"Red alert in cyberspace": A battle over First Amendment privileges on the Internet

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"RED ALERT IN CYBERSPACE": A BATTLE OVER
FIRST AMENDMENT PRIVILEGES
ON THE INTERNET

by

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Bachelor of History
University of Kansas
1995

A thesis submitted in partial fulfillment
of the requirements for the degree of

Master of Arts

in

Political Science

Department of Political Science
University of Nevada, Las Vegas
May 1998
The Thesis prepared by

Derek M. Belt

Entitled

"Red Alert in Cyberspace": A Battle Over First Amendment Privileges on the Internet

is approved in partial fulfillment of the requirements for the degree of

Master of Arts Political Science
ABSTRACT

"Red Alert in Cyberspace": A Battle Over First Amendment Privileges on the Internet

by

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This paper covers Internet communication and the ability of consenting adults to freely and openly express ideas regardless of content, especially when dealing with obscene and indecent materials. The first chapter focuses on the inability of the American courts to specifically define what obscenity is and exactly where it falls within the realm of First Amendment protection. In that chapter, I discuss the theoretical backdrop for the entire obscenity issue. The second chapter focuses on the governmental attempt to regulate Internet communications, focusing on the Communications Decency Act of 1996. The final chapter covers the July 1997 Supreme Court’s deliberation on Reno v. ACLU (1997). The Court’s opinion will stand well into the next century.
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CHAPTER 1

OBSCENITY OUR LEGAL DILEMMA: A CLOSER LOOK
AT THE U.S. SUPREME COURT'S ATTEMPTS
TO DEFINE OBSCENITY

INTRODUCTION

"More than any other provision of the Bill of Rights, the First Amendment reflects vital attributes of the American character."\(^1\) Any intrusion against the First Amendment is regarded as an unwarranted invasion upon the most endearing freedoms granted by our forefathers—the freedoms of speech, religion, and assembly which are among our most cherished cultural heritages. Free speech is symbolic of our "social commitment to the value of individual freedom and autonomy."\(^2\) It is important to understand in what respect the United States

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\(^2\) Ibid, 298.
Supreme Court views our most cherished Amendment. There is a misguided notion that all speech retains some protection under the First Amendment. This is not true. This chapter will analyze one kind of speech often viewed as borderline or outside the purview of the First Amendment—obscenity. This chapter will also consider the theoretical arguments for and against government censorship in the area of obscenity. How have the courts, the United States Supreme Court in particular, viewed the obscenity issue? Has obscenity been defined, is the definition clear enough for use by the courts? How do these views affect obscenity’s quasi-unprotective status for future First Amendment applications?

Subsequent chapters in this thesis will go into more detail about applying these First Amendment obscenity standards to the Communications Decency Act (1996) and to the extent these restrictions concern the Internet.

There are two competing theories to the application of the First Amendment. The liberal view portrays the First Amendment as “content neutral—which stipulates that the government has no power to restrict expression because of its message its ideas, or subject matter.” This view envisions that the Framers believed that a democratic system required open and frank discussion. This liberal standard would believe that we live in a society where all

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3 Ibid, 891.
participants in any sort of discourse are completely content unbiased. This is not
the circumstance at all. People bring their own perspectives, backgrounds and
moral criteria to all social interactions. To argue that some people would not be
offended when certain subjects -such as race, sex, religion, obscenity, etc. come
up in conversation, would be naive. What is offensive to one may not be
offensive to another. Therefore it is important to take into consideration the
freedom of expression for the individual against what society on the whole may
or may not consider unwarranted or obscene. In short, the liberal view believes
that any intrusion against free expression should not be tolerated by any branch
of government and should be safeguarded by the judicial system.

So how does one take steps to protect and ensure that all the people can
have some meaningful interaction? The American courts have not subscribed to
the liberal view of free speech. In fact, American courts have taken a more
pragmatic view of First Amendment principles.

The pragmatic theory of free speech argued that language should not be
regarded as outright conclusive. Rather, there should be "a balancing between
individual and societal rights which seems a logical compromise between those
who would brook no governmental regulation of the First Amendment" and
those who believe that some governmental regulation saves us from all possible lewd and obscene comments being brokered in everyday conversation.4

There are key academic advocates of this middle ground approach. Among them Professor Zechariah Chafee Jr., who admitted there are “two kinds of interests on free speech. The individual interest, the need of the many men to express their opinions on matters vital to them if life is to be worth living, and social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.”5 Another supporter of balancing was Thomas I. Emerson, who stated that there is “a precarious balance between a healthy cleavage and a necessary consensus, and that it is essential not to neglect the individual in order to preserve a stable community in the face of ever-changing political, economic, and social circumstances.”6

The pragmatic theory argued that speech such as libel, obscenity, and


fighting words (words likely to trigger a violent reaction) should not and will not be protected by the First Amendment. "The pragmatic free speech principle rests on two fundamental tenets: 1) that free speech serves special and significant constitutional purposes 2) that the First Amendment should not protect all speech but only speech of a certain quality." Unfortunately, the only way that to ensure that societal mores are to be protected is to legislate restrictions on speech favoring societal values over the individual’s right to that speech.

The problem with regulating speech is that it raises serious ethical questions. One major "problem with freedom of expression is that the government should not decide what expression has value; rather there should be a free market place of ideas." There are questions; such as who in government is best qualified to regulate or censure speech- Congress, the State legislatures, the President, or the U.S. Supreme Court? Should the government err on the side of the individual or society? Just because any one set of citizens may find some material offensive doesn’t mean that all the citizens of a given society would. As anyone can see, a very precarious situation develops when deciding whose rights wins out.

