

NO, WE'RE NOT THERE YET: A PROPOSED LEGISLATIVE APPROACH TO VIDEO ENTERTAINMENT SCREENS IN CARS

*Kristina Wilson**

I.	INTRODUCTION.....	999
II.	BACKGROUND.....	1003
	A. <i>Understanding the Technology</i>	1003
	B. <i>Dramatic Growth of the Industry and Consequent Externalities</i>	1004
	C. <i>Growing Public Concern</i>	1007
	D. <i>Absence of Legal Scholarship</i>	1007
III.	CURRENT AND PROPOSED STATE LEGISLATION.....	1008
	A. <i>Legislation of Screen Placement and Content</i>	1008
	B. <i>Underlying State Concern and Public Sentiment</i>	1012
IV.	LIMITED ABILITY TO IMPOSE CONTENT-BASED LEGISLATION.....	1013
	A. <i>Legislation Under the Obscenity Exception to the First Amendment</i>	1013
	B. <i>Potential Justifications for Restricting Content Outside the Obscenity Exception to the First Amendment</i>	1018
V.	CONTENT-NEUTRAL LEGISLATION AS A VIABLE OPTION.....	1026
	A. <i>Comparative Analysis: Cellular Phone Use While Driving</i>	1028
	B. <i>The Option of Total Prohibition</i>	1030
	C. <i>Less Drastic Alternatives</i>	1031
VI.	ALTERNATIVES TO LEGISLATION.....	1034
	A. <i>Research</i>	1034
	B. <i>Safer Technology</i>	1035
	C. <i>Education</i>	1035
VII.	CONCLUSION.....	1036

I. INTRODUCTION

Video screens were first introduced into vehicles to entertain children in the backseat and put an end to the ever-persistent question: “Are we

* J.D., Northwestern University School of Law; B.A., Stanford University, Economics and Art History.

there yet?”¹ The new feature was an instant success. For example, an estimated thirty percent of Oldsmobile minivan purchasers opted for video screens when the car maker introduced the feature in 1999.² Since their initial debut, in-car video screens have continued to grow in popularity.³ With swelling demand, placement choices have also expanded,⁴ and, increasingly, screens have even been installed in the driver’s area to allow front-seat viewing.⁵ Appeal has extended beyond the family market as in-car video screens have become part of a larger cultural phenomenon, serving as a fashion statement and status symbol for car owners nationwide.⁶

But along with their apparent benefits, such as quieter children and a “pimped out” ride,⁷ in-car video screens introduce associated costs. Concerned citizens and safety experts assert that these screens are an imposition on unwilling viewers in nearby cars and distract all drivers on the road.⁸ To address these externalities, state legislatures have enacted both content-based laws and content-neutral laws to protect moral values and to ensure public safety.

An overwhelming majority of states has imposed content-neutral legislation that governs screen placement. Specifically, thirty-six states have restricted screen location to address issues of driver distraction and to promote traffic safety.⁹ This legislation prohibits the operation of screens

¹ Jeffrey Selingo, *Entertaining Miss Daisy*, N.Y. TIMES, Apr. 22, 2004, at G1 (noting that car makers originally introduced entertainment systems as an option for family cars); Gregory L. White, *Car Makers Go Wild for Trucks*, WALL ST. J., Apr. 7, 2000, at B1 (referring to the introduction of flip-down video screens in the back seat as a “family-friendly feature[.]”); John Wilkens, *Front-Seat DVD Screens Leading More Drivers down the Road to Viewin’*, SIGNONSANDIEGO, July 20, 2003, http://www.signonsandiego.com/news/features/20030720-9999_1c20cartv.html (remarking that mobile-video systems were “[i]ntroduced initially as a way to occupy restless kids in the back seat”).

² *Smart Cars 2000: Electronics—Screen Wars*, BUS. WK. ONLINE, <http://www.businessweek.com/adsections/smartcars/99/smartscreens.htm> (last visited Nov. 28, 2005) (reporting that when Oldsmobile and Ford introduced flip-down video system displays in model year 2000 minivans, “Oldsmobile figured 10% of Silhouette customers would opt for the package” but “[i]n fact, three times as many . . . order[ed] it”).

³ See *infra* notes 29–32 and accompanying text.

⁴ See *infra* notes 16–22 and accompanying text.

⁵ See Wilkens, *supra* note 1 (“[M]obile-video systems have moved aggressively into the driver’s compartment in the past year.”).

⁶ Vicki Hyman, *Video to Go*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 22, 2004, at C1 (noting that current purchasers include people who “consider it a status symbol to stuff their cars with as many monitors as possible”).

⁷ “‘Pimped out’ ride” refers to a car with enhanced design, such as a car that has undergone a makeover by the MTV hit show *Pimp My Ride*. See *infra* note 40 and accompanying text.

⁸ See *infra* Part II.B.

⁹ The following twenty-one states prohibit screens visible to the driver operating the vehicle: Connecticut, Florida, Indiana, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. Eleven of those states exempt navigation systems from the prohibition: Florida, Kansas, Michigan, Nevada, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, and Wyoming. See CONN. GEN. STAT. § 14-105 (1999); FLA. STAT. ANN. § 316.303 (West 2001); IND. CODE

that are visible to the driver of the television-enabled car, and in some states, screens that are located in the driver's area.¹⁰ No state has moved to ban such screens completely, though such a measure would serve to prevent distraction of drivers in other cars as well.

More recently, at least eight states have considered (and three have passed) additional measures specifically controlling the content of in-car video screens. While content-neutral legislation targets placement primarily for road safety purposes, restriction based on content may promote additional goals of preventing harm to minors and offense to unwilling viewers.

Tennessee, Louisiana, and Virginia now have measures in place governing in-car video screen content. Tennessee enacted a law effective July 1, 2004, that prohibits the public display of "obscene and patently offensive movies," including on video screens visible from outside the car.¹¹ The same year, Louisiana passed a law banning the exhibition of "sexually explicit" material, which prohibits "the graphic depiction of sex, including . . . the visual depiction of sexual activity or nudity."¹² Most recently, Virginia approved a measure banning the display of material deemed "obscene" within a vehicle that can be seen outside the vehicle.¹³ The statute applies to material that, "considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex . . . and which goes substantially beyond customary limits of candor in description or representation of such matters" and "taken as a whole, does not have serious literary, artistic,

§ 9-19-17-1 (2004); KAN. STAT. ANN. § 8-1748 (1994); ME. REV. STAT. ANN. tit. 29, § 1921 (1995); MICH. COMP. LAWS § 257.708b (2005); MINN. STAT. § 169.471 (2001); NEB. REV. STAT. § 60-6,287 (2004); NEV. REV. STAT. § 484.639 (2003); N.J. STAT. ANN. § 39:3A-1 (West 2002); N.M. STAT. ANN. § 66-7-358 (LexisNexis 2003); N.Y. VEH. & TRAF. LAW § 375 (McKinney 2005); OKLA. STAT. tit. 47, § 12-411 (2003); OR. REV. STAT. § 815.240 (2003); R.I. GEN. LAWS § 31-23-38 (2002); S.D. CODIFIED LAWS § 32-15-9 (2004); TENN. CODE ANN. § 55-9-105 (2004); TEX. TRANSP. CODE ANN. § 547.611 (Vernon 2005); UTAH CODE ANN. § 41-6a-1641 (2005); W. VA. CODE § 17C-15-42 (2004); WYO. STAT. ANN. § 31-5-961 (2005).

The following fifteen states prohibit screens visible by the driver while operating the vehicle and those located in the area forward of the driver's seat: Alabama, Arizona, California, Colorado, Illinois, Louisiana, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, Vermont, Virginia, and Washington, with five of those states excepting navigation systems from the prohibition: California, Louisiana, Maryland, Pennsylvania, and Virginia. *See* ALA. CODE § 32-5-219 (2005); ARIZ. REV. STAT. § 28-963 (2004); CAL. VEH. CODE § 27602 (West 2005); COLO. REV. STAT. § 42-4-201 (2004); 625 ILL. COMP. STAT. 5/12-604 (2002); LA. REV. STAT. ANN. § 32:365 (2005); MD. CODE ANN., TRANSP. § 22-414 (West 2002); MASS. GEN. LAWS ch. 90, § 13 (2005); N.H. REV. STAT. ANN. § 266:75 (2004); N.C. GEN. STAT. § 20-136.1 (2003); 75 PA. CONS. STAT. § 4527 (1996); S.C. CODE ANN. § 56-5-4440 (1991); VT. STAT. ANN. tit. 23, § 1095 (1999); VA. CODE ANN. § 46.2-1077 (2005); WASH. REV. CODE § 46.37.480 (2001).

The following fourteen states do not have state laws directed specifically at video screens in cars: Alaska, Arkansas, Delaware, Georgia, Hawaii, Idaho, Iowa, Kentucky, Mississippi, Missouri, Montana, North Dakota, Ohio, and Wisconsin.

¹⁰ *See supra* note 9 and statutes cited therein.

¹¹ TENN. CODE ANN. § 55-8-187.

¹² LA. REV. STAT. ANN. § 14:106.3A.

¹³ VA. CODE ANN. § 46.2-1077.01.

political or scientific value.”¹⁴ All three state laws thus target the content displayed on in-car video screens.

Although applied here to a new medium, state legislation of content is not without legal precedent. Over three recent decades, the Supreme Court has engaged in significant dialogue regarding whether laws that purport to regulate content are permissible attempts to safeguard the privacy rights of viewers confronted with such speech or expression, or instead constitute impermissible encroachments upon First Amendment rights of free speech and expression.¹⁵

This Comment evaluates Supreme Court precedent and analyzes what latitude, if any, states have to control video screen content without infringing First Amendment rights. This Comment asserts that although some states have adopted legislation regarding in-car video screens, a more studied and cohesive initiative is warranted to control the negative effects of this growing industry.

Part II discusses in-car video screen technology, the dramatic growth of the in-car video screen industry and resulting externalities, the growing public concern surrounding in-car video screens, and the absence of legal scholarship in this area. Part III considers current state legislation and the objectives underlying these measures. Part IV examines the legality of content-based laws, both within and outside the obscenity exception to the First Amendment, and various justifications that may be offered to support such measures. In light of the strict rules applied to content-based laws, it appears that not all three presently enacted state measures are fit to withstand constitutional challenge. Part V focuses on the alternative of employing content-neutral, rather than content-based, laws to address concerns regarding this technology. Given that states have limited latitude to regulate content, content-neutral laws may be a more comprehensive way for states to address in-car video screens without infringing on constitutional rights. Finally, Part VI evaluates whether state legislation is the most appropriate way to approach this growing industry and its externalities, and the alternatives to legislation that states might pursue.

This Comment ultimately proposes that, prior to enacting legislation that could be inefficient from a cost-benefit perspective, states should engage in thorough research of issues and legislative alternatives related to in-car video screens. Given the newness of the technology, very little research

¹⁴ *Id.*

¹⁵ *See infra* Part III. It must be noted as an initial matter that although the showing of movies is not the typical activity that comes to mind when envisioning speech protected under the First Amendment, the Court has recognized the right to show videos as a protected form of expression. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The Court has thus imbued video exhibitors with the same First Amendment rights and protections as other speakers in more typical speech contexts. *Erznoznik*, 422 U.S. at 208 (comparing the issues presented in the case to those in paradigmatic cases such as *Cohen v. California*, 403 U.S. 15 (1971), and *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

is available on the broader impact of the in-car video screen industry on the issues that current and proposed legislation purport to address. Therefore, states must first carefully consider the costs potentially imposed by the presence or absence of legislation. In particular, before resorting to legislation, states should encourage or mandate research into safer technologies and implement educational programs to promote careful use by consumers. Given that the actual costs imposed by in-car video screens are, to date, unknown, these initial inquiries would help to determine the most appropriate restrictions of in-car video screens.

II. BACKGROUND

A. Understanding the Technology

With recent technological advancements, video screens can be installed virtually anywhere in or on a vehicle.¹⁶ Screens are commonly placed in the back of seat headrests, in the dashboard (viewable by pop-up), and near the interior ceiling light (with a fold-down mechanism).¹⁷ Other potential locations are sun visors and the steering wheel, though placement in the steering wheel may involve illegal removal of the driver's airbag.¹⁸ Video systems are also available as "video-in-a-bag" units, which are more portable than screens fixed in vehicles.¹⁹ In-car video screens range in size, with already-installed screens up to seven inches²⁰ and separately purchased screens²¹ currently available up to twenty-two inches (and conceivably larger).²²

¹⁶ Tweeter.com, Car Multimedia Shopping Guide, <http://www.tweeter.com/info/index.jsp?categoryId=1226132&backTo=1124548&infoType=infosport> (last visited Nov. 28, 2005) (stating that a car owner "can put a video screen pretty much anywhere in [his] car").

