel, appointed pursuant to 28 U.S.C. § 2284, consisted of Judge Jose A. Cabranes of the U.S. Court of Appeals for the 2d Circuit, and Judges Leonard B. Sand and Denise Cote, both of the U.S. District Court for the Southern District Court of New York. *See* 930 F. Supp. at 916 (E.D.N.Y. 1996).

[168] *See* 930 F. Supp. at 923.

[169] *See id.* ("The definition of material regulated by this section is a familiar one, repeatedly upheld against vagueness challenges in a line of jurisprudence concerning television and radio broadcasting, cable programming, and commercial telephone services."). *See supra* notes 158–160 and accompanying text.

[170] *See id.*

[171] *See id.* ("There is no feasible means, with our current technology, for someone to provide indecent content online with any certainty that even his best efforts at shielding the material from minors will be 'effective,' as the language of the good-faith defense requires.").

[172] *See* 930 F. Supp. at 936 ("[T]he courts of appeals have found vagueness challenges to analogous FCC definitions [of indecency] reaching commercial telephone communications and cable programming unavailing.") (citations omitted).

[173] *See id.*

vague given the nature of cyberspace, the panel held that content providers indeed would be able to apprehend the relevant community standards.[174] Finally, the panel noted that section 223(d) did not subject content providers to unbridled prosecutorial discretion because patently offensive material had been construed and enforced by prosecutors overseeing other media.[175]

After positing that strict scrutiny analysis was appropriate given that section 223(d) was a content-based speech regulation, the panel turned to the overbreadth question of whether the challenged provision was a narrowly drawn regulation designed to serve a compelling governmental interest without unreasonably burdening First Amendment freedoms.[176] Because the Internet precludes content providers from knowing the potential recipient of indecent content, the panel found that section 223(d) would unconstitutionally deny adults the ability to communicate constitutionally protected indecent speech over the Internet.[177] The panel noted that section 223(d) had to be read in conjunction with the statutory defenses, but nevertheless concluded that the government did not meet its burden of proving that section 223(d) did not unduly restrict adults' constitutionally protected right to engage in indecent communications.[178] Ultimately, the panel found section 223(d), even as supplemented by the affirmative defenses in section 223(e)(5), likely to be found unconstitutional on the merits, and thus granted plaintiff's motion for a preliminary injunction.[179]

C. *Supreme Court Review*

On December 6, 1996, noting probable jurisdiction in *Reno v. ACLU*, the U.S. Supreme Court agreed to review the constitutionality of the CDA.[180] Asking it to uphold the constitutionality of the four challenged provisions of the CDA,[181] appellants pre-

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[174] *See id.* at 936–38. The panel classified the issue of whether the statute would require content providers to tailor their messages toward the standards of the least tolerant community as one of overbreadth rather than vagueness. *See id.* at 938.

[175] *See id.* at 939.

[176] *See id.* at 940.

[177] *See id.* at 940.

[178] *See id.* at 942–48.

[179] *See id.* at 950.

[180] *See* 117 S. Ct. 554 (1996).

[181] 47 U.S.C. § 223(a)(1)(B), 223(d)(1)(A), 223(d)(1)(B), 223(a)(2) and (d)(2).

sented the Court with their brief on January 21, 1997.[182] The government reasserted its belief that Congress had narrowly tailored the CDA to forward the legitimate governmental interest of protecting children without unconstitutionally proscribing adult access to indecent on-line material.[183] Adding that the Act's restrictions are not unconstitutionally vague, the government closed its argument by asking the Court to utilize the CDA's severability clause[184] to leave intact those provisions that pass constitutional muster, rather than to invalidate the entire Act.

Both groups of appellees delivered briefs to the Court thirty days later.[185] Counsel for both appellees reminded the Court that the CDA should be judged under strict scrutiny, thereafter arguing that the CDA is not tailored narowly enough to survive that test.[186] Although appellees did reassert the vagueness claim followed by two of the judges below, their briefs focused more heavily on re-demonstrating that the Act banned constitutionally protected indecent speech between adults. In addition, both parties noted that the CDA would be ineffective given the existence of internationally produced on-line indecency, and ended by beseeching the Court not to intrude on the legislative role by rewriting the CDA under the authority of the severability clause.

In addition to the briefs submitted by the parties in *Reno v. ACLU*,[187] the Court received fifteen *amicus* briefs from various

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[182] *See* Brief for Appellants, Reno v. American Civil Liberties Union (U.S. 1996) (No. 96-511), *available at* 1997 WL 32931.

[183] *See id.* at 15–16. The Government also argued that the government had no less restrictive alternative to achievement of its interest. *See id.* at 16–17.

[184] *See* 47 U.S.C. § 608 ("If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby.").

[185] *See* Brief for Appellees, Reno v. American Civil Liberties Union (U.S. 1996) (No. 96-511), *available at* 1997 WL 74378; Brief for Appellees American Library Association *et al.*, Reno v. American Civil Liberties Union (U.S. 1996) (No. 96-511), *available at* 1997 WL 74380. Both briefs were filed with the Court on February 20, 1997.

[186] *See* 1997 WL 74378 at 21–34; 1997 WL 74380 at 25–37.

[187] In addition to the three briefs discussed, appellants submitted a reply brief on March 7, 1997. *See* Reply Brief for Appellants, Reno v. American Civil Liberties Union, (U.S. 1996) (No. 96-511), *available at* 1997 WL 106544.

[188] The following groups submitted amicus curiae briefs in support of appellants: Enough is Enough, the Salvation Army, National Political Congress of Black Women, Inc., the National Council of Catholic Women, Victims' Assistance Legal Org., Child-Help USA, Legal Pad Enters., Inc., Focus on the Family, the National Coalition for the Protection of Children and Families, *et al.*, *see* 1997 WL 22958 (U.S.Amicus.Brief Jan. 21, 1997); Members of Congress (Senators Dan Coats, James Exon, Jesse Helms, Charles Grassley, Christopher Bond, James Inhofe, Rick Santorum, Rod Grams; Representatives Henry J. Hyde, Bob Goodlatte, F. James Sensenbrenner, Jr., Chris Smith, Duncan Hunter, Roscoe Bartlett, Walter B. Jones, Jr., Sherwood Boehlert, Mark

groups and individuals.[188] In what promises to be an extremely significant First Amendment opinion,[189] the Court will decide whether to reverse the three-judge panel's preliminary injunction on enforcement of the CDA in light of the oral arguments heard on March 19, 1997.[190]

IV. The CDA Debate Revisited: Communitarianism vs. Liberalism

Whereas Congress, the media, and the public embroiled themselves in the CDA debate by embracing the rhetoric either of utilitarianism or libertarianism, in declaring the CDA unconstitutional, the judicial panels tacitly acknowledged that the Act contravened a more fundamental American ideology—that of liberalism. Defined broadly as "a political philosophy advocating personal freedom for the individual, democratic forms of government, [and] gradual reform in political and social institutions,"[191] liberalism has defined the American political culture since the signing of the Declaration of Independence and the adoption of the Bill of Rights.[192] In deferring to First Amend-

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Souder, Steve Largent, Jim Ryun, Tony Hall, Dave Weldon, Frank R. Wolf), *see* 1997 WL 22918 (U.S.Amicus.Brief Jan. 21, 1997); and Morality in Media, Inc., *see* 1997 WL 22908 (U.S.Amicus.Brief Jan. 21, 1997). Writing in support of appellees were: Volunteer Lawyers for the Arts, Various Artists, and Art Orgs., *see* 1997 WL 76015 (U.S.Amicus.Brief Feb. 21, 1997); Feminists for Free Expression, *see* 1997 WL 74382 (U.S.Amicus.Brief Feb. 20, 1997); Association of Nat'l Advertisers, Inc. and the Media Inst., *see* 1997 WL 74388 (U.S.Amicus.Brief Feb. 20, 1997); ApolloMedia Corp. & Bay Area Lawyers for Individual Freedom, *see* 1997 WL 74391 (U.S.Amicus.Brief Feb. 20, 1997); The Chamber of Commerce of the United States of America, *see* 1997 WL 74385 (U.S.Amicus.Brief Feb. 20, 1997); Site Specific, Inc. & Jon Lebkowski, *see* 1997 WL 74392 (U.S.Amicus.Brief Feb. 20, 1997); The Speech Communication Ass'n, *see* 1997 WL 74393 (U.S.Amicus.Brief Feb. 20, 1997); The Reporters Comm. for Freedom of the Press & the Student Press Law Center, *see* 1997 WL 74394 (U.S.Amicus.Brief Feb. 20, 1997); The National Ass'n of Broadcasters, ABC, Inc., CBS, Inc., and National Broadcasting Co., Inc., *see* 1997 WL 74395 (U.S.Amicus.Brief Feb. 20, 1997); Playboy Enters., Inc., *see* 1997 WL 74386 (U.S.Amicus.Brief Feb. 19, 1997); American Ass'n of Univ. Professors, *et al.*, *see* 1997 WL 74396 (U.S.Amicus.Brief Feb. 19, 1997); and The Family Life Project of the American Center for Law and Justice, *see* 1997 WL 22917 (U.S.Amicus.Brief Jan. 21, 1997).

[189] *See* Scott Powe, *Censorship in Cyberspace: First Amendment Rights Versus Protecting Children*, 1996-97 Preview 382, 387 (Mar. 5, 1997) ("This is a blockbuster case, probably the most important First Amendment case in at least a quarter of a century. In a Supreme Court Term of big cases, it is at or near the top.").

[190] A copy of the United States Supreme Court Official Transcript is available at 1997 WL 136253.

[191] Webster's New World Dictionary of the American Language, 2d Ed. 814 (Avid B. Guralnik ed., Prentice Hall Press, 1986).

[192] The British political philosopher John Locke provided the inspiration for these

ment values in the face of what they conceded to be a compelling governmental interest, the judicial panels reconfirmed the primacy of rights in the American political landscape. In doing so, they declined to accept teleological communitarian arguments which suggest that society must define the scope of a right (*e.g.*, free speech) in light of its conception of what is good (*e.g.*, pristine family values necessitating an indecency-free Internet).

A. *Communitarian Support of the CDA's Teleological Rationale*

Communitarians adopt from Aristotle the notion that political arrangements cannot be justified without reference to the ends for which political society exists.[193] Arranging the state as prior to the individual in terms of moral importance,[194] Aristotle declared that the end of the state is "living well."[195] According to Aristotle, citizens should engage in politics for the sake of cultivating virtue, or moral excellence.[196] Aristotle's philosophy was teleological[197] because he presented a politics in which rights could wane if they were in conflict with those things which would cultivate the common good of virtue.

In the Aristotelian tradition, Michael Sandel argues that John Rawls' tenet that "the self is prior to the ends affirmed by it"[198] denies the fact that some notions of common good precede our notions of justice.[199] Sandel criticizes Rawls' deontological project as enshrining a dispossessed self, thereby denying that the self is situated in and partially defined by certain unchosen roles

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documents. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press 1988).

[193] *See* ARISTOTLE, THE POLITICS 35 (Carnes Lord trans., The Univ. of Chicago Press, 1984) ("[I]t is clear that all partnerships aim at some good, and that the partnership that is most authoritative of all and embraces all the others does so particularly, and aims at the most authoritative good of all. This is what is called the city or the political partnership.").

[194] *See id.* at 37 ("The city is thus prior by nature to the household and to each of us. For the whole must of necessity be prior to the part . . . .").

[195] *See id.*

[196] *See id.* at 197–99.

[197] Like utilitarianism, communitarianism morally evaluates conduct in relation to the end or ends it serves. A teleological theory, then, makes the right dependent upon the good by interpreting the right as maximizing the good. *See* RAWLS, *infra* note 206, at 30.

[198] *See id.* at 560.

[199] *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 175 (1982) ("Only in a universe empty of *telos* . . . is it possible to conceive a subject apart from and prior to its purposes and ends.").

and common aims.[200] According to Sandel, the self cannot be prior to its ends because it cannot be stripped from the family, community, and nation that partially define it.[201] As a consequence of this characterization of the self as constituted by its ends, Sandel posits the good as prior to the right. Because the self partly is defined by the communities it inhabits and the traditions it follows, the communitarian argument suggests that the self's conception of justice will obtain meaning only in relation to the ends of the community.

Notions of family and community values were said to inspire the CDA, and thus it is not surprising that CDA reflects the teleological principles of communitarian philosophers. In Aristotelian terms, on-line indecency may not comport with American society's interest in cultivating virtuous citizens. As proponents of the CDA argued, such communications work in direct contradiction to the achievement of that goal. For Sandel, widely held community values necessarily mold individual perceptions; the CDA can be seen as the codification of society's aversion to indecent communications. If indeed purifying the Internet comports with the common good, the right to free speech—which must seek to maximize this good—must be defined as excluding the right to communicate indecent on-line material. For communitarians, the CDA would be a justifiable legislative mandate given that the right to free speech may be circumscribed if allowing it wider breadth would violate the "decent" common good. This very belief would appall liberals, who would posit the CDA as an attack on the supremacy of rights within the American constitutional framework.

B. *Liberal Promotion of Deontological Legislation*

One of the fathers of the liberal tradition, Immanuel Kant, advised against societal devotion to achievement of some notion of the highest good. Instead of defining morality on the basis of a conception of the good or a conglomeration of desired ends, Kant implored individuals to act according to the supreme principle of morality, which he called the categorical imperative.[202]

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[200] *See id.* at 19–22.

[201] *See id.* at 179.

[202] *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 30 (James W. Ellington trans., Hacket Publishing Co., Inc. 1993) (1785) (defining the categorical

As free and equal rational beings, Kant believed that by acting autonomously, individuals could legislate laws that could be applied universally.[203] Placing Kant's injunction to treat persons always as ends and never simply as means[204] in the context of modern political decision-making, legislators ought to foster the common good only within the bounds of the rights hitherto defined in the Constitution.[205]

Over a century and a half after Kant's death in 1804, John Rawls offered what he called a procedural interpretation of Kant's conception of human autonomy,[206] employing a hypothetical construct called the original position.[207] Rawls posited that behind a veil of ignorance,[208] individuals in the original position would agree to govern their society according to two principles of justice,[209] a system he labeled "Justice as Fairness."[210] According to Rawls, upon emerging from behind the veil of ignorance, persons would have to conform their conceptions of good to the principles of justice they agreed to in the original position.[211] In other words, Rawls' Justice as Fairness concept champions rights (such as the First Amendment right to free speech) as restrictions

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imperative, the working criterion employed by a rational agent as a guide for making choices, as follows: "Act only according to that maxim whereby you can at the same time will that it should become a universal law.").

[203] *See id.* at 49.

[204] *See id.* at 40–42 (discussing his conception of human dignity).

[205] Thus, rights limit what are reasonable conceptions of the good. In Kantian terms, defining morality as acting in accordance with a conception of good fails to respect persons as free and equal rational beings capable of choice. *See id.* at 13–14.

[206] *See* JOHN RAWLS, A THEORY OF JUSTICE 251–57 (1971).

[207] *See id.* The original position is a purely hypothetical situation in which persons are unaware of their place in society, class position or social status, natural rights and abilities, strength, etc. *See id.* Rawls constructs the concept of the original position to ensure that the agreements made with respect to justice are fair. *See id.*

[208] The veil of ignorance nullifies the prejudicial effects of specific contingencies by ensuring that no one knows his situation in society or his natural assets. Thus, no one is in a position to tailor the principles of justice to his advantage. *See id.*

[209] Rawls states the two principles of justice as follows:

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

Id. at 60. The first principle of justice is prior (in importance) to the second. *See id.* at 61. With respect to the first principle, "basic" liberties include Constitutional rights such as the right to vote and run for political office, freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person and right to property, and freedom from capricious arrest and seizure. *See id.*

[210] *See id.* at 11 (defining Justice as Fairness as "the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association.").

[211] *See id.*

on what conceptions of the good are reasonable and thus able to be pursued by society.

The liberal political philosophies of Kant and Rawls are deontological.[212] The categorical imperative and the original position seek to derive rights independent from any particular vision of the good. By giving justice thus derived primacy, Kant and Rawls give priority to claims of the right over those of the good. Because justice takes precedence to all other ends, rights necessarily restrict which conceptions of the good may be endeavored.

In the context of on-line indecency, deontological liberalism demands the existence of an unqualified right to speak freely. By seeking to purify the substance of on-line content, the CDA attempts to impose legislatively a conception of what is good for society. In Kantian terms, the CDA treats content providers as means to achieving the end of hypoallergenic Internet communications. Furthermore, by invoking the CDA, Congress failed to treat the American citizenry with dignity; it forced them to act heteronomously, rather than autonomously. Within the Rawlsian construct, individuals in the original position would not be likely to consent to the CDA, choosing instead to provide for free speech as an equal basic liberty for all. Even if the individuals were able to exclude the right of free speech from the first principle of justice, they likely would not out of concern that they might brush too broadly and limit some "indecent" speech that they would want to hear. The CDA violates deontological liberalism both by defining the right to free speech as limited by the good of anti-pornography and by giving that good priority over that right.

V. Conclusion

Although Congress's desire to cleanse the Internet of indecent material may have been well-intentioned, the Communications Decency Act as passed was woefully misconstructed. By violating the First Amendment right of adults to engage in indecent, though not obscene, communications with other adults, the Act—both as written and as likely to be applied—epitomizes a Congressional endeavor into the ignominious domain of governmen-

[212] Rawls defines a deontological theory as one that "does not specify the good independently from the right, or does not interpret the right as maximizing the good." *Id.* at 30.

tal censorship. As such, it supplants traditional liberal values by proscribing the right to free speech out of a legislative notion of the American common good.

In his dissenting opinion in *Ginzburg v. United States*, Justice Stewart reminded his colleagues that "[T]hose who wrote our First Amendment . . . believed a society can be truly strong only when it is truly free."[213] In seeking to regulate Internet content via the CDA, Congress repudiated its duty to make laws for the common good *limited by* the confines dictated by the conceptions of rights accorded significance not only by the Constitution, but also by over two centuries of the American experiment with liberalism. As notions of the common good necessarily must compete with one another for legislative attention—even within the scope of a particular issue—Congress must not abdicate rights which serve to unite American citizens. In the future, with respect to both on-line decency and any other issue the regulation of which would circumscribe rights in the name of an alleged greater good, Congress should tread carefully to ensure that it does not ignore the "right stuff."

[213] *See* Ginzburg v. United States, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting).

BOOK REVIEWS

SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY. By *James Boyle.* Cambridge, Mass.: Harvard University Press, 1996. Pp. 184, appendices, notes, index. $35.00 cloth.

American University Law Professor and intellectual property scholar James Boyle thinks that the idea of "authorship" underlies how our society regards the right to control information. More specifically, "authored" information tends toward commodification. In *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, Boyle filters this authorial paradigm through utilitarian and distributional prisms and identifies a range of problems, for which he proposes legislative remedies.

Boyle observes that information is either (1) public domain, (2) commodified as property, or (3) explicitly non-commodified and private. These categories, canonized in the literature of information economics, treat information as a public good made possible by the concession of monopoly rights to some agent of production. Boyle argues that this conclusion lacks empirical support, and he undertakes to survey the status of information in the real-world contexts of copyright, blackmail, insider trading, and genetics.

Boyle seeks in copyright law an explanation of the distinction between uncommodified ideas left to circulate in the public domain, on the one hand, and expression commodified in order to incentivize more creation for the public good on the other. He offers the intriguing hypothesis that the touchstone for selecting some information rather than other for protection is the potency of the venerable old ideal of the romantic author. The ancient rationale for investing the romantic author with rights vis-à-vis his creation is twofold: originality (as a criterion) and utility (as in the usefulness of incentivizing the author to create in exchange for proprietary arrangements).

Boyle uses these analytical tools to illumine the illegality of blackmail. He questions why the commodification of legally possessed information is criminalized. Reviewing the literature of the law and economics school, Boyle attacks Landes and Posner for assuming too much rational analysis by legislatures about the decision not to regulate the objects of gossip. Simi-

larly, Boyle chides Coase and Ginsburg for failing to view blackmail as creating value.

Boyle suggests that providing the blackmailed party with loss-avoidance in exchange for the blackmailing party's foregoing the right to sell the information or to gossip is a value-creating transaction. Boyle is unpersuaded by Epstein and other libertarians who disregard this possibility simply on the grounds that blackmail is intimately connected with (other) crime, and by third-party arguments that leverage used in blackmail really belongs to another and is unfairly appropriated by the blackmailer. Boyle asserts that the explanation for blackmail's illegality inheres in the distinction between public and private spheres of information, and in a social desire to resist the commodification of information when this would threaten personal sovereignty.

Similarly, in his discussion of insider trading, Boyle asks why the commodification of legally possessed information is criminalized. Examining the case of Anthony Materia, a New York copy reader who traded on information he gleaned in his work on draft corporate documents,[1] Boyle asks why this information is treated unlike information gleaned from experience in the market. Turning again to the law and economics literature, Boyle finds disagreement as to why insider trading is wrong. He also identifies baseline errors in the definition of a "natural market." Boyle cites Manne, whose attack on insider trading turns on the authorship paradigm: those who do not create information but simply process it deserve no proprietary rights to it from which they may reap benefits. Boyle suggests that the general prohibition on insider trading also stems from an egalitarian notion that some sources of information not accessible to all should not be used in the market.

The spleen in the work's title is that of John Moore, a patient at the University of California whose physicians used his DNA to develop a genetically engineered cell line. Moore sued for conversion.[2] The California Supreme Court dismissed Moore's conversion claim using the language of authorship, comparing him to a uranium mine or other source of a raw material. Since he did not himself create his DNA, he possesses no moral commodity right. In an analogy to "right to publicity" cases, the court held that Moore did no work to make these his cells that

[1] S.E.C. v. Materia, 745 F.2d 197 (2d Cir. 1984).
[2] Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990).

might justify a property interest in the physicians' product. The doctors were the "real" creators and authors. Furthermore, on grounds of utilitarian policy, the court worried about disincentives to research if such a right were found.

Increasingly, intellectual property (IP) creators and owners have lobbied for the internationalization of IP regimes. They characterize those in less developed countries who appropriate IP as "new pirates." The U.S. "Super 301" provisions and the Uruguay Round of GATT talks demonstrate the concern. Former U.S. Trade Representative Carla Hills was especially outspoken in favor of increased protection for U.S. property rights in information and expression.

Boyle argues that the utilitarian arguments for heightened protections are distributionally motivated. IP owners claim that protection for the rights of authors over those of the producers of goods is necessary to incentivize idea-creation. Boyle counters that, in practice, this favors the interests of developed nations. If developed countries have exclusive rights to market the technologies they invent, and less-developed states are deprived of the opportunity even to supplement ideas originating elsewhere given stringent IP protections, then First World utility and Third World distributional concerns stand in direct conflict.

Boyle notes the irony in how the trope of authorship works against Third World nations even when the products "originate" with them, as in instances of indigenously developed crop varieties and pharmacopoeia. If creation is the act of a lone inventor, producing something from nothing, then even the original ownership of unique raw materials without which there would be no creative product development becomes irrelevant. Boyle characterizes W.R. Grace's copyrighting of a pesticide developed from Indian seed varieties as "genetic colonialism."

Drug development from the indigenous pharmacopoeia of the shamans is another case in point. Curare, a popular muscle relaxant, and cancer medications derived from the Madagascar rosy periwinkle, are among the myriad drugs developed by western pharmaceutical companies from indigenous pharmacopoeia. Here again, the authorship paradigm excludes indigenous peoples from sharing in the financial benefits. While Boyle rightly critiques the distributional inequities, he further argues that utility in the aggregate suffers. Indigenous peoples deprived of a share in the proceeds from the value of rainforest biodiversity, for example, often resort to slash and burn practices or grow

other crops for survival. This destruction of pharmacopoeial resources is inefficient in the aggregate, and thus overall utility is served only by rectifying the distributional problem.

The authorship idea also applies closer to home, for example, in the litigation involving Kinko's classroom coursepack. Kinko's lack of creative authorship in assembling course readers placed their production outside the protection of fair use.[3] Boyle also spots the impact of the romantic author concept on the electronic frontier, where inventors of computer hardware and software oppose the commodification of information and its concentration in the hands of large computer corporations, which deprives inventors of necessary tools and programming building blocks.

Boyle also takes issue with the administration's White Paper Report on copyright in the national information infrastructure, authored by Bruce Lehman, head of the Patent and Trademark Office.[4] Under Boyle's analysis, Lehman's advocacy for increased IP rights derives from the romantic author model. Boyle rejects Lehman's view that limiting IP rights is a justified pseudo-tax on something rightfully the creator's.

Boyle builds on his discussion of the authorship basis for the current IP regime with an analysis of public and private realms of information. He discusses the privatization of concepts and language, particularly Congress's grant of a monopoly right to the U.S. Olympic Organizing Committee to the term "Olympic," and the USOOC's successful defense of that right against a San Francisco group planning a "Gay Olympics."[5] He argues that privatizing terms can be tantamount to indirect censorship that, if practiced directly by the government, would be held unconstitutional. Boyle also laments the constriction of the public information sphere by privacy claims on previously published biographical information. He considers the privacy grounds for restricting already published information so flimsy as to constitute, once again, censorship by other means.

Tension between private and public information also undergirds Boyle's analysis of transgenic beings: animals whose DNA is a composite of two or more species. Presently, the oncomouse, a mouse with some human DNA, designed for research into

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[3] Basic Books, Inc. v. Kinko's Graphics, 758 F. Supp. 1522 (S.D.N.Y. 1991).

[4] Information Infrastructure Task Force (Bruce A. Lehman, Chair), Report of the Working Group on Intellectual Property Rights (1995).

[5] San Francisco Arts & Athletics, Inc. v. United States Olympic Organizing Committee, 483 U.S. 522 (1987).

human cancers and patented by Harvard, is the sole transgenic organism. Speculating about the future, Boyle asks whether a chimp with an IQ of 70 and some speech skills, or a humanoid with negligible intelligence, would be copyrightable and, if so, would this not cross the line into slavery? A parallel question exists for artificially intelligent machines: how should society regard a sentient computer that has been "authored" by another? Would it be legitimate as property in a private sphere, or is it illicit thievery from the public domain and, moreover, slavery?

Throughout the work, Boyle seeks to rectify a perceived tilt in today's IP regime in favor of the private domain, whose apologists cite utilitarian doctrine and the need to incent creators/authors. Boyle proposes that, at the very least, databases like NEXIS be subsidized so that information in the public domain be accessible to all. Seeking balance, Boyle contemplates the extent to which a "monopolistic" right can be granted that keeps creators incentivized yet enables producers access, whether the goods in question are drugs or computer programs.

That is not to say that Boyle calls for less IP protection, but rather for a heightened awareness of the synergy between a robust public domain and a smoothly functioning private domain. He cautions that if such a balance is not struck, "information classes" might evolve, segregating information haves from have-nots. In an information-driven global economy, the ramifications of such stratification might be grave indeed.

Boyle's persuasive analysis is sometimes weakened by proposals thin on empirical justification (e.g., his call for a twenty-year limit on copyright) or by suggestions which seem administratively unfeasible (e.g., a reasonable doubt standard for fair use and voidability of patents if the patent holder is held to have received sufficient incentive to create the product initially with the government paying legal fees). As an argument in favor of expanding information in the public domain, however, Boyle's work could be compelling enough to galvanize a coalition as broad and eclectic as one comprised of journalists, indigenous peoples, software developers, parodists, and biodiversity environmentalists.

—Nicklas A. Akers

CIVILIZING CYBERSPACE: POLICY, POWER AND THE INFORMATION SUPERHIGHWAY. By *Steven E. Miller*. New York: Addison-Wesley, 1996. Pp. xvii, 413, index. $29.00 cloth.

Cyberpundits divide into two camps. Some feel that the information superhighway will promote individual choice and foster self-actualization. Others hope the Internet will facilitate the growth of new communities as well as strengthen existing civic bonds.

Steven Miller falls decidedly into the second camp. "Some people believe," he writes in his preface, "that we are totally autonomous individuals who are free to create a personal world, invent a personal future, and inhabit a personal reality . . . . I'm not one of those people" (p. v).

