

COMMENT

The Indecency of Unsolicited Sexually Explicit Email: A Comment on the Protection of Free Speech v. The Protection of Children

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I. INTRODUCTION

The transmission of unsolicited commercial email, also known as spam, has gained popularity as a means for advertising because of its minimal cost to the advertiser. It is estimated that 80.3 trillion unsolicited email messages are sent each year, with an average of 220 million messages sent each day.¹ Approximately three out of ten email messages are spam,² and over 30% of those emails contain sexually explicit material.³ Though the transmission of email may be basically free to the advertiser, costs are imposed both on the Internet Service Providers (ISPs) and on the ultimate recipients of the messages.

Historically, states have attempted to regulate unsolicited email through legislation but have failed because the courts have generally held that these laws violate the dormant Commerce Clause due to the laws' extraterritorial impact.⁴ Consequently, the dormant Commerce Clause has been referred to as "a nuclear bomb of a legal theory"

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1. Calvin Whang, *An Analysis of California's Common and Statutory Law Dealing with Unsolicited Commercial Electronic Mail: An Argument for Revision*, 37 SAN DIEGO L. REV. 1201, 1203 (2000).

2. Michael Pastore, *Email Continues Dominance of Net Apps*, July 25, 2001, at http://www.cyberatlas.Internet.com/big_picture/applications/article/0,1323,1301_808741,00.html (last visited Aug. 13, 2002).

3. David McGuire, *More than 30 Percent of Spam Pornography—Study*, NEWSBYTES NEWS NETWORK, Nov. 2, 1999, available at 1999 WL 20021822.

4. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L. J. 785, 787 (2001).

against state Internet regulations.⁵ However, a recent State Supreme Court decision upholding Washington's spam law, *State v. Heckel*, has defused the "nuclear bomb" with respect to the regulation of unsolicited email in Washington.⁶

The outcome of *Heckel* not only affects future litigation, it also enables the Washington State Legislature to amend the current legislation to eliminate the flow of unsolicited sexually explicit commercial email within Washington State. While there are Washington laws that make it unlawful to sell, distribute, or display erotic (hereafter referred to as "sexually explicit") material to a minor,⁷ there are no laws that proscribe the transmission of this material through email. The current spam law prohibits the transmission of unsolicited email that contains misleading subject headers or transmission paths, but it is silent regarding messages with sexually explicit material.⁸ Thus, while the Washington legislature has expressed an interest in protecting children from harmful material, it has failed to enact laws in an area where the transmission of sexually explicit material is prevalent.⁹

Because the state of Washington has a compelling interest in protecting the moral and psychological welfare of its children,¹⁰ the current spam law should be amended to also proscribe the transmission of unsolicited sexually explicit commercial email within its borders. This article argues that such an amendment would not violate either the dormant Commerce Clause or the First Amendment. In support of this thesis, section II first addresses the pervasive problem of children—not just adults—receiving sexually explicit material via unsolicited email. Then, sections III through V discuss the implications of the dormant Commerce Clause, the First Amendment, and the policy considerations that support elimination of unsolicited sexually explicit email.

5. *Id.*

6. *State v. Heckel*, 143 Wash. 2d 824, 24 P.3d 404 (2001), *cert. denied*, 2001 WL 1117516 (2001).

7. See WASH. REV. CODE § 9.68.060 (2001). "Erotic" has been defined as printed material, photographs, pictures, motion pictures, sound recordings, and other material the dominant theme of which taken as a whole appeals to the prurient interest of minors in sex; which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters or sado-masochistic abuse; and is utterly without redeeming social value.

Id. A minor is any person under the age of eighteen years. See WASH. REV. CODE § 9.68.050 (2001).

8. WASH. REV. CODE § 19.190.020 (2001).

9. See McGuire, *supra* note 3.

10. See *Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

II. THE EXPOSURE OF SEXUALLY EXPLICIT EMAIL TO CHILDREN

In 2000, 54 million households in the United States had at least one computer. Of those households, at least one member of the household was connected to the Internet.¹¹ Moreover, public schools educate children on how to use a computer and access the Internet.¹² Internet access is not exclusive to adults; children have access and are connecting at home.¹³ Nine out of ten children (ages 6 to 17) had access to a computer in 2000; three out of ten use the Internet at home.¹⁴ Of all the applications available, email is the easiest and most common Internet application used at home.¹⁵ Seventy-four percent of the children who are connected to the Internet at home use email.¹⁶

The National Center for Missing and Exploited Children recently surveyed 1,501 young people, ages 10 to 17, who regularly use the Internet.¹⁷ Of those young people, 25% reported being exposed to unwanted sexual pictures in the last year, and 28% of those exposures occurred either while opening email, after clicking a hyperlink in email, or while instant messaging.¹⁸ The content of these messages fell into one of three categories: (1) messages containing nudity; (2) persons engaged in intercourse; or (3) violence in addition to sex and/or nudity.¹⁹ Twenty-three percent of the children who reported exposure incidents stated that they were either very or extremely upset by the content, which amounted to 6% of the total youth interviewed.²⁰

Of the unwanted exposures that occurred through email, 63% came to email addresses used solely by the youth.²¹ Additionally, in 93% of the occurrences, the message was sent from an unknown

11. Michael Pastore, *Computer, Net Access Standard for Many Americans*, Sept. 6, 2001, at http://www.cyberatlas.Internet.com/big_picture/demographics/article/0,1323,5901_879441,00.html (last visited Aug. 13, 2002).

12. "By the fall of 2000, almost all public schools had access to the Internet: 98 percent were connected." Anne Cattagni & Elizabeth Farris, *Internet Access in U.S. Public Schools and Classrooms: 1994-2000*, STATISTICS IN BRIEF (National Center for Education Statistics, Wash., D.C.), May 2001, at 1, available at <http://www.nces.ed.gov/pubs2001/2001071.pdf> (last visited Aug. 13, 2002).

13. Pastore, *supra* note 11.

14. *Id.*

15. *Id.*

16. *Id.*

17. David Finkelhor, Kimberly J. Mitchell & Janis Wolak, *Online Victimization: A Report on the Nation's Youth* (Crimes Against Children Research Center, Durham, N.H.), June 2000, at 9, available at <http://www.missingkids.com/download/nc62.pdf> (last visited Aug. 13, 2002).

18. *Id.* at 26.

19. *Id.* at 27 (94% were of naked persons, 38% showed people having sex, and 8% involved violence, in addition to nudity and/or sex).

20. *Id.* at 29.