The suppression of freedom should never be an easy task. Thomas M.


Cooley proclaimed that any encroachment on free speech endangers both “the development and liberty of the individual and the stability of representative government.” This slippery slope argument contends that the minority or the majority should not dictate what should be considered valuable and valueless speech.

Robert Bork, however, argued in his book *Slouching Towards Gomorrah: Modern Liberalism and American Decline*, that regulating speech is essential. He stated that there is an ongoing dissolution of American values as seen in contemporary art, music and public dialogue and it is essential to save the American cultural dynamic from mediocrity.

Robert Nagel argued that some state interests in regulating speech are legitimate because some violent crime and sexual deviance can be correlated with speech material that is offensive to the public in general. This far more conservative stance argued that we have given too much to the individual and are neglecting societal interests and should alter our views accordingly.

"Censorship does seem more common than we usually like to admit; although labeled differently its substance even appears in the decisions of the

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most respected branch of government," that being the U.S. Supreme Court.\textsuperscript{11}

There are several reasons why the Supreme Court must broker the obscenity question:

1) Often Congress attempted to remedy obscenity and fighting words through legislation. Unfortunately the proposed law is over reactionary, for example, favoring broad bans against speech that the legislation may not have originally been intended against. Laws such as the Sedition Acts (1917-1918) to the current CDA (1996) err too heavily on the side of society over the individual's ability to freely express himself.

2) The failure of the Presidency to stop or slow these advances on freedom of expression. Often the President follows the 'bandwagon' euphoria of Congress for public relations gain and uses the U.S. Supreme Court as a fail-safe device for ill-defined legislation.

3) The finality of the Court's decisions allows most debate to end within the Court's halls. Supreme Court Justices are life long appointments who are perceived to be above mundane legislative politics which gives the illusion of objectivity.

4) The Court's ability to refuse cases without reason allows the Court to choose which laws really chafe against the Constitution and allows them to correct or

\textsuperscript{11} Nagel, 119.
throw out bad legislation, without worrying about the backlash of spin doctoring or grassroots political activism.

The historic view of the Supreme Court was that “obscenity is not within the protection of the First Amendment (except for the right to use it within one’s home) and the government can suppress it without demonstrating a compelling interest in doing so.” The Court has reasoned that “obscenity is immoral and that the standards of the community” outweigh considerations of the individual. The Court originally relied heavily on the premise that “anti-social behavior correlates to obscene material such as adultery, homosexuality, and sexual perversion.” Therefore “suppressing such speech is based on the desirability of promoting true beliefs” and instilling a moral community. The state essentially was legislating morality as it saw fit. This axiom unfortunately has unintended effects. First, this position shows that the state does not trust the individual to use correct judgement when quasi-protected speech applications arise and chooses to err on the side of society by providing blanket protection to those who may be offended. Secondly, legislating morality can make the individual an 

12 Greenwalt, 101.


14 Ibid.

15 Schauer, 75.
unwilling target of tyranny of the majority or of a tightly organized minority group with access to legislative mobilization through money or connections. Neither problem is very palatable for those who believe in the strong sense of the individual.

There are classifications of speech used by the Supreme Court; the first, full value speech had been determined as speech that falls outside the protection of the First Amendment altogether, the second, low value speech was seen as enjoying some protection, but considerably less than full value speech.¹⁶ This indicated that the Supreme Court adheres to the principle that stresses societal values over the individual for considering the First Amendment and speech codes.

The courts have historically sought to identify what obscenity is and how it should be treated within the purview of the Constitution. Though the Supreme Court has failed to provide an all encompassing definition as to how obscenity falls within the First Amendment protection. This policy of ambiguity provided the Supreme Court a chance to keep change the standards to keep up with societal norms.

CAN'T QUITE PUT YOUR FINGER ON IT - DEFINING OBSCENITY

Much of the obscenity law in the United States has roots in England as stated in Regina v. Hicklin (1868) was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to

¹⁶ Greenwalt, 104.
such immoral influences and into whose hands a publication of this sort may fall. Thomas L. Emerson offered that the *Hicklin* standard “brought within the ban of the obscenity statutes any publication containing isolated passages that the courts felt would tend to exert an immoral influence on susceptible persons.”

The history of obscenity law in America has roots that stems back to shortly after the Civil War. From roughly 1872 to 1934, the Comstock Act was considered the standard by which to measure all obscene material. “In 1872, the Comstock Act was used to prohibit the use of the federal mail for sending obscene materials. This legislation gave the government virtual *carte blanche* to enforce and prosecute the law.” This Victorian standard of obscenity was the “driving force behind American courts in general about obscenity until the 1950's.”

There were problems with the Comstock approach. The failure of judges to expressly state why material should be considered obscene often resulted in most juries finding the contested material obscene. Most of the material

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17 Biskupic and Elder, 452.

18 Ibid.


20 Ibid.
contested in the courts was used in sexual education. Regardless of genuine health concerns, the prudish nature of late 19th Century and early 20th Century juries could not really find any value in any obscene materials. The courts did have two exemptions to the law: the first was “sealed private personal letters even if they contained obscene materials, secondly, classics such as the Arabian Nights, Tom Jones, and Ovid’s Art of Love,” literary works which were perceived as having value placing them above other forms of obscenity.

There were early attempts to specifically define what terms such as obscenity, indecency and lewdness really meant for the Court in considering cases dealing with questionable material. Obscenity was defined as being “offensive to chastity and decency expressing or presenting to the mind or view something which delicacy, purity and decency forbid to be exposed.”