Civilizing Cyberspace is Miller's guided tour of the brave new cyberworld, which he hopes will knit us together rather than sunder us. He explores both the utopian and dystopian potentials of the technology, particularly the distributional implications. The community-building capacity of the coming national information infrastructure—the NII, as he calls it—will be lost if large sectors of the population cannot access the networks. He fears that the NII may "bring[ ] the fruits of the technological harvest to some while relegating others to the status of migrant laborer" (p. 27).

Miller has worked in the computer industry since the early days of Lotus, for which he helped create the first 1-2-3 reference manual. Currently developing educational computer networks in Massachusetts, Miller served as Director of Strategic Planning for the Massachusetts Office of Technology Planning under Governor Weld. His grasp of the technology is impressive, yet his book remains accessible to the reader who doesn't know TCP/IP from TCBY.

The title *Civilizing Cyberspace* is a bit of a misnomer. The NII, according to Miller, will include far more than the current Internet. It will encompass a vast array of networks for data, video and enhanced telephone services (p. 179). Whether these networks combine to form one mega-network or remain separate, their influence will expand exponentially in the not-so-distant future.

Miller takes a dim view of the Clinton Administration's decision to shift most of the burden for building the NII to private entities (p. 107). He understands, however, that a massive public

commitment was not realistic given that, in the President's words, "the era of big government is over." He concentrates instead on explaining the need for policy-makers to force the emerging NII to serve the public interest. He urges that space be reserved for "public right of ways" akin to the public-interest programming required of television broadcasters, or bandwidth set aside for public television stations.

Miller's enthusiasm for such a project is tempered by a realization that telecommunications policy is inexorably market-driven. He engagingly recounts a number of short-sighted policy reactions to new transportation and communications technologies, dating back to the development of railroads in the nineteenth century. To speed construction, railroads received vast tracts of federal land at nominal cost, a massive public subsidy that spurred the rise of price-gouging monopolies (p. 84).

Brighter examples, in Miller's telling, include the histories of the telephone and the interstate highway system. Under AT&T's monopoly, regulated by the Communications Act of 1934, virtually the entire population received low-cost access to a technological innovation of enormous power (p. 190). Rate structures incorporated cross-subsidies that allowed city dwellers to subsidize the cost of wiring remote rural areas; similarly, long-distance rates borne mostly by businesses subsidized cheaper local calls, placed mostly by residential consumers.

The construction of the interstate highway system after World War II followed the same path. Built exclusively with taxpayer money, the highways do a good job of connecting all Americans—at least those with cars. The rich may cruise along in Cadillacs while the poor make do with beat-up Chevys, but the roads remain open and accessible to all.

Yet central planning, whether by the government or by AT&T, gave way to the chaotic evolution of cable TV, an industry currently dominated by a few large firms which rarely allow the consumer a choice of provider. Only 20% of cable networks reserve space for public interest programming, and the conspiratorial interests of cable systems and content providers tend to exclude competitors' channels. Cities that try to change providers find that the courts have granted cable companies a "presumptive right" both to renew their contracts and to set pricing schedules (p. 113).

Sadly, the cable TV story is no longer the exception but the rule. AT&T's monopoly disappeared in 1984, and with it went

the cross-subsidies embedded in the old system. Public interest requirements for television programming have been dumbed-down to include home-shopping programs and thirty-minute commercials masquerading as kids' cartoons. And in an unsettling echo of the railroads' nineteenth-century land grab, TV broadcasters and their lobbyists convinced Congress in 1996 to grant them, free of charge, new broadcast frequencies that could have fetched an estimated $70 *billion* at auction.

Miller's unease with untrammeled market exploitation of new technology does not stem from a fear that niche programming and high culture will be crowded out by purple dinosaurs and sneaker ads. His nightmare is not that the NII will prove a "vast wasteland," as an early FCC chairman described television, but precisely the opposite: that it will become *too* valuable. When technology becomes indispensable, those who lack access to it become dispensable. Miller fears "information redlining"—the systematic, market-based alienation of the poor from the sources of information needed to participate in democracy, earn an education, and compete for employment.

To prevent this from happening, Miller insists that some form of "universal service" is necessary to supply all Americans at least basic access to the NII. His notion of universal service is less egalitarian and more realistic than, say, universal health care: he seeks only a "democratically established minimal level of guaranteed functionality" for all (p. 179). A variety of pricing schemes might make this possible. Miller fears, however, that service providers will bundle low-bandwidth services such as voice and text with broadband, higher value services, maximizing profits but pricing some consumers out of the market (p. 192). Only aggressive regulation, he suggests, can avoid this. He advocates anti-redlining laws, such as those that regulate the banking industry, in order to prevent discrimination (p. 183).

Miller cites approvingly FCC Chairman Reed Hundt's call for America to "build a broadband network to every classroom, every clinic, and every library" (p. 182). But he warns that constructing such networks will be useless without funding to maintain these systems over time (p. 182). Providing access will be the easy part, according to Miller, who predicts an initial rush of providers seeking customers, just as Gillette once gave away safety razors in order to ensure a consumer base for its disposable blades (p. 182).

Distributionally speaking, Miller argues, technology may be at its most insidious when it comes cheap. Shiny state-of-the-art equipment may look expensive, but it is still more economical for schools than real, live teachers. Blinded by technology, school districts may view the NII as an easy, politically innocuous way to trim budgets. Most commentators worry that only wealthy districts will gain access to information technology; Miller, on the other hand, cautions against the development of a world where "the rich get teachers and the poor get TVs" (p. 8). In a nation where Channel One beams its commercial-driven programming into 40% of all high schools, this is no small threat.

Like many writers before him, Miller notes the myriad ways in which the new technologies may infringe upon privacy concerns. From the federal government's barring of encryption programs, to employers' screening of their employees' e-mail, the information revolution offers something for everyone trying to find out anything about everybody.

The greatest consumers of data are direct and indirect marketers who must continually refine their consumer databases. Miller describes how Caller ID—hawked by phone companies as a benign means of finding out whether your best friend or your boss is on the line—provides a windfall to firms which can immediately identify the neighborhood of the call and thus the financial profile of the caller (p. 274). Even utility companies are developing so-called "nonintrusive appliance load monitoring," which will enable them to gather, and then sell to the highest bidder, information about how often their consumers use each of their appliances (p. 167).

Miller admits that many Americans do not care whether their data is sold, especially if such sales save them money, as attested to by the hordes who offer up their "friends and family" to MCI (p. 265). But consumers should have the choice to opt out, he insists, urging bans like those in Europe on reselling data without the consumer's consent (p. 280).

When praising the virtues of the new technologies, Miller stresses one theme above all others: "The NII can create community," he claims, by "creat[ing] a new kind of 'common space' in which people can come together" (p. 329). He recites the standard litany of arguments: the elderly and homebound can communicate with each other; people with common interests can find each other. Local "free-nets" provide low-cost access and, where designed in conjunction with municipal government, may

"let people participate in public life at times and locations that fit within their own schedule" (p. 329). Miller hopes that virtual communities will supplement, not replace, tangible ones. An ideal community network is one that "allows people to have large-group conversations which, over a period of time, lead to off-line action" (p. 329).

He gives short shrift to the argument that the NII might destroy communities as well as create them. But when information really is at one's fingertips, why go to a library? A world in which we satisfy our needs with a few keystrokes is not a world that brings people together. A truly dystopian future is one in which no one need ever show up at a bank, movie theater, supermarket or, as telecommuting increases, at an office. The burgeoning of on-line communities threatens democratic pluralism by enabling wealthier Americans to isolate themselves further from the underprivileged.

To consider cyberspace a collection of communities is, in effect, to consider it a city. Such a city is not New York, however, where great democratic institutions such as libraries, museums, and parks blunt great disparities of wealth. Instead, it is Los Angeles, where members of various socio-economic classes come into bare contact with one another only at rush hour on the freeway. One need not be a Luddite to observe that the electronic equivalent of gated residential "communities" is no more democratic than the real thing.

The merits of Miller's arguments aside, a text riddled with typos distracts the reader. Despite the sophisticated technology under discussion, it seems that Miller's copy editor lacked a simple spell-checker. No less excusable are Miller's references to "Michael Orvitz," "Jeremy Benthan" and both "Rupert Murdock" and "Rudolph Murdoch."

Substantively, *Civilizing Cyberspace* suffers from its completion prior to passage of the Telecommunications Act of 1996. Happily for the reader (but less happily for the country), the bill that passed resembles Miller's description of the then-pending legislation. Like any book that charts a rapidly changing field, the details here may quickly become dated. The principles, however, should remain valid. As Miller convincingly shows, they have changed little since the invention of the telephone.

Of course, we still do not know how large a role the NII will play in American life, nor do we know the extent to which Americans will use it for profit, pleasure, or politics. The term

"information redlining" conjures images of underprivileged communities deprived of vital resources. But will this be the case? Or will the development of the NII just be another instance of the rich getting more toys than the poor? If the most far-reaching consequence of information redlining is that Beacon Hill gets video on demand while Roxbury residents must trudge out to Blockbuster, there may be little cause for worry.

But the NII holds great untapped potential, and Miller is right to urge us to keep close tabs on its development. Even where—especially where—private institutions develop new national resources, close public scrutiny remains essential. "Technology," Miller concludes, "is too important too be left to the technologists, and it is much too important to be left to those who are primarily motivated by the pursuit of profits" (p. 377).

—Eric R. Columbus

POLICY ESSAY

EVOLVING SPHERES OF FEDERALISM AFTER *U.S. V. LOPEZ* AND OTHER CASES

JULIAN EPSTEIN*

For nearly a half-century, the United States Congress has used its authority under the Commerce Clause of the United States Constitution as a virtual plenary power. Recently, however, in United States v. Lopez, *115 S. Ct. 1624 (1995), the United States Supreme Court made it clear that there are limits to Congress's power under the Commerce Clause. In this Essay, Julian Epstein analyzes the effects of* Lopez *on congressional authority. He argues that, while the scope of the decision is not yet clear, it will make Congress more cautious about its use of the Commerce Clause. He further suggests that Congress will more likely find Constitutional authority for its actions in evolving doctrinal areas such as the Tenth, Thirteenth and Fourteenth Amendments.*

The United States Constitution provides that Congress shall have the power to regulate commerce with foreign nations and among the various states.[1] During the past half century, Congress has used its Commerce Clause authority in a near plenary manner to pass laws in a wide range of areas, including civil rights, economic regulation, environmental safety, and child support. The Commerce Clause has served as perhaps the broadest jurisdictional basis for the exercise of congressional power.

The recent Supreme Court decision in *United States v. Lopez*[2] has called into question the powers of Congress under the Commerce Clause for the first time in fifty years.[3] *Lopez* involved the Gun-Free School Zones Act of 1990,[4] ("the Act") which made it a federal offense for "any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[5] The Supreme Court struck down the law, finding that Congress had acted outside the proper limits of the Commerce Clause in passing it.[6] The Court noted that the Act neither regulated commercial activity nor required

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[1] *See* U.S. CONST. art. I, § 8, cl. 3.

[2] 115 S. Ct. 1624 (1995).

[3] *See generally* James L. Huffman, Lopez *Pops Feds Ballooning Powers*, 17 NAT'L L.J. A21 (1995).

[4] 18 U.S.C. § 922(q)(1)(A) (1994).

[5] *Id.*

[6] *See Lopez*, 115 S. Ct. at 1630–34.

that the prohibited possession of handguns be connected to interstate commerce.[7] Although the Court in *Lopez* did not explicitly overrule any previous Supreme Court decisions that upheld federal statutes passed under the authority of the Commerce Clause, *Lopez* appears to suggest new limits to Congress's legislative authority.

Complicating the matter further for congressional decisionmakers are potentially new judicially imposed limits on federalism in other doctrinal spheres. For instance, the Supreme Court is currently considering the case of *Printz v. U.S.*,[8] which challenges the requirement under the Brady Act[9] that state and local law enforcement authorities conduct background checks on individuals purchasing firearms. Opponents of the law argue that it is an unconstitutional "commandeering" of state government prohibited by the Tenth Amendment.[10]

The purpose of this Essay is to explore the implications of the *Lopez* decision for congressional action in such areas as possessory crimes, family law, criminal activity, and environmental regulation. The Essay argues that while *Lopez* may not significantly curtail the near plenary power of Congress under the Commerce Clause, the decision does articulate a minimum set of criteria that Congress must satisfy before invoking its Commerce Clause authority. The Essay further argues that in light of the analysis suggested by the *Lopez* Court, certain policy areas into which Congress has recently ventured, such as the regulation of marriage, may now fall outside the reach of federal regulation under the Commerce Clause.

The Essay also briefly examines the implications of additional limits that may be imposed by the judiciary in other evolving spheres of federalism, such as the Tenth Amendment limits under consideration in the *Printz* case. Finally, the Essay examines other, less commonly invoked, Constitutional authorities that may be used either to supplement or to substitute for Congress's lawmaking power when it is otherwise limited.

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[7] *See id.* at 1630–31.

[8] No. 95-1478 (argued Dec. 3, 1996).

[9] 18 U.S.C. § 922(s)(C) (1994).

[10] *See* Brief for the United States at 40–42, *Printz* (No. 95-1478) (citing Brief for Petitioner, Printz at 26–28, Brief for Petitioner, Mack at 35–40).

I. BACKGROUND

The debate over federalism is anything but new; its philosophical divide dates back to the dawn of the Republic. The New Federalists, led intellectually by Madison, expressed their "continuing concern over federal invasions of state prerogatives."[11] They believed that federal powers are "few and defined,"[12] while state powers are "numerous and indefinite,"[13] and they likened unchecked centralized government to the British Crown against which they had waged and won a war of independence. Today, Chief Justice Rehnquist's majority opinion in *Lopez* advances a similar notion of limited federal powers.[14]

The Nationalists, on the other hand, characterized by the thinking of Alexander Hamilton, rejected the Madisonian view in favor of a strong federal government in which a nexus could be assumed between federal legislation and the proper ends of national government.[15] The Nationalists believed that broad plenary powers were necessary in order to implement fundamental policy principles that distinguish a union from a confederation of separate sovereign states.[16] They further argued that "checks and balances" among the three branches of government and democratic accountability would prevent oppressive rule.[17]

Notwithstanding the early debate over federalism, the Commerce Clause does not appear to have been of particular concern to the Framers of the Constitution.[18] Rather, it appears that they viewed the Commerce Clause as a necessary basis for facilitating trade and raising revenue.[19] In fact, the New Federalists

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[11] Daniel A. Farber, *Reflections on* United States v. Lopez*: The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 618 (1995).

[12] *Lopez*, 115 S. Ct. at 1626 (quoting THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)).

[13] *Id.*

[14] *See id.* at 1626–27.

[15] *See* Farber, *supra* note 11, at 617.

[16] *See id.*

[17] *Id.*

[18] *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 443–46 (1941); Alan N. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1022–24 (1988). The materials that do address congressional control over commerce focus on the necessity of uniformity in matters of foreign commerce, although the drafters clearly intended domestic commerce to be regulated as well. *See* 2 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 477–528 (1987).

[19] *See* Alexander Hamilton, CONTINENTALIST, No. 5, 18 Apr. 1782 (Paper 3:75–82),

expressed only mild objections to including the Commerce Clause in the Constitution. Although they argued that it empowered the federal government beyond what was justified, they raised no significant objection to the general proposition that the federal government should regulate interstate commerce.[20]

The Commerce Clause's plenary potency was noted early on by Chief Justice Marshall, who wrote in 1824 that "the power over commerce . . . is vested in Congress as absolutely as it would be in a single government"[21] and that "the influence which their constituents possess at elections, are . . . the sole restraints"[22] on the power. Many of the early cases that addressed Commerce Clause authority dealt with validating federal legislation related to such issues as the regulation of lottery tickets,[23] the transportation of adulterated food,[24] the interstate transportation of prostitutes,[25] and the preemption of state interference with interstate commerce.[26]

However, during the early 1900s, the Supreme Court articulated clear limits to the Commerce Clause, holding that it did not vest in Congress the power to regulate "production," "manufacturing,"[27] or "mining."[28] Even today, Justice Thomas argues that the Commerce Clause should be restricted to the regulation of "selling, buying, and bartering as well as transportation."[29]

The 1936 case of *Carter v. Carter Coal Co.*[30] marked the last time the Supreme Court significantly limited Congress's power under the Commerce Clause. In *Carter*, the Court found that Congress exceeded its authority in enacting the Bituminous Coal Conservation Act of 1935,[31] which sought to regulate the wages, hours, and working conditions of miners engaged in the production of coal.[32] The Act also sought to guarantee the right of miners to organize and bargain collectively for these

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reprinted in Kurland & Lerner, *supra* note 18 ("The vesting Congress with the power of regulating trade ought to have been a principal object of the confederation for a variety of reasons. It is as necessary for the purposes of commerce as of revenue.").

[20] *See* Greenspan, *supra* note 18, at 1023.

[21] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

[22] *Id.*

[23] *See* Champion v. Ames (The Lottery Case), 188 U.S. 321 (1903).

[24] *See* Hippolite Egg. Co. v. United States, 220 U.S. 45 (1911).

[25] *See* Hoke v. United States, 227 U.S. 308 (1913).

[26] *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

[27] United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895).

[28] Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936).

[29] *Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring).

[30] 298 U.S. 238 (1936).

[31] *Id.* at 287–88 (citing 15 U.S.C. §§ 801–827 (repealed 1937)).

[32] *See id.* at 282.

matters.[33] In striking down the law, the Court held that congressional authority under the Commerce Clause did not include the power to control the condition in which coal was produced before it became an article in commerce.[34] The Court further held that the regulation of labor conditions of intrastate mining was not sufficiently related to interstate commerce.[35]

But in just the next year, the Supreme Court overturned *Carter*, and in so doing, bestowed a legitimacy upon Congress's Commerce Clause authority that would go largely unquestioned for nearly sixty years. In *NLRB v. Jones & Laughlin Steel Corp.*,[36] the Court held that Congress had sufficient authority under the Commerce Clause to regulate labor relations because industrial strife could "affect" interstate commerce.[37] The Court rejected previous distinctions between economic activities such as manufacturing, mining, and production that led to interstate economic transactions, and the interstate transactions themselves.[38] Thus, by allowing Congress to regulate the "stream" of commerce, the Court opened the door for virtually unchecked plenary powers under the Commerce Clause for the next half century.

Subsequent decisions empowered Congress with wide latitude in determining which activities "affected" interstate commerce. The only requirement imposed by the Court was that the legislation be "reasonably" related to the end of regulating activities that "affect" interstate commerce.[39] Even activities that were purely local in nature, such as the working conditions within a local plant, were found to fall within the ambit of the Commerce Clause by virtue of the fact that the activity impacted the larger commercial market.[40] The Court has since held that local activities that do not substantially affect interstate commerce, such as the production of wheat on farms for private consumption,[41] racial discrimination by businesses,[42] and loan-sharking[43] could,

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[33] *See id.* at 283.
[34] *See id.* at 297–98.
[35] *See id.* at 289–307.
[36] 301 U.S. 1 (1937).
[37] *Id.* at 41.
[38] *See id.*
[39] *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (approving legislation relating to working conditions).
[40] *See id.* at 121.
[41] *See* Wickard v. Filburn, 317 U.S. 111 (1942).
[42] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
[43] *See* Perez v. United States, 402 U.S. 146 (1971).

nonetheless, be regulated as part of an overall regulatory scheme if the activities, considered in the aggregate, "affected" interstate commerce.[44]

II. ANALYSIS

A. *The* Lopez *Case*

In *United States v. Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990,[45] and, for the first time since *Jones & Laughlin*, articulated limits to Congress's power under the Commerce Clause. The case involved Alfonso *Lopez*, a senior at Edison High School in San Antonio, Texas, who was arrested for carrying a concealed handgun onto school grounds. He was charged with violating the Gun-Free School Zones Act, which prohibits the possession of firearms within 1000 feet of a school zone.[46] *Lopez* moved to dismiss the federal charges, arguing that § 922(q) of the Act was "unconstitutional as it is beyond the power of Congress to legislate control over public schools."[47] The District Court denied the motion, ruling that the statute was "a constitutional exercise of Congress's well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce."[48] At the conclusion of a bench trial, the defendant was found guilty of violating § 922(q) and sentenced to six months imprisonment.[49]

The Fifth Circuit reversed the conviction, holding that *Lopez*'s actions had no identifiable connection to interstate commerce.[50] To hold otherwise, the Court concluded, "would open virtually all aspects of education, public and private, elementary and other,

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[44] *See* cases cited *supra* notes 41–43.

[45] 18 U.S.C. 922 (q)(2)(A) (1994).

[46] The Gun-Free School Zones Act of 1990 in pertinent part provides:

> It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone. The term school zone means (a) in, or on the ground of, a public, parochial or private school; or (b) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

18 U.S.C. 922 (q)(2)(A) (1994).

[47] *Lopez*, 115 S. Ct. at 1626.

[48] *Id.*

[49] *See id.*

[50] *See* United States v. Lopez, 2 F.3d 1342, 1367 (5th Cir. 1993).

to the reach of the Commerce Clause."[51] The Fifth Circuit also noted that the law failed to make any findings relating to interstate commerce and failed to include a jurisdictional requirement that the offense in question somehow involve interstate commerce.[52]

The Supreme Court affirmed the Fifth Circuit ruling by a five to four vote, holding that the law encompassed activity that was not sufficiently "economic."[53] The Court noted, for example, that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition or elsewhere, substantially affect any sort of interstate commerce."[54] The Court also found that the Act did not contain a jurisdictional element that would have required the firearm possession to have the requisite nexus with interstate commerce.[55] Chief Justice Rehnquist also noted that the legislation articulated no findings relating to interstate commerce.[56]

In considering the power of Congress to enact § 922(q), the Court confirmed the three permissible categories of Commerce Clause action: (1) regulation of *channels* of commerce; (2) regulation of *instrumentalities* of commerce; and, perhaps most importantly, (3) regulation of economic activities that *"substantially affect"* commerce.[57] With respect to § 922(q), Chief Justice Rehnquist dismissed the applicability of the first two categories, concluding that in enacting the statute, Congress did not "attempt to prohibit the interstate transportation of a commodity through the channels of commerce,"[58] nor did it seek to "protect

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[51] *Id.* (citation omitted).

[52] *See id.* at 1366–67.

[53] *See Lopez*, 115 S. Ct. at 1630–31.

[54] *Id.* at 1634.

[55] *See id.* at 1631.

[56] *See id.*

[57] *See id.* at 1630. The Court failed to note that to some extent, the three categories are intertwined. For instance, the first category, the regulation of "streams" or "channels" of commerce, allows regulation of the creation, movement, sale, and consumption of merchandise or services. But the initial extension of the "streams" of commerce analysis by the Court to intrastate trade was justified by the "effect" of these other activities on commerce. *See* NLRB v. Jones & Laughlin, 301 U.S. 1, 31 (1937). Similarly, the second category, which allows the regulation of such instrumentalities of commerce as planes, trains or trucks, is also based on the theory that a threat to these instrumentalities "affects" commerce, even if the effect is local in nature. *See* Southern Ry. Company v. United States, 222 U.S. 20, 26–27 (1911) (holding that regulation of intrastate rail traffic has a substantial effect on interstate rail traffic). Thus, the final category identified by the Court appears to be a catch-all for all other activities which "substantially affect" commerce.

[58] *Lopez*, 115 S. Ct. at 1630.

. . . a thing in interstate commerce."[59] The Court then turned to the third prong of the analysis — the "substantially affects" test — which is perhaps the most significant because, as in *Lopez*, it involves activity most often regulated by Congress under the Commerce Clause.[60]

1. The "Substantially Affects"[61] Test

The Court in *Lopez* appeared to employ a four-part analysis to determine whether a particular activity satisfies the "substantially affects" prong of the test for valid Commerce Clause authority:[62] (1) whether the activity was commercial or economic in nature; (2) whether the statute contained a jurisdictional element (e.g., requiring prosecutors to show that the offending act has a relationship to interstate commerce); (3) whether there were sufficient legislative findings to support the use of Commerce Clause authority; and (4) whether the arguments connecting the regulated activity to interstate commerce were too broad or attenuated.[63]

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[59] *Id.*

[60] *Id.* at 1630. Importantly, after acknowledging that Supreme Court case law had been unclear whether an activity must "affect" or "substantially affect" interstate commerce in order to be regulated by Congress, Chief Justice Rehnquist explicitly held that the proper test "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* In contrast, Justice Breyer acknowledged the discrepancy but opted for the use of the term "significant" effect on interstate commerce, arguing that the word "substantial" implied a narrower congressional power than recent precedent suggested. *Id.* at 1657–58.

[61] *Id.* at 1360. Although there was evidence that the gun had been manufactured outside the state of Texas, the indictment did not provide it. This small addition might have changed the outcome of the case. *See Lopez*, 2 F.3d at 1368. In another case, Scarborough v. United States, 431 U.S. 563 (1977), the issue was whether the nexus to commerce was satisfied by a showing that the firearms in question "had traveled in interstate commerce." *Id.* at 566. In sustaining the conviction, Justice Marshall, writing for the majority, declared that "Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred." Louis H. Pollak, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533, 548 (1995) (quoting *Scarborough*, 431 U.S. at 577). With evidence on the record that the gun was from outside the state, *Lopez* would have been analyzed, instead, under the second commerce clause category because the gun would have been considered an "instrumentality of commerce." Thus, the "substantial effects" commerce clause analysis would not have been necessary.

[62] While the Court did not expressly articulate the criteria for satisfying the "substantially affects test," the analysis employed by the majority suggests that a federal regulation must satisfy one of four different criteria. *See Lopez*, 115 S. Ct. at 1630–33.

[63] The Court also considered other factors in determining that this law did not properly involve interstate commerce: (1) guns are considered to be private property, the regulation of which violates property rights; (2) the state was already addressing the problem of guns in school zones, and the Act was, thus, a redundant and unnecessary federal law; (3) the federal government likes to encourage positive competition among the states in finding solutions to social problems; (4) criminal law, like education, is a matter generally left to the states; (5) this conduct occurred out of the

In considering the validity of § 922(q), the Court first noted that the statute did not involve commerce or economic activity.[64] The Court further concluded that gun possession, neither by itself nor in the aggregate, affected commercial transactions.[65] Specifically, the Court held that:

> Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[66]

The Court additionally noted that § 922(q) did not contain a jurisdictional element that would require prosecutors to prove that the firearm possession in question affected interstate commerce (e.g., that the defendant in a particular case utilized interstate commerce or traversed state lines).[67] The majority concluded that "by failing to require federal prosecutors to satisfy the jurisdictional element, Congress almost dared the Court to find the statute unconstitutional."[68] Had this somewhat simple requirement been placed in the statute, it might have cured the constitutional defect. This omission may have been a mere lethargic oversight by the congressional drafters, induced by many years of unquestioned acceptance of Congress's authority under the Commerce Clause.

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workplace; in other cases, where the conduct occurred in the workplace, the tie to interstate commerce is more evident to the Court; and finally, (6) sustaining the Act would render Congress's commerce power unbounded. For further discussion on this point, see Deborah Jones Merritt, *Reflections on* United States v. Lopez: *Commerce!*, 94 MICH. L. REV. 674, 700–12 (1995).

[64] *See Lopez*, 115 S. Ct. at 1631.

[65] Yet, in this context, the Court spoke approvingly of earlier cases upholding laws that regulated intrastate credit transactions, restaurants utilizing interstate supplies, and hotels catering to interstate guests. *See id.* at 1630. The Court also recognized the legitimacy of regulating certain intrastate activities that, in isolation, may have trivial effects on commerce, but which are part of a larger economic regulatory scheme. *See id.* at 1628–29. The Court even approved of the holding in *Wickard v. Filburn*, 317 U.S. 111 (1942), which allowed the regulation of the production and consumption of home-grown wheat. *See Lopez*, 115 S. Ct. at 1630.

[66] *Lopez*, 115 S. Ct. at 1630–31.

[67] *See id.* at 1631.