¹⁷ *Id.* (stating that "[o]ne of the most common places [to install video screens] is in the back of the front seat headrests," that "screens can be easily installed in [a] dashboard," and that "[t]he third most common screen placement is on the ceiling where the interior light is").

¹⁸ See Earle Eldridge, *TVs in Steering Wheels Raise Safety Concerns*, USA TODAY, Aug. 13, 2002, at 1B, available at http://www.usatoday.com/money/autos/2002-08-12-car-tv_x.htm (reporting that one New York car customizer is "getting a lot more calls" to install television screens in air bags); Carlson John, *Whatever Happened to Just Driving?*, DES MOINES REG., Feb. 13, 2004, at 1B (noting reports that "some people are illegally removing the air bag from the center of their steering wheel and replacing it with a TV screen"); Wilkens, *supra* note 1 ("Small screens are [even] being installed . . . in the center of the steering wheel, where the air bag is supposed to be.").

¹⁹ *Id.* "Video-in-a-bag" refers to "a portable DVD player and LCD monitor sold in a bag that drapes over the seat headrest or hangs suspended between the two front seats." Dawn Chmielewski, *Are We There Yet?: Back Seat Diversions of the Tech Kind Keep Road Trips on Track*, SAN JOSE MERCURY NEWS, July 2, 2003, at 1E.

²⁰ Declan McCullagh, *Digital Home Entertainment Hits the Road*, CNET NEWS, Oct. 19, 2004, http://news.com.com/Digital+home+entertainment+hits+the+road/2100-1041_3-5417159.html.

²¹ "Separately purchased screens" refers to the video-in-a-bag or flip-down screens that are purchased in the after-market rather than as an option from the manufacturer.

²² Sholnn Freeman, *The Luxury-Car Makeover*, WALL ST. J., Nov. 5, 2004, at W1 (describing the story of one Hummer H2 owner who decided to outfit his vehicle with several accessories, including a twenty-two-inch flat-screen television that folds down from the ceiling); Bob Kocher, *The Next-*

Safety concerns have led to certain limitations on the technology, though such limitations are typically not mandated. Some system manufacturers, installation companies, and industry groups have cautioned in-car screen purchasers that screens should not be placed in the driver's view and have recommended that screens be connected to the emergency brake to prevent functioning unless the emergency brake is engaged.²³ These organizations note that it is unsafe as well as illegal for drivers to view screens while in the act of driving.²⁴ In California, where the placement of screens visible to the driver or in the driver's area is prohibited,²⁵ most major manufacturers automatically wire front-seat systems so they will not operate unless the vehicle is in park or the emergency brake is engaged.²⁶ Further, state laws may require dealers to sign agreements that they will not disable such safety features.²⁷ However, as previously stated, not all states have laws governing the placement of video screens,²⁸ and therefore safety measures by manufacturers, dealers, or installation companies are not universal mandates.

B. Dramatic Growth of the Industry and Consequent Externalities

Over the past five years, the popularity of in-car entertainment systems has skyrocketed. No new car models had DVD entertainment systems available as an option before 1999, while during the 2004 model year,

Generation Drive-In Theatre, CHI. DAILY HERALD, July 19, 2004, at 2 (noting that the most popular range of screen sizes is anywhere from seven-inch screens to sixteen-inch screens).

²³ See Jeanne Wright, *Keep Eyes on the Road, Not the TV Screen: State Law, Recognizing a Dangerous New Trend, Now Prohibits Watching While Driving*, L.A. TIMES, Jan. 14, 2004 at G1 (noting that the Mobile Enhancement Retailers Association has stated that retailers may not install screens visible to drivers); Daniel Mohabir, *Pioneer NAV-SYS900DVD GPS Car Navigation System*, GPSINFORMATION.NET, Sept. 1, 2002, <http://gpsinformation.net/articles/pioneernav.htm> (stating "[t]here are some [video screen] functions that are not available unless the emergency brake is set"); Tweeter.com, *supra* note 16; Wilkens, *supra* note 1 ("Industry associations and system manufacturers recommend that any screen used for entertainment be installed so it is inoperable when the vehicle is moving, and most shops say they follow these guidelines.").

²⁴ See, e.g., Gregory Arroyo, *Distractingly Serious*, MOBILE ELECTRONICS, June 2003, <http://www.me-mag.com/CurrentIssueReader.aspx?Num=1178&curPage=20> (restating the Mobile Enhancement Retailers Association's directive and highlighting one retailer's policy which (1) does not allow installation for driver's viewing and (2) makes customers sign statements acknowledging the retailer's policy); Car Multimedia Shopping Guide, *supra* note 16 ("It should be mentioned however, that if the screen is visible by the driver, the screen must be connected to the emergency brake. It is extremely unsafe (as well as against the law) to watch video while driving.").

²⁵ CAL. VEH. CODE § 27602 (West 2005) ("A person may not drive a motor vehicle if a television receiver, a video monitor, or a television or video screen, or any other, similar means of visually displaying a television broadcast or video signal that produces entertainment or business applications, is operating and is located in the motor vehicle at any point forward of the back of the driver's seat, or is operating and visible to the driver while driving the motor vehicle.").

²⁶ Allison Hoffman, *Behind the Wheel: New Law Aims to Keep Eyes on the Road, Not TV*, L.A. TIMES, Feb. 3, 2004, at B2.

²⁷ *Id.*

²⁸ See *supra* note 9.

eighty-one car and truck models provided such an option.²⁹ In total, shipments of DVD players are expected to increase by forty-eight percent in 2005.³⁰ The purchase level of these systems is as remarkable as their availability—it is predicted that nearly half of Lincoln Navigator and Ford Excursion buyers will opt for video in 2005.³¹ And the surge in popularity is expected to continue. In 2004, the Consumer Electronics Association estimated that in-car DVD player sales would reach \$39 million and that they would more than quadruple by 2007.³²

The increased affordability of in-car video units may partially explain the significant sales boost. In 2004, a DVD player with a seven-inch ceiling screen sold for \$1000, down from \$1400 just a few years earlier, and a portable unit can be purchased today for as little as \$250.³³ The opportunity for relatively large profit margins generates increased supply-side enthusiasm as well. Car manufacturers can earn substantial profits from in-car entertainment system sales because the units are expensive (and may in fact represent a substantial percentage of a vehicle's total cost).³⁴ While overall profit margins on new cars have recently become "razor thin," car accessories yield profit margins of up to fifty percent for car makers.³⁵

Another factor contributing to the growing popularity of in-car video systems is their increasingly broad appeal to consumers. When car manufacturers first began providing the video screen option, the market for video screens was for the most part limited to families outfitting their minivans to

²⁹ Kenn Peters, *Smart Cars; Will Your Vehicle Be More Intelligent than You Are? Series: 2005 Auto Preview*, POST-STANDARD (Syracuse, N.Y.), Oct. 13, 2004, at G1. The increase in entertainment systems has paralleled that of electronics in cars generally. In 1999, navigation systems were available for only twelve car and truck models, whereas such systems were an option for 105 car and truck models in 2005. *Id.*

³⁰ Joseph M. Tartakoff, *Tune-up? No, They're Tuned-in*, PALM BEACH POST, Aug. 8, 2005, at 1F (noting several projections from the Consumer Electronics Association, including that "half of new cars [will] have screens for entertainment or navigation" by 2010).

³¹ Bo Emerson, *Buckle up, Press Play: For On-the-Go Americans, Video Screens Are the Latest Must-Have Auto Accessory for Keeping the Peace Among Passengers*, ATLANTA J.-CONST., July 1, 2004, at NW6.

³² Edward L. Kennedy, *More Car Buyers Getting the Picture with DVDs*, CHI. SUN-TIMES, Mar. 28, 2004, at 68. The article does not specify whether the \$39 million figure includes sales of units in new cars as well as sales of portable units bought separately from car purchases. Because the *Sun-Times* article refers to prices of both of these types of units and to be most conservative, it is assumed that the \$39 million sales figure reflects all sales of in-car DVD players.

³³ *Id.*

³⁴ See *Some Car Dealers Exit Body Shop Work*, SPOTS 'N' DOTS SALES EXTRA, Oct. 26, 2004, <http://media.radcitey.net/zsnd/salesextra/SALESEXTRA102604.pdf> (stating that in the mid-1970s, less than nine percent of a vehicle's value was in its electronics while by 2010 it is estimated that the value of electronics in cars, including DVD players, phones, systems such as OnStar, and satellite radio, will constitute forty percent of a vehicle's worth).

³⁵ Anita Hamilton, *Driving into the Future: High-Tech Extras Are Making New Cars Smarter. But Are These Gizmos Keeping Us Safe Behind the Wheel—Or Just Busy?*, TIME, June 2, 2003, at 48.

entertain children on road trips.³⁶ However, the target consumer group has expanded and diversified over time as car manufacturers have begun offering the systems in vehicles that appeal to a wider audience.³⁷ Demand for entertainment systems now comes from teenagers and young adults, in addition to the primary market of parents of young children.³⁸ The functionality of video screens has transformed as well. Use has extended beyond pure function, as screens increasingly serve as a status symbol of exorbitant vehicle expenditure:

Mix the greasers from high school auto class with the geeks from the A/V club, and you've got a whole generation of young men—and make no mistake: It is guys who the sales and service people talk about; it is guys who consider it a status symbol to stuff their cars with as many monitors as possible. Go into almost any car stereo shop in the Triangle, and ask to see the pictures. A Hummer tricked out with five monitors—four in the headrests and one in the dash. A Cadillac Escalade with six. Tales are told of . . . SUVs with eight monitors, with eighteen.³⁹

MTV's newly introduced car makeover show *Pimp My Ride* is the quintessential example of the current generation's focus on automobile upgrades. In each episode, a body shop transforms (i.e., "pimps") a viewer's car by improving various features, including new paint, new wheels, new interiors, and upgraded electronics.⁴⁰ A majority of these vehicles are outfitted with at least one video screen.⁴¹ In fact, the head of West Coast Customs, MTV's commissioned body shop, reported that he once installed fifteen screens in a single vehicle.⁴²

While video screens may benefit users inside the vehicle,⁴³ their presence on the road necessarily results in certain externalities to drivers and passengers. These externalities stem from the underlying technology and from the increasing prevalence of the systems. Video technology, with bright contrast and clear resolution, makes in-car video screens clearly visible from a substantial distance. Particularly at night, screens are "easily

³⁶ See Selingo, *supra* note 1 (noting that car makers originally introduced entertainment systems as an option for family cars).

³⁷ See *id.* ("[C]ar manufacturers are beginning to put the systems—many of which also contain video games—in vehicles that have appeal beyond families, like full-size pickup trucks and sedans.").

³⁸ Emerson, *supra* note 31 (noting that, along with parents of young children, "PlayStation-wielding teens [and] young adults outfitting the ultimate party car[] all swell the demand for in-car screens").

³⁹ Hyman, *supra* note 6; see also Emerson, *supra* note 31 ("[Car buffs] always love to show off, to see who has the better stuff . . . —[o]ne way is TV, the other way is big wheels.").

⁴⁰ MTV.com, Pimp My Ride Episode Guide, http://www.mtv.com/onair/pimp_my_ride/episode_guide (last visited Nov. 21, 2004) (summarizing multiple episodes and revealing that extras range from upgraded rims to a chandelier to an espresso machine).

⁴¹ *Id.*

⁴² Emerson, *supra* note 31.

⁴³ *Id.* (according to one reporter, the presence of video screens "has revealed itself to be a wonder drug in the car, the instant cure for 'Are we there yet?'").

visible from a passing car or a vehicle stopped alongside at a traffic light,"⁴⁴ as "images become even more visible when it is dark outside."⁴⁵ The increasing prevalence of video screens in cars is a second externality that impacts other cars.⁴⁶ As one reporter notes: "Driving down any given street, one is sure to see several SUVs or minivans in which movies are being watched on a video screen."⁴⁷ Thus, in-car video screens present problems for others outside the vehicle in their ability to be seen by drivers and passengers in surrounding cars and overwhelming presence on the road.

C. Growing Public Concern

Citizens nationwide have raised concerns about bombardment by video screens in nearby cars. In Mississippi, for example, police have been getting complaints about "skin flicks" on video screens that are visible to others.⁴⁸ State Senator Mark Norris, co-author of a Tennessee bill restricting content of video screens in cars, reports that he started receiving complaints from constituents in 2003.⁴⁹ According to Senator Norris, "a number of folks . . . were in their cars with children, being held hostage to this kind of display at traffic lights[;] [e]ven pedestrians reported the experience."⁵⁰ One Nashville radio host described being "trapped" between two cars, each displaying an explicit video on an in-car video screen.⁵¹

D. Absence of Legal Scholarship

Although the proliferation of news articles indicates the growing public concern over in-car video screens, the topic has not been addressed in legal scholarship. This absence is not surprising given that some state laws (primarily content-based laws) are fairly recent⁵² and the exponential increase in industry sales is a new occurrence.⁵³ However, given the mounting pub-

⁴⁴ David Runk, *Drivers Spot X-Rated Films in Other Cars*, HERALD NEWS (Fall River, Mass.), Mar. 10, 2004, http://www.zwire.com/site/news.cfm?newsid=11103641&BRD=1710&PAG=461&dept_id=362262&rfti=6.