21. *Id.* at 27.

source.²² Most of these exposures occurred while the youth was at home, although some reported that they were exposed while using a computer at school or in the library.²³ Only 39% of these incidents were disclosed to parents, and none were reported to a law enforcement agency.²⁴

III. UNSOLICITED EMAIL, THE DORMANT COMMERCE CLAUSE, AND *STATE V. HECKEL*

Congress has the power to regulate commerce with foreign nations and among the several states.²⁵ Implicit in this power is the dormant Commerce Clause principle that prevents states from impermissibly intruding on this exclusive federal power by enacting laws that unduly burden interstate commerce.²⁶ Courts generally follow an analysis known as the *Pike* balancing test for determining whether a state law is unconstitutional because it violates the dormant Commerce Clause.²⁷

The *Pike* test is a two-step process. First, the court determines whether or not the law openly discriminates against out-of-state business interests in favor of intrastate businesses.²⁸ Laws that openly discriminate against out-of-state interests are subject to the strictest scrutiny of the "purported legitimate local purpose and of the absence of nondiscriminatory alternatives."²⁹ Second, if the law applies evenhandedly to both inter- and intra-state businesses (*i.e.*, it is facially neutral), the court then must balance the local benefits provided by the law against the interstate burdens imposed by the law.³⁰ If the law promotes a legitimate state interest, it will be upheld unless the burden on interstate commerce is clearly excessive in relation to the local benefits the law creates.³¹ If the law survives this two-part analysis, the court will next evaluate whether the law leads to inconsistent burdens among the states or regulates extraterritorially.³²

22. *Id.*

23. *Id.* Sixty-seven percent of these unwanted exposures occurred at home, 15% happened at school, and 3% happened in a library.

24. *Id.* at 28.

25. U.S. CONST. art. I, § 8, cl. 3.

26. *See, e.g., Healy v. The Beer Inst.*, 491 U.S. 324, 326 (1989); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87 (1987).

27. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

28. *Heckel*, 143 Wash. 2d at 832, 24 P.3d at 409.

29. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

30. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

31. *Id.*

32. *Healy*, 491 U.S. at 336; *see also Heckel*, 142 Wash. 2d at 838, 24 P.3d at 412.

The dormant Commerce Clause prohibits laws that are inconsistent with or that conflict with other states' laws.³³ The Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory scheme into the jurisdiction of another state.³⁴ Although the meaning of this requirement is generally unclear, it is established that it does not mandate state law uniformity.³⁵

Finally, the dormant Commerce Clause prohibits the "application of state statutes to commerce that takes place wholly outside the State's borders."³⁶ The critical inquiry under the extraterritoriality principle is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."³⁷

In *State v. Heckel*, the Washington Supreme Court held that Washington's Commercial Electronic Mail Act did not violate the dormant Commerce Clause.³⁸ This Act makes it unlawful to transmit to a Washington resident or from a Washington computer commercial email messages containing misrepresentations in either the subject line or the transmission path.³⁹ The statute responds to the concern of unsolicited email messages (spam) that are misleading or fraudulent.⁴⁰

In upholding the statute, the court first recognized that the Act did not discriminate against out-of-state interests in favor of Washington residents.⁴¹ The Act applies equally to both Washington residents and nonresidents.⁴² Thus, because the law does not openly discriminate against out-of-state interests, strict scrutiny does not apply.⁴³

The court next moved to the second part of the dormant Commerce Clause analysis, which is a two-part inquiry: (1) whether Washington has a legitimate purpose for banning this type of email; and (2) whether the burden on interstate commerce is clearly excessive in relation to the local benefits the law creates.⁴⁴ The court first recognized Washington's legitimate purpose in banning fraudulent or misleading

33. *Healy*, 491 U.S. at 336.

34. *Id.* at 337.

35. Goldsmith & Sykes, *supra* note 4, at 790.

36. *Healy*, 491 U.S. at 336.

37. *Id.*

38. *Heckel*, 143 Wash. 2d at 833, 24 P.3d at 409.

39. WASH. REV. CODE § 19.190.020 (2001).

40. Final Bill Report, ESHB 2752, 106th Cong. (1998), available at http://www.leg.wa.gov/pub/billinfo/1997-98/house/2750-2774/2752-s_fbr_040698.txt (last visited August 28, 2002).

41. *Heckel*, 143 Wash. 2d at 833, 24 P.3d at 409.

42. WASH. REV. CODE § 19.190.020; *see also Heckel*, 143 Wash. 2d at 833, 24 P.3d at 409.

43. *See Hughes*, 441 U.S. at 337.

44. *Heckel*, 143 Wash. 2d at 832-33, 24 P.3d at 409.

messages to alleviate the cost shifting inherent in the sending of deceptive spam.⁴⁵

The state has a legitimate purpose in protecting the interests of ISPs, owners of forged names, and email users. ISPs incur additional costs attributable to spam because they have to purchase additional computer equipment to handle the increased flow.⁴⁶ Additionally, more personnel need to be hired to handle the complaints about the spam as well as to detect accounts being used to send out spam.⁴⁷ Furthermore, individual users are unable to distinguish spam from legitimate personal or business messages, forcing them to spend valuable time weeding out the wanted from the unwanted. These efforts take time and cause frustration.⁴⁸ "All internet users bear the cost of deceptive spam."⁴⁹

After finding that Washington has a legitimate purpose for banning fraudulent or misleading messages, the court applied the balancing test: if the burden imposed on interstate commerce clearly exceeds the local benefits created by the law, the law is unconstitutional.⁵⁰ The effectiveness of the law to create a local benefit must be assessed before it can be weighed against the burden imposed on interstate commerce.⁵¹ If the Commercial Electronic Mail Act does not effectively redress the problem associated with fraudulent or misleading spam, then it would run afoul of the dormant Commerce Clause because there would be no justification for burdening interstate commerce.⁵²

The court held that the Act effectively protected ISPs and consumers from the problems associated with spam for two reasons. First, requiring truthful subject headers makes spamming less appealing to many spammers who send fraudulent messages, and will, therefore, reduce the volume of spam sent into Washington.⁵³ Second, the ability to identify spam, without reading the content of commercial spam alone, would enable a recipient to delete the message without opening it and thereby avoid offensive content.⁵⁴

Balancing these benefits against the burden the Act imposes on out-of-state spammers, the court held that the burden imposed on in-

45. *Id.* at 836, 24 P.3d at 411.

46. *Id.* at 834, 24 P.3d at 410.