Indecency was clarified as “the wanton and unnecessary expression or exposure in words or pictures of that which the common sense of decency requires should be kept private or concealed – unbecoming immodest and unfit to be seen.”

Lewd was seen as “given to the unlawful indulgence of lust eager for sexual


\[22\] Ibid.

\[23\] Ibid, 180.

\[24\] Ibid, 181.
indulgence or incited by lust or incites lustful thoughts, leading to irregular
indulgence of animal desires, lustful, lecherous libidinous." These words and
their definitions were used in subsequent cases and were a basis for what speech
should be contested.

The Hicklin - Comstock approach was the standard for judging obscenity
until 1933. Eventually the Hicklin standard was contested because the precedent
was being used against literary works that possessed educational and cultural
value. In 1933-1934, a "federal district court, Judge Woolsey, held that James
Joyce’s Ulysses was not obscene despite the presence of pornographic
passages." The district court found that there was no intent what-so-ever to
produce an impure desire on the part of the reader. The same district court
altered the Hicklin standard which allowed for more literary works that
possessed “isolated passages that attempted to exert immoral influence” could
not be challenged. This action was the first push to shed the old English
standards of obscenity and give the obscenity issue a truly American point of
view.

Chaplinsky v. New Hampshire (1942) began what the Court would call the
two level test. The two level test was the first framework for testing questionable

25 Ibid.

26 Downs, 12.

27 Biskupic and Witt, 452.
material. This case would provide a watershed for free speech law. Forms of "expression such as obscenity, lewd and offensive speech, libel and now fighting words were not protected by the First Amendment."^ The Court surmised that "even if such utterances pose no clear and present danger they are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest of order and morality."^ Chaplinsky was the first case to develop a test that would test First Amendment protection to all forms of speech. The Court clearly believed that there were certain forms of speech and expression that had more intrinsic value than others. "Chaplinsky's two-level speech theory favored rational, civil discourse over indecent or highly provocative expression."^ This test showed how the Supreme Court perceived fighting words within the context of questionable speech and suggested the Court's adherence to the more pragmatic application of free speech theory.

Roth v. U.S. (1957) became the U.S. Supreme Court's first true test for defining obscenity in judicial terms. This case concerned both federal and state obscenity laws. Several important issues were raised by this case. The case tried to determine if it was a violation of law to mail obscene, lewd, lascivious, or

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28 Downs, 3.

29 Ibid.

30 "Unprotected Speech" in Hall, Kermit L., ed., 892.
filthy material? Did obscene material fall under the protection of the First Amendment? According to the Comstock Law, it was illegal to send obscene material through the mail, but now the Court, led by Justice William J. Brennan, stated that obscenity, including both pictures and also written words about sexual relations, could also be considered under the Chaplinsky test. Brennan relied on the Chaplinsky two-level approach and stressed that “obscenity is narrower than pornography or sexual material in general. It is the material which deals with sex in a manner appealing to the prurient interest or impure sexual desires.”

Brennan proposed a test that would determine just what would be considered obscene. In his test he developed the ‘community standards premise’ which meant the “type of person the material appeals to” would determine if it were obscene or not. This test offered three criteria for determining obscenity: “1) Obscenity appeals to the prurient interest in sex. 2) It has no serious literary, artistic, political or social value. 3) It is offensive to the average person under contemporary community standards.”

The decision in Roth affirmed several standards from past cases. First, it accepted and used the layered speech argument of Chaplinsky. It attempted to

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31 Downs, 13.
32 Ibid, 14.
33 Ibid.
define obscenity as appealing to the prurient interest (IE. restless craving). Brennan reemphasized the district court’s findings of 1933 intended to keep classic literary works from being censored as well. Brennan also tried to modernize the Comstock approach by incorporating the term ‘contemporary community standards’ to adjust for the ever changing societal standards.

Although Roth answered many questions, it also created new problems. The challenged work had to be substantial. There were conflicting definitions as to what prurient interest means. Furthermore, the Court did not specify the geographic boundaries of the community standards nor say the standards were enduring ones.34

An interesting adjustment to the Court’s disposition on obscenity occurred in Memoirs v. Massachusetts (1966). Massachusetts argued that “Roth did not protect John Cleland’s 1748 pornographic novel Fanny Hill. However Justice Brennan devised a new three part test concerning obscenity and literature.”35 The three part test required that for any material to be counted as obscene it must be established that: 1) dominant theme of the material taken as a whole appeals to the prurient interest in sex. 2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters. 3) The material is utterly without redeeming social value.36

This was the Court’s attempt to ensure that future literary works be given as

34 Ibid, 14.
36 Greenwalt, 100.
broad protection as possible and to further narrow the category in which literary material could be challenged in court.

The 1973 case of *Miller v. California* created yet another new standard by which obscenity and questionable material could be judged. This 5-4 outcome showed the highly controversial problems that the Supreme Court confronted when considering obscenity and exactly what the standards for judging it should be. "Once again the Court was asked if state obscenity standards infringed upon freedom of speech guaranteed by the First Amendment." The test consisted of another three-step material test:

1) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law. 3) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value.38

Chief Justice Warren E. Burger stated that "the majority in this case intended to exclude only hard-core materials from First Amendment protection." The *Miller* test once again adhered to specific previous cases and tried to add a little room to the understanding of what obscenity is. Once again the

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38 Ibid, 2.

Court brought in the two-layered argument to provide a rational reason as to why obscenity was not covered by the First Amendment. It recognized the importance of the Roth standard but adopted a crucial new application - state laws could be used to consider obscene material as long as they remained within the parameters of the Miller test.