⁴⁵ Kocher, *supra* note 22.

⁴⁶ See *supra* notes 29–32 and accompanying text.

⁴⁷ Kocher, *supra* note 22.

⁴⁸ William C. Bayne, *Pop a Porn Video in Car DVD, but Other Drivers Might Get Hot: Lawmakers Want to Limit the View on Road*, DESOTO APPEAL (Memphis, Tenn.), July 13, 2004, at DS1 [hereinafter Bayne, *Porn Video in Car DVD*].

⁴⁹ David Kirby, *When the Car Beside You Is an XXX Theater*, N.Y. TIMES, Oct. 27, 2004, at G26.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *supra* note 9.

⁵³ See Alan Goldstein, *Snazzy Entertainment Systems Settle in for Long Car Rides with Families*, DALLAS MORNING NEWS, Aug. 15, 2002, at 3D ("In 2000, sales of mobile video and navigation systems reached \$500 million, according to the Consumer Electronics Association. By [2001], the figure reached \$690 million, and the trade group expects sales [in 2002] of \$930 million."); *supra* notes 29–42. The exponential sales increase reveals that the industry has grown from nonexistent to pervasive in just a

lic concern and growth of the industry, the issue demands attention. This Comment is intended to start the discussion.

III. CURRENT AND PROPOSED STATE LEGISLATION

A. *Legislation of Screen Placement and Content*

Thirty-six states currently prohibit the operation of vehicles with video entertainment screens visible by the driver, and fifteen of those states further ban the placement of such screens in the area forward of the driver's seat.⁵⁴ In California, a state that prohibits both types of placement,⁵⁵ California Highway Patrol ("CHP") reports reflect an increase in the number of drivers who have been stopped for watching video screens while driving: the CHP stopped 237 drivers in 2001, 525 in 2002, 863 in 2003, and 920 in 2004.⁵⁶

Issues arising from video entertainment screens are not limited to states that have legislated. For example, Alaska has not restricted video screen placement, though one recent situation has forced the state to confront the issue. In 2002, Alaska resident Erwin J. Petterson, Jr. was slated to become the first person in the nation to go on trial for, in part, watching a movie while driving.⁵⁷ Petterson crossed a double-yellow line, drove head-on into another car, and killed two people, allegedly while viewing *Road Trip* on a screen in the dashboard of his Jeep.⁵⁸ Alaska is one of fourteen states without laws prohibiting placement of video screens in the driver's area.⁵⁹ In reaction to the Petterson case, it has been observed that "[t]he rapid spread of mobile video in some cases is outstripping the spread of laws to control it."⁶⁰ The case highlights the dangers that exist when drivers are exposed to video screens while driving.

few years, and scholarship may have been slow to respond given the rapid development of the area in such a short time frame.

⁵⁴ See *supra* note 9.

⁵⁵ See *supra* note 25.

⁵⁶ Michael Cabanatuan, *Bill Defeated to Outlaw X-rated Videos on Video Screens*, S.F. CHRON., Mar. 16, 2005, at B3; Hoffman, *supra* note 26.

⁵⁷ Eric C. Evarts, *New Peril in Driver's Seat: Films on DVD*, CHRISTIAN SCI. MONITOR, Aug. 6, 2004, at 1 (reporting that Petterson is the "first person in the US to go to trial for allegedly watching a movie"); *Murder By DVD Distraction?: Alaska Trial Focuses on Whether Dashboard Movie Distracted Driver*, MSNBC.COM, Jul. 27, 2004, <http://msnbc.msn.com/id/5529317/> [hereinafter *Murder by DVD*].

⁵⁸ *Murder by DVD*, *supra* note 57.

⁵⁹ See *supra* note 9.

⁶⁰ Emerson, *supra* note 31. The prosecutor in the case believed that the case "was really important because it brought out the issue for public discussion" and revealed an "issue the Legislature should address." *Driver Watching DVD: Not Guilty*, WIRED, Aug. 11, 2004, <http://www.wired.com/news/autotech/0,2554,64546,00.html>. Defense attorney Eric Derleth reinforced this sentiment in his statement that "it certainly can't hurt to bring [the topic of distracted driving] into the forum for discussion in our society." Warren Williamson, *Petterson Found Not Guilty on Murder Charges*, KTUU.COM, Aug. 10, 2004, <http://www.ktuu.com/CMS/templates/master.asp?articleid=3251&zoneid=4>.

Recently, eight states have taken more substantial steps to monitor the in-car video screen industry, proposing content restrictions in addition to long-standing placement limitations. Three states have enacted laws specifically restricting content of in-car video screens, as follows:

1. *Tennessee*.—“To avoid distracting other drivers and thereby reduce the likelihood of accidents arising from lack of attention or concentration, the display of *obscene and patently offensive* movies . . . on, or in, a motor vehicle which are visible to other drivers is prohibited.”⁶¹ The consideration of whether material is obscene includes whether:

(A) [t]he average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (B) [t]he average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and (C) [t]he work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁶²

The penalty upon conviction is a fine between \$2 and \$50.⁶³

2. *Louisiana*.—“It shall be unlawful . . . to knowingly exhibit *sexually explicit* material in a motor vehicle . . . knowing that the material is visible to the public from outside the motor vehicle.”⁶⁴ This prohibits material displaying “(1) [u]ltimate sexual acts, normal or perverted, actual, simulated, or animated, whether between human beings, animals, or an animal and a human being” and “(2) [t]he graphic depiction of sex, including but not limited to the visual depiction of sexual activity or nudity.”⁶⁵

The penalty for violation is a fine up to \$1000 and imprisonment up to one year, depending on the number of times the individual has previously been convicted of violating the statute.⁶⁶

3. *Virginia*.—“It shall be unlawful . . . to display or permit the display within the vehicle of any image, motion picture, or video display that is *obscene* . . . if such image, motion picture, or video display can be seen by persons outside the vehicle.”⁶⁷ This would prohibit the showing of material

which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits

⁶¹ TENN. CODE ANN. § 55-8-187 (2004) (emphasis added).

⁶² *Id.* § 39-17-901.

⁶³ *Id.*

⁶⁴ LA. REV. STAT. ANN. § 14:106.3A (2005) (emphasis added).

⁶⁵ *Id.* § 14:106.3B.2.

⁶⁶ *Id.* § 14:106.3C.

⁶⁷ VA. CODE ANN. § 46.2-1077.01 (2005) (emphasis added).

of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.⁶⁸

The penalty for a violation is a fine up to \$250.⁶⁹

Five states—California,⁷⁰ Missouri,⁷¹ Mississippi,⁷² New York,⁷³ and Oklahoma⁷⁴—have drafted similar measures, but they have not been en-

⁶⁸ *Id.* § 18.2-372.

⁶⁹ *Id.* § 18.2-11.

⁷⁰ The proposed bill would have prohibited the knowing exhibition of “sexually explicit material . . . in a motor vehicle . . . open to public view.” Assemb. B. 282, 2005-06, Reg. Sess. (Cal. 2005), available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_282&sess=CUR&house=B&author=benoit. The term “sexually explicit material” was defined to mean “[u]ltimate sex acts, normal or perverted, actual, simulated, or animated, whether between human beings, animals, or an animal and a human being.” *Id.* The proposed penalty was as follows: for a first violation, a fine not exceeding \$500, imprisonment in a county jail for up to six months, or both; for a second violation, a fine not exceeding \$1000, imprisonment in a county jail for up to one year, or both; and for subsequent violations, mandatory imprisonment in a county jail for at least ten days without probation or suspension. *Id.* This proposed amendment did not pass the committee stage. Although the bill was ultimately rejected, Assemblyman John Benoit warned that the issue “[is] only going to become more of a problem.” Cabanatuan, *supra* note 56.

⁷¹ This proposed amendment prohibits the “display . . . of any adult entertainment film . . . within the vehicle in such a manner that any child under the age of eighteen in the person’s vehicle or in another vehicle on the road or highway is able to view any part of the film.” H. 83, 93rd Gen. Assem., Reg. Sess. (Mo. 2005), available at <http://www.house.mo.gov/bills051/biltxt/intro/HB00831.htm>. “Adult entertainment film” is defined as the depiction of “sexually explicit conduct,” which includes “sexual intercourse” and the “lascivious” depiction of genitals. *Id.* Proposed penalty for a violation is a Class C misdemeanor: a fine up to \$300. MO. REV. STAT. § 560.016 (1999). This measure is currently pending in the House. CONSUMER ELECS. ASS’N, STATE LEGISLATIVE STATUS REPORT THROUGH OCT. 18, 2005, http://www.ce.org/GovernmentAffairs/SLSR/slsr_report.asp (last visited Oct. 19, 2005).

⁷² To “avoid distracting other drivers and, thereby, to reduce the likelihood of accidents arising from lack of attention or concentration,” this state measure would have prohibited the exhibition of “obscene or patently offensive” movies on video screens “located within or on a motor vehicle, in any manner visible to other drivers.” S. 2089, 2005 Leg., Reg. Sess. (Miss. 2005), available at <http://billstatus.ls.state.ms.us/documents/2005/pdf/SB/2001-2099/SB2089IN.pdf>. The term “obscene” was defined to mean that

(i) [t]he average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (ii) [t]he average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and (iii) [t]he work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Id. The term “patently offensive” was intended to mean “that which goes substantially beyond customary limits of candor in describing or representing such matters.” *Id.* The proposed penalty upon violation is a fine between \$2 and \$50. *Id.* This proposed amendment did not pass the committee stage. CONSUMER ELECS. ASS’N, *supra* note 71.

⁷³ This proposed measure prohibits display of a “sexually explicit” video on a video or television screen in a vehicle located in a public place. Assemb. B. 1645, 2005-06, Reg. Sess. (N.Y. 2005). The proposed penalty upon violation is one point added to the offender’s driving record and up to 200 hours of community service. *Id.* This measure is currently pending in the State Assembly. N.Y. State Assembly, A01645 Summary, <http://assembly.state.ny.us/leg/?bn=A01645> (last visited Nov. 18, 2005).

⁷⁴ The proposed “dirty driving” amendment would have decreed that “no material deemed ‘harmful to minors’ could be exhibited on a television, monitor or other viewing screen or surface in a motor vehicle ‘in any manner visible to any person outside the vehicle.’” Press Release, Media Div., Okla.

acted, either because they are currently pending or were proposed but subsequently did not pass the committee stage.

Officials in states without specific content legislation regarding in-car video screens have used local laws prohibiting display of obscene materials to enforce limitations on screen content. For example, according to the Police Chief in one Mississippi county, officers have stopped drivers and informed them that viewing nudity on in-car video screens violates local antiobscenity ordinances.⁷⁵ In February 2004, a driver in New York was charged with playing an X-rated movie in his car.⁷⁶ Even without an established statute governing video screen content, police charged the man with publicly displaying offensive sexual material,⁷⁷ likely determining that general antiobscenity laws barred display of such material visible outside of the car.⁷⁸ Police in Florida arrested two men for playing obscene material on a screen in their car that children could, and did, see.⁷⁹ The acts were found to violate a local law banning display of obscene materials to minors.

House of Representatives, House Votes Twice Tuesday to Ban “Drive-By Pornography” (Apr. 20, 2003), available at <http://www.lsb.state.ok.us/house/news6763.html>. This would prohibit the showing of

any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when the material or performance, taken as a whole . . . the average [adult] applying contemporary community standards would find . . . has a predominant tendency to appeal to a prurient interest in sex to minors, and . . . is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and the material or performance lacks serious literary, scientific, medical, artistic, or political value for minors.

OKLA. STAT. ANN. tit. 21, § 1040.75 (West 2004). The proposed penalty for violation was a fine of up to \$500. This proposed amendment did not pass the committee stage.

⁷⁵ Bayne, *supra* note 48. Local ordinances and state laws governing obscene materials could be construed to apply to video screens in cars. See *Playing at an SUV Near You: Porn*, CBS NEWS, Mar. 11, 2004, <http://www.cbsnews.com/stories/2004/03/11/national/main605394.shtml>; *infra* Part III. However, that would only provide narrow restrictions limited to obscenity and not other content.

⁷⁶ Kathleen Murphy, *States Take Aim at Driving Under the Influence of TV*, STATELINE, Apr. 20, 2004, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15623>.