[68] *Id.*

The *Lopez* Court further noted that in enacting § 922(q), Congress made no findings, as it frequently does in legislation, of the relationship between possessing a gun within 1000 feet of a school and interstate commerce.[69] Although the Court acknowledged that Congress is not normally required to make formal findings in order to legislate, the Court seemed to suggest that supporting evidence is helpful to the extent it enables the Court to evaluate "the legislative judgment that the activity in question substantially affected interstate commerce."[70] In reaching this conclusion the Court rejected the government's attempt to utilize previous findings to justify § 922(q) on the basis that the Act "plow[ed] thoroughly new ground and represent[ed] a sharp break with the longstanding pattern of federal firearms legislation."[71] Finally, the majority concluded that the connection between the possession of a firearm in a local school zone and interstate commerce was too attenuated to survive constitutional scrutiny.[72]

In seeking to establish a connection to interstate commerce, the government argued that the possession of a firearm in a school zone may result in violent crime and that violent crime can affect the national economy in two ways: by raising insurance rates and by discouraging interstate travel.[73] It explained that the presence of guns in schools threatens the learning environment, which in turn results in a less productive citizenry, which ultimately affects the nation's economic well-being.[74] The Court rejected both arguments, concluding that federal power would be virtually limitless under the theories the Government raised.[75] The Court noted, for example, that under the government's reasoning, Congress would have the power to regulate even in areas that have been traditionally reserved to the states, including family law, criminal law enforcement, and education.[76] The Court further noted that in order to uphold the Government's contentions, it "would have to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort

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[69] *See id.*
[70] *Id.* at 1632.
[71] *Id.*
[72] *See id.* at 1632–34.
[73] *See id.* at 1632.
[74] *See id.*
[75] *See id.* at 1632–33.
[76] *See id.*

retained by the States,"[77] a tenuous step the Court acknowledged it was unwilling to take.[78]

In the dissenting opinion, Justice Breyer argued that gun-related violence has an adverse impact on classroom learning, which in turn represents a substantial threat to trade and commerce.[79] Justice Breyer further argued that in America's highly integrated economy, a "commercial character" distinction is unworkable because the line between commerce and numerous other activities (such as education) is too difficult to draw.[80] Justice Breyer concluded by noting that gun violence in schools has a direct relationship to interstate commerce because violent crimes raise insurance rates, discourage interstate travel, and disrupt education, thereby reducing the skills of students and diminishing their productivity.[81]

2. An Enhanced Rational Basis Review?

Traditionally, the Supreme Court has applied a rational basis standard to congressional invocations of Commerce Clause authority. As the Court noted in *Hodel v. Virginia Surface Mining and Reclamation Association*,[82] "when Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational."[83]

The conventional view is that the Court typically has utilized a diminished rational basis review, highly deferential to Congress, provided that some hypothetical link to commerce could conceivably be articulated.[84] In *Lopez* however, the Court set aside the Gun-Free School Zones Act, holding that the invocation of the Commerce Clause was without rational basis.[85] Congress did not make any findings as to the substantial burdens that the activity has on interstate commerce, and the Court disagreed with "Congress's *implicit* conclusion that gun-free school zones substantively affect[ed] interstate commerce."[86] The four-

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[77] *Id.* at 1634.
[78] *Id.*
[79] *Id.* at 1659–62 (Breyer, J., dissenting).
[80] *Id.* at 1663–64.
[81] *Id.*
[82] 452 U.S. 264, 277 (1981).
[83] *Id.* at 277.
[84] Merritt, *supra* note 63, at 682.
[85] *Id.* at 682.
[86] *Lopez*, 115 S. Ct. 1624 at 1367.

part analysis the Court employed to determine whether an activity "substantially affects" commerce, seems to suggest a strengthened rational basis review. Specifically, what used to be a procedural review of whether Congress had a rational basis for its actions, now appears to be a more substantive review of whether the regulated activity does in fact substantially affect interstate commerce.

While the majority in *Lopez* did not explicitly address the proper scrutiny that should be given to a congressional assertion of the relationship of a statute to interstate commerce, the dissent forcefully argued that the Gun-Free School Zones Act would have survived the weak rational basis review that the Court normally uses had Congress properly constructed the statute. This suggests a belief, at least among the dissent, that the Court was ratcheting up the rational basis scrutiny.[87]

Legal commentators disagree about the implications of *Lopez*. Some see the decision as largely inconsequential, merely nipping at the outer reaches of a vast legislative universe that Congress has created in the Twentieth Century.[88] Others argue that the *Lopez* decision reconfirms that Congress's Commerce Clause powers are enumerated, not plenary. Therefore legislation enacted under Commerce Clause authority must bear a direct relation to interstate commerce; attenuated connections will not be found sufficient.[89] Still others believe that the Court may even be suggesting that there are subjects beyond the power of Congress to regulate, such as education and certain areas of criminal law.[90] Yet regardless of how one views the substantive impact of *Lopez* on specific areas of the law, the decision certainly suggests that the Court seeks to reassert its judicial oversight over Congress's Commerce Clause power.

B. *Implications of* Lopez *for Other Statutes*

As the *Lopez* decision indicates, Congress's authority to pass a criminal gun possession statute under the Commerce Clause has some limits. The question now arises as to how the case will affect other areas of law that are traditionally reserved to the

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[87] *Id.*
[88] Pollak, *supra* note 61, at 550 (arguing that *Lopez* is neither radical nor epochal).
[89] Merrit, *supra* note 63, at 689.
[90] *Id.*

states or that do not clearly involve economic or commercial regulation. For example, the Court in *Lopez* expressly noted that the regulation of such subjects as domestic law is traditionally reserved to the states.[91] The next section will examine some of the implications of the *Lopez* decision.

1. Possessory Crimes

Because the *Lopez* Court struck down a criminal law, it would appear that other federal criminal statutes may be subject to similar challenges. Numerous federal statutes currently punish possessory crimes. The Drug-Free School Act,[92] for instance, forbids the possession of controlled substances on or near school grounds similar to the way in which the Gun-Free School Zones Act sought to regulate guns near schools.[93] However, the former law is distinguishable from the latter in numerous respects. First, the law contains the necessary jurisdictional requirements, including the requirement that the regulated items moved previously in interstate commerce. Second, the law asserts, and makes findings regarding, the effects on commerce. Finally, the Drug Free School Zone Act is part of a larger regulatory scheme to prohibit or regulate the trafficking of illegal items.

When Congress has criminalized possession of an item in commerce, it has generally required that such items actually travel in interstate commerce. A regulated activity, including possession, which involves an item that merely crossed state lines, would appear to be regulable under the Commerce Clause. In this respect, the Ninth Circuit recently upheld the federal car-jacking statute, which applies to the forceful taking of cars that have been "transported, shipped or received in interstate or foreign commerce,"[94] and was designed to regulate illegal interstate trafficking in stolen vehicles and parts. If the Gun-Free School Zones Act contained a similar requirement that the prohibited item had itself moved in interstate commerce, the law would likely have been upheld.

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[91] *See Lopez*, 115 S. Ct. at 1632.

[92] 21 U.S.C. § 860 (1994).

[93] *Id.*

[94] United States v. Oliver, 60 F.3d 547,550 (9th Cir. 1995). *See also* United States v. Robinson, 62 F.3d 234 (8th Cir. 1995); United States v. Bishop, 66 F.3d 569 (3d Cir. 1995).

In addition, Congress may also enact laws criminalizing possession of an item in commerce if such laws are within a larger regulatory effort to control contraband items. For instance, the Tenth Circuit recently rejected a challenge to a statute prohibiting the acquisition, possession, or transfer of automatic weapons manufactured after 1986, stating that the statute was part of a larger regulation of the interstate flow of firearms.[95] In this respect, the courts are likely to uphold as a valid exercise of Commerce Clause power criminal statutes for possessory offenses that are aimed at curbing trafficking.

Alternatively, some criminal laws that appear to prohibit predominantly intrastate activities, such as those relating to inhibiting access to abortion clinics and drug possession, generally relate to the sale or transfer of goods or services, and thus are commercial in nature and have a demonstrable interstate commerce impact.[96]

Thus, under *Lopez*, if a federal law simply punishes possession without some rational connection to interstate commerce, or without reference to a larger regulatory goal or to trafficking, the legislation might be found to be outside congressional authority under the Commerce Clause. If, however, the federal regulation is aimed at trafficking items that move through interstate commerce or across state lines, is otherwise part of a larger federal regulatory framework, or is otherwise related to commercial activity, the law will likely be upheld. Existing federal possessory crime statutes are likely to be upheld because they generally contain at least one of these jurisdictional elements. However, Congress will have to be more careful, and less cavalier, in crafting laws criminalizing possession under the Commerce Clause than it was in *Lopez*. It may not simply assume that its powers in the area of criminal law are unchecked.

2. Child Support

In *Lopez*, the Supreme Court noted, in *dicta*, that the regulation of domestic law—marriage, divorce, and child custody—was "tenuously" related to commerce, and may therefore be

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[95] United States v. Wilks, 58 F.3d 1518 (10th Cir. 1995); *see also* United States v. Rankin, 64 F.3d 338 (8th Cir. 1995) (applying Commerce Clause similarly with respect to a sawed-off shot gun).

[96] *See* Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995) (upholding Freedom of Access to Clinic Entrances Act of 1994).

outside the bounds of the Commerce Clause.[97] Consistent with this reasoning, a district court in Arizona struck down the Child Support Recovery Act of 1992 (CSRA),[98] which criminalizes delinquency in payment of child support by non-custodial parents who live in a different state from a dependent child. In *United States v. Mussari*,[99] the court struck down the law, finding the lack of a jurisdictional requirement that an offending party cross state lines to avoid child support to be fatal, and noting that the law could apply when the custodial parent moved out of a state and the offending non-custodial parent remained in the same state.[100] "[B]ecause the government did not have to prove intent to flee as an element of the crime, CSRA prosecution would be possible when the custodial parent, rather than the delinquent parent, changed states."[101] The case is pending on appeal.

In addition, where courts have held CSRA to be unconstitutional, they have held that the connection between interstate commerce and child support non-payment is attenuated, that the *Lopez* decision forbids Congress from aggregating activities quantitatively, and instead requires the evaluation of the qualitative aspects of an activity to determine if it is economic or commercial in nature. Under this reasoning, some courts have found that the withholding of child support constitutes a *de minimis* impact, if any at all, on interstate commerce.[102] Finally, child support decrees are traditionally the exclusive province of the states and enforcement of CSRA could conceivably require federal court intervention in ways that would entail modifications of state decrees.[103]

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[97] *Lopez*, 115 S. Ct. at 1632.

[98] 18 U.S.C. § 228 (1994).

[99] 894 F.Supp 1360, 1364, *reconsideration denied by* 912 F.Supp 1248 (D. Ariz. 1995), *and rev'd*, 95 F.3d 787 (9th Cir. 1996).

[100] Further, the court found that the impact of failure to pay child support on federal social welfare expenditure can be addressed by civil legislation, and the criminal legislation in question could not be shown to be related to interstate commerce. *Id.*

[101] Ronald S. Kornreich, *The Constitutionality of Punishing Deadbeat Parents: The Child Support Recovery Act of 1992 After* United States v. Lopez, 64 FORDHAM L. REV. 1089, 1119.

[102] United States v. Parker, 911 F. Supp. 830 (E.D. Pa. 1995); United States v. Bailey, 902 F. Supp. 727 (W.D. Tex. 1995); United States v. Mussari, 894 F. Supp. 1360, *reconsideration denied by* 912 F. Supp. 1248 (D. Ariz. 1995), *rev'd*, 95 F.3d 787 (9th Cir. 1996).

[103] *Id.*

However, other federal courts have found the CSRA to be constitutional,[104] concluding that the payment of child support involves payment of a debt, that the statute constitutes a criminal enforcement of interstate debt, and that the act of collecting child support payments amounts to a commercial transaction and the use of the channels of interstate commerce.[105] These courts have thus found that the *Lopez* requirements are met. These courts have also found that non-payment of child support, in the aggregate, has a substantial affect on commerce[106] and that the "basic function of child support is an economic one—to provide money to the custodial parent on behalf of the child,"[107] as distinguished from mere gun possession at a school. Finally, courts upholding the statute have concluded that the payment of child support constitutes a constructive transfer of funds from the child to the non-custodial parent, which is arguably economic. In addition, there are other significant arguments that may be presented to support a finding that child support substantially affects interstate commerce. First, there is a direct link between failure to pay child support and welfare expenditures by federal and state governments. Second, rises in poverty rates resulting from single parent households burden interstate commerce, meaning that such households in turn have less money to purchase goods and services. Third, the money diverted from child support directly buttresses the economies of the home state of the non-custodial parent.[108]

Further, unlike *Lopez*, Congress made clear findings of the connection between non-payment of child support and interstate commerce, noting that there is $5 billion in uncollected child support, that uncollected support orders increase welfare costs, and that states are limited by jurisdictional constraints when trying to enforce criminal laws outside of their boundaries.[109] However, as *Lopez* suggests, courts may not gloss over such an

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[104] United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996); United States v. Mussari, 95 F.3d 787 (9th Cir. 1996), U.S. v. Sage, 92 F.3d 101 (2d Cir. 1996); United States v. Lewis, 936 F.Supp. 1093 (D.R.I. 1996); United States v. Nichols, 928 F.Supp. 302 (S.D.N.Y. 1996); United States v. Sims, 936 F.Supp. 817 (N.D. Okla. 1996); United States v. Murphy, 893 F. Supp. 614 (W.D. Va. 1995).

[105] Rebecca A. Wistner, Comment, *The New Federalism After* United States v. Lopez*: Abusing the Power to Regulate: The Child Support Recovery Act of 1992*, 46 CASE W. RES. L. REV. 935, 942 (1996).

[106] United States v. Hampshire, 95 F.3d 999, 1004 (10th Cir. 1996).

[107] Kornreich, *supra* note 101, at 1113.

[108] Kornreich, *supra* note 101, at 1114.

[109] *Id.* at 1113.

assertion of a congressional connection; rather, these assertions may be more closely scrutinized under an enhanced rational basis test.

It is unclear how the Supreme Court may resolve the challenge to CSRA. While the *Lopez* Court rejected the "attenuated arguments" that the government proffered in linking the possession of handguns to interstate commerce, the CSRA does not involve such a tenuous link to the economy. "[T]he activity itself is economic, and linking a lack of financial support to commerce does not involve the same mental gymnastics as the government's *Lopez* arguments."[110] The payment of child support is an economic activity, by definition. Also, it substantially affects commerce because it is a monetary obligation occurring across state lines. As such, it is possible to uphold CSRA without undermining the principles enunciated in *Lopez*.

3. Marriage

Lopez also calls into question whether Congress has any authority to regulate the institution of marriage under the Commerce Clause. When Congress recently passed the Defense of Marriage Act,[111] it did not invoke the Commerce Clause as its authority. Rather, it utilized the Privileges and Immunities Clause[112] to authorize states not to recognize same-sex marriages that were licensed in other states.[113] While Congress has not yet passed an act to regulate marriage under its Commerce Clause authority,[114] *Lopez* suggests that such a law may be beyond Congress's reach.

In *Lopez*, both majority and dissenting opinions stressed that the educational process and family law (including divorce, marriage, and child custody) were areas where states have "historically been sovereign,"[115] and suggested that such areas may be beyond congressional regulation under the Commerce Clause. For example, in his dissent, Justice Breyer wrote that to hold the

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[110] Wistner, *supra* note 105, at 946.

[111] Pub. L. No. 104-199.

[112] U.S. CONST. art. IV, § 2, cl.1.

[113] Pub. L. No. 104-199.

[114] The Defense of Marriage Act, which President Clinton recently signed into law, was not supported by the Commerce Clause but was an exercise of Congress's authority under Article IV to "prescribe the Manner in which [the public acts, records and judicial proceedings of every other state] shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

[115] *Lopez*, 115 S. Ct. at 1632; *see also* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1986 (1995).

Gun-Free School Zones Act constitutional was not to hold that the federal government could regulate "marriage, divorce, and child custody," or education.[116]

However, should Congress attempt to regulate marriage under the Commerce Clause, there are several steps it could take to help insulate the regulation from a constitutional challenge. For instance, it could assert that marriage is fundamentally economic today, so deeply enmeshed in interstate commerce so as to satisfy the "instrumentalities," "channels," or "substantial affects" tests. In his dissent in *Lopez*, for instance, Justice Breyer suggested that in enacting legislation, Congress should be able to respond to "economic realities" and that commerce power should be used in a manner commensurate with national economic needs.[117] Applying this reasoning to the institution of marriage, Congress could point to the economic benefits that married couples enjoy, such as certain tax benefits, health insurance benefits, pension benefits, social security benefits, and the benefit of living off a joint income. To the extent that any federal legislation regulating marriage substantially affects any of these benefits, Congress could assert that the legislation also substantially affects interstate commerce. Congressional findings that marriage is fundamentally economic could include data showing married couples' legal benefits (e.g., tax and social security), income levels, and reduced reliance on government assistance.

Nevertheless, marriage has been historically treated as an area of family law reserved to the sovereignty of the states. Furthermore, even the most resourceful arguments that marriage substantially affects interstate commerce struggle to demonstrate anything more than an attenuated relationship. Finally, both the majority and the dissent in *Lopez* point to marriage as a safe example of an activity that should be outside of Congress's Commerce Clause reach.[118] Thus, this is perhaps the riskiest area for Congress to attempt to regulate under its Commerce Clause authority.

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[116] *Lopez*, 115 S. Ct. at 1661 (1995) (Breyer, J., dissenting); *see also* Anne C. Dailey, *Federalism and Families*, 143 U. PA. L.REV. 1787, 1820 (1995) ("[T]he dissent remains unwilling to cede authority over family law to the federal government, asserting without support that its approach would not permit Congress 'to regulate marriage, divorce, and child custody.'").

[117] *Lopez*, 115 S. Ct. at 1662 (Breyer, J., dissenting).

[118] *See Lopez*, 115 S. Ct. at 1632, 1661.

4. Church Arson

Arson became the subject of national concern when, in the spring of 1996, a rash of church arsons swept through the South, many of which were directed at African American churches.[119] Congress responded with the Church Arson Prevention Act of 1996,[120] which broadened the existing federal arson statute to create enhanced penalties for church arsons that are "in or affect interstate or foreign commerce."[121]

During the drafting of this Act, the prime sponsors were very careful to ensure that the provisions satisfied the *Lopez* criteria.[122] First, the sponsors included a jurisdictional requirement modeled after the existing federal arson statute,[123] and authorized federal prosecution only when the alleged act "substantially affects" interstate commerce, such as when a defendant crossed state lines or utilized the instrumentalities of interstate commerce.[124]

Second, the drafters sought to insulate the statute from any attack on commerce grounds by invoking congressional authority under the Thirteenth Amendment,[125] which authorizes congressional action to ameliorate the "badges and incidents" of slavery. The use of additional constitutional authority to provide supplemental protection may signal a new awareness by congressional drafters of the limits to commerce authority. However, because there is little precedent for utilizing Thirteenth Amendment authority, it is still useful to examine the statute's vulnerability to a Commerce Clause challenge.

While the general federal arson statute (on which the church arson statute was modeled) has generally been upheld, federal courts have closely scrutinized the jurisdictional requirements.

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[119] 142 CONG. REC. E 1258.

[120] Pub. L. No. 104-155, amending 18 U.S.C. 247(b) (1994).

[121] *Id.*

[122] The author of this Essay was one of a half dozen principle House and Senate staffers responsible for the drafting of the Act.

[123] 18 U.S.C. 844(I) (1994) provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than 20 years, fined the greater of the fine under this title or the cost of repairing or replacing any property that is damaged or destroyed, or both.

[124] *Id.*

[125] U.S. CONST. amend. XIII.

For example, in *United States v. Pappadoulos*,[126] the Ninth Circuit reversed an arson conviction, holding that the mere receipt of natural gas from an out-of-state source was insufficient to satisfy the jurisdictional element the statute required.[127]

However, the Supreme Court has recently denied *certiorari* in two sister cases that involve facts similar to *Pappadoulos*. In *United States v. Ramey*[128] and *United States v. Moore*,[129] the Fourth Circuit sustained federal convictions for the arson of private residences on the basis that a residential connection to interstate power grids constituted a sufficient connection to interstate commerce so as to satisfy the jurisdictional requirements of the arson statute.[130] In *Ramey*, the defendants were convicted of committing arson of a residential trailer that received its electricity from an interstate power grid. The Court held that "considered in the aggregate, [the] disruption of electrical service through repetition elsewhere would have a substantial effect on commerce."[131] The principal distinction between *Pappadoulos* and *Ramey* is that in the latter case, the electricity supplied to the residential trailer crossed state lines. The Court's denial of *certiorari* in *Ramey*, viewed in light of the Kennedy concurrence in *Lopez*,[132] suggests that for purposes of satisfying the jurisdictional element, Congress may retain broad powers to criminalize activity whose targets merely utilize the channels or instrumentalities of interstate commerce, such as utilities or services.[133] Courts have also held that the jurisdictional element has been satisfied in several other similar cases, including setting fire to a six-unit apartment building,[134] torching a restaurant,[135] burning

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[126] *Pappadoulos*, 64 F.3d 522, 527 (9th Cir. 1995); *see also* United States v. Denalli, 73 F.3d 328, 329 (11th Cir. 1996).

[127] *Pappadoulos*, 64 F.3d at 528.

[128] 24 F.3d 602 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1838 (1995).

[129] 25 F.3d 1042 (4th Cir. 1994), *cert denied*, 115 S. Ct. 1838 (1995).

[130] Kathleen F. Brickey, *An Academic View*, *in* THE CHAMPION 47 (1996) (citing *Ramey*, 24 F.3d at 602; *Moore*, 25 F.3d at 1042).

[131] Brickey, *supra* note 130, at 47 (quoting *Ramey*, 24 F.3d at 607).

[132] In his concurrence, Justice Kennedy says that *Lopez* is a "necessary though limited holding." *Lopez*, 115 S. Ct. at 1634.

[133] *See generally* Brickey *supra* note 130, at 47.

[134] United States v. Gomez, 87 F.3d 1093, 1095–96 (9th Cir. 1996) (finding jurisdictional requirements satisfied because the burned building was used in a manner that substantially affected interstate commerce).

[135] United States v. DiSanto, 86 F.3d 1238, 1244–46 (1st Cir. 1996) (holding that an arson statute contains the requisite jurisdictional elements where it ensures the property damaged was used in interstate commerce).

a college dormitory,[136] and the arson of a building that had not been rented for three months.[137]

In enacting the Church Arson Prevention Act, Congress was very careful to satisfy the requirements imposed by the *Lopez* Court. First, it made findings asserting the relationship between church arsons and interstate commerce. It asserted, for example, that churches frequently engage in inherently economic activities that substantially affect interstate commerce: churches provide day care and other services which involve financial transactions, collect dues from members each week, and frequently rely on interstate utilities such as electricity, gas, and telecommunications which are interrupted by acts of arson.[138] Second, the law limits federal jurisdiction to "offenses in or affect[ing] interstate or foreign commerce."[139] Finally, the law invokes the Thirteenth Amendment for supplemental authority.[140] In view of the careful drafting of the Church Arson Prevention Act, it appears that the law is safe from constitutional challenge, even though it criminalizes an activity that is inherently intrastate.

5. Environmental Law

Most environmental laws involve the regulation of commercial activities, such as mining, farming, processing, manufacturing, transporting, reuse, and disposal, and thus are clearly within the power of Congress to regulate under the Commerce Clause.[141] In addition, although many environmental laws regulate individual activities, such as the disposal of hazardous waste, they have been enacted as part of a larger regulatory scheme to prohibit actions that clearly have substantial effects on interstate commerce.[142] Still other statutes contain explicit requirements that the activities subject to federal regulation must be "in or affect-

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[136] Unites States v. Sherlin, 67 F.3d 1208, 1212–14 (6th Cir. 1995) (finding jurisdiction because school, and specifically the burned building, affected interstate commerce).

[137] United States v. Martin, 63 F.3d 1422, 1426–28 (7th Cir. 1995) (holding that a unit on the rental market bears a sufficient connection to interstate commerce for jurisdictional purposes).

[138] Church Arson Prevention Act of 1996 § 3(3), Pub. L. No. 104-155 (1996), codified at 18 U.S.C. § 247.

[139] *Id.*

[140] *See id.* at § 2(6).

[141] John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10421, 10427 (August 1995).

[142] *See id.*

ing interstate commerce."[143] In view of such provisions, it is generally believed that the *Lopez* decision will not imperil federal environmental laws.

Nevertheless, at least one challenge to a federal environmental law has been successful on the basis that the action in question did not sufficiently affect interstate commerce.[144] In *Hoffman Homes, Inc. v. U.S. Environmental Protection Agency*,[145] the Seventh Circuit held that § 404 of the Federal Water Pollution Control Act could not constitutionally be applied to an "isolated wetland" whose filling was a "purely local activity" with no interstate effect.[146]

In addition, it may also be possible to challenge federal regulation of non-commercial state action, such as federal requirements that state and local governments provide residents safe drinking water. However, because most state and local governments are involved in commercial activity with respect to that drinking water in that they actually sell the water to residents, there may to be a sufficient commercial nexus to withstand an attack.

Notwithstanding the holding in *Hoffman Homes*, there have been few challenges to federal environmental laws on the basis of improper Commerce Clause authority after *Lopez*. Because federal environmental laws generally regulate industrial activities and are part of an acceptable larger federal regulatory framework, they appear to be safely insulated from constitutional attack on Commerce Clause grounds.

C. *Related Tenth Amendment Limits*

In addition to refining the scope of Congress's Commerce Clause authority, the courts may also redefine the contours of federalism in related spheres. The outcome of such ongoing

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[143] *Id.*

[144] *Cf.*, New York v. United States, 505 U.S. 144, 174–75 (1992) (declaring unconstitutional a federal environmental law that would require state governments to "take title" to radioactive wastes if federal disposal requirements were not met). In *New York*, the federal law was held unconstitutional under the Tenth Amendment because it "commandeered" local government. *Id.* at 176. This issue is further discussed *infra* note 148 and accompanying text.

[145] 961 F.2d 1310 (7th Cir. 1992), *vacated*, 975 F.2d 1554 (7th Cir. 1992), *vacated on reh'g*, 999 F.2d 256 (7th Cir. 1993).

[146] *See id.* at 1313.

litigation, taken together with *Lopez*, could have significant implications for federal legislation.

The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[147] Recently, the Court has revived the power of this provision and thereby placed some additional limits on congressional power.

In *New York v. United States*,[148] the Court invalidated provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which required states to either regulate according to Congress's instructions, (i.e., participate in a regional waste disposal compact) or "take title" to the waste and accept liability for generators' damages.[149] The choice for the state was to either implement federal legislative mandates or to be "commandeered" into making unpopular and expensive policy choices.[150] In striking down the law, Justice O'Connor, writing for the majority, stated that Congress may not simply
"commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[151] Thus, the Court held that the "take title" provision was beyond the reach of Congress's enumerated powers, and inconsistent with the Tenth Amendment.[152]

In *Printz v. United States*[153] the Court revisited the issues of the federal-state balance that were addressed in *New York*. The issue in *Printz* is whether § 922(s)(C) of the Brady Act, which requires state and local law enforcement officers to conduct background checks on firearm purchasers, violates the Tenth Amendment.