ARE OBSCENITY STANDARDS REALLY WORKING?

There are three basic problems with contemporary obscenity standards. The Courts and legislatures failed to tackle the most basic problem of defining what was obscenity. Do any of the results truly justify suppression? Was it truly possible to enforce such standards at both state and federal levels?

The Court’s history of obscenity judgements speaks for itself. The Comstock-Hicklin application to First Amendment theory of obscene materials may have been over broad and possibly damaging to unintended targets, yet it did stand for 80 years with little or no alterations. During this time the Court strongly followed the pragmatic course of First Amendment application to obscenity following the Victorian cultural attitudes acquired from England in both societal mores and legal premises.

The Roth case propelled an already bad problem into an abyss of bureaucratic red tape definitions. The promulgation of cases concerning obscenity indicates one change the counter-culture movement of the 1960's
produced—an explosion of the pornography industry that was purposely aimed at having society rethink the cultural morality that had been legislated against the American public since the Civil War through the use of the Comstock standard. Perhaps a century of choosing First Amendment protection in favor of the society over the individual was too great not to consider. The obscenity issue was reexamined in a new light when contemporary Supreme Court Justices’ thoughts on valuable and valueless expression were used to retest an old argument.

Conservatives like Robert Bork may find it easy to point a finger at the counter-culture movement but the obscenity problem can really be attributed to the Court itself. The Court’s vague definitions on obscenity, prurience, community standards and patently offensive clause causes there to be continuing ambivalence on the subject of obscenity.

The Supreme Court has never explained fully why obscenity falls completely outside of the First Amendment protection. That determination has relieved the Court from looking very hard at the justifications for banning obscenity outright and from worrying about the rule against content discrimination as it applies to such bans.\(^{40}\)

The Court’s stand was ambiguous, and it seemed content with trying each case on its own merits and in the time period which it is considered.

Is suppression of certain expressions and speech really needed?

\(^{40}\) Greenwalt, 103.
Suppression was "premised on the assumption that it will be effective, that as to the opinion suppressed this opinion will be less accepted after the suppression than before." One of the premises for early Supreme Court views on legislating morality stated that obscenity was immoral and was the cause of subsequent crime. However, empirical evidence provided no clear cut basis for any causal connection between challenged speech like obscenity and sexual deviance or crimes. "It is only speculative that repressing obscenity would build a moral community, in any event the ideal moral community is not defined." Suppression should not be so broad as to deny conversation between consenting adults.

The last problem with obscenity was the actual enforcement of the law itself. People who believe that obscenity law was vague at best argue this is the best reason to keep governmental regulation out of the First Amendment. They argue that there is no follow through for existing anti-obscenity statutes. They provide seven legitimate reasons for Miller's failure to attack the problem of obscenity:

1) Low priority has been given to obscenity cases by prosecutors because of the scarcity of resources, prosecutors unfavorable attitudes and greater concern for other crimes. 2) Relative public tolerance of freedom of choice in this area reinforces similar attitudes on the parts of juries and judges. 3) The definitional ambiguity of

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41 Schauer, 75.

42 Ibid.
Miller like obscenity case precedent. 4) The vagueness of political
decision. The Supreme Court continues to stipulate that there are levels of low
value speech and expression which do not fall under First Amendment
protection. Historically the Supreme Court has opted to err on the side of society
by refusing to provide broad protection to materials that should not have been
challenged in the courts. Yet, the incremental protections that occurred
throughout the Roth to Miller era demonstrated increasing care when attempting
suppression of literary materials applied. Furthermore, to accommodate a
rapidly changing society the Court adopted a flexible standard that specified
'contemporary' community standards as the position on obscenity. However, it
never stated where that community begins and ends.

Although the Supreme Court has far from closed the door on the
obscenity issue, there are still perilous waters ahead that signify new challenges
for the Roth and Miller tests. The new technology of the Internet sprang to life in
the late 1980's and the conservatives began to rally anew for reinvigorated efforts

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43 Downs, 20-21.
to stem a new type of public discourse that represented "untrammeled, uncontrolled and wholly liberated ocean of information for obscenity and pornography." This occurred not in a public assembly or news tabloids, but the virtual surroundings of Cyberspace. Another wave of pragmatism spurred on by political conservatives, wanted to restrict speech in a way that speech itself had never been considered. This new wave of government intrusion upon First Amendment rights leaned even further towards broad societal protection and was to be considered under the new Communications Decency Act of 1996.

\[44\] Bork, 135.
CHAPTER 2

"RED ALERT" IN CYBERSPACE: FIRST AMENDMENT

FIGHT OVER THE INTERNET

The newest medium, the Internet, provided the government with another opportunity to exercise its regulatory powers. Often these governmental responses to new technology come at a price of freedom of expression. The Communications Decency Act of 1996 (CDA) is an example of a misguided legislative attempt to intrude on the dearest part of our Constitution, the First Amendment. The CDA attempted to regulate transmission of pornography to children, and regulate other expression by ambiguously broad language used in the bill, that upon closer examination is unconstitutional. This attempted regulation is nothing more than governmental censorship of consensual communication through the Internet.