47. *Id.*

48. *Id.* at 835, 24 P.3d at 410.

49. *Heckel*, 143 Wash. 2d at 835, 24 P.3d at 410.

50. *Id.* at 833, 24 P.3d at 410.

51. *Id.* at 836, 24 P.3d at 411.

52. *Id.*

53. *Id.*

54. *Id.* at 836-37, 24 P.3d at 411.

terstate commerce did not exceed the local benefits.⁵⁵ The only burden that the Act places on spammers is to require them to be truthful.⁵⁶ Spammers only incur costs for noncompliance with the Act.⁵⁷ If spammers choose to send deceptive spam, they must filter out email addresses belonging to Washington residents; otherwise, there are no costs associated with complying with the Act.⁵⁸ The filtering requirement would be considered a burden only if the statute had completely banned the transmission of all unsolicited email to Washington residents.⁵⁹

The court also addressed the issues of inconsistency and extraterritoriality. With respect to the inconsistency of laws analysis, the court noted that seventeen other states at the time of the ruling had passed legislation to regulate unsolicited email.⁶⁰ Although no other state had a truthfulness requirement similar to Washington's, the Act did not conflict with the requirements of any other states' laws. It is improbable that any state would pass a law that would require the use of misleading subject lines or transmission paths.⁶¹

Further, although some states may impose additional obligations, such as requiring subject lines to contain "ADV" or "ADV-ADLT,"⁶² these will not be inconsistent for purposes of the dormant Commerce Clause analysis.⁶³ The question is not whether different anti-spam laws exist in other states, but whether those differences create compliance costs that are "clearly excessive in relation to the putative local benefits."⁶⁴ In this case, the different anti-spam laws did not impose extraordinary costs on the transmission of commercial spam.⁶⁵

Finally, the court held that the Act did not violate the extraterritoriality principle of the dormant Commerce Clause because there was no sweeping effect that outweighed the local benefits of the Act.⁶⁶ The Act only targets the conduct of spammers who send email to

55. *Heckel*, 143 Wash. 2d at 836-37, 24 P.3d at 411.

56. *Id.* at 836, 24 P.3d at 411.

57. *Id.*

58. *Id.* at 836-37, 24 P.3d at 411.

59. *Id.* at 837, 24 P.3d at 411.

60. *Heckel*, 143 Wash. 2d at 838, 24 P.3d at 411.

61. *See id.*

62. *Ferguson v. Friendfinders, Inc.*, 94 Cal. App. 4th 1255, 1258 (2002). ADV indicates that the message is an advertisement, and ADV-ADLT indicates that the advertisement pertains to adult material.

63. *Heckel*, 143 Wash. 2d at 838, 24 P.3d at 412.

64. *Id.*

65. *Id.*

66. *Id.* at 839, 24 P.3d at 412.

Washington residents; it does not regulate messages opened out of the state.⁶⁷

A. *Proscription of Unsolicited Sexually Explicit Email in Washington*

Washington's Commercial Electronic Mail Act could be, and should be, amended to proscribe all unsolicited sexually explicit email sent into Washington State in such a way as to not violate the dormant Commerce Clause. This proposed law would make it unlawful to initiate, conspire with another to initiate, or assist in the transmission of an unsolicited commercial email message that contains sexually explicit material if that transmission either comes from a computer located in Washington or is sent to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident.⁶⁸

The analysis employed by the court in *Heckel* is applicable by analogy to this proposed amendment. The proposed amendment does not discriminate against out-of-state residents. Because the new law would apply evenhandedly to both Washington residents and non-residents, the *Pike* balancing test, and not strict scrutiny, would apply.⁶⁹

1. Legitimate State Interest

The *Pike* balancing test first requires that the state have a legitimate local public interest.⁷⁰ In this case, Washington has a substantial legitimate interest in protecting the moral and psychological welfare of its children.⁷¹ Additionally, the State has an interest in creating laws that promote and support the right of parents to raise their children as they see fit.⁷² "The custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder."⁷³ This proposed amendment would prevent the transmission of unsolicited sexually explicit images to children and enable parents to have more control over their children's reading material.⁷⁴

Further, the proposed law would effectively redress the problem of children's exposure to sexually explicit material. As discussed pre-

67. *Id.*

68. *Cf.* WASH. REV. CODE § 19.190.020; WASH. REV. CODE §§ 9.68.050–.060 (2002).

69. *See Pike*, 397 U.S. at 142.

70. *Id.*

71. *Ginsberg*, 390 U.S. at 636.

72. *Id.* at 639.

73. *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

74. *See Ginsberg*, 390 U.S. at 639.

viously, three out of ten email messages are unsolicited, and more than 30% of all unsolicited email contains sexually explicit material.⁷⁵ It is not only adults who have email addresses; children have them too.⁷⁶ By proscribing the transmission of these unsolicited messages into Washington, the risk of unwanted exposure to children would be significantly reduced.

2. Burden on Interstate Commerce

The second part of the dormant Commerce Clause analysis requires a finding that the burden imposed on interstate commerce does not outweigh the benefits of proscribing unsolicited sexually explicit email.⁷⁷ Under this proposed law, spammers would be required to filter out Washington residents when sending unsolicited commercial email with sexually explicit content.⁷⁸ Like the costs imposed by the Commercial Email Act, under the proposed law spammers would only incur costs for noncompliance.⁷⁹ Spammers need only filter out Washington residents if they send messages with sexually explicit content.⁸⁰ Further, the filtering requirement would not be considered a burden because the proposed legislation does not prohibit the transmission of all unsolicited email; it prohibits only those messages containing sexually explicit material.⁸¹

3. Inconsistency and Extraterritoriality

Proscribing the transmission of unsolicited sexually explicit email would not violate the inconsistency or the extraterritoriality principles of the dormant Commerce Clause. Currently, only one other state, West Virginia, prohibits the transmission of sexually explicit email.⁸² West Virginia prohibits the unsolicited transmission of sexually explicit email to a West Virginia resident.⁸³ Because the terms of Washington's statute do not facially conflict with the proposed law, and be-

75. Pastore, *supra* note 2; McGuire, *supra* note 3.

76. *Spamming: The Email You Want to Can: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection*, 106th Cong. (1st Sess. 1999) (statement of Hon. Heather Wilson, Member, U.S. House of Rep.).

77. *Pike*, 397 U.S. at 142.

78. *Cf.* WASH. REV. CODE § 19.190.020(2) (2000) (providing that a person "knows" that he or she intended a recipient of a commercial electronic mail message to be a Washington resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address).