The sheriffs in *Printz* (and its companion case *Mack v. United States*)[154] argued that under *New York,* the federal government cannot commandeer state officers to assist in carrying out a federal program.[155] They further argued that the law places unduly burdensome requirements on local law enforcement be-

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[147] U.S. CONST. amend. X.
[148] 505 U.S. 144 (1992).
[149] *See id.* at 175–76.
[150] *Id.* at 176.
[151] *Id.* at 176.
[152] *See id.* at 177.
[153] No. 95-1478 (U.S. argued Dec. 3, 1996).
[154] No. 95-1503 (U.S. argued Dec. 3, 1996).
[155] Petitioner's Argument Before the Supreme Court, *Printz* (No. 95-1478), 11.

cause background checks can occupy up to two hours, thereby diverting precious resources from the local community.[156] The sheriffs also argued that the law forces them "to take the heat" for gun control.[157]

In contrast, the government argued that for the purposes of the Tenth Amendment, there is a distinction between *Printz*, where the federal government merely required that states carry out federal policy, and *New York*, where the federal government commandeered the political processes of local government and forcing local governments to "take the political heat" for unpopular decisions.[158] The government cited the Ninth Circuit opinion in *Printz*, where the court concluded that *New York* stood for the proposition that the federal government cannot compel states to enact, administer, or make decisions with respect to a federal regulatory program.[159] Thus, the government argues, the requirement of a mere background check does not commandeer state political processes because it does not place state officials in charge of a regulatory program nor does it require state officials to make policy decisions and thereby "take the heat" for federal policy choices.[160]

The government also argued that the requirement to "make reasonable efforts" is not overly burdensome, but rather, is consistent with traditional law enforcement duties of the state officials.[161] Finally, the government argued that the temporary requirements are consistent with the plenary authorities of the Necessary and Proper Clause[162] of the Constitution.[163]

During oral argument, Justice Scalia asserted that the federal government could not have states "dancing on its fingers like marionettes" under the Tenth Amendment.[164] However, when the sheriffs argued that only a voluntary program or one conditioned on federal funding would satisfy the standards articulated under *New York*, Justice O'Connor responded by stating that this was an "extreme position."[165]

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[156] *Id.* at 6.

[157] *Id.* at 27. *See also New York*, 505 U.S. at 168 (holding that "where the federal government compels the state to regulate, the accountability of both federal and state officials is diminished").

[158] Brief for United States, *Printz* (No. 95-1478), 10–11.

[159] *See id.* at 8 (citing *Mack*, 66 F.3d at 1030).

[160] *Id.*

[161] *Id.* at 12.

[162] U.S. CONST. art. I, § 8, cl. 18.

[163] Brief for United States, *Printz* (No. 95-1478), 11.

[164] Petitioner's Argument Before the Supreme Court, *Printz*, at 29.

[165] *Id.* at 38.

The outcome of this decision will have significant implications for federalism. Specifically, the decision will determine whether Congress may require state officials to implement federal mandates only so long as the policy-making apparatus of the state is not "commandeered," or whether the Tenth Amendment forbids Congress from imposing "unfunded mandates" like background checks on the states. The latter result would force the federal government to utilize other mechanisms to obtain state cooperation with its policy goals.

D. *Alternative Authorities and Their Limits*

Because the Court clipped the wings of the Commerce Clause in *Lopez*, and may impose yet additional limits in *Printz*, Congress might now look to other authorities to implement policy goals, as it did by invoking the Thirteenth Amendment in enacting the church arson legislation. In this respect, available authority includes the Fourteenth Amendment,[166] the Thirteenth Amendment ("badges and incidents of slavery"),[167] the Spending Clause,[168] which permits congressional expenditures "for the common benefit" as distinguished from some mere local purpose,[169] and federal preemption.

1. The Fourteenth Amendment

Section 5 of the Fourteenth Amendment has traditionally been used by Congress to effectuate the guarantees of equal protection in voting and civil rights.[170] However, such authority too was recently limited in *Adarand v. Pena*,[171] where the court held that so-called "benign" racial classifications to promote affirmative action plans would be subject to the same strict scrutiny standard of judicial review as malevolent classifications.[172]

Congress most recently used its Section 5 authority in an unconventional manner. In the Religious Freedom Restoration Act of 1993 ("RFRA"),[173] Congress attempted to limit the effect

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[166] U.S. CONST. amend. XIV, § 5.
[167] U.S. CONST. amend. XIII.
[168] U.S. CONST. art. I, § 8, cl. 1.
[169] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 322 (1988).
[170] *See id.*
[171] 115 S. Ct. 2097 (1995).
[172] *Id.* at 2100.
[173] Pub. L. No. 103-141, codified at 42 U.S.C. § 2000bb.

of the Supreme Court's holding in *Employment Division, Dep't. of Human Resources v. Smith*,[174] where the Court declined to apply strict scrutiny to facially neutral laws that have mere ancillary effects on religious freedom.[175] In the RFRA, Congress utilized Section 5 to overturn *Smith* and impose a strict scrutiny standard of review of any federal or state action with such ancillary effects on religious free exercise.[176] The RFRA now faces significant challenges on grounds that Congress lacks Fourteenth Amendment authority to extend free exercise protections beyond those recognized by the Court, and that the statute conflicts with, and is therefore trumped by, First Amendment doctrine as articulated by the Supreme Court.[177]

There is little direct precedent for using the Fourteenth Amendment in the manner in which it was employed by Congress in RFRA. In *Katzenbach v. Morgan*,[178] the leading case concerning the scope of Congress's power to protect Fourteenth Amendment rights, the majority opinion held that "Section 5 of the Fourteenth Amendment, authorizing 'appropriate' enforcement legislation, is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[179] In *Morgan*, the Court held that § 4(e) of the Voting Rights Act of 1965, despite precedent that literacy requirements do not violate Fourteenth Amendment Equal Protection, forbids the denial of the franchise to a person who had completed the sixth grade in a Spanish language school but

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[174] 494 U.S. 872 (1990).

[175] *See id.*

[176] *Employment Division*, in effect, overruled two prior Supreme Court cases, Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). In both cases, the Court strictly scrutinized the governmental actions in question, requiring the government in each case to demonstrate a compelling interest before its infringement on religious liberty would be upheld. In *Sherbert*, the Court held that the State of South Carolina could not constitutionally deny unemployment benefits to a Seventh-day Adventist whose observance of Saturday as the Sabbath prevented her acceptance of otherwise available employment. In *Yoder*, the Court held that Old Order Amish parents could not be compelled by a criminal law to send their children to school beyond the eighth grade.

[177] City of Boerne v. Flores, No. 95-2074. The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[178] 384 U.S. 641 (1966).

[179] *Morgan*, 384 U.S. at 651; *see also* TRIBE, *supra* note 169, at 341.

could not read or write English.[180] Congressional action was upheld as a traditional remedial measure to secure equal rights at the ballot box. The Court rejected the argument that Congress was defining the content of Fourteenth Amendment rights. It held that Congress was not acting in a novel and contentious role of constitutional interpreter.[181]

Congress has, however, sometimes used its power to enforce Fourteenth Amendment rights. In the *City of Boerne v. United States*,[182] the Fifth Circuit first found that RFRA "may be regarded" as an enactment to enforce the Fourteenth Amendment and those rights incorporated through the Due Process Clause. There, the court held that "[i]t has been long established that the Due Process Clause of the Fourteenth Amendment incorporates the Free Exercise Clause of the First Amendment."[183] Second, the Court found that RFRA is "plainly adapted to that end."[184] Stating that Congress's power under Section 5 is remedial, the Fifth Circuit accepted the government's arguments that RFRA deters governmental violations of the Free Exercise Clause, prohibits laws that have the effect of impeding religious exercise, and protects the free exercise rights of adherents of minority religions.[185]

Additionally, the court found that RFRA is consistent "with the letter and spirit of the Constitution," and does not violate the separation of powers, the Establishment Clause, or the Tenth Amendment.[186] In so holding, the court agreed with the contention of the United States that the law is "simply a statute that provides legislative protection for a constitutional right over and above that provided by the Constitution."[187] It further noted that RFRA did not advance religion through its own activities and influence and therefore did not run afoul of the Establishment Clause.[188] Finally, the Court held that RFRA did not violate the Tenth Amendment, noting that "the principles of federalism that constrain Congress's exercise of the Commerce Clause powers are attenuated when Congress acts pursuant to its powers to

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[180] *Morgan*, 384 U.S. at 643.
[181] *Id.* at 648.
[182] 73 F.3d 1352 (5th Cir. 1996).
[183] *Id.* at 1358 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).
[184] *Id.* at 1360.
[185] *Id.*
[186] *Id.* at 1363–64 (citing *Morgan*, 384 U.S. at 650).
[187] *Id.* at 1361 (internal quotation marks omitted).
[188] *Id.* at 1364.

enforce the Civil War Amendments."[189] The case is now pending before the Supreme Court.[190]

It is possible to utilize this Fourteenth Amendment authority in other areas, however, such use is untested in the courts. For example, rather than attempting to regulate child support enforcement through the Commerce Clause, Congress could attempt to regulate it under the Fourteenth Amendment, asserting that minor children have an enforceable Due Process right to parental support and that custodial parents have a "fundamental liberty interest in the care, custody, and management of their child."[191]

Similarly, Congress could attempt to regulate marriage under the Fourteenth Amendment, arguing that it is protecting a substantive due process right recognized in *Loving v. Virginia*[192] and the later case of *Zablocki v. Rednail*,[193] which established a constitutional right to marry and where the Court held that the "freedom to marry has long been recognized one of the vital personal rights essential to the orderly pursuit of happiness."[194] This is not to suggest that the Supreme Court will necessarily approve of such theories. Traditionally, Congress has used the Fourteenth Amendment to advance civil rights; novel uses of the authority are plausible but untested.

2. The Thirteenth Amendment

The Thirteenth Amendment prohibits slavery or involuntary servitude, and empowers Congress to pass legislation to ameliorate the badges and incidents of slavery.[195] As discussed earlier, the Thirteenth Amendment provided additional authority for congressional enactment of the Church Arson Prevention Act.[196]

However, until recently, Congress relied on the Fourteenth Amendment and Commerce Clause almost exclusively to secure civil rights for African Americans and other minorities. There-

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[189] *Id.* (quoting Gregory v. Ashcraft, 501 U.S. 452, 468 (1991)).

[190] *See* note 177, *supra.*

[191] TRIBE, *supra* note 169, at 1652 n.51 (quoting Santosky v. Kramer, 455 U.S. 745 (1982)).

[192] 388 U.S. 1, 12 (1967) (invalidating a state law against racial intermarriage).

[193] 434 U.S. 374 (1978) (striking down a Wisconsin law allowing a parent with child support obligations to marry only if such obligations were met).

[194] TRIBE, *supra* note 169, at 1415 (quoting *Loving*, 388 U.S. at 12).

[195] U.S. CONST. amend. XIII.

[196] *See supra* note 140 and accompanying text.

fore, there are few instances in which the authorities of the Thirteenth Amendment have been tested. Yet, the Supreme Court in *Jones v. Alfred H. Mayer Co.*,[197] suggested that the Thirteenth Amendment gives Congress broad remedial powers to fight discrimination and to "rationally determine what are the badges and the incidents of slavery" that are worthy of remedy.[198] However, this authority is limited to legislation relating to civil rights—conduct Congress generally can reach under both the Fourteenth Amendment and Commerce Clause. Further, it is unlikely that the Thirteenth Amendment would permit Congress to effectuate affirmative action legislation that was struck down under the Fourteenth Amendment in *Adarand*.[199] Nevertheless, Congress's use of the Thirteenth Amendment in the Church Arson Prevention Act signals a confidence that it provides far reaching powers to prevent discriminatory activity directed at African Americans even if such activity does not substantially affect interstate commerce. Thus, the Thirteenth Amendment is a useful area to watch if Congress continues to utilize it to pass civil rights legislation in areas that have an attenuated relationship to interstate commerce.

3. The Spending Clause

The Spending Clause[200] is perhaps the clearest method of avoiding constitutional challenges to congressional acts under the Commerce Clause or Tenth Amendment.[201] In *South Dakota v. Dole*,[202] the Supreme Court sustained a federal statute that directed "the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States 'in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.'"[203]

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[197] 392 U.S. 409 (1968).

[198] *Id.* at 440; *cited in* TRIBE, *supra* note 169, at 332.

[199] *See supra* note 171 and accompanying text.

[200] U.S. CONST. art. I, § 8.

[201] Article I, Section Eight of the Constitution grants Congress the "Power To . . . provide for the common Defence and general Welfare of the United States . . . ." Under this clause, "Congressional expenditures must be made 'for the common benefit as distinguished from some mere local purpose.'" TRIBE, *supra* note 169, at 322 (quoting United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950)).

[202] 483 U.S. 203 (1987).

[203] *South Dakota*, 483 U.S. at 205 (quoting 23 U.S.C. §158 (1984)); *see also* Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 COLUM. L. REV. 1911, 1929 (1995).

Here, the Court held that "Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking ages," and went on to hold that the legislation is "within constitutional bounds even if Congress may not regulate drinking ages directly."[204]

It is likely that Congress could have used conditional spending to achieve the objectives of the Gun-Free School Zone Act. As Baker argues,

> A conditional grant of federal funds is the only way for Congress to achieve precisely the regulatory effect that it originally sought with the Gun-Free School Zones Act. An alternative would be to modify the language of the original Act, for example, to limit its applicability to the possession of firearms that have moved in or otherwise affect interstate commerce.[205]

Similarly, Congress could have conditioned federal crime-fighting funds on state willingness to conduct background checks. The only limit on this authority is the requirement that the condition placed on the funding recipient be rationally related to the objective of congressional spending,[206] which is generally easy to satisfy with the vast array of congressional appropriations.

III. Conclusion

The *Lopez* decision represents the first curtailment of congressional authority under the Commerce clause in over half a century. While the reach of the limitation is subject to further refinement, it means, at a minimum, that Congress will have to be more cognizant of Commerce Clause limits when drafting legislation. The case law may further suggest that certain conduct, such as marriage, may be outside the ambit of congressional authority under the Commerce Clause.

Even more interesting are evolving doctrinal spheres in related areas. Congress's authority to enact laws under the Fourteenth Amendment has been limited in cases involving affirmative action.[207] The Court is now deciding whether to limit Congress's Fourteenth Amendment authority to provide greater free exercise

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[204] *South Dakota*, 483 U.S. at 206.
[205] Baker, *supra* note 203, at 1913 n.8 (internal quotation marks omitted).
[206] *See, e.g.*, *South Dakota*, 483 U.S. at 208; Maher v. Roe, 432 U.S. 464 (1977).
[207] *See* Adarand v. Pena, 115 S. Ct. 2097 (1995).

protections than might otherwise exist under the First and Fourteenth Amendments.[208] The Court is also considering whether Congress is limited by the Tenth Amendment from imposing on states record collection requirements to enforce federally mandated waiting periods for gun purchases.[209]

At the same time, Congress also seems to be relying on other authorities that the Courts have not limited in any meaningful way. Both conditional spending and federal preemption that allows state regulation consistent with federal standards, are approaches that Congress can be relatively certain will withstand judicial scrutiny. The Thirteenth Amendment is also an area in which Congress has shown some interest and might increasingly use in cases involving civil rights where the relationship to interstate commerce is tenuous.

At the very least, these evolving doctrines will force Congress to exercise greater care in drafting laws. More significantly, the result of these evolving doctrines may be to declare certain activities outside of the boundary lines of particular areas of congressional authority. It is possible that as a result Congress will draft statutes better insulated from constitutional attack. Such strategems may include utilizing different and overlapping authorities as the Church Arson Prevention Act demonstrates.

Thus, while the *Lopez* decision is unlikely to result in any watershed change in congressional authority, it may enhance congressional care and creativity in the evolving areas of federalism as the debate regarding the proper scope of federal powers continues both in and out of the courts.

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[208] *See* City of Boerne v. Flores, No. 95-2074 (U.S. argued Feb. 19, 1997).
[209] *See* Printz v. United States, No. 95-1478 (U.S. argued Dec. 3, 1996).

NOTE

REINVENTING A LIVELIHOOD: HOW UNITED STATES LABOR LAWS, LABOR-MANAGEMENT COOPERATION INITIATIVES, AND PRIVATIZATION INFLUENCE PUBLIC SECTOR LABOR MARKETS

JANET C. FISHER*

As public pressure for more cost-effective government services has increased, federal, state, and local governments have looked for alternatives to current public sector labor policies. Recent initiatives range from privatization to labor-management cooperation programs within the public sector. In this Note, the author challenges privatization schemes and uses empirical research to evaluate factors that influence public sector cooperation program outcomes. After applying multiple regression analyses to data derived from Department of Labor Task Force survey responses, the author concludes that cooperation programs can succeed by letting employees decide how to attain specific goals for improving public service delivery. These employee initiatives will be most successful if accompanied by labor law reforms that enable greater job security, encourage innovation, and motivate genuine industrial democracy.

United States labor policy has long prevented joint labor-management decisions concerning employment conditions, while publicizing cooperative initiatives as harmful to America's global competitive advantage.[1] Policymakers have garnered support to limit employee participation and employer bargaining obligations in the name of protecting both union autonomy and managerial prerogatives for free enterprise.[2]

This adversarial process established the core of collective bargaining in the private sector, and distinctly influenced public sector labor relations as well. Public sector employees are unique

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Finally, I wish to express my gratitude to the faculty, staff, and administration that have made the School of Industrial and Labor Relations at Cornell University a truly unprecedented institution of learning and achievement.

[1] *See* JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994, at 173–74, 190 (1995).

[2] *See id.* at xi–xii, 196, 212, 226–27, 259–62.

in that they seek higher wages for the services they provide as workers *and* seek lower tax rates for the public services they consume as taxpayers. President Franklin D. Roosevelt recognized that the right to manage adheres to government to a greater degree than to employers in the private sector:

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service . . . . The employer is the whole people, who speak by means of laws enacted by their representatives in Congress . . . . Accordingly, . . . officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures, or rules in personnel matters.[3]

How can labor relations be reformed so that public sector employees receive both sufficient rights and bargaining power in their respective careers, yet provide quality services with the efficiency that taxpayers demand? While some policymakers advocate total privatization of government services, others advocate establishing public sector programs by drawing on the experiences of private sector workplaces, and still others advocate achieving uniformity by applying private sector precedents formed under the National Labor Relations Act (NLRA)[4] to public sector laws. Despite these differing approaches, the consensus is clear: change must take place now to improve public service delivery and to compete successfully in the increasingly globalized economy.[5] Taking affirmative strides toward this end, President Clinton recently commissioned a task force to determine a modern process of improving public services within a unionized context.[6]

The purpose of this study is to determine the characteristics and issues that act to influence the effectiveness of different public sector labor-management cooperation programs across the United States. Part I explores the adversarial institutional and historical context of labor-management cooperation programs.

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[3] Letter from President Franklin D. Roosevelt to Luther C. Steward, President, National Federation of Federal Employees (Aug. 31, 1937), *reprinted in* Christine G. Cooper & Sharon Bauer, *Federal Sector Labor Relations Reform*, 56 CHI.-KENT L. REV. 509, 511–12 (1980).

[4] National Labor Relations Act, §§ 1–19, 29 U.S.C. §§ 151–169 (1994).

[5] *See* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT, 20–24 (1992).

[6] *See* THE UNITED STATES SECRETARY OF LABOR'S TASK FORCE ON EXCELLENCE IN STATE AND LOCAL GOVERNMENT THROUGH LABOR-MANAGEMENT COOPERATION, U.S. DEP'T OF LABOR, WORKING TOGETHER FOR PUBLIC SERVICE (1996).

Part II assesses the current legal framework underpinning these programs. Part III examines how cooperation and employee involvement programs challenge labor relations in both public and private sectors. This Part pays particular attention to public sector "Reinventing Government Initiatives," which seek to prevent public employee layoffs and other adverse consequences of privatization. Through these initiatives, cities such as Philadelphia[7] are utilizing cooperation programs within public sector labor forces to improve services and encourage greater efficiency, rather than subcontracting municipal work to private companies as a means of realizing these goals. Part IV uses multiple regression analysis to evaluate survey responses compiled by the Department of Labor's Task Force on Excellence in State and Local Government. The implications of this study are presented in Part V. This Part concludes by applying statistically significant regression results and current labor policy to determine which specific areas require legislative change.

I. The Institutional and Historical Context of Labor-Management Cooperation

In both the public and private sectors, labor law is premised upon protecting constitutional values central to collective bargaining and association, workplace democracy, and employee due process. Recognizing this basis, Congress passed the Norris-LaGuardia Act of 1932 to guarantee private employees their First Amendment freedoms.[8] Yet the ability to exercise these freedoms is inextricably linked to the amount of economic bargaining power a party possesses. Government interference with public or private employees' power to withhold their labor affects both sectors similarly by limiting employees' economic weapons and decreasing their inclination to use them.

Despite these similarities, several distinctions have caused public and private sector labor policy to evolve along separate paths, especially with regard to labor-management cooperation programs. First, the services provided by each sector are distinct in

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[7] *See* Memorandum of Agreement between the American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME), District Council 33 and the City of Philadelphia 5–7 (June 30, 1993) (exemplifying their "Redesigning Government Initiative" labor-management cooperation program) (on file with the author and with the Mayor's Office of Philadelphia).

[8] Norris-LaGuardia Act, §§ 1–15, 29 U.S.C. §§ 101–115 (1994).

nature. Private sector goods and services can, for the most part, be substituted or even foregone altogether, while public sector goods and services are often essential.[9] Second, public and private sectors are affected by different market forces.[10] Finally, because the government acts both as an employer and as a representative of its constituents, public sector employee compensation raises issues which implicate both the government's managerial prerogatives regarding its employees and its ability to legislate, tax, and distribute resources among the general public.[11]

A. *Goods, Services, and the Different Meanings of Productivity in Public and Private Sectors*

The majority of public sector laborers, both skilled and unskilled, produce what are best characterized as continuous services, while most private sector laborers generate discrete products or goods. The nature of private sector goods enabled private firms to implement "scientific management," a principle developed by philosopher Frederick Taylor, whereby employers separate product design from the production process to achieve maximum worker output with minimum worker thought or cognitive input.[12] Scientific management provided a foundation for the adversarial labor policy and fear of management control on which NLRA provisions are based.[13] Using this management approach, private sector employers could figure assembly line workers into their balance sheets like so many parts of a machine. In contrast, public sector employers found it difficult to establish similar requirements for public sector employees, whether employed as firefighters or prison guards, because their output could not be compartmentalized into discrete units.

Such different workplace experiences led to correspondingly different public and private sector labor movements. Congress allocated to public employees only those collective rights that

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[9] *See* Bernard D. Meltzer & Cass R. Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 736–37, 740–41 (1983).

[10] *See id.* at 786.

[11] *See id.*

[12] *See* DAVID I. LEVINE, REINVENTING THE WORKPLACE 10–12 (1995).

[13] *See generally* THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (2d ed. 1994).

would not interfere with government operations.[14] As a result, all government employees were excluded from representation before the National Labor Relations Board (NLRB),[15] while state and municipal employees were originally excluded from protection under the Fair Labor Standards Act (FLSA).[16] Most significantly, section 305 of the Taft-Hartley Act prohibited strikes by federal employees, providing:

> It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for re-employment for three years by the United States or any such agency.[17]

Although rehiring possibilities may lessen the force that an overriding strike prohibition imposes, significant deterrents remain for public employee strikes, including seniority loss, lack of rehiring guarantees, and financial problems resulting from mandatory discharge.[18]

By contrast, in the private sector, individual resources are allocated according to personal choices. The resulting large yet diverse consumer demand creates mass production industrial systems that must operate efficiently within markets full of substitute products. As noted earlier, these workplaces resemble scientific management prototypes and are ripe for adversarial labor relations. Once Congress recognized that private sector labor relations could be managed only if parties bargained over their respective interests, it passed the Wagner Act in 1935 to enable and equalize collective bargaining rights and representation.[19] Behind these purposes lay the core premise of carrying demo-

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[14] *See* Cooper & Bauer, *supra* note 3, at 510–12.

[15] *See* National Labor Relations Act, §§ 2–3, 29 U.S.C. §§ 152–153 (1994).

[16] *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (1994). Notwithstanding the FLSA's original exclusion of state and local government employees, in a 5-4 decision the United States Supreme Court held that it was constitutional for Congress to extend FLSA protection to state and municipal employees. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[17] Labor-Management Relations (Taft-Hartley) Act § 305, 29 U.S.C. § 188 (1952) (repealed 1955). Federal government employees continue to be prohibited from striking under current statutory provisions. *See* 5 U.S.C. §§ 3333, 7311 (1996); 18 U.S.C. § 1918 (1996).

[18] *See* Meltzer & Sunstein, *supra* note 9, at 788.

[19] National Labor Relations Act (Wagner Act), ch. 372, §§ 1–19, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151–169 (1994)).

cratic principles into the private workplace.[20] Senator Robert F. Wagner stated in support of his legislation, now known as the NLRA:

> The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood.[21]

To secure a means for achieving democratic freedoms in the workplace through fair negotiation and equal bargaining power, the NLRA protected private employees' right to strike.[22] Although the Landrum-Griffin Act of 1959 attempted to reinforce participatory rights within collective organizations,[23] the NLRA continued to recognize an inherent "core of entrepreneurial control" and managerial prerogatives that limited employee participation in workplace governance.[24] For instance, although employers are required to bargain over wages, hours, and terms and conditions of employment, employers retain the absolute right to close their operations.[25] Employers may also hire permanent replacements for economic strikers.[26] Finally, participatory efforts between private sector employers and their unions tend to be displaced by economic warfare, because the parties' respective duties to bargain do not require them to reach an agree-

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[20] *See* Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 696–99.

[21] *Id.*

[22] *See* Meltzer & Sunstein, *supra* note 9, at 733–34.

[23] Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), §§ 1–611, 29 U.S.C. §§ 401–531 (1994). Within a collective organization, the Landrum-Griffin Act protected union members' rights to free speech, free association, and participation in union decisionmaking and electoral processes. *Id.*

[24] *See* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *see also* Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 36 (1988).

[25] *See* American Shipbuilding Co., 380 U.S. 300, 316–17 (1965). Section 8(d) of the NLRA provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U.S.C. § 158(d) (1994).

[26] *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). Employees who strike as a result of employer unfair labor practices, however, are entitled to reinstatement or are listed on preferential hiring lists if no vacancy is available. Employers may hire temporary replacements during unfair labor practice strikes, but may not hire permanent replacements. *Id.*

ment.[27] Despite the NLRA's good intentions, very few bargaining tables are round.

Although Senator Wagner took great strides in initiating fair participation, the private sector production process created a labor relations context unlike that of the public sector. Because public employees deliver services deemed essential by taxpayers and unsuited to scientific management principles, cooperation programs are more likely to succeed in public sector operations than in private sector workplaces.

B. *Developing Legislation within Different Public and Private Sector Labor Markets*

Just as public and private sector labor forces must produce different types of goods and services, they are subject to different market constraints and incentives that shape labor legislation and determine whether labor-management cooperation programs will succeed.[28] George W. Taylor, chairman of the New York Governor's Committee in 1966, justified public sector strike prohibitions based on the unique market forces that determine public sector compensation and services.[29]

First, government budgetary and taxing decisions dictate public sector market constraints and compensation levels.[30] Taxpaying consumers do not directly pay for public services, such as education, hospital care, police, or fire protection. Instead, tax revenue is funneled through legislatures and then paid to service providers.[31] When a public sector union gains wage increases, this roundabout fund transfer prevents consumers from realizing an immediate increase in public service prices.[32] In contrast, both unionized and nonunionized private sector labor markets are subject to competitive price constraints.[33] In the unionized context, the result is that collective agreements under the NLRA are influenced by an employer's ability to terminate high-cost

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[27] *See* NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

[28] *See* Jonathan Walters, *The Politics of Change: Another Perspective*, GOVERNING, Dec. 1992, at 32 (discussing Michael Walsh's keynote address at the Reinventing Government Conference).

[29] *See* Meltzer & Sunstein, *supra* note 9, at 738–40.

[30] *See id.*

[31] *See id.*

[32] *See* Charles E. Wilson, *The Replacement of Lawful Economic Strikers in the Public Sector in Ohio*, 46 OHIO ST. L.J. 639, 657–58 (1985).

[33] *See* Meltzer & Sunstein, *supra* note 9, at 739.

operations, refuse employee wage demands, or bear the cost of a strike.[34]

Second, demand for public sector goods and services is highly inelastic, especially in relation to most private sector goods.[35] Unlike most private sector firms, which operate under near perfect competition, the government holds a monopoly on the supply of public services.[36] Taxpayers have little choice but to use the public services their state and local governments provide, since no substitute services are available.[37] Short of tax evasion and refusal to use essential services, including water and electric utilities, consumers have no alternative but to support public sector labor markets, even at high costs. Naturally, in the absence of alternatives, taxpayers who pay for public services expect uninterrupted access and provision.[38]

The government cannot shut down its operations, unlike private employers who have the managerial prerogative to do so.[39] In contrast to taxpayers as such, private sector consumers can impose outside restraints by choosing to purchase less expensive or nonunion-produced goods.[40] Consumers suffer much less when private sector operations are interrupted than when public sector services come to a halt.[41] Because market forces beyond immediate employer relations affect private employees to a greater extent than their relatively isolated public sector counterparts,[42] private employees must employ economic weapons such as strikes and work stoppages to protect their interests.