What is the Internet? The Internet is a global network linking millions of computers located in homes, businesses, and organizations across state and national boundary lines. The Internet provides a medium of communications for
art, literature, business, information, local news, and international debate. “The Internet presents a wide variety of methods of communication and information exchange and retrieval.” Generally the Internet is arranged into six prevalent categories:

1) One to one messaging (such as e-mail)
2) One to many messaging (such as list serve)
3) Distributed message databases (such as Usenet news groups)
4) Real time communication (such as Internet Relay Chat)
5) Real time remote computer utilization (such as telnet)
6) Remote information retrieval (such as ftp, gopher, and World Wide Web [WWW])

What is cyberspace? The term cyberspace describes the place—without physical walls or even physical dimensions where ordinary telephone conversations happen, where voice-mail and e-mail messages are stored and sent back and forth, and where computer-generated graphics are transmitted and transformed, all in the form of interactions—some in real-time others delayed—among the countless users and between users and the computers itself.

Therefore, the Internet is the actual connection of the computer network, and the

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46 Ibid.

term cyberspace relates to the ambiguous arena which those transactions take place.

Thomas Jefferson recognized that

The liberty to exchange information—to vent, shmooze, even circulate gossip was to be so vital to the thriving of the American body politic that he once declared "Were it left for me to decide whether we should have a government without newspapers, or a newspaper without government, I should not hesitate a moment to prefer the latter."^4^8

Although Jefferson was not able to witness the unique nature of immediate communication on the Internet, certainly he would have included it. The First Amendment should cover all forms of speech.

The spontaneous nature of the Internet and the transactions through cyberspace present serious legal questions concerning the nature of regulation. It has been argued that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."^4^9 These alleged differences have resulted in layered degrees of speech protection, with the printed word receiving the highest, broadest protection afforded by the First Amendment, and transmissions that come into your home via radio, and

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television received less. Proponents of the CDA argued that the Internet represents technology more akin to radio, television and telephone and therefore should be regulated accordingly under this precedent. Hence the broadcast analogy argument spawned in *Red Lion Broadcasting Co. v. FCC* (1969).

It is important to recognize the timelessness of the Constitution and apply it to all forms of communication that technology will bring. "The Constitution must be read through technologically transparent lenses."\(^{50}\) Hence, new technologies afforded with the passage of time should not degrade the amount of protection the First Amendment confers to the dynamic of individual or group speech values. Unfortunately, legislators rarely come up to speed with such developments in a timely manner and often pass legislation fraught with problems that fail to address this technological-legislative gap.

The contention that underlined all the cyber-related cases depended on how one answered the question of whether the Internet should be considered as analogous to the printed word or some form of broadcast medium? The proponents argued that it was more like the latter. Hence, much like radio and broadcast TV, which allows the FCC to regulate the Internet for material termed 'indecent'. The opposition to the CDA believed that, because of its unique nature and public applications, the Internet demanded the full protection of the First Amendment unfettered by any attempts at censorship or intrusion. The term

\(^{50}\) Tribe, 39.
'indecent' provided yet another example of vague legalese that had yet to be defined, or provide a framework of what could be censored.

This chapter will provide a brief history of First Amendment related cases citing relevant decisions in the field of cyber-law to better understand the original orientation of the courts. Two questions in particular need to be considered. First, have the courts treated the Internet more like a broadcast or a print medium? Second, sort of regulatory model did the CDA represent? Arguments both for and against the CDA will be studied. And finally, possible alternatives to the CDA will be discussed.

BUILDING A FRAMEWORK OF UNDERSTANDING

There are several cases that brought the Internet to judicial prominence. These cases were the basis for Congressional attempts at regulating the Internet, which prompted the CDA. It is important to understand that obscenity, and the freedom of expression via the Internet is not a new argument in the courts. A brief summary of each case, followed by an explanation of the cases relevance will be addressed in this section.

The first case was Miller v. California (1973). Although, this had nothing to do with the Internet it underscored the problem of obscene materials and First Amendment protection driven on by an earlier Supreme Court case, Roth v. US
(1957). "Did the California anti-obscenity law infringe upon the freedom of speech guaranteed by the First Amendment?"\textsuperscript{51}

The case started when Miller,

conducted a mass mailing campaign to advertise the sale of 'adult' material, was convicted of violating a California statute prohibiting the distribution of obscene material. Many unwilling recipients of Miller's brochures complained to the police, initiating criminal proceedings under California's anti-obscenity law.\textsuperscript{52}

The decision was appealed to the Supreme Court and after a 5-to-4 decision, the Court ruled that "obscene materials did not enjoy First Amendment protection."\textsuperscript{53} The Court established parameters to judge obscene material that was covered in Chapter One. This application had broad ramifications and spurred several anti-pornography acts through Congress. The problem would be to apply \textit{Miller} to the new medium of Internet communications.

\textit{Cubby, Inc. v. CompuServe, Inc.} (1991) would be the first true judicial attempt at establishing a chain of responsibility for libelous statements occurring on the Internet. CompuServe, as an Internet provider, contained several bulletin boards meant to distribute messages for the various users that have certain interests. (For example: if you are interest is history, the user would connect to

\textsuperscript{51} \textit{Miller v. California} (1973), 1.

\textsuperscript{52} Ibid.