⁷⁷ *Id.*

⁷⁸ Such content is outside First Amendment protection and can therefore be more easily regulated and monitored by the state. See *infra* Part III.A–B. However, such may not be the case for content considered “pornography” or merely containing “nudity” that does not rise to the level of being patently offensive. See *infra* Part III.A–B.

⁷⁹ Mark Spain, *Movie Porn in Car Leads to Arrests*, FIRST COAST NEWS, Sep. 29, 2005, <http://www.firstcoastnews.com/news/local/news-article.aspx?storyid=44955>. Although the article’s title states that the viewing of “porn” led to the arrests in the case, this is likely a misstatement by the reporter. The article itself refers to local antiobscenity laws, which are permissible and most likely led to the arrests in the case. Pornography, however, does not necessarily amount to obscenity. See *infra* Part III.A–B.

B. Underlying State Concern and Public Sentiment

State statutes controlling in-car video screen content vary in breadth and legislative intent. The general concerns reflected in statutory language appear to be influence on juveniles, sensibilities of unwilling viewers, and road safety. As for the enacted laws specifically, the Tennessee statute applies to “obscene and patently offensive movies” for the stated objectives of preventing driver distraction and reducing accidents.⁸⁰ The Louisiana statute covers “sexual activity and nudity” but is silent as to legislative intent.⁸¹ The Virginia provision targets “obscene material” and similarly declines to state an underlying legislative purpose.⁸² Both the Louisiana and Tennessee statutes, however, specifically apply to material visible to persons outside the vehicle.⁸³ This condition suggests concern for exposure to the external public, though refrains from stating the justification. Proposed but not enacted legislation is more revealing of underlying concerns, which include harm to minors, unwilling exposure to offensive material, and driver distraction.⁸⁴

Although the Tennessee, Louisiana, and Virginia statutes seemingly address legitimate public issues, some organizations are skeptical about the constitutionality of such laws.⁸⁵ In Tennessee, the American Civil Liberties Union and Motion Picture Association of America both expressed opposition to the bill and challenged the constitutionality of prohibiting offensive material.⁸⁶ During deliberation of Louisiana’s in-car video screen law, prosecutors and defense attorneys testified before the House of Representatives that the bill would likely face constitutional challenge.⁸⁷

⁸⁰ TENN. CODE ANN. § 55-8-187 (2004).

⁸¹ LA. REV. STAT. ANN. § 14:106.3 (2005).

⁸² VA. CODE ANN. § 46.2-1077.01 (2005).

⁸³ *Id.*; LA. REV. STAT. ANN. § 14:106.3.

⁸⁴ *See, e.g.*, S. 2089, 2005 Leg., Reg. Sess. (Miss. 2005) (stating that bill’s purpose is to “avoid distracting other drivers and, thereby, to reduce the likelihood of accidents arising from lack of attention or concentration”); N.Y. State Assembly, *supra* note 73 (discussing concern for children who might see the material and the right to use roadways without being exposed to pornographic material); Press Release, *supra* note 74 (noting that the proposed amendment would encompass material deemed “harmful to minors”).

⁸⁵ Ed Anderson, *Bill Bans Device Used to Change Traffic Lights: Emergency Workers Could Keep Them*, TIMES-PICAYUNE (New Orleans, La.), Apr. 15, 2004, at 3.

⁸⁶ Holly Edwards, “*Drive-By Porn*” Bill Taken up by House, TENNESSEAN (Nashville, Tenn.), Apr. 4, 2004, at 1B (“Although obscenity is not protected by the First Amendment, patently offensive material, including pornography, is, said Hedy Weinberg, executive director of the American Civil Liberties Union of Tennessee. The Motion Picture Association of America also has complained about the wording of the bill, saying that prohibiting the viewing of offensive material is unconstitutional . . . [in that] ‘using the term “patently offensive” could have unintended consequences.’”).

⁸⁷ *Id.*

IV. LIMITED ABILITY TO IMPOSE CONTENT-BASED LEGISLATION

Content-based legislation refers to regulations under which the permissibility of speech or expression varies depending upon content.⁸⁸ As stated in *City of Renton v. Playtime Theatres, Inc.*, “[the Supreme] Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.”⁸⁹ In general, when faced with a statute that prohibits speech on the basis of content, the Court applies strict scrutiny in order to safeguard First Amendment values.⁹⁰ This heightened standard generally limits the ability of states to legislate content of speech or expression.

A. Legislation Under the Obscenity Exception to the First Amendment

Although typically viewing alleged First Amendment violations with strict scrutiny,⁹¹ the Court has recognized an exception to First Amendment protections for laws pertaining to obscenity.⁹² The Court has explained that while the First Amendment was intended to “assure unfettered interchange of ideas for the bringing about of political and social changes,” obscenity has historically been considered as “utterly without redeeming social importance.”⁹³ For this reason, obscenity in speech and press is not constitutionally protected.⁹⁴

Under the obscenity exception, states can restrict material that is considered obscene “when the mode of dissemination carries with it a signifi-

⁸⁸ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

⁸⁹ 475 U.S. 41, 46–47 (1986) (citing *Carey v. Brown*, 447 U.S. 455, 462–63 & n.7 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 98–99 (1972)).

⁹⁰ See *infra* notes 134–137 and accompanying text.

⁹¹ See *id.*

⁹² *Miller v. California*, 413 U.S. 15, 23 (1973) (“[O]bscene material is unprotected by the First Amendment.”); *Roth v. United States*, 354 U.S. 476, 481 (1957) (stating that although the case involved the first direct question of whether obscenity is within the area of protected speech and press, prior opinions reflect that the Court has always implicitly assumed that obscenity is not within these freedoms).

⁹³ *Roth*, 354 U.S. at 484; see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that any value that “lewd and obscene” speech may have is “clearly outweighed by the social interest in order and morality”).

⁹⁴ *Roth*, 354 U.S. at 485. It should be noted, however, that while obscenity is not “constitutionally protected” and the regulation of obscenity is thus not presumptively entitled to strict scrutiny, restrictions on obscene speech are nonetheless subject to some limitations. The Court has held that categories of speech that fall outside of constitutional protection “because of their constitutionally proscribable content (obscenity, defamation, etc.),” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), are nonetheless not “entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content,” *id.* at 383–84. In *R.A.V.*, the Court explained that “the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.” *Id.* at 384 (emphasis omitted). In the context of video screens, then, the following limitation does inherently apply: obscene content may be regulated on the whole, but not on a content basis within the category of obscenity unless related to the government’s reason for regulation.

cant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”⁹⁵ While obscenity-focused regulation may escape First Amendment scrutiny, the Court has noted that “[s]tate statutes designed to regulate obscene materials must be carefully limited.”⁹⁶ The Court stressed the importance of clear definition in setting forth how obscenity may be controlled and of narrowly focused scope in order to prevent encroachment on protected interests.⁹⁷ As a policy matter, the Court has expressed concern that adjudicators “must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.”⁹⁸

Courts have long struggled with the appropriate characterization of obscenity, leading one Supreme Court justice to term the issue “the intractable obscenity problem.”⁹⁹ The obscenity exception to the First Amendment has existed in American jurisprudence since the nineteenth century.¹⁰⁰ One early standard derived from English courts judged whether material tended to “deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall” and “would suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of a most impure and libidinous character.”¹⁰¹ This rule, the *Hicklin* standard, considered the material from the perspective of the most susceptible person whose senses would be most easily offended.¹⁰² Although some American courts applied this rule,¹⁰³ it was ulti-

⁹⁵ *Miller*, 413 U.S. at 19. This justification may be included in statutory text, however, obscenity-focused regulations written without this rationale have been upheld, even as the Court stated that a “danger that obscene material might fall into the hands of children” was ever-present. *See Stanley v. Georgia*, 394 U.S. 557, 567 (1969).

While the Court may simply state justification where none exists, the Court does not always do so. The Court has invalidated legislation when legal claims did not specifically assert that statutes “reflected a specific and limited state concern for juveniles.” *See Redrup v. New York*, 386 U.S. 767, 769 (1967).

Thus it appears that to justify regulation on the basis of obscenity, states should include a purpose such as prevention of “harm to minors” in the statutory text, unless the activity therein obviously poses danger of “harm to minors.”

⁹⁶ *Miller*, 413 U.S. at 23–24.

⁹⁷ *Roth*, 354 U.S. at 488 (emphasizing that “[c]easeless vigilance is the watchword to prevent . . . erosion [of First Amendment rights] by Congress or by the States” and stating that “[t]he 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”).

⁹⁸ *Miller*, 413 U.S. at 23.

⁹⁹ *Ginsburg v. New York*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting).

¹⁰⁰ *See Regina v. Hicklin*, (1868) L.R.Q.B. 360.

¹⁰¹ *Id.* at 371.

¹⁰² *Roth*, 354 U.S. at 489 (“The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press.”).

¹⁰³ *Id.* at 489 & n.25 (citing *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913); *MacFadden v. United States*, 165 F. 51 (3d Cir. 1908); *United States v. Bennett*, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879); *United States v. Clarke*, 38 F. 500 (E.D. Mo 1889); *Commonwealth v. Buckley*, 86 N.E. 910 (Mass. 1909)).

mately rejected by the Supreme Court because of the potential for overbreadth.¹⁰⁴

The Court replaced the *Hicklin* standard with a test of whether “to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”¹⁰⁵ In his concurrence, Chief Justice Warren emphasized that this evaluation depends upon the *effect* of the materials upon the particular viewer.¹⁰⁶ He further stressed that because the person, not the material, is on trial, the analysis should account for the context of the materials.¹⁰⁷ This notion was ultimately adopted by the Court.¹⁰⁸

The Court continued to modify the obscenity exception several times over the next fifteen years, though frequently in plurality opinions,¹⁰⁹ until ultimately reaching the modern-day standard.¹¹⁰ According to the standard in effect since 1973, three considerations determine whether material is obscene:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹¹¹

The present-day test thus essentially limits obscenity to “hard-core pornography”¹¹² and thereby still protects material that potentially contains serious artistic and literary expression.¹¹³

¹⁰⁴ *Id.* at 489.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 495 (Warren, C.J., concurring) (emphasis added).

¹⁰⁷ *Id.* (emphasizing that the result depends upon the setting and that the scienter requirement reflects this “personal element” within the analysis).

¹⁰⁸ *Ginzburg v. United States*, 383 U.S. 463, 465 (1966) (referring to *Roth*, 354 U.S. 476).

¹⁰⁹ *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 482, 486 (1962) (plurality opinion) (introducing the “patently offensive” component of the test, such that legal obscenity requires materials to be “so offensive on their face as to affront current community standards of decency,” as an addition to the “prurient interest” requirement); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964) (plurality opinion) (explaining that the standard to judge obscenity is a federal, not a local standard); *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (plurality opinion) (adding an “utterly without redeeming social value” component such that the test is whether the material: (a) taken as a whole appeals to a prurient interest in sex; (b) is patently offensive in its offense to contemporary community standards of sexual matters; and (c) is “utterly without redeeming social value”).

¹¹⁰ *Miller v. California*, 413 U.S. 15 (1973).

¹¹¹ *Id.* at 24 (citations omitted). In establishing this test, the Court specifically declined to incorporate the “utterly without redeeming social value” component introduced in *Memoirs*. *Id.* at 24–25 (quoting *Memoirs*, 383 U.S. at 419). Likewise, the Court rejected the need to evaluate national standards of obscenity that had been asserted in *Jacobellis*. *Id.* at 31–32.

¹¹² The Supreme Court has not specifically defined the term “hard-core pornography.” The Court’s references to the test to find hard-core pornography serve as the best definition of the term. *See, e.g.*,

The Court has expressed concern with setting aside First Amendment protection and granting power to regulate in the vague area of obscenity.¹¹⁴ Examples of the difficulty perceived by the Court in classifying material as “obscene” include the aforementioned labeling by Justice Harlan of the issue as “the intractable obscenity problem”¹¹⁵ and the famous statement by Justice Stewart that “I know it when I see it, and the motion picture involved in this case is not that.”¹¹⁶ Designating material as obscene thus appears to be a tricky and subjective business.¹¹⁷ The subjectivity intrinsic in classifying materials as obscene is further illustrated by the large number of plurality opinions that involve numerous and divergent viewpoints.¹¹⁸ As noted by the Court, there have been “a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.”¹¹⁹

I. Implications for State Legislation.—The difficulty in clearly defining what constitutes “obscenity” would seem to create inherent issues of vagueness and lack of notice in state legislation banning obscenity. The Court has responded, however, that the *Miller* standard is sufficiently specific to provide notice to dealers of questionable materials.¹²⁰ In balancing concerns of notice for potential violators and protection of viewers, the

Jacobellis, 378 U.S. at 197 (Stewart, J., concurring) (stating that the First and Fourteenth Amendments limit the scope of criminal laws to “hard-core pornography”). As Justice Stewart acknowledged: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description.” *Id.* Instead, he offered his famous, yet vague and subjective, reference: “But I know it when I see it, and the motion picture involved in this case is not that.” *Id.*

¹¹³ *Miller*, 413 U.S. at 27 (stating that because the exception is confined to patently offensive (i.e., hard-core) material, a prospective offender will have fair notice of potential violation); JAMES WEINSTEIN, HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE 29 (1999) (stating that the decision in *Miller* “limits obscenity to ‘hard-core’ pornography” by specifying that “[t]o be legally obscene and thus without First Amendment protection, the material must, taken as a whole, ‘appeal to the prurient interest,’ describe ‘ultimate sexual acts,’ in a ‘patently offensive way,’ and lack ‘serious literary, artistic, political, or scientific value’” (footnotes omitted)).