Third, unlike their private sector counterparts, public sector employees provide services that are not easily replaced by labor-saving automation technology.[43] Private employers have

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[34] *See id.*

[35] *See* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 508 (3d ed. 1988); *see generally* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 104–16, 472–516 (6th ed. 1996) [hereinafter EHRENBERG & SMITH] (applying principles of wage and labor demand elasticity to different sectors of the labor market).

[36] *See id.*

[37] *See* Meltzer & Sunstein, *supra* note 9, at 740–41.

[38] *See* Wilson, *supra* note 32, at 656–57.

[39] *See* Meltzer & Sunstein, *supra* note 9, at 739.

[40] *See* Wilson, *supra* note 32, at 657.

[41] *See id.* at 660–61.

[42] *See id.* at 657 & n.123. "Additionally, private employers have a weapon that public employers lack. Although private employers can relocate to nonunion jurisdictions, the government of Cleveland cannot relocate to South Carolina or Hong Kong." *Id.* at n.123.

[43] *See id.* at 657.

greater opportunities to substitute capital-intensive technology for mass production, thus warding off the higher wages traditionally associated with unions.[44] Because unions in these automated industries consequently face declining membership strength, private sector employees require the right to strike as an economic weapon.

While public employers may acquire location-specific monopolies over their respective services, public employees may be replaceable to varying degrees depending upon their skill level, and consequently may not possess corresponding "monopolies" over the skill their particular job requires. In this respect, public employees take on private sector characteristics *without* acquiring similar striking rights. Police officers and firefighters can be replaced less easily and acquire relatively high bargaining power since more harm results if their services are interrupted.[45] Public employees whose jobs require less skill, such as administrative personnel, can be replaced more easily and acquire relatively low bargaining power if temporary replacements are allowed.[46] The only apparent limitation is that government employers, especially elected officials, may refrain from laying off public employees so as to avoid the public opposition that generally ensues.[47]

C. *Dueling Roles: The Government as Both Employer and Representative*

When the government provides public services, it functions as both an employer and a public servant elected to represent its respective constituency. These roles may conflict when the government is held accountable to its employees and their unions and to its taxpaying consumers. As a sovereign entity, the government arguably cannot delegate authority to its employees so that they in turn can determine their own working terms.[48] In essence, this kind of delegation would allow public employees to decide how taxpayers' dollars are spent. Yet public demand

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[44] *See id.*
[45] *See id.* at 655–56.
[46] *See id.*
[47] *See id.* at 656–57.
[48] *See* G. ABOUD & A. ABOUD, THE RIGHT TO STRIKE IN PUBLIC EMPLOYMENT 5–9 (2d ed. 1982) (noting challenges to the sovereignty theory). *But see* Meltzer & Sunstein, *supra* note 9, at 735 (criticizing sovereignty as a "question-begging term").

for uninterrupted public services may pressure elected politicians to settle labor disputes quickly regardless of the terms demanded.[49] Prohibiting public employee strikes, therefore, is necessary to avoid catching the government in the middle of clashing duties and demands.

Unlike private sector unions, public sector unions may be able to extract concessions through political pressure.[50] Public sector unions have concentrated, vocal constituencies with the power to harm elected officials' reputations if those officials do not accede to union demands.[51] If given the right to strike, public employees could demand exceedingly high wages and inflate budget requirements without market or political constraints.[52] Theoretically, unions could even cease essential government services.[53]

Public sector unions do face certain restraints from which private sector unions are sheltered. First, even if public employees have the right to strike, the government does not suffer direct economic costs since it continues to collect tax revenues when its labor costs are suspended.[54] Second, while section 8(d) of the NLRA requires private employers to bargain over "wages, hours, and other terms and conditions of employment,"[55] public sector employers are not required to bargain over these "mandatory terms" and can limit their bargaining obligations based on current fiscal constraints.[56]

Nevertheless, legislatures in many states have prohibited public employees, especially those providing essential services, from striking.[57] Much of this prohibition may be due to media focus

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[49] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228–29 (1977) (recognizing that because public sector employees have additional means of input in workplace decision-making through voting and other political channels, they may have more bargaining power than private sector workers by the nature of their employer).

[50] *See* Wilson, *supra* note 32, at 656.

[51] *See* Meltzer & Sunstein, *supra* note 9, at 736–40.

[52] *See id.* at 740. Meltzer and Sunstein do note that certain forces may constrain public employees, such as fear of lost wages and unemployment, as well as competition from other groups within a limited-budget framework. *Id.* at 740–41.

[53] *See id.* at 741–42.

[54] *See* Wilson, *supra* note 32, at 658.

[55] 29 U.S.C. § 158(d) (1994).

[56] *See* J. SHAFRITZ ET AL., PERSONNEL MANAGEMENT IN GOVERNMENT 261–72 (1986).

[57] States allowing limited public employee striking rights include Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin. *See* ALASKA STAT. § 23.40.200 (Michie 1996); HAW. REV. STAT. § 89-12 (1996); IDAHO CODE § 44-1811 (1996); 5 ILL. COMP. STAT. 315/17 (West 1996); MINN. STAT. § 179A.18 (1996); MONT. CODE ANN. §§ 39-32-110, 39-34-105 (1995); OHIO

on labor demands that could potentially increase taxes.[58] Whereas private employee wage demands affect only consumers of that particular firm, rising public employee costs ultimately affect all taxpaying consumers through higher tax rates. This ripple effect fosters greater public opposition toward granting striking rights to public employees who, if they had these rights, could extract higher wages by threatening the availability of public health and safety services.

Due to the distinct characteristics of the public and private sectors, policymakers have recognized the difficulty, if not impossibility, of wholly importing private sector labor legislation into the public sphere with any success. Strike prohibitions, managerial prerogatives unimpeded by duties to bargain, and public employer-oriented reviewing agencies have made true collective bargaining within an adversarial context a mere public sector illusion.[59] W.J. Usery, Jr., former Special Assistant to the President, and Director of the Federal Mediation and Conciliation Service in 1968, recognized:

> The reason there is so little true collective bargaining in the federal sector is because there is so little that can be bargained for. Congress preempts the economic issues . . . . Many of the primary noneconomic issues—seniority, job transfers, discipline, promotion, the agency shop, and the union shop, are nonnegotiable—because of a combination of law, regulation, management rights, and the thousands of pages in the Federal Personnel Manual.[60]

Regardless of entitlement allocation, however, any method that reduces transaction and information costs will yield economic gains to all parties involved.[61] Labor-management cooperation programs should not be overlooked as a means of achieving information disclosure between parties, decreasing transaction costs, and increasing long-term efficiency.

REV. CODE ANN. § 4117.15–.16 (Banks-Baldwin 1997); OR. REV. STAT. § 243.726 (1995); 43 PA. CONS. STAT. ANN. § 1101.1001–.1003, 1101.2201 (West 1997); VT. STAT. ANN. tit. 21, § 1730 (1995); WIS. STAT. § 111.70(4)(cm)(6)(c) (1995). The California Supreme Court has held that public employees may not be prohibited from striking unless the strike will put public health or safety in imminent danger. *See* County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, Local 660, 699 P.2d 835, 849–50 (1985).

[58] *See* Wilson, *supra* note 32, at 658.

[59] *See* Michael R. McMillion, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 MIL. L. REV. 169, 187–88 (1990).

[60] *Id.* at 188. *See also* Cooper & Bauer, *supra* note 3, at 509, 520–21.

[61] *See* Klare, *supra* note 24, at 27.

1. Taking a Stand at the Federal Level

In 1962, President John F. Kennedy issued Executive Order 10,988, which enabled federal government unions to participate in formulating federal personnel policies, industrial health practices, scheduling and safety policies, and training provisions.[62] Between 1962 and 1968, federal union representation grew from 19,000 employees to over 1.4 million employees.[63] In 1978, Congress sought to legislate improvements in public employee participation with the Civil Service Reform Act (CSRA),[64] which gave collective bargaining rights to federal employees.[65]

Under the Executive Order and the CSRA, striking continued to be prohibited as an unfair labor practice subject to Federal Labor Relations Authority (FLRA)[66] regulation, and the federal government retained managerial rights over employee discharges and budget determinations.[67] In these respects, the regulations reinforced public and private sector distinctions so as to prevent strike-induced disruption in public service delivery.[68]

The CSRA did make strides beyond Executive Order 10,988 by requiring public sector management to bargain over the effects its workplace decisions had on unit employees.[69] Interestingly, the aspect of the CSRA that most favors labor is also the aspect that most resembles the private sector adversarial context, rather than the cooperative framework advocated by CSRA proponents. But it is more a *lack* of cooperation programs than a failure of cooperation programs that makes this the case. As reported by the Committee on Labor Relations of Government Employees:

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[62] Exec. Order No. 10,988, 3 C.F.R. 521 (1962).

[63] *See* McMillion, *supra* note 59, at 181.

[64] Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101–7135 (1994).

[65] *See id.*

[66] 5 U.S.C. § 7116(b)(7)(A) (1994) (providing that, "[f]or the purpose of this chapter, it shall be an unfair labor practice for a labor organization . . . to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity . . . ."). *See also* 5 U.S.C. § 7120(f) (1994).

[67] *See* AFGE v. OPM, 33 F.L.R.A. 41 (1988) (holding that a union proposal is negotiable only if it vitally affects the working conditions of bargaining unit employees, a standard applied by the NLRB as well); AFGE Local 659 and Department of Treasury, 3 F.L.R.A. 43 (1980) (holding that a union proposal requiring management to shift work assignments was nonnegotiable because it conflicted with management's rights under section 7106(a)(2)(A) of the CSRA).

[68] *See* McMillion, *supra* note 59, at 191–92.

[69] *See* 5 U.S.C. § 7106(b)(2), (3) (1982); McMillion, *supra* note 59, at 197.

> A Government which imposes on other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants . . . . It should set the example for industry by being perhaps more considerate than the law requires of private enterprise.[70]

This statement reflects a half-hearted cooperative approach that seems paternalistic at best,[71] and perhaps even apathetic. Worse, by promising cooperation but then imposing limitations, policymakers may cause more litigation over bargaining rights, while reducing the time and effort spent improving public service efficiency—exactly the dilemma they sought to avoid in the first place.[72]

2. State and Local Governments Initiate Change

Because collective bargaining in the public sector has no overarching federal statute for regulatory guidance, state and local governments and their employees must look to their respective statutes, executive orders, and state attorney general opinions.[73] Case law is limited, especially since collective bargaining laws are state-specific and have restricted applicability outside their jurisdiction.[74] While following private sector law on issues lacking precedent would be tempting, the distinguishing features of public sector labor relations demonstrate that the private sector's adversarial context should not be imputed blindly into the public sphere. Deference to private sector precedent is unwarranted unless the state statute specifically intends such an interpretation.[75] Exemplifying this limited application, Pennsylvania law requires parties to consider "the distinctions that necessarily must exist between legislation primarily directed to the private sector and that for public employees."[76]

If a state or local government decides to privatize its services, determining appropriate labor regulations becomes even more complex. Whether businesses providing the privatized services are covered by the NLRA or by a state's collective bargaining laws is unclear.[77] Courts defer to NLRB political subdivision

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[70] McMillion, *supra* note 59, at 190.
[71] *See id.* at 189–91.
[72] *See id.* at 209–11.
[73] *See* Wilson, *supra* note 32, at 653–54.
[74] *See id.* at 653.
[75] *See id.* at 654.
[76] *Id.* at 654–55.
[77] *See* Eric J. Pelton, *Privatization of the Public Sector: A Look at Which Labor Laws*

decisions unless they determine the decision has prejudiced the employer providing the privatized services.[78] In *National Transportation Services*,[79] the NLRB held that an employer maintains NLRA coverage if the employer maintains a "right of control" over its own employees to enable effective collective bargaining,[80] but is not created by the state, administered by individuals directly responsible to public officials, or in possession of attributes requiring that it be treated as a public entity.[81] Because this analysis effectively narrows the NLRA political subdivision exemption so that many employees providing privatized public services now have the right to strike,[82] it undermines the well-recognized need to provide uninterrupted public services and the very distinctions that made public sector labor laws differ from private sector legislation. For instance, the *National Transportation* rule could grant striking rights to firefighters employed by a privatized company, thus jeopardizing the safety of residents who rely on their local government to provide fire protection.[83]

The general public is likely to reject privatization if it means emergency services could be disrupted legally without readily available replacement employees.[84] Alternatively, if voters and their representatives choose to employ a unionized public sector workforce and keep strike prohibitions intact, impasse resolution procedures are necessary to prevent a local level Professional Air Traffic Controllers Organization (PATCO) strike experience[85] and to give the public union adequate leverage.[86]

Although the concept that efficient government operations at every level require effective labor-management cooperation is hardly novel, local governments have had long-standing prob-

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Should Apply to Private Firms Contracted to Perform Public Services, 1986 DET. C.L. REV. 805, 808–09 (citing NLRB v. Natural Gas Util. Dist., 402 U.S. 600, 603 (1971)). Section 2(2) of the NLRA provides the political subdivision exemption, stating: "The term 'employer' . . . shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ." 29 U.S.C. § 152(2) (1994).

[78] *See* Pelton, *supra* note 77, at 811 (citing NLRB v. Children's Baptist Home, 576 F.2d 256, 260 (9th Cir. 1978)).

[79] National Transp. Serv., Inc., 240 N.L.R.B. 565 (1979).

[80] 240 N.L.R.B. at 566.

[81] *See Natural Gas*, 402 U.S. at 608–09.

[82] *See* Pelton, *supra* note 77, at 810–11.

[83] *See National Transp. Serv.*, 240 N.L.R.B. at 568.

[84] *See* Wilson, *supra* note 32, at 657.

[85] *See* Meltzer & Sunstein, *supra* note 9, at 731. PATCO engaged in an illegal strike after Congress failed to implement the union's proposals for improved equipment and work conditions. *See id.*

[86] *See* Pelton, *supra* note 77, at 820–21.

lems in implementing efficient public services. First, state constitutions and statutes fail to establish quality or efficiency requirements for public service delivery, due to the fear that objective standards will cause conflict within local government operations.[87] Second, without definite efficiency goals, local governments have no incentive to deviate from the status quo.[88] Since employees are assured of compensation and security without performing above minimum job requirements, no incentive exists for public employees to improve efficiency on their own. Third, elected officials fear unpredictable budgets that may upset tax rates and have a negative impact on future elections. Because change could disrupt their current positions, officials do not endorse cooperation programs or other new efforts to improve public service delivery.[89] Finally, limited experience and relatively short terms make it nearly impossible for officials to develop public service innovations, which require long range planning to succeed.[90]

Institutional deterrents to public service innovations combine with strong management rights clauses to impede cooperation initiatives in public sector labor relations. Without foreseeable rewards or future participatory guarantees, public employees and employers are deterred from expressing or implementing such programs on their own: at best, they remain in their current positions and at worst, they risk losing their jobs.[91] Absent a change in these incentives, the public sector system has no hope of achieving efficiency and quality equivalent to the price-competitive private sector. Recognizing this fact, public sector collective bargaining agreements, such as the Philadelphia-AFSCME contract,[92] have utilized collaborative approaches to ensure that cooperation in improving productivity remains part of the labor relations process long after the ink on the formal agreement is dry.

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[87] *See* Walters, *supra* note 28, at 32.

[88] *See* Charles C. Mulcahy & Marion E. Mulcahy, *Innovation as the Key to a Redesigned and Cost Effective Local Government*, 78 MARQ. L. REV. 549, 556 (1995).

[89] *See* Walters, *supra* note 28, at 32.

[90] *See id.*

[91] *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 181–90 (1984).

[92] *See* Memorandum of Agreement between AFSCME, District Council 33 and the City of Philadelphia, *supra* note 7, at 5–7.

II. The Current Legal Framework Surrounding Labor-Management Cooperation Programs

Institutional factors, such as collective bargaining limitations, market imperfections, and economic inequality, have dealt public sector labor relations a raw hand with which they now must contend. Because these structures foster adversarial behavior, the legislatures, government employers, and public unions have had to make great efforts in establishing cooperation programs.[93]

A. *A Legal System Ripe for Change*

Intent on upholding reciprocal obligations between taxpayers and public employees delivering their services,[94] states have emulated private sector laws to varying degrees. Twelve states allow public employees qualified and restricted striking rights,[95] thirty-five states use mediation and fact-finding,[96] and twenty-seven use both binding and nonbinding arbitration to resolve public labor disputes.[97] While public employees may organize or join unions, including unions having nationwide membership,[98] closed shops, union shops, and union security agreements are invalid.[99]

Each state's collective bargaining laws differ in their specific provisions. For instance, Ohio's Public Employee Collective Bargaining Law (PECBL)[100] authorizes non-safety public employees to engage in economic strikes only after the union gives required notices and exhausts all impasse procedures.[101] Unlike private

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[93] *See* Klare, *supra* note 24, at 9.

[94] *See* Meltzer & Sunstein, *supra* note 9, at 746.

[95] *See supra* note 57 and accompanying text.

[96] *See* Richard C. Kearney, Labor Relations In The Public Sector 242–48 (1984).

[97] *See id.*

[98] *See* McMillion, *supra* note 59, at 192–94.

[99] In an agency shop, employees are not required to join a union, but are required to pay union dues and initiation fees as conditions of employment. In return, employees can get strike, education, and retirement benefits, but cannot vote or go to meetings. An employee cannot be discharged for quitting as a union member as long as that employee has paid his or her dues and fees. Union shops required employees to become union members 30 days after being hired. Finally, a closed shop required employees to join the union as a condition of receiving or retaining a job. Today, closed shops and union shops are illegal, but agency shops are legal. Union membership does not have to consist of more than dues and fees, and has been "whittled down to its financial core." *See* NLRB v. General Motors, 373 U.S. 734 (1963).

[100] *See* Ohio Rev. Code Ann. § 4117.01–.23 (Banks-Baldwin 1997).

[101] *See* Ohio Rev. Code Ann. §§ 4117.11(B)(8), 4117.14(D)(2) (Banks-Baldwin 1997). Public employees allowed to engage in economic strikes may do so only after

sector employees, who are not required to provide strike notice if no collective agreement is in effect,[102] public employees may not strike to gain recognition,[103] assert a jurisdictional work dispute,[104] or protest an unfair labor practice.[105] In addition, the PECBL forbids strikes before a union's collective agreement has expired or when impasse procedures are forthcoming.[106] Public employees responsible for protecting public health or safety, such as police, prison guards, and medical workers, are prohibited from striking.[107]

In states giving limited striking rights to public employees, no concrete rule exists regarding a public employer's right to replace lawful economic strikers.[108] Ohio's PECBL dodges this particular issue, providing only that employers cannot lock out public employees,[109] but can discharge unlawful strikers.[110] Other states seem to take the government's right to replace lawful economic strikers as given. The Montana Supreme Court accepted a school district's claim that it could replace teachers engaged in a lawful economic strike, even though the school supported its claim with private sector law.[111] Likewise, the Idaho Supreme Court assumed that where the state legislature was silent, public employers could replace or effectively discharge lawful economic strikers.[112] The Michigan Supreme Court also addressed this issue in a case involving a public teachers' strike:

> When public employees strike, the public employer must, like a private employer, be able to hire substitute employees so that the public business is not interrupted. In order to hire

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exhausting good faith bargaining, mediation, and fact-finding procedures, as well as giving a 10-day notice to their government employer and to the State Employee Relations Board (SERB). *See id.*

[102] *See* 29 U.S.C. § 158(d) (1994). However, health care institutional employees must give their employers and the Federal Mediation and Conciliation Service written notice of an intent to strike at least 10 days prior to such action. *See id.* at § 158(g). This requirement exemplifies the special treatment accorded entities that provide essential services.

[103] *See* OHIO REV. CODE ANN. § 4117.11(B)(5) (Banks-Baldwin 1997).

[104] *See id.* § 4117.11(B)(4).

[105] *See id.* § 4117.15(B).

[106] *See id.* §§ 4117.15(A)–4117.18(C).

[107] *See id.* § 4117.15(A). Ohio prohibits striking by certain public employees, such as police officers, firefighters, emergency medical employees, and prison guards. *See id.*

[108] *See* Wilson, *supra* note 32, at 680.

[109] *See* OHIO REV. CODE ANN. § 4117.11(A)(7) (Banks-Baldwin 1997).

[110] *See id.* § 4117.23.

[111] Board of Trustees v. State, 604 P.2d 778, 779–81 (Mont. 1979).

[112] Local 1494, Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 586 P.2d 1346 (Idaho 1978).

> competent replacements, it may be necessary for the public employer to offer permanent employment and thus displace strikers. Where essential services have been suspended, the hiring of replacements often cannot await time-consuming adjudicatory processes.[113]

In that case, however, the court overlooked crucial public and private sector distinctions by premising a public employer's right to replace lawful strikers on private precedent, but justifying replacements based on the essential features unique to public sector services.

B. *Public Unions, Privatization, and Combined Solutions*

Eager to please their constituents, current local government representatives have proposed a variety of ideas to improve public service performance. These ideas have revolved around two recurring themes: privatization with private sector employment and cooperation with public sector unions.[114] Privatization ideas include contracting out local government functions, such as providing education through privately operated charter schools.[115] Cooperation initiatives include allowing public employees to decide how they plan to increase efficiency so as to meet concrete goals.[116] Intermediate suggestions have involved public employee layoffs,[117] as well as voter participation in public service changes through local referendum.[118] Anxious to please their constituents, state and federal officials have likewise begun to espouse policies running the gamut from public union participation to total privatization.

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[113] Rockwell v. Crestwood Sch. Dist. Bd. of Educ., 227 N.W.2d 736, 742–44 (Mich. 1975).

[114] *See* Mulcahy & Mulcahy, *supra* note 88, at 557.

[115] *See id.*

[116] *See id.* at 560, 575; WIS. STAT. § 111.70(1)(nc) (1995) (describing the Qualified Economic Offer provision); Memorandum of Agreement between AFSCME, District Council 33 and the City of Philadelphia, *supra* note 7, at 5–7.

[117] *See* Mulcahy & Mulcahy, *supra* note 88, at 557.

[118] *See id.* (describing Wisconsin referendum issues on term limits for elected officials).

1. Competing Voices for Change: Public Union Advocates versus Privatization Interests

President Clinton issued Executive Order 12,954 on March 8, 1995, which subjected federal contractors, such as those providing privatized services, to expulsion if they hired permanent striker replacements.[119] Although the order angered employer factions,[120] Clinton's publicized motives of efficiency and uninterrupted service delivery through quicker strike settlements appeased taxpaying voters,[121] and his underlying motive of limiting the *Mackay Radio* striker-replacement rule appeased labor union constituents.[122] As recent studies show replacement strikes to have become continually longer and more violent than nonreplacement strikes, Clinton's order may be justified as providing incentives for faster dispute resolution, reduced service disruption, and decreased strikes.[123]

On its face, Executive Order 12,954 provides increased bargaining leverage for private sector employees by limiting employer rights to replace economic strikers permanently. In practice, this Order may lead to one of two outcomes, neither of which would benefit private unions. First, governments may choose to privatize their services by subcontracting to nonunion firms that are unaffected by strike-replacement rules and can provide uninterrupted service delivery as long as an adequate labor supply exists.[124] Alternatively, governments may choose to cooperate with public unions since nothing guarantees that private union firms, whose employees still have striking rights, will provide

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[119] Exec. Order No. 12,954, 29 C.F.R. 270.1–270.23 (1995).

[120] *See Complaint and Memorandum Supporting Preliminary Injunction Against Executive Order on Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 51, at E-31 (Mar. 16, 1995).

[121] *See* Exec. Order No. 12,954, 29 C.F.R. 270.2(a) (1995); Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 277–78 (1996).

[122] *See Mackay Radio*, 304 U.S. at 347; *Labor's Agenda Seen Rising Under Clinton; Family Leave Legislation Tops List*, Daily Lab. Rep. (BNA) No. 11, at A-6 (Jan. 19, 1993).

[123] *See* LeRoy, *supra* note 121, at 276, 294. The author's research showed that the duration of the average replacement strike increased from 121 days between 1960 and 1969 to 229 days between 1980 and 1992. *See id.*

[124] *See id.* at 292–93; Richard J. Long, *The Effect of Unionization on Employment Growth of Canadian Companies*, 46 INDUS. & LAB. REL. REV. 691, 695–98 (1993). Labor supply is unlikely to pose any barriers to nonunion employers. U.S. free trade agreements with Canada and Mexico promise to narrow labor-cost differentials and provide U.S. employers with an ever-increasing supply of nonunion labor.

uninterrupted services where employers cannot offer permanent replacement provisions. Regardless of the outcome, two things are clear: private sector unions will not benefit from the privatization,[125] and governments will choose the method most likely to provide uninterrupted services and thereby prevent public disapproval.

Privatization presents potential harms for both the public at large and government employees. First, while privatization advocates argue that private businesses would administer operations more efficiently than public departments, opponents argue that businesses "motivated solely by financial and market considerations do not treat consumers of these services properly."[126] Second, privatization enables employees providing public services to strike, while interrupting services that taxpayers fund in the meantime.[127] Third, privatization robs employees providing public services of their constitutional protections against unfair discharges.[128] The United States Supreme Court has held that employees of businesses providing privatized services are not protected against firing by the First or Fourteenth Amendments.[129]

2. Trying to Please Everyone: Federal Government Corporations

Vice President Albert Gore advocated government-sponsored Federal Government Corporations (FGCs) in his 1993 Reinventing Government Program.[130] FGCs combine government owner-

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[125] Subcontracting out to nonunion firms will become increasingly feasible as private sector unionism continues to decline. In 1953, unions represented 35.7% of the private nonagricultural workforce, whereas today unions represent under 13% of this workforce. *See Union Membership: Proportion of Union Members Declines to Low of 15.8 Percent*, Daily Lab. Rep. (BNA) No. 25, at B-3 (Feb. 9, 1993). Much of this decline can be attributed to increasing private employer NLRA section 8(a)(3) and 8(a)(5) violations, and the corresponding chilling effect that blankets their workforces. *See* EHRENBERG & SMITH, *supra* note 35, at 492–95; Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1771, 1778–82 (1983).

[126] Joseph W. Belluck, *Increasing Citizen Participation in U.S. Postal Service Policy Making: A Model Act to Create a Post Office Consumer Action Group*, 42 BUFF. L. REV. 253, 262 (1994).

[127] *See* Pelton, *supra* note 77, at 808–09.

[128] *See* Summers, *supra* note 20, at 690–91.

[129] *Id.* (discussing Rendell-Baker v. Kohn, 457 U.S. 830, 834–37 (1982)). In *Rendell-Baker*, six teachers were discharged from a Boston private nonprofit school for supporting the students' right to picket the school board. The Supreme Court upheld the discharges, finding that the school board's decisions were not state action. If the teachers had been employed by a public school, their discharges would have violated their First Amendment rights to free speech and their Fourteenth Amendment rights to due process. *See id.*

[130] *See* ALBERT GORE, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS

ship with privately run operations to increase profits and efficiency, enable innovations to be implemented with flexibility, and refute the government's reputation for using rigid regulations to create bureaucratic inefficiency.[131]

These FGCs are often viewed as hybrids between government control and eventual privatization.[132] When, however, the FGCs begin to be seen as, or attempt to become, either an entity purely under government control or purely privatized, different impediments arise. On the one hand, most FGCs that the government controls "as a policymaker" may be subject to state labor laws prohibiting or significantly limiting employees' right to strike.[133] On the other hand, full privatization would require FGCs to give up certain privileges, such as state tax immunity,[134] lower borrowing rates, relaxed government monitoring, and SEC requirement exemptions.[135]

Amending the NLRA is one intermediate solution to prevent public service disruption that may ensue from privatization. In the 1974 Health Care Amendments to the NLRA, Congress extended collective bargaining protections to private non-profit hospital and health care employees but modified the provisions to require mediation of health care employee strikes.[136] With these modifications, Congress intended to prevent strikes and avoid medical service disruption.[137] Congress, however, has not succeeded in further NLRA modification regarding privatization issues. This failure, combined with the strong likelihood that full privatization would enable employees to exercise their striking rights and thereby disrupt service, indicates that privatization may lead to the very inefficiencies it is supposed to prevent.[138]

LESS (1993); A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543.