\textsuperscript{53} Ibid, 2.
the history bulletin board. There you'd be able to view various posts related to that topic. The user can even write to the bulletin board and distribute whatever he feels about a certain topic.) Two competing corporations posted daily to a bulletin board sponsored by CompuServe called, Journalism Forum. A news bulletin dubbed 'Rumorville USA,' published by Don Fitzpatrick Associates of San Francisco was the source of the litigation.54

In 1990, Cubby, Inc. began publishing a competing newsletter called 'Scuttlebutt'. Someone from 'Rumorville', perhaps concerned with the new competition, used the online bulletin board system to derail 'Scuttlebutt' by stating that it was a start-up scam, and implied that 'Scuttlebutt' was plagiarizing entire articles in an attempt to undermine 'Rumorville'. Cubby sued CompuServe and Fitzpatrick for libel. CompuServe, having never been notified of any trouble from 'Rumorville,' moved for summary judgement, stating that it was a distributor, not a publisher, of the libelous material. "The court held that CompuServe was a distributor, not a publisher, since it did not attempt to exercise editorial control over the contents of the information flowing through its network."55 This landmark case recognized some of the unique characteristics of


the Internet. Spontaneity of the communications were considered different, because with the “written word the publisher is presumed to know what it publishes, whereas the online distributor service can’t possibly be aware of the contents of everything that passes through a bulletin board.”

*US v. Robert & Colleen Thomas* (1992) was the first case that attempted to link the state anti-pornography standards that resulted from *Miller* to the Internet, and to define distributive responsibility for indecent materials. The Thomas’s company, Amateur Action Bulletin Board System (AABBS) was an Internet distributor of pornographic materials. They were investigated twice under California obscenity and anti-pornography statutes and found to be totally legal. A postal inspector posed as a potential customer, e-mailed AABBS for some potential child pornographic materials. He found no material proof that could be prosecuted in California. The postal inspector refused to come up empty so he simply repeated his request for pornographic materials from a state that would easily find any pornographic material offensive. The case was brought up in Memphis, Tennessee, where the state pornography laws are among the toughest in the nation. The prosecution argued that “computer

---56 Wallace, and Mangan, 85.

technology does not require a redefinition of community", as cited in Miller.\textsuperscript{58} A disjointed defense effort kept switching between the voluntary nature of the pornographic service and the fact that the Internet did require a redefinition of what was considered community. It was argued that "everything found on the bulletin board could have been acquired on any street in San Francisco."\textsuperscript{59} The application of this dual standard of the community values to pornographic materials provided legal questions that had not been previously raised.

The Thomas's were convicted of interstate pornography trafficking. Yet, the conviction raised more questions than answers. Does new technology require redefining community? Why did the defense ignore a freedom of expression argument? If the anti-pornography laws are reasonable from state to state why transfer this particular case? Who determines vulgar material, your community or one that you do not reside in? All these questions would eventually haunt governmental regulatory attempts.

A case that brought some fireworks to the cyber-scene was \textit{US v. Jake Baker & Arthur Gonda} (1995). A sophomore at University of Michigan, Jake Baker provided imaginative, yet disturbing narrative tales of rape and torture on a popular Usenet site called alt.sex.stories. These stories often documented the

\textsuperscript{58} Wallace, and Mangan, 32.

\textsuperscript{59} Reske, Henry J. "Computer porn a prosecutorial challenge; Cyberspace smut easy to distribute, difficult to track, open to legal questions." \textit{ABA Journal}. Vol. 80. (December 1994): 40.
stalking, abduction, rape, torture, abuse and even murder of various women. He gained instant popularity with his stories and became the talk of sex Usenet groups. Baker’s last attempt at notoriety, termed “Doe,” was posted January 9, 1995, about a girl with whom he shared a language class. University of Michigan started an investigation after it had been brought to their attention. What had been the most disturbing development is that while Baker had been writing his stories he had been contacted via e-mail by Arthur Gonda to possibly meet and talk about planning a real life scenario that resembled Baker’s stories. The university summarily suspended Jake Baker and then set out to prosecute him, while the search commenced for Arthur Gonda.

Although the case seemed to highlight a disturbed individual, there were underlying moral questions that were eventually brought out. The brutality and the vulgarity of the writings were not the real issues on trial, much to the chagrin of the prosecution. The failure to prove harm or eventual harm became a key problem with the prosecutions case as cited by Judge Cohn, who stated these works were “offensive but not an imminent threat to anyone. People should not have to stand trial for private thoughts and fantasies.” An ACLU lawyer filed to dismiss the case based on *Whitney v. California* (1927). In that case the court held that “fear of serious injury cannot alone justify suppression of free speech. To justify suppression of free speech there must be reasonable ground to fear

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60 Wallace and Mangan, 80.
that serious evil will result if free speech is practiced. There must be reasonable
ground to believe that the danger apprehended is imminent." 61 What was
perhaps best established in this case was that the government did not have a
right to censor what it felt were inappropriate or explicit stories on the Internet.
This provided legislators with some eventual ammunition that would be applied
to CDA.

PROS OF THE CDA

The proponents of the CDA argued that "without regulation, the children
of our nation will be defenseless against the pornographers and pedophiles" now
lurking throughout the Internet. 62 "In addition to protecting the children from
indecent material" there are the rights of those adults who, through religious or
moral predilection, do not deserve to be bombarded with obscene and
pornographic material. 63

Another problem that must be considered is the open nature of the
Internet. There is simply no crude V Chip solution that we could install that

61 Ibid, 81.

62 Gensler, Marc, and Jay Klug. "Pros and Cons of the CDA and Other Internet
~mag1/procon.html; Internet; accessed 2 February 1998. 2.

63 Ibid.
would nullify all obscene material in cyberspace. The Internet is a constantly changing mass of information that can appear, disappear, then reappear, under different web site titles and headings. This problem thwarts V Chip technology by circumventing certain ‘tagged’ sites or web-pages altogether. Another problem that was raised was the inability of parents do much about it due to their lack of understanding of the Internet on the whole. Generally, children know more about computers than their parents do, and would probably be able to circumvent blocking technology anyway.