79. *Cf. Heckel*, 143 Wash. 2d at 836, 24 P.3d at 411.

80. *Cf. id.* at 836-37, 24 P.3d at 411.

81. *Cf. id.* at 837, 24 P.3d at 411.

82. W. VA. CODE § 46A-6G-2 (1999), State of West Virginia, available at <http://www.spamlaws.com/state/wv.html> (last visited Aug. 13, 2002).

83. W. VA. CODE § 46A-6G-2 (1999).

cause West Virginia is the only other state to proscribe these messages, there would be no inconsistency among the laws of the states.⁸⁴ Further, it is very unlikely that states would require the transmission of unsolicited sexually explicit email, so there is no appreciable concern of future conflict.⁸⁵

Finally, the proposed amendment would not violate the extraterritoriality principle of the dormant Commerce Clause. Like the current Commercial Electronic Mail Act, there is no sweeping effect that would outweigh the local benefits of the proposed law.⁸⁶ It only targets the conduct of spammers who send email to Washington residents.⁸⁷

IV. FIRST AMENDMENT PROTECTION OF SEXUALLY EXPLICIT MATERIAL

States are not permitted to make laws that impermissibly abridge free speech.⁸⁸ When assessing the constitutionality of a regulation, courts will consider whether the statute is a content-neutral or a content-based regulation.⁸⁹

Content-neutral statutes are defined as such because of the secondary effects of the material, rather than because of the impact of the content on the reader.⁹⁰ Legitimate secondary effects include prevention of crime, maintenance of property values, and the protection of residential neighborhoods.⁹¹ If a statute is content-neutral, it need only serve a substantial governmental interest and allow for reasonable alternative avenues of communication to be upheld as constitutional.⁹² However, this lower standard of review is not afforded to content-based regulations that target the effects of protected speech.⁹³

Regulations that are imposed because of the harmful effect the content will have on minors are considered to be content-based regulations.⁹⁴ Although content-based regulations are presumptively unconstitutional and subject to strict scrutiny review,⁹⁵ a finding that a stat-

84. *Cf. Heckel*, 143 Wash. 2d at 838, 24 P.3d at 412.

85. *Id.*

86. *Id.* at 839, 24 P.3d at 412.

87. *Id.* at 838, 24 P.3d at 412.

88. U.S. CONST. art. I, § 5.

89. *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996).

90. *Id.*

91. *Id.* at 385.

92. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50 (1986).

93. *See United States v. Playboy*, 529 U.S. 803, 816 (2000).

94. *Id.*

95. *Crawford*, 96 F.3d at 385; *see Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

ute is content-based does not foreclose the possibility that it is constitutional.⁹⁶

A statute will pass constitutional muster if it serves a compelling state interest and is the least restrictive means to further that interest.⁹⁷ The scope of the statute must be narrow in order to prevent unnecessary burdens on free speech.⁹⁸ If a less restrictive alternative exists, then the statute is unconstitutional.⁹⁹ However, the less "restrictive alternative must be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."¹⁰⁰

Finally, a statute that is either overbroad or vague will also violate the First Amendment.¹⁰¹ A statute is overbroad if it not only bans speech unprotected by the Constitution, but also bans speech protected by the First Amendment.¹⁰² A statute is vague if the definition of what constitutes forbidden speech is so clearly undefined that a reasonable person would have to guess at its meaning.¹⁰³

The courts have recognized a compelling interest in protecting the physical and psychological well-being of minors.¹⁰⁴ This interest includes shielding minors from the influence of material that is not obscene by adult standards.¹⁰⁵ While the First Amendment does not constitutionally protect speech that is considered to be obscene,¹⁰⁶ sexually explicit, or indecent, speech that is not obscene to adults but is obscene to minors is protected by the Constitution.¹⁰⁷

A. Cases Where State Regulations Have Been Found Constitutional

In *Ginsberg v. New York*, the United States Supreme Court upheld a New York criminal obscenity statute that made it unlawful to sell material to minors (under age 17) that was obscene to minors but not necessarily obscene to adults.¹⁰⁸ The statute under examination, and upheld as constitutional in *Ginsberg*, defined material as obscene to minors if it:

96. *Crawford*, 96 F.3d at 385.

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

98. *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

99. *Id.* at 874.

100. *Id.*

101. *Id.* at 870, 877.

102. *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

103. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

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

105. *Ginsberg*, 390 U.S. at 636; *Sable*, 492 U.S. at 126.

106. *Ginsberg*, 390 U.S. at 636.

107. *See id.* at 637.

108. *Id.* at 632.

(1) appeals to the prurient, shameful or morbid interest of minors; (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (3) is utterly without redeeming social importance for minors.¹⁰⁹

While the United States Constitution may protect material intended for adult distribution, it does not necessarily protect restrictions placed on the dissemination to minors.¹¹⁰ In *Ginsberg*, the defendant owned and operated a lunch counter at which he sold magazines containing pictures of female nudity, or "girlie" magazines.¹¹¹ The defendant was charged and found guilty of violating the statute when he sold two of these girlie magazines to a 16-year-old boy.¹¹² Applying strict scrutiny analysis, the Court first determined that the statute was not overly broad because businesses may continue to stock the magazines and sell them to adults.¹¹³

The Court held that the state has a compelling interest in preventing the distribution of material to minors that is not obscene to adults, but that is obscene to them.¹¹⁴ Two interests support this regulation.¹¹⁵ First, a parent's right to choose how to raise children is paramount in our society, and that right should be free from state involvement.¹¹⁶ However, states may enact laws that do not impose a moral standard on children, but instead support the right of parents to decide what their children read.¹¹⁷ In *Ginsberg*, the New York statute did not prevent parents from purchasing the magazines for their children.¹¹⁸

Second, states have an interest in safeguarding minors from abuses that would hinder their development into independent and well-developed adults.¹¹⁹ Because parents cannot control or provide guidance to their children twenty-four hours a day, the state also has an independent interest in the well-being of children.¹²⁰

In a similar case addressing the regulation of material obscene to children but not to adults, the Ninth Circuit Court of Appeals, in

109. *Id.* at 632-33.

110. *Id.* at 636.

111. *Id.* at 632.

112. *Ginsberg*, 390 U.S. at 632.

113. *Id.* at 634.

114. *Id.* at 636.

115. *Id.* at 639.

116. *Id.*

117. *Id.*

118. 390 U.S. at 639.

119. *Id.*

120. *Id.* at 640.