[131] *See* Froomkin, *supra* note 130, at 557, 578–82.

[132] *See id.* at 577.

[133] *See id.* at 568–69, 577. It is important to note the distinction the United States Supreme Court has made between FGCs that the government controls "as a policymaker" and those the government controls "as a creditor" and treats as private entities. *See* Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995); PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 170 (1988).

[134] *See* Froomkin, *supra* note 130, at 584.

[135] *See id.* at 584, 613.

[136] 29 U.S.C. § 158(d), (g) (1994); *see* ABA SECTION OF LABOR RELATIONS LAW, LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY (1977).

[137] *See National Transp. Serv.*, 240 N.L.R.B. at 568.

[138] *See* Pelton, *supra* note 77, at 821.

If elected officials want to protect constitutional values and provide uninterrupted service delivery, they may do well to shift away from privatization toward labor-management cooperation.

C. *Reinventing the Status Quo*

Just as global competition has forced United States firms to become more efficient, private sector competition has forced governments to improve public service delivery.[139] Innovative government policymakers at all levels have broken from the status quo in the quest for improved public service quality and efficiency. At the federal level, several successful cooperation programs have been implemented through collective agreements between the IRS and the NTEU, including jointly written retraining guides to address automation-driven job displacement.[140]

Meanwhile, at the state level, Wisconsin has taken great strides in implementing innovation-driven policies. The state's budget legislation from 1993 to 1995 substituted traditional interest arbitration procedures with a Council on Municipal Collective Bargaining (CMCB), made up of ten public labor relations experts who resolved disputes after hearing from public employers, unions, and the general public.[141] Because only a seven-member approval was needed to implement a resolution,[142] the CMCB could utilize labor-management input to innovate without fearing that parties would oppose the entire decision and refuse to employ it in the future. A group approach also prevented against a sole arbitrator making inconsistent decisions, which can seldom be overruled.[143] In a state allowing limited public employee strik-

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[139] *See* Mulcahy & Mulcahy, *supra* note 88, at 553–54.

[140] *See* U.S. DEPARTMENT OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION, 119 BLMR 6, 7–9 (Oct. 1987) [hereinafter FUTURE OF LABOR-MANAGEMENT COOPERATION].

[141] *See* WIS. STAT. § 111.71(3)(c) (1993) (repealed 1995); *see also* WIS. STAT. § 111.71(4), (5) (1995).

[142] *See* WIS. STAT. § 111.71(3)(b) (1993) (repealed 1995). In 1995, the Wisconsin State Legislature recreated WIS. STAT. § 111.71(4) and (5) to advance the labor-management cooperation focus beyond the procedures provided in section 111.71(3). Sections 111.71(4) and (5) provide for regular state reviews of arbitration law, as well as programs whereby state residents are trained for arbitration panel service, and labor and management parties are trained in cooperation aspects of collective bargaining. *See* WIS. STAT. § 111.71(4), (5) (1995).

[143] *See* Mulcahy & Mulcahy, *supra* note 88, at 575; Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

ing rights,[144] the CMCB has succeeded in preventing strikes and ensuring uninterrupted public service delivery.[145]

Another model of successful innovation is Wisconsin's Qualified Economic Offer, a provision in school district collective bargaining agreements that requires union employees to forego binding interest arbitration and to participate in labor-management cooperation procedures if the district offers an annual 3.8% combined increase in wages and benefits.[146] This type of labor-management contract resembles Philadelphia's current collective agreement with AFSCME, which requires the local government to forego privatization if union employees submit to labor-management cooperation procedures and implement concrete goals to increase cost-effectiveness and performance.[147] In Wisconsin, the Qualified Economic Offer has satisfied taxpayers by controlling public spending, but has angered union members, who in a few instances responded to static compensation increases with slow downs and sick-ins.[148] Nevertheless, the Wisconsin legislature has held firmly to its spending limits.[149]

Wisconsin has also demonstrated a long-standing commitment to government innovation by establishing the Wisconsin Local Government Innovation Center (WLGIC), a nonprofit corporation that implements labor-management cooperation programs and researches other states' cooperation methods.[150] Intent on garnering public support, the WLGIC continually informs government employers, public employees, taxpaying consumers, and the media of its current progress and future expectations.[151] Communicating with the general public, as the WLGIC is designed to do, may be pivotal to the success of a labor-management cooperation program.

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[144] *See supra* note 57 and accompanying text.
[145] *See* Mulcahy & Mulcahy, *supra* note 88, at 575.
[146] *See id.* at 560, 575.
[147] *See* Memorandum of Agreement between AFSCME, District Council 33 and the City of Philadelphia, *supra* note 7.
[148] *See* Mulcahy & Mulcahy, *supra* note 88, at 560.
[149] *See id.*
[150] *See id.* at 578.
[151] *See id.*

III. Contemporary Public Sector Labor Market Concerns and Alternative Resolutions

Public sector employees enable state and local government officials to deliver services essential to sustaining a modern economy. Because their presence is felt on a community level, public sector officials in county seats, city halls, and state capitols are expected to bear much of the blame for America's modern-day problems, such as rising health care costs, poverty, crime, drug use, homelessness, and illiteracy.[152] When the costs of government services increase without a corresponding improvement in performance, dissatisfied taxpayers react quickly and demand change, perhaps perceiving that the government is providing services whose quality does not meet the imposed tax rates or is pursuing internal goals instead of solving cost containment issues.[153] Legislatures must respond to public discontent with innovative ways to reduce spending and improve service delivery; if they fail to implement such innovation, local voters may choose to elect new members who will.

A. *The Privatization Dilemma*

As a method of improving public sector performance, state and local governments have subcontracted to private firms traditionally public sector services such as transportation, fire protection, refuse collection, prison administration, mental health facilities, and education.[154] Local policymakers believe that privately owned operations may improve service delivery while capping costs.[155]

Politicians are not alone in this belief. After a period of urban government failures in responding to public service demands, there developed a widely held belief that nonunionized private firms could provide what inefficient, unionized public bureaucracies could not.[156] Academics supported this belief with studies

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[152] *See id.* at 551.

[153] *See id.* at 550, 574.

[154] *See* David Seader, *Privatization and America's Cities*, *in* Privatization: The Provision of Public Services by the Private Sector 29, 29–38 (Roger L. Kemp, ed., 1991).

[155] *See* Mary Ann Glendon, *Symposium Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 BYU L. Rev. 385, 391.

[156] *See* Pelton, *supra* note 77, at 805.

showing that unions increased wages to a greater extent than profitability.[157] Yet to prevent membership decline and ultimately increase support, unions are caught in a bind. They must pursue higher wage, benefit, and job control policies—the very same policies that led to cost increases in the first place.[158] As a result, unions cannot guarantee employers that they have the economic power to impose these increased wage costs on other firms within a competitive market.[159]

Globalized product markets, technological advances, and deregulation of what were once almost completely unionized industries, such as trucking, airlines, and telecommunications, have impeded private sector unions' abilities to shelter wages from market competition.[160] Privatization would have the same effect on public sector unions that deregulation had on organized labor in the private sector, by preventing public sector unions from protecting their wages against the competitive marketplace. It follows that nonunion firms providing privatized public services would have little reason to be bombarded with threats of unionization; no such threat of unionization could be credible since it would undermine the firms' market niche. As more governments turn to privatization, a corresponding net decrease in overall unionization is certain.[161]

Privatization advocates argue that private firms are more efficient for several reasons. First, the decisions of legislatures, interest groups, courts, and governmental agencies influence public managers to a greater extent than private organizations.[162] Second, public managers have much less control over their labor costs than do private firms.[163] Taxpayer initiatives in many states allow voters to fix limits on funds available to increase public employee wages, preventing public officials from raising union wages even if such raises are justified.[164] As a result of these wage limits imposed beyond their control, public sector unions lack strike leverage and instead may act in other ways to sabo-

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[157] *See* FREEMAN & MEDOFF, *supra* note 91, at 181–90.

[158] *See id.*

[159] *See* Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 14 (1993).

[160] *See* Peter D. Linneman et al., *Evaluating the Evidence on Union Employment and Wages*, 44 INDUS. & LAB. REL. REV. 34, 40–44 (1990).

[161] *See* Joe Morris, *The Unions*, *in* PRIVATIZATION: THE PROVISION OF PUBLIC SERVICES BY THE PRIVATE SECTOR 267, 267–71 (Roger L. Kemp, ed., 1991).

[162] *See* Belluck, *supra* note 126, at 261–62.

[163] *See id.*

[164] *See* Wilson, *supra* note 32, at 659–60.

tage service delivery, whereas private firms are not subject to similar constraints and can focus on efficient service provision.[165] Third, public sector budgets are not directly related to profits generated in the preceding year, while private firms accrue revenues only to the extent that they have performed efficiently.[166]

A significant factor in analyzing privatization is whether unionized private firms that have contracted to provide public services are exempt from NLRA regulation, as are government entities. If such private sector employees are covered by the NLRA, they will not be limited by statutory employment laws that apply to public sector employees.[167] Most significantly, in many states public sector employees are prohibited from striking.[168] This prohibition is designed to ensure that essential health and safety services are available and to protect the government's sovereignty, which would be misdirected if its employees could impede public service delivery.[169]

Private sector employees working within a privatization scheme must also be prohibited from striking if the efficiency arguments of privatization advocates are to hold any weight. Guaranteeing efficient delivery of essential public services is impossible if privatized firms are subject to NLRA coverage.[170] For instance, by granting NLRA striking rights to school bus drivers employed under privatization contracts, the NLRB has jeopardized communities that rely on public officials to provide essential and safe transportation.[171] This precedent endangers community health and safety when applied to public emergency services, as demonstrated by privatized firefighters who presumably acquire NLRA

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[165] *See id.*

[166] *See* Belluck, *supra* note 126, at 262.

[167] *See* SHAFRITZ ET AL., *supra* note 56, at 261–72. Under section 8(d) of the NLRA, private employees are guaranteed bargaining rights with respect to subjects affecting employment terms or conditions. 29 U.S.C. § 158(d) (1994). Public employee bargaining rights are restricted by statutory and case law. *See* School Comm. v. Boston Teachers Union, 389 N.E.2d 970, 973–74 (1979); Pennsylvania Labor Relations Bd. v. State College Area Sch. Dist., 337 A.2d 262, 264–65 (1975).

[168] *See supra* note 57 and accompanying text.

[169] *See* Kurt Hanslowe & John Acierno, *The Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1060–72 (1982).

[170] *See* 29 U.S.C. § 157 (1994).

[171] *See National Transp. Serv.*, 240 N.L.R.B. at 566–68 (holding that the public school administration had no right of control over private employee bus drivers' wages and work conditions).

protection and striking rights[172] after previously being exempt from NLRA protection.[173]

The question of NLRA coverage for companies operating under privatized schemes poses the following possible outcomes. First, in those states where public sector employees are allowed to strike, privatization would have no effect, whether or not privatized firms are covered by the NLRA. Second, if public sector employees are prohibited from striking, privatization has no effect *only* if privatized firms *are not covered* by the NLRA. Finally, if public sector employees are prohibited from striking or have limited striking capacities and privatized firms *are covered* by NLRA, an irreconcilable conflict exists within pro-privatization arguments, as shown by the firefighter example above. The threat that essential health, safety, or economic services could be interrupted legally under NLRA provisions undermines the argument that privatization would improve efficiency and quality in service delivery. In this respect, privatization may provide additional burdens instead of the benefits its proponents advocate.

Another argument against privatization maintains that the central focus of public services on taxpayer satisfaction will be lost if such services are contracted to private firms motivated only by market competition.[174] Private sector firms that contract for public functions fail to acquire governmental accountability for their actions.[175] Furthermore, because private sector employers are not considered state actors for Constitutional purposes, they may exercise control over areas where government employers would be limited, such as employee speech.[176]

While privatization may be an unacceptable method of improving public service delivery, continued reliance on public sector unions requires a shift in focus from adversarial labor relations to the public's needs. Public sector labor relations can-

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[172] *See National Transp. Serv.*, 240 N.L.R.B. at 567–68 (Murphy and Penello, Members, dissenting).

[173] *See* Rural Fire Protection Co., 216 N.L.R.B. 584 (1975) (holding that firefighters employed by a private corporation were exempt from the Board's jurisdiction).

[174] *See* Belluck, *supra* note 126, at 262.

[175] *See* Froomkin, *supra* note 130, at 548.

[176] *See* Summers, *supra* note 20, at 690. This argument may serve as an incentive for economic actors to push for increased privatization because of the corresponding freedoms that accrue to private actors, but which are unavailable to government employers. *See id.* at 691–92.

not remain at the status quo if government services are to respond more effectively to taxpayer demands.

B. *Labor-Management Cooperation Alternatives within the Public Sector Union Context*

Public sector labor relations require cooperation to ensure that essential services are delivered efficiently. Studies confirm that labor-management cooperation and employee involvement (EI) or participation programs result in improved efficiency, productivity, and worker satisfaction when implemented within the public sector union context.[177]

Autonomous unions are recognized as necessary for maximizing employees' collective bargaining power and enabling employees to use this power to protect their interests.[178] Although the company union threat was initiated and reinforced within private sector labor law to deter labor-management programs, the issues surrounding employer domination and union autonomy can be applied within public sector labor relations in evaluating whether to establish cooperation programs.

Because many company unions were merely sham organizations used by employers to manipulate employee decisionmaking and denigrate employee bargaining power, Senator Wagner authored what is now section 8(a)(2) of the NLRA. Section 8(a)(2) provides: "it shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[179] In the *E.I. duPont de Nemours* and *Electromation* decisions, the NLRB interpreted "labor organization" broadly to prohibit "any organization of any kind, or any agency or employee representation committee or plan," the purpose of which is "dealing with" the employer, whether or not actual collective bargaining is involved.[180] In response to *Electromation*, Congress

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[177] *See* LEVINE, *supra* note 12, at 156–63.

[178] *See* Klare, *supra* note 24, at 4.

[179] 29 U.S.C. § 158(a)(2) (1994).

[180] *See* E.I. duPont de Nemours & Co., 311 N.L.R.B. 893 (1988) (holding that an employer in a unionized workplace violated section 8(a)(2) where the Employee Involvement committee dealt with the employer in addressing working terms and conditions, including safety incentives, awards, and arrangements for picnic and athletic facilities); Electromation, Inc., 309 N.L.R.B. 990 (1992) (holding that an employer in a nonunionized workplace violated section 8(a)(2), under a totality of the circumstances test where the Action Committee dealt with the employer concerning grievances, labor

passed "The Teamwork for Managers and Employees Act" (TEAM Act) to amend section 8(a)(2) and allow employee participation in nonunionized workplaces "to address matters of mutual interest," provided such organizations do not claim exclusive representation and do not negotiate, amend, or enter into collective bargaining agreements.[181] Although corporate lobbies enabled the TEAM Act to pass in Congress, labor supporters persuaded President Clinton to veto the bill.[182]

EI program supporters maintain that such programs are vital to industrialized nations in light of economic globalization. As it currently stands, section 8(a)(2) has failed to prevent many employer abuses, including discriminatory discharges and refusals to bargain.[183] Section 8(a)(2) has also failed to increase autonomous unionization, while it has discouraged greater employee voice in nonunion workplaces.[184] In addition, *Electromation* and *E.I. duPont* have reinforced increased bureaucratization and top-down management, which has resulted in inefficiencies because employees now must contend with more rules and layers of authority before making necessary decisions.[185]

Legislation that impedes efficiency and economic competition without significantly improving labor relations is increasingly hard to justify when confronted with global economic competition. Even if the "totality of the circumstances" approach in *Electromation* is applied more favorably than the preceding analysis suggests,[186] the *Electromation* decision certainly acts to deter employers from using labor-management cooperation programs.[187] The concern that the American workforce will lose out to global competition is relevant because firms will respond by no longer using EI programs to increase worker skills within their companies.[188] This loss is

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disputes, wages, hours, and conditions of work, and employees acted as representatives under section 2(5)); *see also* NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

[181] H.R. 743, 104th Cong. (1995).

[182] *See* Clay Chandler, *Bill on Employee Teamwork Vetoed, Clinton Backs Labor But Hints He May Break With It On Comp Time*, WASH. POST, July 31, 1996, at A6.

[183] *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 238 & n.18 (1990). Throughout the late 1970s and the 1980s, U.S. labor relations saw increasing ratios in section 8(a)(3) employer discriminatory discharges per representation election and in section 8(a)(5) employer duty to bargain violations per representation election. *See id.*

[184] *See* Estreicher, *supra* note 159, at 24–25.

[185] *See* LEVINE, *supra* note 12, at 113–14.

[186] *See* 309 N.L.R.B. at 997–99.

[187] *See* LEVINE, *supra* note 12, at 113–14.

[188] *See id.* at 59–61.

significant when we recognize that EI programs have the potential to enhance internal labor market skills and overall productivity, which in turn may prevent technological change-induced or skill-induced layoffs as well.

All of these considerations, while drawn from a private sector context, are relevant to public sector labor relations. Top-down management and bureaucracies within local government are inefficient, while governments which support cooperation programs attain significant benefits.[189] First, public sector unions benefit because their rights must be considered in formulating work-related policy.[190] Second, government managers benefit because including employees in work-related decisions fosters better union relationships, which in turn increases labor union support at the polls. Finally, taxpayers benefit from improved service quality, cost-effectiveness, and continuity.[191]

The strongest opponents of cooperation programs contend that employers act under the facade of a team simply to appease employees. This distrust was exemplified in *NLRB v. Yeshiva University* and *College of Osteopathic Medicine and Surgery*, regarding full-time faculty, and in *NLRB v. Health Care and Retirement Corporation*, regarding nurses. In these cases, employees were excluded from NLRA protection because of their ability to participate directly in formulating workplace terms and conditions.[192] These decisions are incompatible with the notion that employees are to have a genuine and continuing role in workplace governance.[193] In fact, cooperation programs such as

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[189] *See* Roger Dahl, Address at the Symposium on Excellence in Government through Labor-Management Cooperation (Nov. 11, 1994).

[190] *See* Mulcahy & Mulcahy, *supra* note 88, at 564.

[191] *See* Klare, *supra* note 24, at 10; *see also* Mulcahy & Mulcahy, *supra* note 88, at 565.

[192] *See* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); College of Osteopathic Medicine and Surgery, 265 N.L.R.B. 295 (1982) (both holding that because the faculty had obtained a voice and participated in decisions through collective bargaining, the union was no longer a "labor organization" deserving of NLRB protection). The Board's decision in the latter case epitomizes "antidemocratic absurdity" by deterring statutory employees from using collective bargaining to obtain a direct, participatory voice in firm governance since they will then be barred from the very collective bargaining rights that NLRA coverage protects. *See* Klare, *supra* note 24, at 54; College of Osteopathic Medicine and Surgery, 265 N.L.R.B. at 297–98. *See also* NLRB v. Health Care and Retirement Corp., 511 U.S. 571 (1994); Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976), *cert. denied*, 450 U.S. 917 (1980).

[193] Professor Summers said of *Yeshiva*: "The purpose of [the NLRA] to extend democracy to the workplace through encouragement of collective bargaining had been turned inside out." Summers, *supra* note 20, at 711. *See also* Klare, *supra* note 24, at 53.

workplace teams have been shown to increase worker self-realization as individuals and as employees.[194]

Local government workforces particularly benefit from on-site cooperation programs because decisions can be tailored to focus on those public services that need the most improvement, support local market conditions, and achieve employee interests. These benefits may be best realized in participation programs, where employees can see firsthand what involvement with workplace decisions can accomplish.[195]

Philadelphia's "Redesigning Government Initiative" program, as implemented in its June 1996 Collective Bargaining Agreement with AFSCME, exemplifies this approach.[196] Philadelphia agreed that no layoffs or demotions of AFSCME employees would occur as a result of subcontracting or privatizing municipal work.[197] In return, AFSCME employees had to participate in labor-management cooperation programs to determine ways of increasing the efficiency of public service delivery.[198] Philadelphia's "Redesigning Government Initiative" program is particularly unique. Instead of unilaterally imposing worker-management cooperation programs on a unionized workforce, as the Team Act would have done, it gives employees something in return—in this case, the assurance that no layoffs or demotions will result from subcontracting. Nevertheless, this contractual relationship suggests that worker-management cooperation programs *do* take some autonomy and control away from employees, in that they need compensation in the form of additional collective bargaining agreement provisions.

Unionism has declined significantly within both the public and private sectors, even with protections against company unionism.[199] Perhaps the only means of obtaining union strength resembling the independent union movement of the 1930s is to build worker support through the very labor-management cooperation programs that have been held as hostile to independent unionization.

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[194] *See* LEVINE, *supra* note 12, at 158.

[195] *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (1977); NLRB v. Magnavox Co., 415 U.S. 322, 323–24 (1973).

[196] Memorandum of Agreement between AFSCME, District Council 33 and the City of Philadelphia, *supra* note 7, at 5–7.

[197] *See id.*

[198] *See id.*

[199] *See* WEILER, *supra* note 183, at 238.

IV. Evaluating Labor-Management Cooperation Programs

The data for this study was collected from surveys provided by the United States Department of Labor in Washington, D.C. The surveys were distributed to state and local governments across the United States that had instituted labor-management cooperation programs. The Department of Labor randomized survey distribution to ensure statistical validity, and as a result, the programs varied widely in terms of methods used and employees affected. The statistical foundation was achieved by analyzing each survey's responses to create variables that would be most valid and consistent in determining the factors influencing a program's outcome. Statistical analyses were performed on fifty-two Task Force Survey responses. Descriptive statistics are included in Appendix 1. Ordinary least squares (OLS) regression analysis was used to generate estimates which predict the dependent variable in each multiple regression category.[200] The results follow in Appendix 2 through Appendix 6.

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[200] Conclusions drawn solely from a descriptive univariate analysis do not account for other factors that may influence cooperation program outcomes, such as specific methods, collective bargaining laws, or party resistance. Multivariate analysis, known as multiple regression, is necessary to analyze the effect of each independent (or explanatory) variable on the dependent variable while controlling for the simultaneous influence of other independent variables in the same category. By estimating the distinct influence each independent variable has on the interval-defined program outcome (the dependent variable), OLS multiple regression analysis can predict those independent factors vital to a cooperation program's success. For a more in-depth discussion of multiple regression analysis, see Michael O. Finkelstein & Bruce Levin, Statistics for Lawyers 323–442 (1990); David G. Kleinbaum & Lawrence L. Kupper, Applied Regression Analysis and Other Multivariate Methods (2d ed. 1988); John Neter, Applied Linear Regression Models (3d ed. 1996).

The independent variables are designated by category in the Appendices. With the exception of "Number of employees affected," "Months since implementation," and "Months of planning," the independent variables are indicator or "dummy" variables that indicate whether a certain condition holds for the case in question. The categories signified by an asterisk in Appendix 1 are denoted as the "base" indicators. These categories are constrained to zero and omitted in the regression models to serve as a basis for comparative evaluation. *See generally* Melissa A. Hardy, Regression with Dummy Variables (1993); J. Scott Long, Regresson Models for Categorical and Limited Dependent Variables (1997) (discussing applied regression analysis using indicator and categorical variables).

In-depth residual analysis ensured that each categorical distribution validated assumptions of normality and independence. Each analysis included a test for linearity, satisfied by both a random scatter of residuals as well as a linear relationship of the partial regression plot. The residuals exemplified a constant variance with no collinearity. Any outliers were analyzed as separate indicator variables before applying these tests.

If a regression model failed to validate the assumptions of normality and independence, using a linear transformation of the dependent variable improved the model's

Separate multivariate analyses describe each survey category. The first regression analysis measures demographic and local area factors and examines how they influenced the programs' outcomes. The second regression analyzes the changes in workplace dynamics and practices that occurred as the cooperation programs were used, and how these factors influenced the programs' results. The third regression analysis measures the collective bargaining factors, if any,[201] that influenced the programs' outcomes. The fourth regression analyzes the factors surrounding the programs' initiation and their effects on the programs' consequences. The fifth regression analysis measures the programs' specific characteristics and how they influenced the programs' successes or failures.

The dependent variable was determined based on five criteria: first, whether the program resulted in improved efficiency or cost-effectiveness for its respective area; second, whether the program resulted in improved quality of worklife for the workers it affected; third, whether the program increased in "pervasiveness" with respect to the scope of employees covered; fourth, whether the program survived an election of union, management, or local political officials; and fifth, whether the program improved the way in which grievances or disputes were handled, such as producing faster settlements or having less complaints result in interest arbitration. A program received one point for each criteria in which it reported success. Correspondingly, five was the maximum score achievable, and zero was the minimum score. A higher program score corresponds to a more successful program outcome. This method provides a valid dependent vari-

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linearity. If even a linear transformation failed to correct collinearity problems, the survey variable most likely to be answered in context of another answer was deleted from the regression analysis. This occurred twice. First, longevity factors were deleted because they correlated with workplace practice responses. Second, the variable determining whether parties used interest arbitration was deleted because it correlated with whether a state had collective bargaining laws in place.

If certain data was not provided by a particular survey, that factor was coded to conform with the median of the data for the remaining cases in the specific category. Because multiple regression is a measurement of variables *in relation* to other variables, it would be fundamentally incorrect, and in fact impossible, to ignore categories for a particular case due to missing data. Coding missing variables to median values enables the case to be included in the statistical analysis while preventing any statistical discrepancy. Eliminating those cases would reduce the sample size of the data and significantly reduce its accuracy. This procedure needed to be done only once, for the "Number of employees affected" by the cooperation program.

[201] Labor-management cooperation program surveys were collected from Right-to-Work states, such as Arizona, as well as states with collective bargaining laws in place, such as New York.

able by allocating equal weight to all relevant survey areas and does not favor any program for putting more effort toward one aspect over another.

A. *Descriptive Statistics: The Foundation*

Descriptive statistical analyses examining labor-management cooperation programs are presented in Appendix 1. While these univariate measurements cannot determine the factors significantly influencing whether a program will succeed or fail (those statistics follow in Appendix 2 through Appendix 6), they do provide a reliable means for determining whether the sample itself is capable of providing valid results. As shown under "Outcome," the fifty-two surveys were normally distributed in terms of successes and failures. Over 80% received scores of two, three, or four, with the most receiving the median score of three. Only 9.62% received the highest score of five, and one program (1.92%) received the lowest score of zero.

In focusing on demographics, the programs were evenly distributed among regions of the United States, urban and rural areas, and types of workforce units affected. This distribution demonstrates that the survey was randomized with reliability. Randomization is important to ensure that the regression analyses did not measure biased data. The normal distribution trend described each of the ensuing categories, as Appendix 1 provides. Several factors are especially noteworthy for future study. First, resistance to labor-management cooperation programs was initiated equally from each party: the union resisted in 30.77% of the cases, management resisted in 28.85% of the cases, and both parties provided resistance in 30.77% of the cases.

Second, forty-one programs were initiated in jurisdictions regulated by collective bargaining laws. This statistic is not surprising, since few right-to-work states exist in relation to states instituting labor laws with varying restrictions. The interesting result is that in only six of the forty-one states regulated by collective bargaining laws did state labor laws *help* the cooperation program in its start-up or work process phases. Nineteen of the forty-one programs had to work around their respective laws to initiate and proceed with their new program.

Third, parties were less likely to use methods that are ambiguous under labor laws or that may have legal implications. A

majority of the programs refrained from addressing safety issues, using informal volunteer employee participation (as opposed to designated responsibilities), implementing temporary employee replacements, using media in promoting the program, instituting a "no-layoff" clause, and taking on privatization and the subcontracting legal issues it entails.