Pro-Family groups rightly presume that in the untamed electronic abyss known as the Internet there are people who do not really care about family values. One of the leading advocates of the CDA, Ralph Reed, the former head of the Christian Coalition, stated “we are not asking the court to ban material from the Internet, we just want our children to be protected from smut on the Internet in their living rooms as they get at the corner drug store or library.”

Many pro-CDA advocates warned that if some regulation was not attempted, it would be equivalent of giving “every child a free pass to every adult bookstore and video store with the click of a mouse.” Others argued in favor of keeping children away from harm in on-line chat groups. New York Assemblywoman RoAnn M. Destito argued that pedophiles are “moving from the playground to

\footnote{Ibid.}

\footnote{Ibid.}
The CDA advocates stated that when the bill was passed that children would be protected.

In a letter addressed to Thomas J. Bliley Jr., the Chairman of the House Commerce Committee, proponents argued for the "strongest possible criminal law provisions to address the growing and immediate problem of computer pornography, without any exemptions, defenses, or political favors of any kind accorded to those who knowingly participate in the distribution of obscenity to anyone or indecency to children." This letter was signed by the leading advocates for the CDA, including the Christian Coalition, American Family Association, Concerned Women for America, Traditional Values Coalition, American Center for Law and Justice, Morality in Media and the National Family Legal Foundation.

In several aspects, pro-CDA advocates had several valid points. What type of society do we live in where pornography and indecent communications can be sent to minors with immunity from prosecution? Worse yet, what type of youth does a society produce when they are bombarded with the worst aspects of the society in which they live in? Is that the future we want to build?

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66 Ibid.


68 Ibid.
The leading proponent of the CDA was the Christian Coalition, which was able to garner tremendous support through fund raising, letter writing and increased political weight during elections by voter turnout. Therefore, politicians who count on this support simply can’t dismiss it on a whim. Ironically, the Internet has given the Christian right added weight by increasing the ability of pro-family values activism through a number of web-sites and pages created for that political niche. Web sites like the Original Responsible Speech Page, and Usenet sites like alt.pro-CDA.talk, and the Christian Coalition were designed to garner support and provide information to the public and Congress alike.

"Netparents: Resources for Internet Parents" page provides a positive look at the CDA. Unlike the Christian pages, this page considers alternative methods of censoring unwanted materials. This informative page presented a blanket of resources that covered the Internet and Internet-awareness relevant sites. Netparents covered methods such as blocking software, kid-safe access, net rating systems, and most importantly, educating children themselves about responsible use of the Internet. This web page offered an interesting look at what private citizens could do about monitoring what was available on their own computer. The Netparent page provided the first real look at the new line of blocking software that was just becoming available to the public. Programs
such as Cyber-Patrol, Cyber Sitter, Net Nanny, and Surf Watch are among the most used programs for private censoring on the market.69

The Netparent page also demonstrated to parents where they may find information regarding the objectionable material and why it was considered questionable by some viewers. This was a far cry from the laundry lists of material considered obscene by the Christian Coalition. Netparents offered alternative sites like "Disney's Web page, and the Parent's Guide to Cyberspace page provided by the American Library Association."70 Equally valuable to the parent were books listed on child-friendly web pages. One of the most interesting points of Netparents information were the several rating systems that had come about over the Internet in the last several years. These rating systems were strictly voluntary, and were to be used by web pages who were concerned about the material they were sending. These independent third parties rated material for people that were concerned about substance content.

There are four major rating systems that are covered by the Netparents webpage.

1) The Platform for Internet Content Selection (PICS).


Technical standards developed by the World Wide Web Consortium and the Internet industry which enable multiple, independent, third party rating systems to operate simultaneously on the Internet.

2) **NetShepard.** A rating system that has labeled over 300,000 web sites.

3) **RSACi.** A self-labeling system allowing Internet publishers to describe the levels of sex, nudity, violence, and harsh language. To date, over 35,000 sites have self-rated with RSACi.

4) **Safe Surf.** A PICS-compatible rating system that has labeled over 50,000 web sites. 71

Unfortunately, the mundane academic approach that made the Netparent page so informative also made it unattractive. The Christian Coalition wanted something with teeth and something with widespread appeal to mobilize their constituency. Hence, the Christian Coalition’s “Contract with the American Family,” released May 17, 1995, provided the following three principles that became a rallying cry for the passage of the CDA. The Restricting Pornography doctrine supported three main principles:

1. Enactment of Legislation to protect children from being exposed to pornography on the Internet.
2. Enactment of legislation to require cable television companies to completely block the video and audio on pornography channels to non-subscribers.
3. Amending the federal child pornography law to make illegal the possession of any child pornography. 72


The Christian Coalition argued that both soft and hard core pornography was readily available on the Internet. They believed that a law that followed these guidelines would provide the kind of protection they sought.

The first of these principles was directed solely against the Internet. The Christian Coalition urged Congress to enact broad legislation to “protect children from being exposed to pornography on the Internet.”^73 They stated that “criminal law should be amended to prohibit distribution of, or making available, any pornography, soft core or hard, to children, and to prohibit distribution of obscene hard core pornography to adults.”^74

The Restricting Pornography doctrine dealt with the Internet and it was used to swamp Congress and the White House staffers on how to best couple this with the CDA. Interestingly enough informative brochures which were once bulk mailed and shipped maybe once or twice per one issue due to cost concerns now became uploadable and free to all their target districts. They could hit each district as many times as they wished at virtually no cost.