Crawford v. Lungren, upheld a California statute that banned the sale of "harmful matter" in unsupervised sidewalk vending machines.¹²¹ California's definition of "harmful matter" mirrored that put forth by the statute in *Ginsberg*.¹²² Applying strict scrutiny analysis, the court first recognized that states have a compelling interest in safeguarding the physical and psychological welfare of children.¹²³

A compelling state interest alone is insufficient; the state must also use the least restrictive means for achieving that interest.¹²⁴ Suggesting that the state did not use the least restrictive means, the plaintiff in *Crawford* proposed two possible alternatives for protecting minors: warning labels and geographic restrictions.¹²⁵ However, the court found neither alternative to be effective.¹²⁶ Warning labels placed on material that would alert the buyer that it contained material obscene to minors might deter some minors, but would not deter (and may even attract) the bulk of them.¹²⁷ A minor who purchases material from an unsupervised public vending machine is anonymous.¹²⁸ The hypothesis that a minor will heed the warning is an assumption the court was not willing to accept.¹²⁹

The suggestion of geographic restrictions prohibiting placement of these machines near schools or in neighborhoods was also unpersuasive.¹³⁰ The effectiveness of this type of restriction relies on the assumption that minors stay within the confines of school grounds and homes. However, children are mobile—"the assumption that children are only to be found around schools or at home is ludicrous in today's society."¹³¹ Moreover, material located away from school zones and neighborhoods is even more attractive to minors who want to avoid detection.¹³²

121. 96 F.3d at 383.

122. *Id.* Moreover, California Penal Code § 313(a) defines harmful matter as "matter taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

123. *Id.* at 386.

124. *Id.* at 387.

125. *Id.*

126. *Crawford*, 96 F.3d at 387.

127. *Id.* at 388 ("Although the state presented no evidence to that effect, we hardly think that evidence is required.")

128. *Id.*

129. *Id.* ("It borders on absurd to say that a youngster would be deterred by an announcement which said something like [This publication] is highly explicit and is intended for adults for the age of 21 only.")

130. *Id.*

131. *Crawford*, 96 F.3d at 388.

132. *See id.*

Finally, the statute was not too prohibitively invasive of any adults' interest in obtaining the material.¹³³ Adults could obtain the material from alternate sources and in alternate ways.¹³⁴ Vendors are still able to distribute publications on the streets through other distributors.¹³⁵

B. Cases Where Regulations Have Been Found Unconstitutional

Recent case law suggests that courts are very demanding when states attempt to regulate speech that is otherwise protected by the Constitution. For example, in *Reno v. ACLU*, the Supreme Court struck down the Communications Decency Act (CDA), a federal statute that made it unlawful to knowingly transmit indecent or patently offensive messages to any recipient under the age of 18. The Court held that the CDA was an unconstitutional abridgment of the freedom of speech.¹³⁶ The messages covered under the CDA included all telecommunications made via the Internet (*e.g.*, email, mail exploders, newsgroups, chat rooms, and instant messages).¹³⁷ Under the statute, a sender was criminally liable for messages sent regardless of whether he or she placed the call or initiated the communication.¹³⁸ A violation was punishable by a fine and/or imprisonment not to exceed two years.¹³⁹ The statute also provided for two affirmative defenses, one covering those who acted in good faith to restrict access by minors and the other covering those who attempted to restrict access by requiring proof of age.¹⁴⁰

The CDA was a content-based regulation that failed strict scrutiny review because it was overly broad.¹⁴¹ In its efforts to deny minors access to indecent material, the CDA effectively suppressed a "large amount of speech that adults have a constitutional right to receive."¹⁴² The only way to escape liability under the CDA was to completely refrain from using indecent speech on the Internet,¹⁴³ effectively reducing the level of material on the Internet to that which is

133. *Id.* at 388.

134. *Id.* at 387.

135. *Id.* at 388 ("If merchants . . . do not wish to carry these materials, that is no fault or business of the State.")

136. *Reno* struck down 47 U.S.C. § 223(a), which prohibited the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. 521 U.S. 844, 864 (1997).

137. *See id.* at 876.

138. *Id.* at 859.

139. *Id.* at 860.

140. *Id.* at 869.

141. *Reno*, 521 U.S. at 874.

142. *Id.*

143. *Id.* at 891.

only suitable for a child.¹⁴⁴ Furthermore, the New York statute at issue in *Ginsberg* permitted parents to purchase the materials for their children if they so desired, but the CDA had no such provision.¹⁴⁵ Under the CDA, neither parental consent nor participation would have prevented application of the statute.¹⁴⁶

The *Reno* Court also criticized the CDA for not limiting the prohibition to just commercial speech or commercial entities.¹⁴⁷ Commercial speech generally receives less protection under the First Amendment than other forms of constitutionally protected speech.¹⁴⁸ Unlike the statute in *Ginsberg*, the CDA criminalized all “nonprofit entities and individuals posting indecent messages or displaying them on their computers in the presence of minors.”¹⁴⁹

The Court also found it problematic that the CDA criminalized messages sent to those who were close to reaching majority.¹⁵⁰ The CDA applied to minors age 18 and younger, but the statute at issue in *Ginsberg* only applied to minors age 17 and younger.¹⁵¹

The CDA also failed strict scrutiny review because its definition of harmful material was vague. In *Ginsberg*, the New York statute defined “harmful matter” as material that had no redeeming social importance for minors; in the CDA, this limitation did not exist, and the Act failed to define the term “indecent.”¹⁵² Consequently, the CDA effectively banned nonpornographic material as well as material with educational or some other value.¹⁵³

Finally, the Court invalidated the CDA because it lacked the sufficient narrow precision needed to survive strict scrutiny review.¹⁵⁴ The burden placed on adult speech is acceptable only if there are no other less restrictive alternatives that would achieve the state’s compelling interest.¹⁵⁵ The CDA had a chilling effect on speech that would otherwise receive constitutional protection.¹⁵⁶ There were no effective means to determine the age of a user, and it would be prohibitively

144. *Id.* at 875.

145. *Id.* at 865.

146. *Id.*

147. *Reno*, 521 U.S. at 865.

148. *Cent. Hudson Gas v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563 (1980).

149. *Id.*

150. *Reno*, 521 U.S. at 865.

151. *Id.*

152. *Id.* “The CDA fails to provide us with any definition of the term ‘indecent’ . . . and, importantly, omits any requirement that the ‘patently offensive’ material covered by § 223(d) lack serious literary, artistic, political, or scientific value.” *See id.*

153. *Id.* at 877.