B. *Regression Analyses: What Makes Labor-Management Cooperation Programs Work?*

The regression results analyzing factors that influence whether labor-management cooperation programs will succeed, fail, or merely maintain the status quo are presented in Appendix 2 through Appendix 6. The independent variables that influenced the cooperation program outcome with ninety percent significance or better are denoted by asterisks beside their respective t-values. As explained in the Appendices, an increasing number of asterisks corresponds to an increasing level of significance.

The regression analysis of Demographic Factors, in Appendix 2, finds that cooperation programs affecting multi-unit workforces are significantly less likely to succeed than programs affecting single unit workforces. Cooperation programs initiated to cover a specific bargaining unit tend to affect employees with similar job positions, whereas programs initiated to cover a whole municipal or statewide workforce affect many bargaining units with employees holding a broad range of jobs. Perhaps programs affecting a single unit have more success because they can be tailored to meet the needs and goals of similar and, presumably, cohesive workforces. In addition, single unit programs may benefit from better intra-workforce communication and organization, while greater decentralization may be detrimental to multi-unit programs.

Appendix 3 presents the Workplace Practice factors that influence a program's success or failure. Interestingly, external work process changes, such as improved technology, equipment, or service methods, are more effective than internal work process changes, such as employee teams. Personnel changes that focus on compensation methods significantly influence a program's success, while hiring and classification changes significantly influence a program's demise. All barriers, whether external hierarchical structures or internal distrust, significantly impair a program's out-

come. Likewise, resistance by any or all parties—union, management, or both—significantly detracts from a program's chance of success. All is not lost, however: both external procedures, such as facilitators, and internal procedures, such as common goals, significantly act to cause a program's success. Finally, the longer a program has been in effect, the more likely it is to improve its respective workforce effectiveness and public service delivery.

Collective Bargaining factors, as shown in Appendix 4, had few significant effects on program outcomes. Two factors did positively influence a program's chance of success with ninety-five percent significance: bargaining administration changes and conflict resolution changes. The survey responses demonstrate that bargaining changes overwhelmingly focused on increasing flexibility in terms of negotiation and administration. Further study must determine exactly how flexible bargaining can become before it ceases to benefit the cooperation program. In any event, this study shows that collective bargaining laws may do well to allow a more flexible scope of bargaining between labor and management parties.

The regression analysis of Program Initiation factors, in Appendix 5, shows that cooperation programs initiated based on an "Opportunity" are significantly related to a program's relative failure. Because each program could be initiated by more than one factor, an "Opportunity" may have been one impetus along with "Leadership" or "Budget" factors. Yet programs that have impending pressures as their only driving force, such as a "Crisis" or "Need," may succeed more often simply because they have no other option: their community's welfare depends on it.

In addition, this analysis demonstrates that outside help from an individual, such as a consultant or mediator, significantly influences a program's likelihood of success. Individual experts may be more effective in targeting the specific needs of the workforce affected, rather than relatively bureaucratic and inefficient outside agencies or less-than-practical academic studies.

Appendix 6 presents the Program Characteristics that significantly influence a program's success or failure. The results show that using employee volunteers, where employees have the choice to participate in labor-management cooperation programs, positively influences the outcome. Meanwhile, temporary employee replacements act to the detriment of cooperation programs. Taken together, this result confirms what scholars and policymakers have

advocated for some time: an adversarial labor relations context like that of private sector labor law does not succeed in the public sector. Instead, allowing public employees to exercise true decisionmaking in their workplaces without the constant fear of being replaced or subject to privatization seems to benefit all parties involved: labor, management, the government, and the general public.

V. Implications for Future Legal and Policy Change

A. *Congress's Role in Changing Private Sector Legislation*

Because policymakers who determine public sector labor laws often look to preceding private sector policy in initiating or revising legislation,[202] it is important to take the initiative and revise NLRA provisions that have set the tone for inefficient and detrimental performance in both private and public operations. Part III demonstrated the conflict presented by section 8(a)(2) protections against company unionism and TEAM Act provisions enabling employers to use employee participation programs in their workplaces. If employees and employers understand that cost-effectiveness is a major goal, and that change is necessary to meet this goal, TEAM Act opponents have no logical argument for perpetuating the legal status quo as implemented since 1935.[203] Where workplaces lack labor-management cooperation programs due to static section 8(a)(2) interpretations more appropriate for the scientific management era, it is inconsistent to argue that the legal status quo will enable workplaces to achieve cost-effectiveness.

The NLRA should be revised to keep pace with an increasingly service-oriented global labor market. In amending section 8(a)(2), the Dunlop Commission suggests "non-union employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation *where such discussion is incidental to the broad purposes of these programs.*"[204] To protect workers' uncoerced choice to join independent unions, the revision of section 8(a)(2) should

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[202] *See* Wilson, *supra* note 32, at 652–54.

[203] *See* Klare, *supra* note 24, at 34.

[204] Commission on the Future of Worker-Management Relations, Fact-Finding Report 4, at 8 (1994) (emphasis added) [hereinafter Fact-Finding Report].

be accompanied with an amendment to the labor organization definition under section 2(5).[205] "Labor organizations" should be defined to include only those representative structures that actively bargain with management over terms and conditions of employment.[206] By narrowing this definition, unfair labor practices under section 8(a)(2) would include only those employee participation programs that truly coerce employees in exercising their section 7 rights.[207]

Although TEAM Act supporters argue that company unionism is not a real threat to today's workplaces,[208] legislation should ensure union security and workers' free choice to join independent unions. These objectives can be achieved in several ways. First, labor organizations could be distinguished from employee participation programs by preventing employers from using measures characteristic of union representation within their programs, such as separate representation for supervisory personnel and secret ballot elections.[209] More importantly, employee participation committees could be empowered to form independent unions and engage in concerted activities, such as strikes, under section 7 of the NLRA.[210] Second, employers could agree to recognize a union that employees pre-selected before the participation program was put in effect.[211] While such a pre-hire agreement runs the risk of being deemed unlawful, it could be justified as a form of "effects" bargaining, as demonstrated by the successful collective agreement between General Motors and the UAW.[212]

Employers should be required to ensure that their employees clearly understand that the participation committees are a means of initiating joint decisions regarding workplace objectives, not

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[205] *See* Paul C. Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 YALE L.J. 1907, 1922–23 (1993).

[206] *See* Estreicher, *supra* note 159, at 25, 35.

[207] *See id.* at 35.

[208] *See The Team Act: Legal Problems with Employee Involvement Programs Hearing Before the Senate Comm. on Labor and Human Resources*, 104th Cong. (1996) (Chairman Sen. Kassebaum stated, "[I]f management tried to dictate, wouldn't that be the very thing that would drive workers to rebel and to seek unionization. And who is to determine what is a sham? Again, it seems to me that workers are not going to accept that in this day and age.").

[209] *See* Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(A)(2)*, 69 CHI.-KENT L. REV. 129, 141–47 (1993).

[210] *See* WEILER, *supra* note 183, at 283–95.

[211] *See* Estreicher, *supra* note 159, at 43.

[212] *See id.* This collective bargaining agreement occurred within the Saturn plant at General Motors. *See id.*

alternative forms of union representation.[213] Information-sharing should not stop with the mandatory subjects now required under the NLRA. Rather, employee participation committees should be required to discuss financial, personnel, investment, and public administration policies, as well as management's plans and expectations for the future.[214]

Recently, labor relations scholars introduced an Employee Involvement Bill (EI Bill) that seeks to allow flexibility in creating workplace-specific EI programs, while protecting employees' democratic rights to elect union representation independent of EI processes.[215] The EI Bill promotes these goals in several ways. To promote flexibility, the EI Bill legalizes EI committees that are elected by an employee majority through a secret ballot process, are not implemented during any union organizing campaigns of which the employer is aware, and do not coincide with any unfair labor practices under the NLRA.[216] To promote employees' democratic rights, the EI Bill draws a much greater distinction between EI programs and union representation than suggested by the Dunlop Commission. For instance, the EI Bill forbids an EI committee from dealing with wages, hours, grievances, labor disputes, or work conditions *even if it does so only incidentally to the committee's primary purpose*.[217] In addition, the EI Bill makes it an unfair labor practice for an employer to fail to inform employees of their rights under the bill and the means by which they can acquire NLRB assistance.[218]

The combination of flexibility and workplace democracy makes the EI Bill a promising alternative in light of global competition and company unionism concerns. The EI Bill may even increase union membership by instilling a sense of self-realization in nonunion employees and leading them to desire independent union representation.[219] Government administrators and public sector unions need to inform public employees of the progress made in labor-management cooperation laws and programs within

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[213] *See id.* at 27.

[214] *See* WEILER, *supra* note 183, at 285–87.

[215] *See* Charles J. Morris, *Will There Be a New Direction for American Industrial Relations?—A Hard Look at the TEAM Bill, the Sawyer Substitute Bill, and the Employee Involvement Bill*, 47 LAB. L.J. 89, 97–99, 104–07 (1996).

[216] *See id.*

[217] *See id. See* also FACT-FINDING REPORT, *supra* note 204, at 8.

[218] *See* Morris, *supra* note 215, at 104–07.

[219] *See* Estreicher, *supra* note 159, at 21.

private employment.[220] In this way, public employees, unions, employers, and taxpayers will come to perceive labor-management cooperation programs as a realistic norm, rather than an idealized exception.[221]

B. *Removing Incompatible Private Sector Influences from Public Sector Law*

Policymakers formulating public labor legislation have drawn on private sector precedent, in part because of the wealth of doctrine and experience in private labor relations.[222] Yet the distinctions between public and private labor relations, such as historical background, economic market forces, and the government's dual nature as both employer and representative, mean that public labor law should apply private sector adversarial-oriented precedent with critical discretion, especially with regard to inconsistent private sector rules.[223] Two areas where private sector law should not be imitated in formulating public labor legislation are employee definitions as applied in *Yeshiva*[224] and the striker replacement doctrine as applied in *Mackay*.[225]

First, public employees who directly participate in workplace and service delivery decisions should not be excluded from state law protections, which would happen if *Yeshiva* applied.[226] Labor-management cooperation programs instituted to improve public service delivery and efficiency often entail direct employee participation in making workplace decisions. If participating employees were deprived of state collective bargaining law protections, they would be deterred from participating, and cooperation programs would have no chance of improving public service performance. Certainly, this problem would escalate if employees were *required* to participate in their government employer's

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[220] *See id.* at 46. Successful employee participation programs within the private sector include the EI committees at unionized firms such as Xerox, AT&T, Inland Steel, and Goodyear. *See id.*

[221] *See id.*

[222] *See* Wilson, *supra* note 32, at 652–54.

[223] *See* Paul C. Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 381, 385–94 (1984).

[224] NLRB v. Yeshiva Univ., 444 U.S. at 682–86.

[225] *Mackay Radio*, 304 U.S. at 347.

[226] *See* Klare, *supra* note 24, at 54. *Yeshiva* held that employees who gained the ability to participate directly in workplace decisions lost NLRA protection because they were no longer considered employees under the Act. *See id.*

cooperation program, as is the case with Philadelphia's collective agreement with AFSCME.[227]

Second, in those states allowing certain public employees limited striking rights,[228] governments should not be allowed to use permanent replacements[229] or privatize and subcontract out public services during lawful public employee strikes.[230] In the private sector, the *Mackay* rule allows employers to hire permanent replacements for economic strikers in order to balance employers' rights to continue operating with employees' rights to strike.[231] *Mackay* is inconsistent as applied to employees' ability to exercise section 7 rights because it does not distinguish between the effects employees face from discharges, which the NLRA prohibits,[232] and permanent replacements, which *Mackay* allows.[233] President Clinton's recent Executive Order 12,954 attempts to resolve this inconsistency at the federal level by departing from the *Mackay* rule and prohibiting federal contractors, such as those providing privatized services, from hiring permanent striker replacements.[234]

Likewise, the *Mackay* rule should not be applied under public collective bargaining laws, such as the PECBL, because permanent replacement strikes are longer and more violent than non-replacement strikes and should be avoided where essential and emergency public services are concerned.[235] In addition, because

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[227] Memorandum of Agreement between AFSCME, District Council 33 and the City of Philadelphia, *supra* note 7, at 5–7. Pennsylvania collective bargaining laws do prohibit public employers from dominating or interfering with the formation, existence or administration of any employee organization or contributing financial or other material support to it. *See* 43 PA. CONS. STAT. §§ 211.6(1)(a), (b), (e), 1201(a)(1)–(5) (1992). A public employer will violate these laws, however, only if the employer completely circumvents the employees' exclusive bargaining representative and supports an employee organization to the point that the organization's independence must be questioned. *See* Millcreek Township Sch. Dist. v. PLRB, 631 A.2d 734 (Pa. 1992); Kennett Square Police Ass'n v. Kennett Square Borough, 25 P.L.R.B. (PPER) ¶ 25,179 (Sept. 27, 1994).

[228] *See supra* note 57 and accompanying text.

[229] *See* Weiler, *supra* note 223, at 392–94.

[230] From the employee's perspective, privatization and permanent replacement policies are one and the same in terms of job loss and successful reinstatement. *See* Weiler, *supra* note 125, at 1790–92, 1824–26.

[231] *Mackay Radio*, 304 U.S. at 347.

[232] *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

[233] *See* Weiler, *supra* note 223, at 392–94. Unlike the *Mackay* Court, Professor Weiler recognized "the employee may be excused for not perceiving a practical difference [between the permanency of losing a job due to a permanent replacement and losing a job due to being discharged] as far as his rights under section 7 are concerned." *Id.* at 390.

[234] Exec. Order No. 12,954, 29 C.F.R. 70.1–70.23 (1995).

[235] *See* Wilson, *supra* note 32, at 682; LeRoy, *supra* note 121, at 276, 294. This fact

lawful strikers must follow a multitude of complex notification and impasse procedures prior to striking, government employers should be prepared for the strike, and strikers should not still have to face the possibility of losing their jobs.[236] State collective bargaining laws such as the PECBL specifically intended to allow qualified striking rights. Allowing permanent replacements under *Mackay* would undermine their purposes.

Because permanent replacements are most harmful to weaker unions and less-skilled employees,[237] public employees may be easy targets since many possess jobs requiring minimal skills and qualifications. Although public employees have strong union representation through organizations such as AFSCME and the American Federation of Teachers (AFT), many of their unskilled and skilled service providers have high labor supplies that are easily privatized and subcontracted to private firms. While public employers argue that permanent replacements do not endanger unions representing skilled workers in full employment regions or union-oriented communities,[238] these arguments are not persuasive with respect to public employees facing privatization-induced replacement, since privatization is prevalent in urban areas having high labor reserves and diverse union sentiments.

Instead, to ensure that public sector collective bargaining and state labor laws retain a meaningful existence, and public services continue uninterrupted, public employers should be allowed to hire temporary replacements[239] or to privatize services temporarily by subcontracting with private firms. Lawful public employee strikers should have the right to their former positions after their strike participation ceases, much like the rights enjoyed by unfair labor practice strikers under current private sector law.[240]

Public unions may argue for a ban on temporary replacements as well, as was the law in Ontario and Quebec,[241] on the ground that replacements of any kind act to prolong strikes.[242] Yet barring replacements would leave public employers with no means

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served as one rationale for President Clinton's Executive Order 12,954 barring federal contractors from hiring permanent replacements.

[236] *See* Wilson, *supra* note 32, at 682.

[237] *See id.* at 652–54.

[238] *See* Weiler, *supra* note 223, at 393–94.

[239] *See* Wilson, *supra* note 32, at 682, 685.

[240] *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

[241] *See* Estreicher, *supra* note 159, at 31.

[242] *See* Wilson, *supra* note 32, at 685–87.

of providing essential or emergency services, and would thwart their basic goal of preventing service interruption.[243] Public employers cannot rely on the hope that their employees will provide emergency services without pay based on a sense of personal obligation, as health care union employees have done in strikes between AFSCME and Boston Hospital.[244] Finally, barring temporary replacements would work against public sector labor relations by further insulating unions from competitive pressures and reducing incentives to cooperate and improve efficiency.[245]

C. *Specific Policy Measures that Significantly Influence Success*

Legislative attempts at all government levels have reinforced private sector-oriented adversarialism more than they have promoted labor-management cooperation. This trend is especially detrimental in an area in which most laws prohibit striking. The result may be to characterize public employees with a lower legal status than their private counterparts, while giving public supervisors little reason to care about employee concerns.[246] For instance, the CSRA creates an adversarial relationship by restricting issues that are negotiable[247] and perpetuating section 8(a)(2)-type doctrine by making it an unfair labor practice for management to bypass the union and negotiate directly with unit employees.[248] Likewise, on the state and local levels, public labor legislation has caused parties to focus more on prevailing in interest arbitration than on mutually solving their disputes in ways that account for employees, employers, and the public at large.[249]

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[243] *See id.*

[244] Dan Lawlor, Vice President for Physicians, National Union of Hospital & Health Care Employees, AFSCME 1199, AFL-CIO, Remarks at the Labor and Worklife Forum, Unions for Doctors? (Jan. 23, 1997).

[245] *See* Estreicher, *supra* note 159, at 32–33.

[246] *See* Meltzer & Sunstein, *supra* note 9, at 798.

[247] *See* FUTURE OF LABOR-MANAGEMENT COOPERATION, *supra* note 140, at 15–40.

[248] 5 U.S.C. § 7116(a) (1994) states: "For the purpose of this chapter, it shall be an unfair labor practice for an agency—(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter . . . . (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter."

[249] *See* Mulcahy & Mulcahy, *supra* note 88, at 574.

There is no reason why public labor relations cannot use the collective bargaining process in conjunction with enhanced labor-management cooperation.[250] Scholars and labor experts have supported a "market reconstruction" approach to enhance workplace participation by removing the laws and policies that threaten job security and the hierarchical structures that reinforce these laws.[251] Policymakers should encourage labor-management cooperation by prohibiting permanent replacements and restricting privatization options. A structurally "flatter" and more integrated workplace would reinforce job security goals by making it easier to relocate and retrain employees for changing labor demands.[252]

For labor-management cooperation to be effective, employers would need to inform employees of current economic conditions and constraints, so as to enable employees to improve their service performance within these constraints.[253] In addition, such information would assist both labor and management in assessing their progress and implementing specific goals.[254] The bottom line for effectiveness means that both public employers and employees must be accountable to the taxpayers who rely on their services. While government employers are well-known for reinforcing the status quo and finding scapegoats for rising taxes and poor service delivery,[255] unions are also guilty of reinforcing the status quo, since they represent security for senior employees and do not require increased productivity or efforts in retraining. Parties must realize that inefficient status quo operations put *all* of their jobs at risk.[256]

CONCLUSION

If we consider labor-management cooperation programs to enhance democratic processes, it makes the most sense to establish these programs in the workplace, where people spend most of their waking time and energy. Labor-management cooperation

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[250] *See* Klare, *supra* note 24, at 22.

[251] *See id.* at 13, 41.

[252] *See* Samuel Estreicher, *Laws Promoting Worker Training, Productivity, and Quality*, 44 LAB. L.J. 110 (1993); Klare, *supra* note 24, at 12.

[253] *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, at 1470–71 (1993); Klare, *supra* note 24, at 8–9; Meltzer & Sunstein, *supra* note 9, at 797.

[254] *See* Klare, *supra* note 24, at 8; Mulcahy & Mulcahy, *supra* note 88, at 580.

[255] *See* Meltzer & Sunstein, *supra* note 9, at 797.

[256] *See* Mulcahy & Mulcahy, *supra* note 88, at 573.

programs are especially imperative where public services are concerned. Public employees, like private sector employees, are essential in fulfilling their respective production responsibilities and invest their time, effort, ability—their very lives—into their work. In exchange, employees have rights within their workplaces. Because public employees can place claims upon government employers as both workers and members of the taxpaying public, the case for their participation in workplace decisions is strengthened.

Labor relations policy and legislation should not construct false barriers around cooperation programs and limit their potential to increase employees' participation in their greater communities.[257] This study demonstrates that labor-management cooperation programs having greater flexibility and employee initiative in instituting the program's criteria are most successful in improving public service delivery. To encourage such innovation, current collective bargaining laws must be revised so that public employers are not deterred from broadening the scope of subjects bargained with their employees. Cooperation programs should encompass areas even beyond the immediate workplace and give employees information and avenues for getting involved in community organizations of their choice—from Little League coaching and interscholastic extracurricular programs to religious activities and soup kitchens—that employees otherwise may lack the time or resources to find. This innovation would genuinely serve the public interest.

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[257] *See* GROSS, *supra* note 1, at 284–85. Professor Gross concludes that "the national labor policy should encourage employers and labor organizations to bargain about all issues and decisions directly or indirectly affecting employees' working lives and, consequently, their families and communities . . . . Workers whose livelihoods depend on the decisions of others should not be treated as outsiders." *Id.* at 285.

Appendix 1. **Descriptive Statistics for 52 Task Force Surveys**

Variable	*N*	*Frequency*	*Percent*
Dependent Variables			
Outcome	52		
Score: Zero		1	1.92%
Score: One		3	5.77%
Score: Two		14	26.92%
Score: Three		16	30.77%
Score: Four		13	25.00%
Score: Five		5	9.62%
Independent Variables			
Demographics	52		
Type of workforce affected:			
Multi-unit		28	53.85%
Single Unit*		24	46.15%
County:			
Urban		28	53.85%
Rural*		24	46.15%
Region:			
Northeast		13	25.00%
South		15	28.85%
West		10	19.23%
Midwest*		14	26.92%
Number of employees affected		Median: 680	
Workplace Practices and Dynamics	52		
Work process changes:			
External methods		22	42.31%
Internal methods		27	51.92%
No changes*		3	5.77%
Personnel policy changes:			
Compensation		24	46.15%
Hiring and classification		18	34.62%
Transfers		8	15.38%
No changes*		2	3.85%
Barriers to workplace practices:			
External barriers		23	44.23%
Internal barriers		28	53.85%
No barriers*		1	1.92%
How barriers were overcome:			
External procedures		22	42.31%
Internal procedures		23	44.23%
Not overcome*		7	13.46%

* Denotes base level indicator variable of the regression equation

Appendix 1. **Descriptive Statistics for 52 Task Force Surveys *(cont.)***

Variable	*N*	*Frequency*	*Percent*
Months since program's implementation		Median: 25.5 months	
Months of planning		Median: 5.5 months	
Resistance encountered:			
Union resistance		16	30.77%
Management resistance		15	28.85%
Both parties' resistance		16	30.77%
Community resistance		2	3.85%
No resistance*		3	5.77%
Collective Bargaining	52		
Collective Bargaining Laws:			
Exist		41	78.85%
Do not exist*		11	21.15%
Collective Bargaining Laws Helped Program:			
Helped		6	11.54%
Did not help*		46	88.46%
Parties' interaction with labor laws:			
Had to work around laws		19	36.54%
Did not have to work around laws*		33	63.46%
Changes in governing rules: (each program may have more than one)			
Collective Bargaining Agreement amendments		19	36.54%
Work Rule changes		11	21.15%
Improved/New Joint Committees		23	44.23%
Collective Bargaining Administration changes		12	23.08%
Statutory changes		5	9.62%
Bargaining relationship changes		14	26.92%
Conflict resolution changes		19	36.54%
No changes*		19	36.54%
Type of governing agreement:			
Informal		23	44.23%
Formal		16	30.77%
No governing agreement*		13	25.00%

*Denotes base level indicator variable of the regression equation

Appendix 1. Descriptive Statistics for 52 Task Force Surveys *(cont.)*

Variable	*N*	*Frequency*	*Percent*
Program Initiation	52		
How Cooperation Program was Initiated: (each program may have more than one)			
Leadership		35	67.31%
Crisis/Need		28	53.85%
Budget/Financial		21	40.38%
Opportunity		25	48.08%
None applicable*		1	1.92%
Employee Provisions made: (each program may have more than one)			
Retraining		22	42.31%
Placement		11	21.15%
Benefits		5	9.62%
Performance appraisals/Measurements		5	9.62%
None applicable*		17	32.69%
Outside Help Received: (each program may have more than one)			
Individual help		24	46.15%
Organization help		13	25.00%
Studies/Surveys help		13	25.00%
None applicable*		7	13.46%
Outside Harm:			
Outside harm impeded program		4	7.69%
None applicable*		48	92.31%
Program Characteristics	52		
(Each program may have more than one)			
Regular Assessments:			
Used		29	55.77%
Not used*		23	44.23%
Media:			
Used		6	11.54%
Not used*		46	88.46%
Consumer-focus:			
Used		28	53.85%
Not used*		24	46.15%
Privatization/Subcontracted to outside source:			
Used		6	11.54%
Not used*		46	88.46%
Information Sharing:			
Used		26	50.00%
Not used*		26	50.00%
Pilot programs:			
Used		13	25.00%
Not used*		39	75.00%

* Denotes base level indicator variable of the regression equation

Appendix 1. **Descriptive Statistics for 52 Task Force Surveys *(cont.)***

Variable	*N*	*Frequency*	*Percent*
Flexibility-enhancing measures:			
Used		12	23.08%
Not used*		40	76.92%
Safety Issues:			
Addressed		9	17.31%
Not addressed*		43	82.69%
Employee Volunteers:			
Used		10	19.23%
Not used*		42	80.77%
Temporary employee replacements:			
Used		3	5.77%
Not used*		49	94.23%
"No-Layoff" Clause:			
Used		4	7.69%
Not used*		48	92.31%
Strict Objective Standards to measure progress:			
Used		37	71.15%
Not used*		15	28.85%

* Denotes base level indicator variable of the regression equation

Appendix 2. **Regression Analysis of Demographic Factors**

	Program Outcome	
Variable	**Coefficient**	**(T-value)**
Constant	3.445	(7.453)***
Type of workforce affected:		
Multi-unit	-0.606	(-1.776)*
County:		
Urban	-0.040	(-0.115)
Region:		
Northeast	-0.287	(-0.601)
South	-0.518	(-1.137)
West	0.302	(0.612)
Number of employees affected	0.00001	(0.908)
Sample Size	52	
R Square	13.40%	
F Statistic of Overall Significance	1.16	

* Significant at the .10 level (90% significance)
** Significant at the .05 level (95% significance)
*** Significant at the .01 level (99% significance)

***Appendix 3.* Regression Analysis of Workplace Practice Factors**

Variable	Program Outcome Coefficient	(T-value)
Constant	3.014	(4.160)***
Work process changes:		
External methods	0.752	(1.610)
Internal methods	0.549	(1.164)
Personnel policy changes:		
Compensation	0.988	(2.269)**
Hiring and classification	-1.086	(-2.344)**
Transfers	-0.014	(-0.030)
Barriers to workplace practices:		
External barriers	-1.758	(-2.887)***
Internal barriers	-1.178	(-1.832)*
How barriers were overcome:		
External procedures	1.304	(2.349)**
Internal procedures	1.890	(3.298)***
Months since program's implementation	0.012	(2.592)**
Months of planning	0.005	(0.365)
Resistance encountered:		
Union resistance	-1.674	(-2.291)**
Management resistance	-1.248	(-1.690)*
Both parties' resistance	-0.911	(-1.189)
Community resistance	-0.915	(-0.922)
Sample Size	52	
R Square	51.85%	
F Statistic of Overall Significance	2.585**	

* Significant at the .10 level (90% significance)
** Significant at the .05 level (95% significance)
*** Significant at the .01 level (99% significance)

Appendix 4. **Regression Analysis of Collective Bargaining Factors**

	Program Outcome	
Variable	Coefficient	(T-value)
Constant	2.244	(5.339)***
Collective Bargaining Laws:		
Exist	0.213	(0.511)
Collective Bargaining Laws Helped Program:		
Helped	0.380	(0.740)
Parties' interaction with labor laws:		
Had to work around laws	-0.401	(-1.056)
Changes in governing rules:		
Collective Bargaining amendments	-0.019	(-0.038)
Work Rule changes	0.050	(0.118)
Improved/New Joint Committees	-0.453	(-1.123)
Bargaining administration changes	1.056	(2.174)**
Statutory changes	-0.347	(-0.542)
Bargaining relationship changes	-0.364	(-0.788)
Conflict resolution changes	1.020	(2.389)**
Type of governing agreement:		
Informal	0.367	(0.882)
Formal	0.786	(1.468)
Sample Size	52	
R Square	39.97%	
F Statistic of Overall Significance	2.164**	

* Significant at the .10 level (90% significance)
** Significant at the .05 level (95% significance)
*** Significant at the .01 level (99% significance)

***Appendix 5.* Regression Analysis of Program Initiation Factors**

Variable	Program Outcome Coefficient	(T-value)
Constant	2.670	(5.801)***
How Cooperation Program was Initiated:		
Leadership	-0.183	(-0.532)
Crisis/Need	0.396	(1.303)
Budget/Financial	0.181	(0.493)
Opportunity	-0.838	(-2.862)***
Employee Provisions made:		
Retraining	0.418	(1.346)
Placement	0.117	(0.279)
Benefits	0.523	(0.908)
Performance appraisals/ Measurements	0.527	(0.993)
Outside Help Received:		
Individual help	0.700	(1.790)*
Organization help	0.358	(0.751)
Studies/Surveys help	-0.327	(-0.765)
Outside Harm:		
Outside harm impeded program	-0.821	(-1.357)
Sample Size	52	
R Square	40.00%	
F Statistic of Overall Significance	2.166**	

* Significant at the .10 level (90% significance)
** Significant at the .05 level (95% significance)
*** Significant at the .01 level (99% significance)

Appendix 6. **Regression Analysis of Program Characteristic Factors**

	Program Outcome	
Variable	Coefficient	(T-value)
Constant	2.672	(5.763)***
Regular Assessments:		
Used	-0.266	(-0.720)
Media:		
Used	0.096	(0.174)
Consumer-focus:		
Used	-0.091	(-0.230)
Privatization/Subcontracted to outside source:		
Used	0.102	(0.171)
Information Sharing:		
Used	0.506	(1.412)
Pilot programs:		
Used	-0.313	(-0.733)
Flexibility-enhancing measures:		
Used	-0.255	(-0.576)
Safety Issues:		
Addressed	0.126	(0.254)
Employee Volunteers:		
Used	0.839	(1.759)*
Temporary employee replacements:		
Used	-1.244	(-1.637)
"No-Layoff" Clause:		
Used	-0.079	(-0.117)
Strict Objective Standards to measure progress:		
Used	0.395	(0.892)
Sample Size	52	
R Square	18.59%	
F Statistic of Overall Significance	0.742	

* Significant at the .10 level (90% significance)
** Significant at the .05 level (95% significance)
*** Significant at the .01 level (99% significance)

BOOK REVIEWS

NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA. By *Ralph Nader and Wesley J. Smith.* New York: Random House, 1996. Pp. xxviii, 370, appendices, notes, index. $25.95 cloth.