¹¹⁴ See *Manual Enterprises*, 370 U.S. at 500 (Brennan, J., concurring) (recognizing that “[t]he area of obscenity is honeycombed with hazards for First Amendment guaranties” and therefore the “grant of . . . power should not be decided when the relevant materials are so ambiguous as to whether such grant exists”).

¹¹⁵ *Ginsburg v. New York*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part).

¹¹⁶ *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

¹¹⁷ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92 (1973) (“The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.”).

¹¹⁸ See *Miller*, 413 U.S. at 22 (recognizing that apart from *Roth*, “no majority . . . [has] been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States’ police power”); *supra* note 109.

¹¹⁹ *Ginsburg*, 390 U.S. at 704–05 (Harlan, J., concurring in part and dissenting in part) (footnote omitted).

¹²⁰ *Miller*, 413 U.S. at 27.

Court has concluded that the *Miller* standard conveys sufficiently definite warning while still providing some protection for juveniles and unwilling recipients.¹²¹

Miller does provide some clear directives. Obscenity is one category of content that may be restricted by the states without raising First Amendment issues. The *Miller* test covers the area of “obscenity” only, and contains three specific criteria for determining whether material is obscene.¹²² Furthermore, given the Court’s historic difficulty in reaching consensus on this issue, and the Court’s ultimate agreement in *Miller*, state legislation of obscenity should adhere to the *Miller* test as closely as possible to ensure survival under the Court’s scrutiny.¹²³

Only two of the three currently enacted state statutes governing content appear to meet the *Miller* directives and fall within the obscenity exception.¹²⁴ The Virginia statute both precisely references “obscene” material and closely recapitulates the considerations in *Miller*,¹²⁵ and thus appears to fit quite comfortably within the obscenity exception to the First Amendment. The Tennessee statute uses the terms “obscene” and “patently offensive.”¹²⁶ The statute defines obscene in a manner that matches the *Miller* standard,¹²⁷ so as long as the phrase “patently offensive” is treated similarly to the phrase as stated within the *Miller* standard, the Tennessee statute does not extend beyond the obscenity exception. Unlike the Virginia and Ten-

¹²¹ *Id.* at 28 n.10; see also *United States v. Petrillo*, 332 U.S. 1, 7 (1947) (stating that the potential existence of “marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense”).

¹²² See *Miller*, 413 U.S. at 24.

¹²³ In addition, as previously stated *supra* note 95, to provide optimal transparency, states could include their interest for legislating within the statutory language, though it appears waiting to raise such justification until there has been a constitutional challenge may suffice. *Miller*, 413 U.S. at 17 n.1, 18–19 (finding justifications of “danger of offending the sensibilities of unwilling recipients or of exposure to juveniles” for the statute although the statutory language did not contain such purposes).

¹²⁴ This Comment will consider the impact of these rules on currently enacted state legislation (i.e., in Tennessee, Louisiana, and Virginia) only. While legislative activity is fruitful for discussion purposes, pending statutes may go through several versions before a final statement of the law is reached, and rejected statutes were obviously found unsuitable for enactment, inappropriate for enactment, or both. Focus on enacted statutes is therefore more germane. The analysis of these statutes is intended to provide guidance for other states considering legislation without speaking directly to their current or failed attempts to compose legislation.

¹²⁵ VA. CODE ANN. § 46.2-1077.01 (2004); see also *id.* § 18.2-372 (defining “obscenity”).

¹²⁶ The Tennessee statute regulates “obscene and patently offensive movies.” TENN. CODE ANN. § 55-8-187 (2004).

¹²⁷ “Obscene” means,

(A) [t]he average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (B) [t]he average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and (C) [t]he work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

TENN. CODE ANN. § 39-17-901 (2003).

nessee statutes, however, the Louisiana statute does not closely align with the *Miller* standard. The Louisiana statute refers to “sexually explicit” material and focuses on sexual activity and nudity, without limitation by the considerations outlined in *Miller*.¹²⁸ The statute’s overly broad definition of “sexually explicit” does not contain the same considerations that exist in the *Miller* standard, e.g., that the work should be considered “as a whole.”¹²⁹ Therefore, the Louisiana statute appears to fall outside the obscenity exception to the First Amendment.

2. *Public Concern Left Unaddressed.*—States’ ability to legislate content changes outside the scope of the obscenity exception. If material does not meet *Miller* standards, then legislative restrictions of the material fall beyond the obscenity exception and therefore are subject to the more stringent scrutiny of content-based laws. However, the Louisiana statute suggests that state legislatures seek to regulate content outside what is allowable under the obscenity exception to the First Amendment. In addition, public concern¹³⁰ and local law enforcement activity¹³¹ reveal that legislation is not as far-reaching as some groups would like. Though beyond the category of obscenity, there are no areas, such as “pornography” or “nudity,” that would be subject to less than strict scrutiny under the First Amendment. “Pornography,” for instance, is a term that has no legal significance within Court standards.¹³² Even legislation of material considered pornographic must meet the *Miller* standard to fall within the obscenity exception.¹³³ The *Miller* standard is the complete and only test for the obscenity exception—legislation that does not meet *Miller* standards is beyond the bounds of this exception.

B. *Potential Justifications for Restricting Content Outside the Obscenity Exception to the First Amendment*

Outside of the obscenity exception, the Court generally applies strict scrutiny to limitations of expression based on the message conveyed.¹³⁴

¹²⁸ The Louisiana statute governs “sexually explicit material,” which is defined as including “(1) [u]ltimate sexual acts, normal or perverted, actual, simulated, or animated, whether between human beings, animals, or an animal and a human being” and “(2) [t]he graphic depiction of sex, including but not limited to the visual depiction of sexual activity or nudity.” LA. REV. STAT. ANN. § 14:106.3.B(2) (2004).

¹²⁹ *Miller v. California*, 413 U.S. 15, 24 (1973) (stating three considerations, two of which are applied to the work “as a whole”).

¹³⁰ See *supra* notes 48–51 and accompanying text.

¹³¹ See *supra* note 77 and accompanying text.

¹³² KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* 128 (2003) (“Pornographic material has sexual content but is not necessarily obscene.”); Dept. of Pub. Educ., Am. Civil Liberties Union, *Why the ACLU Opposes Censorship of “Pornography,”* Dec. 11, 1994, http://www.eff.org/Censorship/aclu_opposes_porno_censorship.article.

¹³³ SAUNDERS, *supra* note 132, at 128.

¹³⁴ *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).

This standard reflects the Court's position that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹³⁵ Strict scrutiny requires that state governments establish a compelling government interest and legislate using the least restrictive means available.¹³⁶

Although strict scrutiny may be difficult to survive, legislators have historically attempted to craft content-based regulations to withstand strict scrutiny in various ways. Three asserted purposes germane to this analysis are: (1) preventing the corrupting influence on juveniles, (2) protecting citizens against unwilling exposure to material, and (3) providing road safety.¹³⁷

1. Preventing the Corrupting Influence on Juveniles.—One potentially regulable niche outside of the obscenity exception may exist for material that does not reach the level of obscenity but is still considered "harmful to minors." Supreme Court rulings suggest that material of a sexual nature that does not qualify as "obscene" under the *Miller* standard is nonetheless a "lower-valued" form of material that may not be entitled to complete First Amendment protection.¹³⁸ The Court has also stated that government may more tightly control materials accessible by youths than those available to adults.¹³⁹ One rationale offered for the different treatment for youths as for adults, as explained by Justice Stewart, is that "a child—

¹³⁵ *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹³⁶ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Carey v. Brown*, 447 U.S. 455, 461–62 (1980) ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."); Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 745–46 (2003) (citing *Playboy Entertainment Group*, 529 U.S. at 813, for the proposition that "a statute [that] regulates speech based on its content . . . must be narrowly tailored to promote a compelling Government interest").

¹³⁷ These purposes were previously asserted in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), a comparable case involving restrictions placed on a drive-in movie theater screen.

¹³⁸ Weinstein, *supra* note 113, at 33 (1999) (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres*, 427 U.S. 50 (1976)). In *Young*, when considering regulation of "erotic materials that have some arguably artistic value," the Court stated that "[e]ven though the First Amendment protects communication in this area from total suppression[,] . . . the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." 427 U.S. at 70–71. In *Renton*, the Court referred to *Young* to find that a distinction between adult theaters and other theaters did not violate the government's obligation of neutrality regulating protected communication. *Renton*, 475 U.S. at 49–55.

¹³⁹ *Ginsberg v. New York*, 390 U.S. 629, 640–41 (1968) ("It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults." (quoting *People v. Kahan*, 206 N.E.2d 333, 334–35 (N.Y. 1965) (Fuld, J., concurring))). It appears from the text of *Kahan* that Judge Fuld was indeed referring to a statute targeting "obscene" material, despite his use of the term "pornography." 206 N.E.2d at 334–36.

like someone in a captive audience—is not possessed of that full capacity of individual choice which is the presupposition of First Amendment guarantees.”¹⁴⁰ While acknowledging that there may be lessened scrutiny for materials accessible by juveniles, however, the Court has specified that governments may bar youth exposure to materials only in relatively narrow and well-defined circumstances.¹⁴¹

In *Ginsberg v. New York*, the Court considered the constitutionality of a New York statute that “prohibit[ed] the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.”¹⁴² The Court concluded that allowing state restriction of material defined as obscene with relation to minors (which may not be so with relation to adults) required the finding that it was “not *irrational* for the legislature to find that exposure to material condemned by the statute is harmful to minors.”¹⁴³ The Court stated that it would not demand that states provide “scientifically certain criteria” that material is obscene as to minors.¹⁴⁴ Applying these rules, the Court deferred to the state’s judgment and found there was no lack of rational relation between the focus of the statute and the objective of safeguarding minors.¹⁴⁵

While it seems logical to extend the distinction drawn in *Ginsberg* and defer to state judgment in the context of in-car video screens visible to minors, a significant difference exists between the sale of materials and the viewing of in-car video screens. This distinction precludes the extension of the Court’s logic in *Ginsberg*. The state law in *Ginsberg* could restrict sales to minors without affecting sales to adults, whereas a similar law applying to video screens could not easily prohibit viewing by minors without also impacting viewing by adults. Because the law would unavoidably include activities of adults in its scope, the Court likely would not find a law governing video screens “narrowly tailored” to the purpose of preventing the corruption of minors.

After *Ginsberg*, the Court invalidated an ordinance because of overbreadth as to viewers and as to scope. This later invalidation concerned legislation of a medium more similar to in-car video screens than the book sales in *Ginsberg*. In *Erznoznik v. City of Jacksonville*, the city asserted that the prohibition of the display of nudity, including bare buttocks and breasts, on a drive-in movie theater screen was within state police power to

¹⁴⁰ *Ginsberg*, 390 U.S. at 649–50 (Stewart, J., concurring).

¹⁴¹ Ashutosh Bhagwat, *What if I Want My Kids to Watch Pornography?: Protecting Children from “Indecent Speech,”* 11 WM. & MARY BILL RTS. J. 671, 672 n.6 (2003) (citing *Ginsberg*, 390 U.S. 629, as evidence that the Court found that the government may prohibit speech viewed by minors even if the speech is protected for adult viewing).

¹⁴² 390 U.S. at 631.

¹⁴³ *Id.* at 641.

¹⁴⁴ *Id.* at 641–43.

¹⁴⁵ *Id.* (concluding that the Court would accept the state’s finding that the obscenity standard reasonably related to the state’s objective of safeguarding minors).

protect children.¹⁴⁶ The Court rejected this argument and invalidated the ordinance as overly broad in its prohibition of any exposed buttocks or breasts “irrespective of context or pervasiveness.”¹⁴⁷ The Court noted two fundamental difficulties with ordinances like the one at issue in *Erznoznik*. First, the application to all groups of people, which might include relatively few or no minors, represented unlawful interference with general access to such materials.¹⁴⁸ Second, the incorporation of all “nudity,” was an impermissibly broad action for the purpose of protecting minors because “[c]learly all nudity cannot be deemed obscene even as to minors.”¹⁴⁹

As with movie theater screens, in-car video screens may be viewed by minors and adults simultaneously. Unlike the sale of materials in *Ginsberg*, which involved transactions on a one-on-one basis, the projection of a screen is visible to all. For this reason, the Court likely would have the same concerns of unlawful interference with general access to materials that were raised in *Erznoznik* and similar cases.¹⁵⁰ Therefore, while the Court deems material of a sexual nature less protected than the content of the material on the whole, and grants some deference to states in preventing harm to minors, in practice, concern for overbreadth with respect to content and audience appears to leave little room for legislation of in-car video screens beyond the obscenity exception.