154. *Id.*

155. *Reno*, 521 U.S. at 874.

156. *Id.*

expensive to require commercial and noncommercial users to implement an age verification system.¹⁵⁷ Further, despite its limitations and availability, software would soon be available that would enable parents to prevent their children from accessing sexually explicit material.¹⁵⁸

In another recent decision by the Supreme Court, *United States v. Playboy Entertainment*, the Court struck down the Telecommunications Act's "signal bleed" provision, section 505.¹⁵⁹ Under section 505, cable operators had the option of either "scrambling a sexually explicit channel in full or of limiting the channel's programming to the period between 10 p.m. and 6 a.m."¹⁶⁰ Because the scrambling technology of programming is not perfect, discernable pictures may sometimes appear on the scrambled screen, which is referred to as signal bleed.¹⁶¹ The purpose of section 505 was to protect minors from hearing or seeing images resulting from signal bleed.¹⁶² However, the only reasonable way to comply with section 505 was to limit programming within specified time limits.¹⁶³ Thus, for two-thirds of the day no household in the service area could receive the programming, regardless of the presence of children and irrespective of the wishes of viewers.¹⁶⁴

The signal bleed provision was a content-based regulation that failed strict scrutiny review.¹⁶⁵ The regulation may not have imposed a complete prohibition, but it did impose a significant burden on adult programming.¹⁶⁶ "The distinction between laws burdening and laws

157. *Id.* at 876–77.

158. *Id.* at 877.

159. 529 U.S. 803, 806 (2000).

160. *Playboy*, 529 U.S. at 808.

161. *See id.* at 807.

162. *Id.* at 808.

Analog cable television systems may use either 'RF' or 'baseband' scrambling systems, which may not prevent signal bleed, so discernable pictures may appear from time to time on the scrambled screen The problem is that at present it appears not to be economical to convert simpler RF or baseband scrambling systems to alternative scrambling technologies on a systemwide scale.

Id. at 807–808.

163. *Id.* at 812.

164. *Id.* "[Thirty] to 50% of all adult programming is viewed by households prior to 10 p.m., when safe-harbor period begins." *Id.*

165. *Id.* at 811. "Section 505 applies only to channels primarily dedicated to 'sexually explicit adult programming or other programming that is indecent.' The statute is unconcerned with signal bleed from any other channels." *Id.*

166. *Playboy*, 529 U.S. at 812.

banning speech is but a matter of degree.”¹⁶⁷ Content-based regulations are subject to the same rigorous review as content-based bans.¹⁶⁸

The Government had a compelling interest in regulating the transmission of unwanted, indecent speech into homes without parental consent, but the signal bleed provision violated the First Amendment because there was a less restrictive means available to accomplish the Government’s goal.¹⁶⁹ For example, section 504 of the Telecommunications Act, the “opt out” provision, required cable operators to block channels, free of charge, to individual households upon request.¹⁷⁰ This option was less restrictive of constitutionally protected free speech than the signal bleed provision.¹⁷¹ Moreover, section 504 best supported the Government’s goal in supporting parents’ desires to shield their children from possible exposure to sexually explicit material.¹⁷²

When there exists a less restrictive alternative to a content-based speech restriction, the Government has the obligation to prove that the alternative will be ineffective in achieving its goals.¹⁷³ In this case, the Government submitted evidence indicating that, while section 504 was available, only a fraction of consumers used it, and was thus ineffective.¹⁷⁴ However, even if an alternative appears to be ineffective, the Government still must “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁷⁵

In *Playboy*, there was insufficient evidence to prove that signal bleed was a pervasive, widespread serious problem.¹⁷⁶ The Government made generalizations concerning the potential of exposure, but the true nature and extent of the risk of actual exposure were not articulated.¹⁷⁷ For example, no survey-type evidence was submitted that

167. *Id.*

168. *Id.*

169. *See id.* at 814. “[E]ven where the speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.” *Id.*

170. 47 U.S.C. § 560 (1994 ed., Supp. III); *Playboy*, 529 U.S. at 809 (stating “upon request by a cable service subscriber without charge, to fully scramble or otherwise fully block any channel the subscriber does not wish to receive.”).

171. *Playboy*, 529 U.S. at 809.

172. *See id.* at 816.

173. *Id.*

174. *Id.*

175. *Edenfield v. Fane*, 507 U.S. 761, 770–771 (1993).

176. *Playboy*, 529 U.S. at 822. “If the number of children transfixed by even flickering pornographic television images in fact reached into the millions we . . . would have expected to be directed to more than a handful of complaints.” *Id.*

177. *Id.*

would show the likelihood of exposure to a child.¹⁷⁸ Additionally, there was no evidence that illustrated the duration of the bleed or the quality of the pictures or sound.¹⁷⁹

The question of whether individual blocking under section 504 was an effective alternative versus whether signal bleed was a serious, pervasive problem was a tie at best.¹⁸⁰ And, a tie is resolved in favor of free speech.¹⁸¹

C. Regulation of Indecent Speech in the State of Washington

Washington can, and should, proscribe the transmission of unsolicited commercial pornographic email to Washington residents. *Ginsberg* recognizes the power of the state to adjust the definition of obscenity based on its harmful effects on minors.¹⁸² The free speech provision of the Washington State Constitution does not give greater protection to obscenity than the protection afforded by the First Amendment.¹⁸³ Therefore, an independent state constitutional analysis is not required with respect to obscenity cases heard in Washington.¹⁸⁴

A Washington law regulating material obscene to minors would be subject to the same First Amendment analysis that is applied to federal laws.¹⁸⁵ The courts will not uphold the proposed regulation if it violates the First Amendment.¹⁸⁶ Because this proposed ban is premised on the harmful effect on minors, it would likely be characterized as a content-based regulation and subject to strict scrutiny review.¹⁸⁷ Thus, the proposed amended law must support a compelling state interest that employs a narrow means for achieving that interest, and the problem it seeks to remedy must be pervasive and not speculative.¹⁸⁸ Finally, the language of the statute must not be overly broad or vague.¹⁸⁹

178. *Id.* at 819.

179. *Id.*

180. *Id.*

181. *Id.*

182. 390 U.S. at 638.

183. *State v. Reece*, 110 Wash. 2d 766, 776, 757 P.2d 947, 953 (1988).

184. *Id.*

185. *Id.* at 776, 757 P.2d at 953.

186. *See Sable*, 492 U.S. at 126.

187. *See supra* notes 94–103 and accompanying text.