> *The law lets you do it, but don't . . . . It's a rotten thing to do.*[1]

No Contest begins with the observation that the profession of law bears no direct relation to the pursuit of justice. Authors Ralph Nader and Wesley Smith argue that practitioners currently view their professional obligations as hindrances to achieving a just society. *No Contest* is an attempt to recreate the ostensibly lost nexus between law and justice.

The authors begin with an anecdotal survey of dissatisfaction within the profession. Attorneys are unhappy and the public cynical because lawyers and law schools treat the legal process as "just another business" (p. xiv). Nader and Smith contend that law can and should be more. The "two pillars of affirmative professional responsibilities—a licensed monopoly for practicing law and [the designation] as an officer of the court" mandate certain duties for practitioners (p. xxii). First, as "attorneys," practitioners are accountable to their clients. Second, as "lawyers," they must obey the justice system and serve the public interest.

Arguing that a "service-only-to-client-model" (p. xxvii) currently predominates, Nader and Smith call for checks on the "corporate-legal establishment" responsible for this ethos, and for a renewed sense of service to the public. This is vital when nearly omnipotent "power lawyers" manipulate the legislative process and the tort system.

The authors use Lloyd N. Cutler, a founding partner of Washington, D.C.'s Wilmer, Cutler & Pickering, as a prime example of lawyers' undue leverage over all three branches of government. Behind closed White House doors, Cutler recommends judicial appointees (including Supreme Court nominees); at the same time, many of his high-paying clients employ him precisely for his access to the highest echelons of government. The

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[1] RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA, at xvi (1996) (quoting Elihu Root).

authors caution, "[u]nless tempered by adherence to the higher calling of professional honor and restraint, unquestioning client loyalty can cause profoundly adverse consequences" (p. 17).

The authors similarly critique the cynical manipulation of civil procedure. Protective orders, for instance, are vital when information sought in discovery could jeopardize trade secrets or disclose privileged communications. However, attorneys deliberately involve themselves in corporate matters in order to claim privilege for otherwise discoverable information.

Another procedural abuse occurs when corporate attorneys automatically challenge requests for discovery in court. This exhausts the resources of legitimate plaintiffs. Deep-pocketed defendants' ability to absorb the mounting billable hours, however, only encourages the corporate attorneys to heap them on. The authors also accuse corporate attorneys of taking advantage of legal grey areas to engage in ethically dubious document destruction. For instance, attorneys often dispose of records that inculpate their corporate clients while preserving older documents that could be construed as exculpatory.

For the authors, SLAPP (Strategic Lawsuits Against Public Participation) suits are a particularly pernicious means to subvert the social good via the law. Some states have instituted remedies for those targeted by meritless SLAPP's, such as sanctions and tort actionability, but the authors argue that such responses are insufficient. SLAPP-back suits are so time-consuming and expensive that SLAPP-back plaintiffs are effectively silenced. Too often, SLAPP-back litigants are secretly bought off, foreclosing public discourse. Nader and Smith argue, therefore, that the only effective remedy is legislation that deters SLAPP suits.

Besides abuse of procedure targeted directly against plaintiffs, corporate attorneys also avail themselves of licit but underhanded methods to preempt other nuisances to their clients. These include defending the firing of whistle-blowers, forcing unfavorable judges to remove themselves from a case, and harassing plaintiffs' expert witnesses using SLAPP-like threats.

Nader and Smith also condemn firms' (over-) billing practices. Businesses tolerate the "BUTS principle" ("bill until they squawk") only because of a cartel-like pricing front presented by the leading corporate law firms. Nader and Smith identify three main categories of overcharging. First, firms bill for work they never do. For instance, a two-minute phone call is billed as half an hour. Judge-ordered investigations in bankruptcy cases reveal

single lawyers billing as many as twenty-five hours per day to a client.

Second, lawyers bill for unnecessary work. Nader and Smith allege that attorneys draw up unnecessary documents, depose unnecessary witnesses, and bring unnecessary associates to court. Worse, attorneys "advis[e] clients not to accept reasonable settlements so that the case, and the billing, can continue" (p. 239). Even xerox and fax machines are turned into profit centers, as firms apply ridiculous surcharges. Associates are billed out at partner rates, paralegals at associate rates.

Nader and Smith go so far as to allege a "corporate scheme to wreck our justice system" (p. 256). Business executives, corporate attorneys, anti-consumer lobbyists, politicians dependent on corporate campaign funds, conservative "think tanks," and certain special interest groups constitute, collectively, a de facto bloc against a level legal playing field. The authors term these entities "tort deformers." Common "tort deformer" goals include suppressing tort suits, restricting punitive damage awards, raising the hurdles in the way of malpractice claims, promoting arbitration over jury tort resolution, enervating the plaintiffs' bar, and forcing courtroom losers to pay the winners' costs. Nader and Smith argue that all these goals truncate existing rights of ordinary citizens, and insist that lawyers should work instead to expand the rights of private individuals.

The authors fear that the conspiracy of powerful interests to deform the justice system begets a legal "culture of deceit." They bemoan lawyers' flagging professional pride and urge a recommitment to the community through pro bono work. Judges exacerbate the problem when, as in *Balla v. Gambro, Inc.*, 145 Ill. 2d. 492, the Illinois Supreme Court upheld the firing of a whistle-blowing attorney whose intervention likely saved lives (pp. 348–49). The court reasoned that the attorney was legally bound to disclose the information anyway, and was therefore unentitled, on policy grounds, to additional incentives such as court protection.

Nader and Smith try to lead by example. They display a certain courage throughout *No Contest* by naming the firms whose practices they excoriate. Adding insult to injury, they also cite the firms' annual gross revenues and profits per partner, mischievously implying a correlation between ugly practices and a handsome bottom line. They even detail why certain successful defa-

mation suits were decided wrongly, and in so doing they level actionable charges that might expose them to similar suits.

This approach, while laudable, sometimes leads to excess. In their specific complaints against power-attorneys like Lloyd Cutler and Kenneth Starr, there is an ad hominem quality. Cutler's behavior, they assert, impinges "intimately and often adversely [on] the health, safety, and economic well-being of many people here and abroad" (p. 13). Starr "has not only passed Cutler in influence, he also exceeds him in sheer audacity" (p. 320).

More disturbing is the authors' casual presentation of solutions that lack evidence of feasibility or efficacy. To fix problems attendant upon secret settlement talks, they suggest that courts refuse to accept confidential settlements because "[o]penness deters misconduct" (p. 98). The counter-argument that "anti-secrecy legislation will impair the ability of the legal system to resolve disputes—[that] without confidentiality there will be fewer settlements and thus greater court congestion" (pp. 97–98) is rebutted to the authors' satisfaction by the testimony of one San Diego Superior Court Judge, Judith McConnel. Her observation that during a five-year period in which her court applied an anti-secrecy statute, "'We have seen no difference at all in the amount of settlements'" (p. 96) is probative, but alone inconclusive. Furthermore, the authors' assertion that "ending secrecy would ultimately *reduce* the amount of litigation" (emphasis added; p. 98) enjoys no empirical support. Such overstatement reduces the authors' credibility.

Their proposals for eliminating obstruction during the discovery process are unworkable. Nader and Smith recommend that judges impose default judgments on obnoxious obstructionists. Recognizing the complexities of the attorney-client relationship, they advocate working "to strengthen and clarify obligations of parties and their lawyers." (p. 129) Yet in their analysis of particular cases, they condemn practices without identifying the normative standard. The same indeterminacy characterizes the authors' reliance on judicial case-by-case clarification for curing selective document spoliation among attorneys.

Similarly disappointing is the authors' failure to make solid recommendations to curb scandalous corporate law firm billing practices. Beyond the authors' valuable explanations of the ways in which "'hourly billing translates into billing all the client can afford to pay'" (p. 252), their discussion of the pros and cons of alternative billing methods does not yield a conclusion that one

billing system is patently better than any other. For instance, "flat-fee billing" would eliminate perverse incentives for prolonging litigation, but may diminish incentives so much that "'the financial incentive for the flat-flee compensated lawyer is to do less work'" than is ultimately necessary (p. 253). "Value billing," another possibility, "'shifts some of the risk of paying legal fees and expenses from the client to the firm'" (p. 253), but "this kind of reward system raises its own set of ethical concerns—if the real earnings come only with victory, and not simply with responsible, zealous representation, win-at-all-costs tactics may actually increase" (p. 254). Nevertheless, even without identifying a definitively superior billing method, their exercise in consciousness-raising should, in the jargon of the BUTS principle, get people "squawking."

Such consciousness-raising is most effective when the authors bring hard figures to bear to dispel misconceptions ostensibly spread by interests allied with corporate lawyers. For example, the popular view that a flood of tort litigation currently inundates our courts and drowns business is countered by statistics gleaned from the 1994 report of the National Center for State Courts: tort "deformers" complain about the one hundred million lawsuits filed annually in America, yet only two percent of those are tort cases and, of those, less than half are of the type that disturb the "deformers" (pp. 264–65). Moreover, certain kinds of tort litigation have declined markedly in recent years (p. 264).

The authors counter the notion that jurors harbor an anti-business bias by citing data (compiled, inter alia, by the conservative Rand Corporation) about the impressive won-lost record in favor of corporate defendants. In addition, courts award unreasonable damages much less frequently than widely believed. Even in instances of highly publicized excesses, such as that of the woman awarded nearly $3,000,000 after she had spilled hot McDonald's coffee on her lap, the prosaic truth—that such awards are often reduced—attracts much less publicity. In the McDonald's case, the judge reduced the award to $640,000 and, pending appeal, the parties settled out of court, presumably for less than the judge's determination (pp. 266–67).

Furthermore, Nader and Smith note what "tort deformers" conveniently neglected to publicize, namely, that McDonald's sold coffee at a temperature twenty to thirty degrees above industry standard, such that it would cause third-degree burns in

a matter of three seconds. The "deformers" portrayed McDonald's as a victim of the tort system even as McDonald's rejected all attempts to settle out of court. Most importantly, McDonald's now serves its coffee at a safe temperature; that is to say, this much-maligned tort suit succeeded in deterring unreasonable behavior.

As to the myth of an epidemic of medical malpractice suits, Nader and Smith demonstrate that incompetent repeat offenders inflate the statistics. Parrying the argument that contingency fee arrangements encourage frivolous lawsuits, the authors reason that many plaintiffs can afford to bring suit only because of the leveling effect of such arrangements. The authors likewise try to temper the public's enthusiasm for alternative dispute resolution, since corporate defendants often try to impose this "alternative" on plaintiffs in order to avoid facing a jury. They also reason that forcing the loser to pay only places a greater burden on consumers who cannot afford to lose: ceteris paribus, plaintiffs will pay twice as much as corporate defendants for legal fees because the expense is only tax deductible for the latter.

No Contest is most effective as manifesto. It stirs the practicioner's dormant idealism, and often prescribes specific methods to harmonize the practice of law with justice. At times, Nader and Smith overstate their points or arrive at conclusions based on scant evidence or mere assertion. Nevertheless, the work makes a compelling case that the corporate-dominated, client-based model of law begets a casual corruption with a boomerang effect: a profession that ignores the social good undermines its own sense of dignity. In consequence, personal self-respect suffers. Personal malaise will persist as long as cynicism and low morale permeate the lawyerly ranks. Hopefully, self-interest will make a heady incentive for professional reform.

—John P. Carlin
Guy Ruttenberg

BETWEEN HOPE AND HISTORY: MEETING AMERICA'S CHALLENGES FOR THE 21ST CENTURY. By *Bill Clinton*. New York: Times Books, 1996. Pp. xiii, 178. $16.95 cloth.

TO RENEW AMERICA. By *Newt Gingrich*. New York: HarperCollins, 1995. Pp. xii, 260, index. $24.00 cloth.

How can a candidate for high political office today communicate directly with the electorate, circumventing the gatekeepers of television and print media? How can a politician get her message across, free from the cynical glosses of self-appointed pundits? Increasingly, it seems, the answer is: write a book.

In recent presidential elections, both major parties have produced books, ostensibly written by the candidates themselves and produced under the auspices of independent publishing houses. Actually, candidates have quite *literally* circumvented media intermediaries by publishing books—or having favorable books published about them—at least since 1824. That year saw the publication of the first true campaign-oriented biographies, written on behalf of presidential candidates John Quincy Adams, John Calhoun, and Andrew Jackson.[1] In 1853, Nathaniel Hawthorne penned a campaign biography of his friend, candidate Franklin Pierce, for which President Pierce subsequently rewarded Hawthorne with a diplomatic post.[2]

Lately, such books are by-lined by the candidates themselves, perhaps to boost sales and to lend the candidates an aura of learnedness. These works have also become more policy-oriented, and less biographical, although self-references and a popular writing style still convey a strong sense of the candidate's personality. Teddy Roosevelt, in 1912, seems to have been the first candidate-turned-scribe.[3] More contemporary examples of campaign books written in the first person include those by Adlai Stevenson,[4] Richard Nixon,[5] Jimmy Carter,[6] Ronald Reagan,[7] and

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[1] WILLIAM MILES, THE IMAGE MAKERS: A BIBLIOGRAPHY OF AMERICAN PRESIDENTIAL CAMPAIGN BIOGRAPHIES 1–2 (1979).

[2] Andrew Ferguson, *The Sinful Joys of Campaign Books*, FORTUNE, July 8, 1996, at 30.

[3] THEODORE ROOSEVELT, THOU SHALT NOT STEAL (1912).

[4] ADLAI E. STEVENSON, THE NEW AMERICA (1956).

[5] RICHARD M. NIXON, NIXON ON THE ISSUES (1968).

[6] JAMES E. CARTER, WHY NOT THE BEST? (1975).

[7] Strictly speaking, Reagan never did produce his own campaign book describing his personal background and spelling out his vision for America, although for his second campaign his lieutenants compiled some of his writings and speeches and published

George Bush.[8] Bill Clinton teamed up with Al Gore to publish such a work in their first presidential campaign.[9]

In the most recent presidential elections, dueling books by candidates figured prominently once again. Bob Dole decided to separate out his policy proposals from personal commentary; he and running-mate Kemp co-authored a work outlining their policies in exquisite detail,[10] while Dole and wife Elizabeth updated and reissued their joint political biography, originally written for Dole's 1988 primary battle against Bush.[11] Ross Perot released a rather technical reformulation of his familiar themes.[12]

Of the major candidates, only Bill Clinton proffered the usual mixture of policy and autobiography, in his *Between Hope and History*, the title of which punningly alludes to his birth in the small town of Hope, Arkansas. Interestingly, Newt Gingrich's *To Renew America*, published the year before—at a time when Gingrich still contemplated making his own run for the Oval Office—also follows the conventional style of modern campaign works: policy draped in personality.

Another striking similarity between those two books is the headlong rush toward the middle by the authors. Indeed, these works share this as their predominant subtext, and the parallels are striking.[13] If our opening assumption about the campaign book as an end-run around the media is correct, then these artifacts of self-packaging speak, sadly, volumes (no pun in-

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them under autobiographical- and biographical-sounding titles. RONALD REAGAN, IN GOD I TRUST (David R. Shepherd, ed. 1984); RONALD REAGAN, A MAN TRUE TO HIS WORD (James S. Brady, ed. 1984).

[8] GEORGE H.W. BUSH WITH VICTOR GOLD, LOOKING FORWARD (1987); GEORGE BUSH WITH DOUG WEAD, MAN OF INTEGRITY (1988).

[9] BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN CHANGE AMERICA (1992).

[10] BOB DOLE & JACK KEMP, TRUSTING THE PEOPLE: THE DOLE/KEMP PLAN TO FREE THE ECONOMY AND CREATE A BETTER AMERICA, BALANCE THE BUDGET, CUT TAXES 15%, AND RAISE WAGES (1996).

[11] BOB & ELIZABETH DOLE WITH RICHARD NORTON SMITH & KERRY TYMCHUK, UNLIMITED PARTNERS: OUR AMERICAN STORY (1996).

[12] ROSS PEROT & PAUL SIMON, THE DOLLAR CRISIS: A BLUEPRINT TO HELP REBUILD THE AMERICAN DREAM (1996).

[13] The candidate-authored campaign work has made an appearance in the recent British elections for Prime Minister. TONY BLAIR, NEW BRITAIN (1997). Interestingly, it shares the telos of the American works which inspired it, to wit, to portray the candidate in as innocuously centrist a light as possible. A Tory reviewer characterized Blair's work in terms easily applicable to many of the American campaign books of the last several decades: "There are a few arguments, but most of the book is a sort of political Muzak, with vague uplift about making Britain a 'young country'; [and] a succession of four-, five- and six-point programs." John O'Sullivan, *The Man Who Would Be Prime Minister*, WALL ST. J., Apr. 21, 1997, at A20.

tended) about the degradation of American political discourse. In no other aspect of electioneering is Ross Perot's mantra of major party sameness so warranted.

Clinton's book revolves around a trio of virtues with which no one could quarrel: opportunity, responsibility, and community (p. xii). He reinforces these with another trinity of bromides which implies that his mission is less a political campaign than a manichean crusade against darkness: hope versus fear, vision over adversity, and social harmony against polarization (pp. 4–7). Fleshing these out in nebulous policy terms, Clinton discusses his pursuit of opportunity/hope with reference to his Americorps program, his 1993 deficit-slashing budget, and his earned income tax credit (p. 21). Looking ahead, Clinton cites his intention to realize the full potential of NAFTA, to fund education more generously, and to promote such programs as Head Start.

These policies are a melange of left- and right-center. His fence-straddling is ostentatious as he both proposes a new per child tax credit (pp. 25, 31) and new federally funded scholarships (p. 51). How he will simultaneously give parents a tax break for their children yet increase federal spending for their education is unelaborated. A candidate who vows to tax less and spend more cannot be identified exclusively with the right or the left. Clinton is reinventing himself as a new political animal, neither Democratic donkey nor Republican elephant, but rather a chimerical fusion of the two.

In spelling out the policy implications of the second leg of his triad, that of responsibility/vision, Clinton concentrates on his role in welfare reform and his engagement with law-and-order issues. While he advocates the removal of assault weapons from the streets, he is careful to couch this goal in the context of safety for civilians and police officers, in order to preempt NRA counterarguments. He burnishes his credentials as crime fighter by citing his intent to swell the ranks of police, his sponsorship of the Crime Bill, and his intent to push more such measures through Congress (pp. 78, 81). Similarly, Clinton balances his support for environmental protection with provisos about fairness to commercial and industrial interests. Lest conservatives view some of Clinton's responsibility/vision policies with skepticism, the President manages to explain how each will contribute to the downsizing of the federal government.

Moving on to the dyad of community/social harmony, Clinton's prose waxes yet more saccharine. He sees the White House

as a bully pulpit, which licenses him to panegyrize such all-time favorites as family values, religious freedom, shielding kids from TV violence, strength in diversity, and international comity. Clinton side-steps controversy with regard to tobacco as well, when he limits his remarks to a well-worn critique of tobacco advertizing aimed at children.

In a rather telling omission, nowhere does Clinton present himself as an exemplar of the values he champions. This was certainly a wise decision, given his administration's embroilment in nearly weekly scandals of one sort or another. Nevertheless, the reader will appreciate the irony of how Dick Morris—the svengali who strategized Clinton's self-reinvention as the consummate moderate—fell from grace so fantastically at the same time as the book's publication.[14] Clinton's credibility as a preacher from the bully pulpit hardly holds up in the wake of the revelations about Morris, who scripted his sermons.

Gingrich, in his book, is no less eager to grab the middle ground inhabited by the bulk of the middle class. His reputation as a "permanent revolution[ary],"[15] once espoused with such alacrity, is not in evidence. Rather, Gingrich characterizes the present as a new Progressive Era, whose challenges must be met by thorough adaptations in American culture and politics. This advocacy of fundamental change is hardly standard for a conservative, as Dole reminded the electorate in 1996 by urging a return to an erstwhile American golden era.

Like Clinton, Gingrich organizes his narrative around a core of uncontroversial ideals. For Gingrich, these are religious spirituality, individual responsibility, free enterprise, invention, and pragmatism (pp. 33–34). Like Clinton, Gingrich discusses welfare reform under the rubric of responsibility. Gingrich expands the discussion into such areas as volunteering and charity, and he parallels Clinton's line of argument as he ties these notions to the need for solidifying a sense of community. Although Gingrich, unlike Clinton, stresses the advantages of a common

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[14] *Dick Morris Says Arrogance Led to Fall*, BOSTON GLOBE, Nov. 24, 1996, at A20.

[15] This phrase became a veritable nickname for Gingrich after it graced the cover of *The Weekly Standard* along with a caricature of the Speaker swinging from a vine, spraying machine-gun fire. Examples of the use of the phrase can be found in *Why We're for Clinton-Gore*, NEW REPUBLIC, Nov. 11, 1996, at 11, and Nancy Gibbs & Karen Tumulty, *Master of the House*, TIME, Dec. 25, 1995, at 54. The British, less given to hyperbole, paint Gingrich's insurrection slightly less bombastically, i.e., as a "semi-permanent revolution"; see *In the Rear-View Mirror*, ECONOMIST, Nov. 19, 1994, at 12.

American culture over a diversification of popular sensibilities, both men swathe their visions of public order in the rhetoric of social harmony (p. 30).

Predictably, Gingrich plumps for a smaller federal government, but he sugar-coats this bitter pill with a decidedly Clinton-like rationale: to save entitlement programs such as Medicare and Social Security (pp. 9, 95). Also similar to Clinton's treatment of opportunity/hope is Gingrich's discussion of free enterprise and invention, with the concomitant valorizations of education, technological advancement, and tax relief (pp. 7–8, 68).

For Gingrich, the Speaker's rostrum is also a bully pulpit. More stridently than Clinton, Gingrich decries America's putative moral decay (p. 3). But this glimpse of the ardor which made Gingrich the guru of the notorious '94 Republican Freshmen is brief. An unwonted mild manner keeps the edge off the rhetoric in most of the work. Were it not for the handsome color photo of Gingrich gracing the book's cover, the reader probably could not identify the author as a pillar of the Republican Party's conservative wing.

Appropriately enough, the author of *To Renew America* found himself, like the author of *Between Hope and History*, caught preaching from the bully pulpit with his fingers crossed behind his back. Gingrich's improper funneling of monies through charitable foundations and his subsequent prevarications to the House Ethics Committee on this matter make his indignation over America's ethical decline seem rather posed.[16]

Despite the best efforts of the authors to portray themselves and their policies as on par with moms and apple pie in their allure for voters of both parties, one cannot help but read these campaign works in the light of their authors' financial and personal improprieties, revealed just as the campaign ended. "Hypocrite Gingrich and Cynic Clinton," the title of an article by political analyst Bill Schneider, echoes the impression left by these works as real-life literature of the absurd.[17] The engaging

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[16] *See* Rebecca Carr, *Subcommittee Lays Out Details of Gingrich Ethics Violations*, CONG. Q., Jan. 4, 1997, at 13; Jackie Koszczuk, *Embattled Speaker Scrambles to Save Eroding Power Base*, CONG. Q., Jan. 4, 1997, at 7.

[17] William Schneider, *Hypocrite Gingrich and Cynic Clinton*, NAT'L J., Jan. 4, 1997, at 50. Schneider compares the vaunted idealism of Clinton and Gingrich, and how their reputations suffered from their ethics violations. He also notes the like manner in which each resorted to rationalizing, temporizing, and minimizing those violations:

color shots of the authors on both covers warn the reader that these books are as much about style as substance. Moreover, the make-believe quality of this melding of medium and message resonates in the scandals which make the authors' embrace of responsibility, community, and virtue seem so fictive.

Another level of the fiction is the extent to which each author deracinates himself politically, concealing his party affiliation to the degree necessary to co-opt those policies of the other party with universal appeal. Such transparent pandering surely helps account for the low voter turnout in 1996: the lowest since 1932.[18] Indeed, the morphing of the candidates into born-again centrists led many voters to the conclusion that they "'could just flip a coin'" to decide for whom to vote.[19]

Were voters given just these books upon which to base their casting of a ballot, they would be hard-pressed to find meaningful contrasts between the candidates by which to arrive at a decision. The candidate-authored campaign book is not so much a work of disinformation as of simulated information. The condescending and cynical strategy of the works—to persuade voters that the candidate possesses the virtues of both parties and the vices of neither—demeans the democratic process.

Ultimately, the public benefits if its information about candidates is first filtered through the prisms of the columnists and talking heads. Despite the inevitable biases and agendas among media elite, at least the pundits will discern differences and reasons—the objectivity of which the voters can decide—for selecting one candidate over another. The candidates themselves, judging by these books, will not perform this service for the electorate.

—James F. Brennan

> Gingrich's hypocrisy is all the more shocking because he is not a typical politician. He cultivates the image of a true believer who fights for a cause bigger than himself. He was supposed to be nobler and purer . . . . Clinton's public image has a lot of the naughty boy but none of the cynic. Whatever his faults, Clinton has always seemed genuinely concerned about people. There doesn't seem to be an ounce of irony in the man. He cares . . . . Sadly, Clinton and Gingrich are beginning to sound more and more alike. Both are using legalisms to defend themselves. Both [now seem like] shrewd, calculating figures (pp. 51, 53).

[18] *The Presidency*, CONG. Q., Nov. 9, 1996, at 3194.

[19] Paul Starobin, *You're OK! Maybe. The Latest Reading of the Nation's Mood*, NAT'L J., Nov. 2, 1996, at 14.