It is difficult to envision a law that would prohibit particularly offensive nudity without also incorporating nudity outside the purpose of the law. Examples of less or nonoffensive nudity, as provided by the Court in *Erznoznik*, include the portrayals of a baby’s buttocks, a war victim, and an indigenous culture.¹⁵¹ One potential standard for legislation may be whether the nudity seems reasonable and appropriate in context of the work as a whole. This factor would avoid inclusion of the previously raised examples, to the extent that the nudity falls within the *Miller* standard and is not deemed gratuitous. However, interestingly and perhaps fittingly, adjudging the reasonableness and appropriateness of the nudity in relation to the work as a whole is a major component of the *Miller* standard.¹⁵² In light of the

¹⁴⁶ 422 U.S. 205, 206, 212 (1975).

¹⁴⁷ *Id.* at 213.

¹⁴⁸ See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874–76 (1997); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74–75 (1983) (“The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox . . . regardless of the strength of the government’s interest [in protecting children].”).

¹⁴⁹ See *Erznoznik*, 422 U.S. at 213.

¹⁵⁰ See cases cited *supra* note 148. In *Reno*, the Court invalidated a law controlling internet distribution of “indecent” material to minors because the law unduly interfered with adults’ access to the same materials. 521 U.S. at 874–76.

¹⁵¹ *Erznoznik*, 422 U.S. at 213 (noting that the ordinance would “bar a film containing a picture of a baby’s buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous”).

¹⁵² *Miller v. California*, 413 U.S. 15, 24 (1973).

Court's concerns in *Erznoznik*, it is clear why the *Miller* standard is the most appropriate way to allow subjective consideration of content while avoiding the incorporation of nudity that falls outside the purpose of the statute. This delicate balance, however, also leads to the ultimate conclusion that there is little room for legislating the content of in-car video screens outside of the obscenity exception according to the *Miller* standard.

2. *Protecting Citizens Against Unwilling Exposure to Offensive Material.*—The Court has confronted several conflicts between First Amendment rights and privacy interests of unwilling viewers.¹⁵³ According to the Court, legislation intended to protect unwilling audiences is allowed only “upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”¹⁵⁴ The Court’s concern in creating such a narrow allowance is rooted in safeguarding First Amendment rights because “[a]ny broader view of th[e states’] authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”¹⁵⁵

At times, the Court has upheld legislation intended to protect against exposure to unwilling viewers even when the legislation conflicted with First Amendment protections. For example, in *Kovacs v. Cooper*, the Court upheld an ordinance banning “loud and raucous” noise produced by amplifying devices on public streets that was challenged as an infringement upon freedom of speech.¹⁵⁶ In other contexts, the Court has found violations of First Amendment rights, such as when the Court invalidated a statute that prevented wearing a jacket bearing the words “Fuck the Draft” in a county courthouse.¹⁵⁷ The Court distinguished the exposure to visual affront from that of exposure to loud noise because viewers “could effectively avoid further bombardment of their sensibilities simply by averting their eyes.”¹⁵⁸ This advice was reiterated by the Court in *Erznoznik* with respect to passersby of drive-in movie theater screens.¹⁵⁹

¹⁵³ See, e.g., *Cohen v. California*, 403 U.S. 15 (1971); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (plurality opinion).

¹⁵⁴ *Cohen*, 403 U.S. at 21.

¹⁵⁵ *Id.*

¹⁵⁶ 336 U.S. at 78–79, 89. The Court decided that the ordinance was an impermissible regulation of speech because the local government acted reasonably in protecting its citizens from nuisance and distracting noises. *Id.* at 88–89. The case is positioned on a fine line between content regulation and time, place, and manner regulation, in that the ordinance did ban a specific category of speech (“loud and raucous”) though arguably for its manner rather than for its content. Though not specifically categorizing the case as either, the plurality opinion references both First-Amendment-type and “time, place, and manner”-type language. *Id.* In addition, the Court referenced *Kovacs* in *Erznoznik v. City of Jacksonville* when weighing “the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors.” 422 U.S. at 208.

¹⁵⁷ *Cohen*, 403 U.S. at 16–17.

¹⁵⁸ *Id.* at 21.

¹⁵⁹ *Erznoznik*, 422 U.S. at 210–11 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

In *Erznoznik*, the Court set forth two situations in which averting one's eyes would *not* be a sufficient solution.¹⁶⁰ These situations include: “when the speaker intrudes on the privacy of the home” and when the “degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.”¹⁶¹ However, considering the specificity of these two exceptions, restrictions of in-car video screens do not appear to clearly fall within either of them. The Court would likely find the exceptions insufficient as applied to in-car video screens just as the Court declared them insufficient in *Erznoznik*.

The first exception referenced in *Erznoznik*, for “when the speaker intrudes on the privacy of the home,” was established in *Rowan v. Post Office Dept.*¹⁶² In *Rowan*, the Court acknowledged that society must be a captive audience in many situations but excepted those “captives” who affirmatively stated their unwillingness to receive certain information.¹⁶³ Specifically, the Court found that “the mailer’s right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.”¹⁶⁴

Regardless of the comparable rights at issue, in a practical sense, it would be difficult for car passengers to express their desire not to be subjected to viewing screens in other cars. In *Rowan*, the affirmative act of unwilling mail recipients allowed abridgment of the mailer’s First Amendment rights. A comparably affirmative act could not be replicated by passengers in cars and communicated to passengers in other vehicles.¹⁶⁵ In addition, video screen exposure is not directed at one viewer, as with a mailing. Instead, in the case of in-car video screens, viewers inside the car containing the video screen and viewers in surrounding cars may want to view the screens, and their rights would need to be balanced against those of unwilling viewers. In *Rowan*, this conflict did not exist, but the same rule could not practically apply in the presence of such conflict.

The first exception referenced in *Erznoznik*, for when the “degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,” was created in *Lehman v. City of Shaker Heights*.¹⁶⁶ In *Lehman*,

¹⁶⁰ See Bell, *supra* note 136, at 753–54 (noting the Court in *Erznoznik* advised viewers to avert their eyes “absent two narrow exceptions”); *Erznoznik*, 422 U.S. at 219 (Burger, J., dissenting) (characterizing the majority as stating that “absent ‘special circumstances’ . . . the burden falls upon the public to ignore offensive materials”).

¹⁶¹ *Erznoznik*, 422 U.S. at 209 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion)); *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)).

¹⁶² 397 U.S. at 728.

¹⁶³ *Id.* at 736–37.

¹⁶⁴ *Id.*

¹⁶⁵ Arguably, honking or yelling at the car displaying the video screen could be one method of communication, but that is not practically feasible in many situations and certainly does not replicate the solution possible in the mailing context.

¹⁶⁶ 418 U.S. at 299–303.

the Court found an increased degree of viewer captivity because the material consisted of political advertisement on public transportation where riders were on board without choice or volition.¹⁶⁷ Although one might argue that car passengers are similarly situated to those riding public transportation, a footnote in *Erznoznik* indicates that the Court likely would not accept such an argument.¹⁶⁸ The Court stated that: “the degree of captivity and the resultant intrusion on privacy is significantly greater for a passenger on a bus than for a person on the street.”¹⁶⁹ This statement reflects that policy concerns in *Lehman* may only pertain to riders of public transportation.¹⁷⁰ Given the tenuous relation of video screens in cars to commuting and public transportation,¹⁷¹ this exception is likely insufficient justification for restrictions on behalf of nearby car passengers.

Other arguments to protect against viewers’ unwilling exposure to offensive material would likely also fail with respect to in-car video screens. One could emphasize the massive size of images projected on forty-inch video screens. However, in his dissent in *Erznoznik*, Chief Justice Burger specifically recognized that the majority advised viewers to avert their eyes even in the face of “the outsize screen of a drive-in movie theater.”¹⁷² One could instead argue the likelihood of a large presence of unwilling viewers given the proliferation of the in-car video industry.¹⁷³ Yet Chief Justice Burger also emphasized the potential for many viewers, noting that petitioner’s movie screen “dominated” the view from public places including “adjacent highways,” but this argument was not accepted by the majority.¹⁷⁴ Lastly, one could suggest that the images portrayed on in-car screens are particularly visible at nighttime, causing even greater offense at certain hours.¹⁷⁵ However, while this consideration was not specifically addressed in *Erznoznik*, it would similarly exist with respect to both drive-in theater screens and in-car video screens, and therefore the new medium does not present a unique concern to be addressed through legislation.

In fact, in the *Erznoznik* opinion, the Court foreshadowed the current situation. The Court stated that “[t]he plain, if at times disquieting, truth is

¹⁶⁷ *Id.* at 299–302.

¹⁶⁸ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 n.5 (citations omitted).

¹⁶⁹ *Id.*

¹⁷⁰ *Lehman*, 418 U.S. at 303 (noting that the City “must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights”); *see also id.* at 307 (Douglas, J., concurring) (“Buses . . . are a practical necessity for millions in our urban centers.”).

¹⁷¹ As a practical matter, those driving from one destination to another, whether for commuting purposes or for other reasons, are “captives” similarly to those using public transportation. However, given the way the Court stressed the public transportation element in *Lehman*, this relation may not be sufficiently close to allow the existence of similar restrictions.

¹⁷² *Erznoznik*, 422 U.S. at 220–21 (Burger, C.J., dissenting).

¹⁷³ *See supra* notes 48–51.

¹⁷⁴ *Erznoznik*, 422 U.S. at 221 (Burger, C.J., dissenting).

¹⁷⁵ Runk, *supra* note 44.

that in our pluralistic society, constantly proliferating new and ingenious forms of expression, ‘we are inescapably captive audiences for many purposes.’”¹⁷⁶ The situation may have changed, but the underlying principles are the same, and thus the Court’s approach to “constantly proliferating” in-car video screens likely would be to protect First Amendment rights and instead emphasize viewers’ responsibility to “avert[] their eyes.”¹⁷⁷

3. *Providing Road Safety.*—Legislative purpose behind the language of current content-based laws suggests that states are concerned with more than just monitoring morality.¹⁷⁸ Specifically, the Tennessee statute was enacted “[t]o avoid distracting other drivers and thereby reduce the likelihood of accidents arising from lack of attention or concentration.”¹⁷⁹ Senate Transportation Committee discussions reveal the concern that the commotion created after the children have been exposed to inappropriate content, and the effort involved in calming the children, will distract parents while driving.¹⁸⁰

While this safety-minded purpose is laudable, the Court in *Erznoznik* quickly dismissed traffic regulation as a justification for the content-based law at issue in the case. The Court found that such a purpose would be “invalid” for a law limiting nudity considering that “[t]here is no reason to think that a wide variety of other scenes in the customary screen diet, ranging from soap opera to violence, would be any less distracting to the passing motorist.”¹⁸¹ In dismissing this content-based law, however, the Court left open the possibility of state action with a nondiscriminatory, content-neutral focus aimed at traffic regulation.¹⁸² Thus, a law that applied to all in-car video screens irrespective of content might pass muster, though a content-based law likely would not.

4. *Implications for State Legislation.*—As discussed, three potential justifications exist that might prevent the application of strict scrutiny to content-based laws. The Court has previously subjected to lesser scrutiny state regulations that aim to: (1) prevent the corrupting influence on juveniles, (2) protect citizens against unwilling exposure to offensive material, and (3) provide road safety. However, as explained, practical ability to regulate in-car video screens prevents the enactment of content-based laws purporting to be justified under any of these three categories.

¹⁷⁶ *Id.* at 210 (quoting *Rowan v. Post Office Dept.*, 397 U.S. 728, 736 (1970)).

¹⁷⁷ *Cohen v. California*, 403 U.S. 15, 21 (1971).

¹⁷⁸ *See supra* notes 80–90 and accompanying text.

¹⁷⁹ TENN. CODE ANN. § 55-8-187 (2004).

¹⁸⁰ Audio tape: Tenn. Senate Transp. Committee meeting to discuss S.B. 0176 (Mar. 3, 2003) (on file with author).

¹⁸¹ *Erznoznik*, 422 U.S. at 214–15.

¹⁸² *Id.* at 215 n.13.