188. *See Reno*, 521 U.S. at 871, 877; *see also Playboy*, 529 U.S. at 813.

189. *See Reno*, 521 U.S. at 871, 877; *see also Playboy*, 529 U.S. at 813.

1. Compelling Interest

The purpose of the proposed legislation is to protect minors from unwanted exposure to sexually explicit unsolicited email. The courts are unanimous in recognizing the protection of minors as a compelling reason, even though the statute may have failed for other reasons.¹⁹⁰ Therefore, the proposed legislation is supported by a compelling state interest: the protection of the psychological welfare of children.¹⁹¹

2. Least Restrictive Means

A complete ban of sending unsolicited email with sexually explicit content is the least restrictive means for protecting the moral and psychological welfare of children. An email address can be completely anonymous and the sender has no way of knowing the age or gender of the recipient.¹⁹² Admittedly, the supervision of a child's reading material is best left to the parents.¹⁹³ However, there is justification for state regulation. Over 28 million school age children have either both of their parents, or their only parent, in the work force.¹⁹⁴ And, each week, at least 5 million children are left alone at home without supervision.¹⁹⁵ Because parents cannot provide guidance and control twenty-four hours a day, seven days a week, society's interest in protecting the welfare of children justifies regulation.¹⁹⁶

A complete ban is the least restrictive and only effective means for supporting this interest. For example, email messages could be "flagged" as containing sexually explicit material by inserting warnings into the subject headers that would notify the recipient of the nature of the content; however, these warnings would only be effective as long as the minor heeded the warning.¹⁹⁷ Furthermore, warning labels may have the reverse effect and attract young curious eyes.¹⁹⁸

Filtering devices would also not be effective means for protecting minors. While it is true that most email service providers offer the option of filtering the amount of spam that a person receives, these provisions are not only ineffective,¹⁹⁹ but also require affirmative steps

190. See, e.g., *Ginsberg*, 390 U.S. at 636; *Reno*, 521 U.S. at 865.

191. See *Ginsberg*, 390 U.S. at 637.

192. See *Reno*, 521 U.S. at 876.

193. See *Ginsberg*, 390 U.S. at 640.

194. *Playboy*, 529 U.S. at 842 (Breyer, J., dissenting).

195. *Id.*

196. *Ginsberg*, 390 U.S. at 640.

197. See *Crawford*, 96 F.3d at 388.

198. *Id.*

199. Jim Rossman, *Spammers Get Around Junk Email Filters*, THE DALLAS MORNING NEWS, Oct. 11, 2001, at 3D.

by the owner of the address.²⁰⁰ The presumption that a minor would enable such a filter is no more persuasive than the argument that a minor would heed a warning label.²⁰¹

Arguably, parents would be responsible for ensuring that filters were enabled on their child's email account.²⁰² But accessing email is not a medium of communication where only a few of the most enterprising and disobedient young people can break through some sophisticated electronic system designed to exclude them.²⁰³ Increasingly, children are being encouraged to learn how to navigate on the Internet.²⁰⁴ Children are able to set up email accounts without their parent's knowledge. Email accounts such as those provided by Hotmail and Yahoo! can be set up free of charge, without age verification or parental consent. The ease with which children may obtain access to email, coupled with the concerns of protecting the moral and psychological welfare of children, justify the proscription of indecent unsolicited commercial email.²⁰⁵

This provision is distinguishable from the regulation struck down in *Playboy* for not being the least restrictive, effective means available to meet the Government's purpose.²⁰⁶ In *Playboy*, the Court based its decision on the fact that the Government had failed to prove the existence of a pervasive problem.²⁰⁷ However, in this case, there is ample evidence of a pervasive and serious problem. Thus, an opt-out provision would not be an effective alternative for three reasons. First, an opt-out provision in this case would still require the recipient to view the message before transmitting a reply message regarding their desire to not receive additional messages. Many parents would object to exposing their children to messages containing "teaser" images that invite the recipient to visit an adult site on the Web.²⁰⁸ Second, like the warning labels, there is no assurance that minors will heed the opt-out provision.

200. Cynthia Flash, *Valid Need for 8-Year-Old to Have Email Leads to Garbage Heap of Junk*, THE SEATTLE TIMES, February 16, 2002, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=phtml16&date=20020216&query=gabage+heap> (last visited Aug. 13, 2002).

201. See *Crawford*, 96 F.3d at 388.

202. See *Ginsberg*, 390 U.S. at 640.

203. See *Sable*, 492 U.S. at 130.

204. Cattagni & Farris, *supra* note 12, at 1.

205. Cf. *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (finding indecent broadcast material should be treated different due to ease of which children may obtain access to it).

206. See *Playboy*, 529 U.S. at 826.

207. *Id.* at 821.

208. *Hearings*, *supra* note 76.

Finally, an opt-out provision would only prevent the transmission of sexually explicit material from one sender, not all senders.²⁰⁹ Unlike the opt-out provision in *Playboy*, which would prevent the cable TV provider from providing programming to a particular household after a single phone call from the consumer, an opt-out provision in this context would result in many email messages still being sent to a recipient even after opting out.²¹⁰ Under an opt-out provision in this case, the recipient would have the burden of first viewing the objectionable material and then sending individual response messages to request removal. *Playboy* dealt with a single source sent to a known household; unsolicited email, in contrast, originates from many different sources and is directed at an unknown recipient.²¹¹

3. Pervasive Problem

Even if a court accepts that the alternative restrictions may not be effective, the court may still invalidate the regulation if there is no evidence of a pervasive problem.²¹² The statute in *Playboy* addressed material transmitted (via cable TV) to some homes where it is not wanted and where parents often are not present to give immediate guidance.²¹³ Yet, the Court found that even though the submitted alternative restriction may not be effective, the Government failed to prove that a significant and pervasive problem existed.²¹⁴ However, in this case, there is evidence to support the claim of a pervasive problem.

As discussed in section II of this article, there is statistical data proving that children are being exposed to sexually explicit material. Children as young as seven years old are receiving unsolicited sexually explicit email.²¹⁵ In this case, there is no speculation; rather, there is quantifiable evidence. Further, parents are complaining.²¹⁶ And, even though this data is not *per se* collected from Washington State alone, the existence of a national problem is sufficient to support regulation of a local nature.²¹⁷

209. *Id.*

210. *See Playboy*, 529 U.S. at 826.

211. *Hearings*, *supra* note 76 ("Many senders of unsolicited commercial electronic mail collect or harvest electronic mail addresses of potential recipients without the knowledge of those recipients.").