Thus it appears practically impossible to fit the content-based Louisiana statute regulation under the three potential purposes outside of the obscenity exception. As a result, the Louisiana statute would likely be subject to strict scrutiny if considered by the Supreme Court as a violation of the First Amendment. Given the Court's clear stance against selectively impinging on free speech rights and the Court's conclusion in favor of First Amendment rights in *Erznoznik*,¹⁸³ the statute would likely fail to pass constitutional challenge under the First Amendment.

V. CONTENT-NEUTRAL LEGISLATION AS A VIABLE OPTION

Conflict with First Amendment rights arises when laws are aimed at certain categories of speech or expression, such as when the government "undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others."¹⁸⁴ However, the Supreme Court views content-neutral "time, place, or manner" restrictions with more deference than laws based on content. The government may set reasonable restrictions on the time, place, or manner of otherwise protected speech, as long as the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."¹⁸⁵ The rationale rests in the Court's acknowledgement that "the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what its message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility."¹⁸⁶ According to the Court, content-neutral regulations of time, place, or manner that may impact speech are permissible as long as they further government interests and still allow for adequate alternative methods of communication.¹⁸⁷ The Court described this lessened standard for content-neutral regulation in its discussion of the content-based ordinance in *Erznoznik*.¹⁸⁸

A statute that does not appear speech related on its face but affects freedom of speech in practice may nonetheless be valid. In *Clark v. Community for Creative Non-Violence*, for example, a regulation preventing

¹⁸³ *Id.* at 209.

¹⁸⁴ *Id.* For a statement of the rule, see *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹⁸⁵ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see also Ward*, 491 U.S. at 791.

¹⁸⁶ *See Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 535 (1980) ("This Court has recognized the validity of reasonable time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." (citations omitted)).

¹⁸⁷ *Id.*

¹⁸⁸ *Erznoznik*, 422 U.S. at 209 ("A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content." (citations omitted)).

overnight camping in a park thwarted the action of demonstrators who intended to sleep in the park as part of their activist effort.¹⁸⁹ The Court upheld the regulation, finding that even if sleeping were considered part of the demonstrators' efforts and therefore were protected by the First Amendment, restricting such rights was valid given the regulation's separate purpose.¹⁹⁰ This decision demonstrates that the Court generally takes a less stringent approach to regulations that are content neutral.

Because of their nondiscriminatory focus, content-neutral laws governing in-car video screens would not raise the same First Amendment concerns as content-based regulation. As noted by the Court, "[s]tates traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."¹⁹¹

Varying types of content-neutral restrictions could be imposed by states with respect to in-car video screens. The only content-neutral laws that exist in states to date prohibit video screen operation, placement in the driver's view, or both.¹⁹² As an extreme extension of current legislation, states could completely ban video screens in cars. However, all benefits provided by the screens would then be lost in favor of avoiding *any* potential harm or offense. To retain some of these benefits, states could increase limitations on in-car video screens to improve road safety but not entirely ban the screens.

Though state restrictions of in-car video screens in cars are relatively new and recently enacted,¹⁹³ state regulations for health and safety concerns in other areas offer helpful comparisons to the current issue. Consideration of these areas provides useful examples of other regulatory methods and a general idea of what has been approved by the states from a cost-benefit perspective.

In considering legislative options to address in-car video screens, legislatures should be mindful of the costs and benefits associated with the new technology.¹⁹⁴ States have a responsibility to provide for the safety of their citizens and act to minimize accidents whenever feasible. At the same time,

¹⁸⁹ 468 U.S. at 289; *see also* *Adderley v. Florida*, 385 U.S. 39, 40–41 & n.1, 46–47 (1966) (finding that a statute that punished "trespass . . . committed with a malicious and mischievous intent" was not worded or applied in a discriminatory manner and therefore conviction under the statute did not violate petitioners' rights to freedom of speech, press, assembly, or petition).

¹⁹⁰ *Clark*, 468 U.S. at 288–99.

¹⁹¹ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1995) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

¹⁹² *See supra* notes 9, 80–90 and accompanying text.

¹⁹³ *See supra* notes 9, 61–74 and accompanying text.

¹⁹⁴ Robert W. Hahn & Patrick M. Dudley, *The Disconnect Between Law and Policy Analysis: A Case Study of Drivers and Cell Phones*, 55 ADMIN. L. REV. 127, 143 (2003) (citing JANE C. STUTTS ET AL., AAA FOUND. FOR TRAFFIC SAFETY, THE ROLE OF DRIVER DISTRACTION IN TRAFFIC CRASHES (2001), available at <http://www.aaafoundation.org/projects/index.cfm?button=distracton>).

states must be wary of taking any action that would impose burdens beyond those warranted and of unnecessarily stifling technology and the public good.¹⁹⁵

A. Comparative Analysis: Cellular Phone Use While Driving

Very little research is available on the driver distraction caused by in-car video screens.¹⁹⁶ Although a lack of research exists in this area, substantial research has been done on the dangers caused by use of a different technology while driving—cell phones. “Driving while dialing”¹⁹⁷ is a hot-button issue among researchers and scholars with a plethora of recent data available.¹⁹⁸

In-car video screens and cell phones distract drivers in different ways. In-car video screens cause primarily visual and only some audio and physical (operation-related) distraction, whereas cell phones create primarily audio and physical (operation-related) distraction with limited visual distraction. The technologies also offer differing benefits to users. In-car video screens provide entertainment value to passengers, and may allow drivers to better focus on the road because they lead to quieter passengers. Cell phones offer convenience and the ability to multi-task, and may stimulate otherwise sleepy drivers on the road. Though they have these differences, both technologies commonly distract drivers and pose potential risks on the road, and in that respect data on cell phone usage has some value for comparative purposes.¹⁹⁹

In 2000, the AEI-Brookings Joint Center published a study that considered the costs and benefits of instituting restrictions on cellular phone use

¹⁹⁵ In this consideration, the issue of safety is not necessarily on one side only. Safety may be increased by restricting in-car video screen usage and reducing distraction to other drivers. However, not restricting the screens might increase safety in another way by quieting passengers that might otherwise be distracting to drivers.

¹⁹⁶ Kristin Dizon, *Laws Can't Keep up with On-the-Go Gadgets: DVD Players, PDAs Escape Regulation*, SEATTLE POST-INTELLIGENCER REP., Nov. 17, 2004, at A13 (according to Mike Goodman, head of the National Highway Traffic Safety Administration driver vehicle performance group, “[i]t’s a no brainer—[y]ou don’t have to do research that a driver shouldn’t watch a movie while driving. You don’t have to waste public funds on that”); *Stateline: Addicted to TV*, ST. LEGISLATURES, Mar. 1, 2004, at 12 (stating that distraction caused by in-car video devices has “barely been studied” and that the National Highway Traffic Safety Administration has not done *any* specific research on the distraction caused by video screens in cars).

¹⁹⁷ See Richard Perez-Pena, *Leaders Favor Ban on Driving While Dialing*, N.Y. TIMES, Apr. 3, 2001, at B1.

¹⁹⁸ *Drive Now, Talk Later—Articles About Driving While Talking*, CARTALK, <http://www.cartalk.com/content/features/Drive-Now/articles.html> (last visited Nov. 18, 2005) (listing over eighty news articles dating from February 1997 to June 2005 discussing cell phone use by drivers).

¹⁹⁹ One news source suggests that video screens might even pose a greater distraction to drivers than cell phone use. *Move to Ban TVs in Cars*, SUNDAY TASMANIAN (Hobart, Tas., Austl.), Apr. 4, 2004, at 6 (stating that the National Roads and Motorists’ Association (“NRMA”) research “indicates that ‘interacting’ with a car’s entertainment system while driving posed a greater hazard than speaking on the mobile phone”).

while driving.²⁰⁰ The authors concluded that the costs of completely prohibiting cellular phone use by drivers greatly outweighed the potential benefits a ban would have in accident reduction.²⁰¹ The study further suggested that not even the benefits of mandating use of hands-free devices while driving surpassed the costs imposed.²⁰² A subsequent article by AEI-Brookings Joint Center scholars concurred, finding the accident risk of using cell phones while driving did not justify a ban.²⁰³ According to the article, studies of distraction-related crashes indicate that the magnitude of cell phone-related crashes is comparable to the percentage caused by smoking or eating, which are both minimal in comparison to other causes.²⁰⁴ The writers emphasized that because virtually all activities create risks, the mere existence of risk did not justify regulation.²⁰⁵

According to these researchers, the implementation of non-cost-beneficial cell phone use restrictions reveals a divide between law and policy in this area.²⁰⁶ One explanation for this phenomenon, the authors suggest, is that lawmakers are responding to widespread public support.²⁰⁷ However, the public's support is based on an exaggerated perception of risk.²⁰⁸ These scholars stress that good policy should pass a cost-benefit test, and many studies have concluded a cell phone ban does not.²⁰⁹ Given the findings of these cellular phone studies and the authors' concluding

²⁰⁰ Robert W. Hahn et al., *Should You Be Allowed to Use Your Cellular Phone While Driving?*, REGULATION, Fall 2003, at 46 (2000), available at <http://www.cato.org/pubs/regulation/regv23n3/hahn.pdf>.

²⁰¹ *Id.* at 47–50.

²⁰² *Id.* at 50–52.

²⁰³ See Hahn & Dudley, *supra* note 194.

²⁰⁴ *Id.* at 143 (highlighting STUTTS ET AL., *supra* note 194, at Executive Summary) (finding that that 1.5% of distraction-related crashes were caused by drivers using cell phones, 0.9% were caused by smoking, and 1.7% by eating, while 29.4% were caused by distractions outside the vehicle, 11.4% by adjusting the radio control, and 10.9% by other occupants). It is relevant to note that statistical data regarding accidents caused by cell phone use is difficult to obtain for many reasons, including that information is unevenly collected and may go unreported because it is not something unlawful that police officers would note. See Dusty Horwitt, Note, *Driving While Distracted: How Should Legislators Regulate Cell Phone Use Behind the Wheel?*, 28 J. LEGIS. 185, 187–90 (2002); Fran Betts, *Driving with Cell Phones: What Have Highway Safety Researchers Learned*, Public Meeting on the Safety Implications of Driver Distraction When Using In-Vehicle Technologies, National Highway Traffic Safety Administration (July 18, 2000), available at http://www.nrd.nhtsa.dot.gov/PDF/nrd-13/BentsF_doc.pdf.

²⁰⁵ See Hahn & Dudley, *supra* note 194, at 144–45.

²⁰⁶ *Id.* at 178.

²⁰⁷ *Id.* at 168–70.

²⁰⁸ *Id.* at 170.

²⁰⁹ *Id.* at 145, 146–49 (citing several studies, including Donald A. Redelmeier & Milton C. Weinstein, *Cost-Effectiveness of Regulations Against Using a Cellular Telephone While Driving*, 19 MED. DECISION MAKING 1 (1999); Hahn et al., *supra* note 200; Karen Lissy et al., *Cellular Phones and Driving: Weighing the Risks and Benefits*, RISK IN PERSP., July 2000, at 1, all of which “find[] that a cell phone ban would be a costly way to save lives”).

messages,²¹⁰ lawmakers currently assessing the need and benefit of in-car video screen restrictions should avoid creating a similar law and policy divide and refrain from overregulation based on public sentiment rather than rational calculation.

B. The Option of Total Prohibition

An overwhelming majority of states concluded that video screens visible to the driver are sufficiently distracting to justify limitation.²¹¹ However, practically speaking, a screen may be equally visible to a driver in a nearby car, if not more so, than one placed within the driver's own car. For example, a seventeen-inch screen suspended from the ceiling of a car immediately in front of the driver's car may present distraction comparable to that caused by a four-inch screen installed in the dashboard of the driver's car. Thus, while states have expressed concern for driver distraction in laws governing video screens within a driver's car, some amount of driver distraction is caused by screens in other cars as well. This external driver distraction is completely unaddressed by current laws. The only way to eliminate this distraction would be to ban the existence of video screens in all cars on the road, given that laws do not differentiate as to screen types, and "screens" as a general category are visible to other drivers.

While total prohibition may not trigger a First Amendment rights violation, outlawing in-car video screens seems overly restrictive given the existence of counterbalancing benefits. Some solution must exist that does not rob the public of the positive aspects of the technology.²¹² Prohibition may be within state police power, but that approach likely is not a socially or economically desirable solution. A complete ban would be drastic, particularly given the benefits of these screens to the public as reflected by their popularity among various consumer groups.²¹³ Intuitively, one can safely conclude that the problems currently and potentially imposed by in-car video screens do not exceed their advantages such that total prohibition is the optimal solution.

²¹⁰ *Id.*

²¹¹ *See supra* note 9.

²¹² *See, e.g.,* *Kovacs v. Cooper*, 336 U.S. 77, 81–82 (1949) ("Absolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activities."). *Compare* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 62–66, 75–77 (1981) (finding an ordinance that prohibited live entertainment, including live dancing, unconstitutional), *with* *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 54, 72–73 (1976) (upholding a restriction that adult motion picture theaters not be placed within 1000 feet of certain land uses).