212. *See Playboy*, 529 U.S. at 826. "[A] tie goes to free expression." *Id.* at 819.

213. *Id.* at 813.

214. *See id.* at 819.

215. *7 Year Old Gets Porn Spam*, at http://www.cauce.org/tales/7_year_old.shtml (last visited July 25, 2002).

216. Flash, *supra* note 200.

217. *See City of Renton*, 475 U.S. at 51–52. "The First Amendment does not require a city . . . to conduct new studies or produce evidence independent of that already generated by

4. Overbreadth

Statutes that overly burden constitutionally protected speech are unconstitutional.²¹⁸ Generally, states cannot reduce the reading level to that which is suitable only for children.²¹⁹ The proposed legislation is not as broad as the statutes that have been held unconstitutional because it still permits adults to access material through other mediums on the Internet²²⁰ and does not impose liability on parents who request the material on behalf of their children.²²¹ Additionally, purveyors do not incur liability if sexually explicit material is sent to a minor who, posing as an adult, requested the material to be sent to him or her directly.

Unlike the Communications Decency Act, in which compliance effectively required that all indecent speech be eliminated from the Internet,²²² the proposed legislation would only proscribe the transmission of commercial unsolicited email with sexually explicit content. Commercial purveyors would still be able to send solicited email as well as advertise through the all other mediums of communications available on the Internet.²²³ For example, a Washington resident visiting a website could request to be added to a mailing list, and sexually explicit email could subsequently be sent to that person without incurring liability on either the sender or the recipient. Additionally, the proposed legislation only proscribes commercial unsolicited email with sexually explicit content; commercial entities would be able to advertise through unsolicited email as long as the message does not contain sexually explicit material. Arguably, the ability of a commercial entity to advertise in Washington may be hindered, but the fact that "purveyors of materials must fend for themselves does not raise a First Amendment problem."²²⁴

5. Vagueness

Language of the proposed legislation must not be vague in defining what materials will be banned.²²⁵ Washington has a statutory obscenity test for minors that is similar to the New York statute in *Gins-*

other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

218. *Gooding*, 405 U.S. at 522.

219. *See Bolger v. Young Drugs Products Corp.*, 463 U.S. 60, 74-75 (1983).

220. *See Ginsberg*, 390 U.S. at 641.

221. *See Reno*, 521 U.S. at 874.

222. *Id.* at 878.

223. *See Ginsberg*, 390 U.S. at 634.

224. *City of Renton*, 475 U.S. at 54.

225. *See Reno*, 521 U.S. at 871.

berg and is not fatally flawed like the CDA.²²⁶ Under this statute, material is obscene to minors when, taken as a whole, it: 1) appeals to the prurient interest of minors in sex; 2) is patently offensive because it affronts contemporary standards; and 3) is utterly without redeeming social value.²²⁷

The Washington statute is precise in its definition of what is considered obscene to a minor and, unlike *Reno*, provides that only material without redeeming social value will be deemed obscene for minors.²²⁸ Furthermore, the Washington Supreme Court has upheld this statute as a constitutionally valid definition of obscenity adjusted for minors.²²⁹

V. POLICY CONSIDERATIONS

Advances in communications and technology have not vitiated the ancient concept that “a man’s home is his castle into which not even the king may enter.”²³⁰ The exclusive right and final judgment of what material enters into the privacy of one’s home²³¹ is not an anachronistic concept that should be disregarded under the subterfuge of “free speech.” The transmission of unwanted, unsolicited, sexually explicit email into private homes is just as offensive as if it were placed in a regular mailbox. Vendors cannot, under the guise of the First Amendment, claim a constitutional right to send sexually explicit material into a person’s home.²³² While it is true that as a society we are often subject to objectionable speech outside the home and that we are expected to avert our eyes to that which we find offensive, this does not mean that we must also be captives in the privacy of our homes.²³³

Parents also have a strong interest in deciding the best method for rearing their children.²³⁴ By not regulating the transmission of unsolicited commercial email with sexually explicit content, both the courts and the legislature imply a general societal approval of these activities that may amount to encouragement.²³⁵ Advances in technology have not relieved the courts or the legislatures of their interest in supporting a parent’s right to control a child’s upbringing.²³⁶ Laws

226. WASH. REV. CODE § 9.68.050 (2001).

227. *Id.*

228. *Id.*

229. *Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 759, 871 P.2d 1050, 1055 (1994).

230. *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 737 (1970).

231. *Id.* at 736.

232. *Id.*

233. *Cohen v. California*, 403 U.S. 15, 21 (1971); *Rowan*, 397 U.S. at 738.

234. *Ginsberg*, 390 U.S. at 639.

235. *Id.* at 641.

236. *Id.* at 639.

that regulate the Internet should be enacted and upheld to aid in the discharge of that responsibility.²³⁷

VI. CONCLUSION

Unsolicited sexually explicit email is not only being sent to adults but also to children. The Washington Supreme Court's decision to uphold Washington's current spam law is the stepping stone to shielding children from unwanted exposure and to supporting parents' right to decide what their children will or will not view. Washington's current spam law could be amended to proscribe the transmission of sexually explicit commercial spam.

The proposed amendment would not violate the dormant Commerce Clause because it would impose no greater burden on interstate commerce than does the current Act. Further, because no other states, other than West Virginia, have enacted similar statutes, there is no concern that this law would conflict with other states' laws. The proposed law for Washington would not conflict with West Virginia law because both laws would ban the same types of messages.

Proscribing the transmission of sexually explicit spam would also not violate the First Amendment. Although this provision would be subject to strict scrutiny, Washington has a compelling interest in protecting the moral and psychological welfare of its children; this is the narrowest means for achieving this goal because other available alternatives would not be effective in furthering Washington's interest. Furthermore, prohibiting only unsolicited, and not solicited, sexually explicit email would not prevent adults from accessing the material via email if they chose to do so. Thus, the law does not unduly burden speech that is otherwise protected.

Finally, there are strong policy reasons for prohibiting sexually explicit spam. First, the State has a substantial interest in enacting laws that promote and support parents' rights to decide the moral upbringing of their children. The proposed amendment to Washington's Commercial Electronic Mail Act empowers parents with the ability to choose whether or not their children will receive sexually explicit email. Finally, the right of a person to communicate with another is not absolute. Although society may permit citizens to be bombarded with offensive speech outside the home, we are not expected to be captives and should have the exclusive and final judgment over what material enters our own homes.²³⁸

237. *Id.*

238. *Rowan*, 397 U.S. at 736.