²¹³ *See supra* notes 29–47 and accompanying text.

C. Less Drastic Alternatives

While complete prohibition of all in-car video screens may not be an efficient remedy for the distraction caused, less drastic alternatives exist that are more narrowly tailored to the situation at hand. A focused approach to the distraction problem will avoid trampling the other interests involved and provide for the continued public benefits of this technology.

1. *Prohibiting “Deliberate Visual Assault”*.—Legislators could restrict the manner in which material is presented on in-car video screens. In expressing hesitation with respect to content-based regulation,²¹⁴ the Court has acknowledged that the manner in which material is communicated may justify regulation.²¹⁵ That is, “it may not be the content of the speech, as much as the deliberate ‘verbal (or visual) assault’ that justifies proscription.”²¹⁶

Many owners of video screens probably are not using the technology with the intent to confront other viewers. Therefore, they may not be using the technology in a manner constituting “deliberate visual assault.”²¹⁷

For some, however, impacting other viewers may be a motivation for communication. The Court found the existence of purposeful “visual assault” in an accumulation of signs on public property.²¹⁸ The Court refrained from finding a violation of First Amendment rights, instead upholding the local ordinance in favor of the city’s interest in banning such signs.²¹⁹ Emphasizing that the First Amendment prohibits discriminatory regulations that treat some types of speech differently from others, the Court found that the local ordinance concerning the posting of signs on public property applied to all speech equally and therefore did not discriminate.²²⁰ Further, the ordinance advanced a legitimate government interest unrelated to speech—advancing aesthetic values.²²¹ The Court set forth a framework for reviewing viewpoint-neutral regulation:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government[,] . . . furthers an important or substantial governmental interest[,] . . . is unrelated to the suppression of free expres-

²¹⁴ See *supra* Part III.

²¹⁵ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 n.13 (1975).

²¹⁶ *Id.* at 211 n.6 (referring to *Rosenfeld v. New Jersey*, 408 U.S. 901, 906 (1972) (Powell, J., dissenting)).

²¹⁷ In *Erznoznik*, for example, the Court determined that the movie theater operator was not trying to shock, or even reach, unwilling viewers. *Id.* Practically speaking, the Court explained, it would not be in the interests of any commercial venture to offer its goods or services for free. *Id.* In fact, if possible, the theater operator may very well prefer to shield the screens from the nonpaying public. *Id.*

²¹⁸ *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (involving signs posted at various locations in support of a candidate for city council).

²¹⁹ *Id.*

²²⁰ *Id.* at 804–05.

²²¹ *Id.* at 805.

sion[.], and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²²²

Practically speaking, watching television does not seem to trigger the same First Amendment issues as laws impacting picketing,²²³ performing music,²²⁴ signs,²²⁵ or even wearing an expressive shirt.²²⁶ Thus it would seem that restrictions of in-car video screens would not necessarily address intent to influence other viewers as would restrictions on what are more typical First Amendment activities. However, the law often encounters unexpected factual situations that link apparently dissimilar activities, such as protesting and using video screens. One Illinois case illustrates just such an intersection in which video screens were used for protesting purposes. In *Hindi v. Gooch*, the plaintiff purchased an Isuzu “box truck” which had been modified and outfitted with four video screens.²²⁷ Three of these screens measured one-hundred inches diagonally and were placed on the outside of the vehicle, two on the sides and one on the rear.²²⁸ The fourth screen was positioned on the front of the truck and was sixty inches diagonally.²²⁹ The truck’s purpose was to communicate “mobile protest.”²³⁰ The truck was cited for violating two provisions of the Illinois Vehicle Code, one restricting the display of red light in the front of vehicles²³¹ and one prohibiting the placement of video screens visible from the driver’s seat.²³²

The *Hindi* court found that the vehicle code provisions were content-neutral²³³ and furthered “the state’s legitimate interest in promoting the safety of its citizens on public streets.”²³⁴ This finding mirrors the reasoning of the Supreme Court in *Cox v. Louisiana*.²³⁵ In *Cox*, the Court considered the constitutionality of a Louisiana statute prohibiting the obstruction of the free, convenient, and normal use of public passages.²³⁶ Ultimately, the statute’s general prohibition of obstructive communication, which specifically

²²² *Id.* (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (implementing this framework for reviewing viewpoint-neutral regulation)).

²²³ *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

²²⁴ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

²²⁵ *Members of City Council*, 466 U.S. 789.

²²⁶ *Cohen v. California*, 403 U.S. 15 (1971).

²²⁷ *Hindi v. Gooch*, No. 02 C 2927, 2003 WL 1475034, at *7 (N.D. Ill. Mar. 21, 2003).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ 625 ILL. COMP. STAT. ANN. 5/12-212 (West 1993).

²³² *Id.* at 5/12-604.

²³³ *Hindi*, 2003 WL 1475034, at *10 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[A] regulation that serves purposes unrelated to the content of the expression is deemed neutral.”)).

²³⁴ *Id.* (referring to *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997)).

²³⁵ 379 U.S. 536 (1965).

²³⁶ *Id.* at 553.

applied to silence petitioner's speech, was held constitutional. In upholding the state statute, the Court stated that "[a] restriction . . . designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection."²³⁷ Therefore, the government's duty and responsibility to guarantee public convenience and safety may justify resulting encroachment on an individual right, because free speech is not a full license for communication.

The Court's endorsement of legislation restricting the manner in which material is directed at viewers²³⁸ suggests that legislation preventing "visual assault" could apply even to video screens like those on the "mobile protest" vehicle in *Hindi*. Such a restriction could conceivably provide that: "deliberate visual assault upon unwilling viewers through the use of video screens placed on or inside a vehicle shall be prohibited." With such wording, the statute would narrowly apply to particularly offensive presentation while maintaining content-neutral application.

2. *Limiting Distracting Placement.*—Legislators could also limit the placement of in-car video screens. Certainly, positioning screens in any area not visible by passengers inside the car should promptly be limited as constituting "deliberate visual assault." Like screens placed directly in the driver's area, those positioned outside of vehicles are clearly not for passenger viewing and serve to distract drivers and threaten road safety. In addition to the placements in *Hindi* on the sides and front of the vehicle,²³⁹ car owners could potentially place screens on the roof, rear or side windows facing out, or in the rear seat headrests.²⁴⁰ State legislation should ban placements that impose a greater cost on outside viewers than the benefit they provide to car operators. In addition, the fourteen states that do not currently prohibit screens visible by the driver or located in the area forward of the driver's seat—and the twenty-one states that restrict screens visible by the driver but not those located in the area forward of the driver's seat—could join those that do.²⁴¹ It seems unnecessary to research the cost-benefit implications of allowing drivers to watch video screens while driving. Because such legislation is clearly permissible as content-neutral measures to promote traffic safety, enactment would depend more upon the states' perceived need to legislate.

²³⁷ *Id.* at 554 (noting, as an example, that "[o]ne would not be justified in ignoring the familiar red light because this was thought to be a means of social protest").

²³⁸ See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211–15 (1975).

²³⁹ *Hindi v. Gooch*, No. 02 C 2927, 2003 WL 1475034, at *7 (N.D. Ill. Mar. 21, 2003).

²⁴⁰ MTV.com, *Pimp My Ride Episode Guide*, http://www.mtv.com/onair/pimp_my_ride/episode_guide (last visited Nov. 19, 2005) (displaying pictures of a Scion outfitted with screens in the rear seat headrests).

²⁴¹ See *supra* note 9.

3. *Limiting Distracting Size.*—In *Hindi*, the “box truck” was outfitted with gigantic screens measuring sixty inches and one-hundred inches diagonally.²⁴² Like distracting placement, the overwhelming size of these devices was clearly intended, at least in part, to create “deliberate visual assault.” Screens inside cars have likewise grown to increasingly large dimensions.²⁴³ Given the proximity of passengers and screens inside the same car, such outsized screens are unnecessary and perhaps even visually harmful to passengers. In addition, it is highly possible that a significant reduction in benefit does not exist between a twenty-two-inch screen and a ten-inch screen when the viewer is sitting a mere three feet away. Regulation of screen size would be a moderate limitation that would permit screens to remain in place without imposing overwhelming costs on screen users.

VI. ALTERNATIVES TO LEGISLATION

Although this Comment presents a very real issue that should be considered by the states, the best approach may not necessarily be regulation. As stated by AEI-Brookings Joint Center scholars, “[t]he mere existence of a problem does not, by itself, warrant government intervention.”²⁴⁴ When instituting any regulation of in-car video systems, states should compare the costs imposed upon society to any gain in road safety or other areas.

A. Research

Many states have not restricted in-car video screen placement or content.²⁴⁵ The reason for lack of action may very well be lack of information. According to Pat Hickman, a traffic safety specialist for the Texas Department of Transportation, “[t]here hasn’t been sufficient data or research concerning this to verify if it’s a problem.”²⁴⁶ Nevertheless, “[a]nything that distracts the driver has the potential to be a problem.”²⁴⁷ This stance reflects Texas officials’ concern for acting too hastily, even as many other states impose regulations.²⁴⁸

The sober viewpoint calling for more research before taking legislative action is always sound, and particularly so for this issue given the lack of study to date. As the in-car video screen industry expands, however, states like Texas cannot continue to ignore problems potentially posed by driver distraction. Research that would confirm or deny the need for legislation has not yet been conducted. Thus, states should invest in research that would identify the problems associated with in-car video screens, particu-

²⁴² *Hindi*, 2003 WL 1475034, at *7.

²⁴³ See *supra* notes 20–22 and accompanying text.

²⁴⁴ See Hahn, *supra* note 200, at 54.

²⁴⁵ See *supra* note 9.

²⁴⁶ Goldstein, *supra* note 53.

²⁴⁷ *Id.*

²⁴⁸ See *supra* note 9.

larly while the industry is still in a development phase and the technology can potentially flex with state requirements.

B. Safer Technology

Cell phone manufacturers have initiated moves toward safer technology rather than wait for a regulatory mandate.²⁴⁹ Improved safety has been achieved through voice activation and other technologies that enable hands-free usage while driving.²⁵⁰ Change has originated from within the cell phone industry and from collaboration between the cellular and automobile industries.²⁵¹ Similar efforts could be taken in the in-car video screen industry (e.g., via state mandates or government subsidies).

C. Education

Advocates of highway safety laws have recently developed educational campaigns to target the growing problem of distraction on the road.²⁵² In California and Arizona, for example, 21st Century Insurance invested in billboards to publicize the danger inherent in driver distraction caused by activities such as eating and cell phone use.²⁵³ According to a vice president at 21st Century, “[the ad campaign] delivers a safety message in a light-hearted way to remind us all that distracted driving is no laughing matter.”²⁵⁴ One billboard displays the scene of a driver watching ketchup drip off his burger and contains a caption that reads, “World’s Riskiest Restaurant.”²⁵⁵ Another billboard shows a woman applying mascara in her car with the caption, “World’s Most Dangerous Make-Up Mirror.”²⁵⁶ The company has found that “[t]he response has been tremendous.”²⁵⁷

The automobile industry, general highway safety advocates, and government agencies could similarly invest in educational efforts to minimize the effects of driver distraction while driving. Education is not as obtrusive to industry economics as changes in design requirements or state legislation. Rather, education heightens drivers’ awareness of potential dangers associated with in-car video screens while still allowing them to purchase and use the technology.

²⁴⁹ Lana Mobydeen, Note, *Reach out and Touch Someone: Cellular Phones Health, Safety and Reasonable Regulation*, 16 J.L. & HEALTH 373, 395–96 (2002).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Debbie Howlett, *Americans Driving to Distraction*, USA TODAY, Mar. 5, 2004, at 3A.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Insurers Warn About EWD—Eating While Driving*, BESTWIRE, May 29, 2003, <http://www3.ambest.com/Frames/FrameServer.asp?>.

²⁵⁶ *Id.*

²⁵⁷ Howlett, *supra* note 252.

VII. CONCLUSION

Given the expansion of the in-car video screen industry and growing public concern in response, it is clear that in-car video screens and state legislation will not remain in their current form. Change is on the horizon—it is simply a matter of how and when. This Comment asserts that states have not yet acted unconstitutionally, but they must remain aware of the constitutional limitations that have been set forth by the Supreme Court. Additionally, states should consider the costs and benefits of any limitations imposed on the technology. Education would be a cautious and uncontroversial first step. Research should be conducted into the costs and benefits imposed. Even without research, limitations of screen placement and size can be enacted that would only slightly impose on the public benefit of in-car video systems while still producing substantial returns in terms of public safety. Beyond these regulations, the states should tread lightly so as not to disturb constitutional rights or the progress of this burgeoning industry.