Unfortunately, these messages could sometimes be mistaken for the pulse of the general public. Due to the ease of communication, repeated messages from a handful of individuals could provide the illusion of being a public mandate due to their frequency and volume. This was to be the case for the CDA. These

^73 Ibid.

^74 Ibid.
messages of concern were to finally find a powerful friend in Senator James Exon (D-NE).

Senator James Exon introduced the Communications Decency Act on February 1, 1995, in an attempt to finally establish some governmental parameters regulating pornography over the Internet. Senator Exon based his legal principle on the Miller ruling that stated obscene speech did not enjoy First Amendment protection. In a classic example of leaping before looking, the Senate and House attempted to garner 'grassroots' support from the vociferous Christian Right. Senators and Congressmen alike used this support to push the bill quickly through Congress without considering the long-term Constitutional questions that might rise from such broad coverage as was dictated in the CDA on a relatively new medium. In order to get his point across about the availability of pornography, during the debates on the bills introduction Senator Exon stood on the Senate floor holding a 'blue binder' that provided countless examples of the worst filth his staff could find on the Internet.

During an interview with the MacNeil/Lehrer NewsHour on June 22, 1995, Senator Exon stated that "it is not an exaggeration to say that the worst, most vile, most perverse pornography is only a few 'clicks' away from any child.

Senator Exon argued that his view of the Internet was analogous to relevant telephone and broadcast law applied by the U.S. courts.

Rep. Chris Cox (R-CA), and Rep. Ron Wyden (D-OR) (Internet educated legislators) recommended a bill that advised a go-slow research approach before attempting any regulation on the Internet. Citing that under the current provisions of the CDA, many of the normal day to day communications held on Internet would be held under the guise of government regulation and therefore encroach upon free speech. This bill however, was quickly sidestepped for a harder-stanced approach to what was viewed as Exon’s discovery of a new era of child pornography distribution via the Internet.

The CDA stated:

whoever in interstate or foreign communications (A) by means of telecommunications device knowingly I.) Makes, creates or solicits and II.) Initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent knowing that the recipient of the communication is under 18 years of age regardless of whether the maker of such communication placed the call or initiated the communication.  

Furthermore, the CDA contained stiff penalties of fines as high as “$100,000 and prison sentences of up to two years on anyone who knowingly exposes minors to

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'indecency' online." Passage of the bill would allow Congress to give the "Federal Communications Commission the power to determine what is 'indecent' in interactive media." The bill did incorporate Cubby Inc. by providing a defense clause for Internet providers. Under section E:1.) "No person shall be held to have violated subsection A. or D. solely for providing access or connection to or from a facility, system, or network not under that person's control." Since there was a question of the Constitutionality of the bill, a compromise was reached which stipulated if the bill were challenged it would be fast-tracked to an Appellate Court. This jurisprudential nuance enabled Exon to pass the CDA.

Although Senator Exon provided the initial steam that was to provide the CDA with its Internet teeth, it was the backing of the Clinton Administration which was to propel the CDA into law. The Clinton Administration shared the goal of the Christian Coalition "of preventing obscenity from being widely transmitted over networks." The Clinton Administration wanted to try and

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help the industry develop legislative solutions for the problems technology
couldn't solve. The Administration pointed out the that there might be "possible
First Amendment issues and privacy considerations" and that it raised legal
questions that would probably be decided in the Supreme Court.\textsuperscript{82} Regardless of
the debate, President Clinton promised the full support and resources of the
White House on what must have seemed tenuous ground.

**OPPOSING THE CDA**

"With the passage of the 1996 Telecommunications Act, Congress was
prepared to turn the Internet from one of the greatest sources of cultural, social
and scientific information into the online equivalent of the children's reading
room."\textsuperscript{83} The rallying cry for the anti-CDA forces came from the language of the
bill itself. The opponents of the CDA claimed that the broad terminology of the
bill interfered with First Amendment rights.

The arguments against the CDA were already on the way. The bill raised
harrowing questions about First Amendment rights in the new world of

\textsuperscript{82} Ibid.

\textsuperscript{83} EFF. "Is This What They Mean by Indecent?" 1998. [database on-line];
available http://www.eff.org/BlueRibbon/sites.html.; Internet; accessed 2
cyberspace. "The act is unconstitutionally over broad and perhaps vague, because it provides no judicial definitions for the terms 'indecency' and 'patently offensive'." Furthermore the bill simply repeated existing federal laws that ban what might be considered the strongest sexual material that results in public outcry, like pedophilia and bestiality. The bill could be used directly against any one individual that the FCC may characterize to be distributing 'indecent' material. What areas of online communication does this cover? Personal? Group? Business? The CDA apparently covered them all. No parameters had been placed on the CDA's jurisdiction. The right of protected online speech now is pending governmental approval. Unfortunately, the good intentions of the CDA may have disastrous effects in the grey areas of defining 'indecency'; what is considered informative to some would be indecent to others.

The anti-CDA forces were led by the American Civil Liberties Union (ACLU), and soon many others followed suit. Organizations like the Electronic Frontier Foundation (EFF), Center for Democracy and Technology (CDT), and Voters' Telecom Watch (VTW) formed the nucleus of the anti-CDA campaign. Much like their opponents, the coalition that stood against the CDA used mail writing campaigns and other means to raise awareness about problems that the

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CDA would create. The ACLU and others soon found that the medium they sought to protect was the perfect way to communicate their message.

The EFF started the Blue Ribbon Campaign, designed to do several things: first raise awareness about the issue as a whole, inform Internet users as to the contents of the bill, and offered ideas on how to circumvent the law should it ever be passed. The Blue Ribbon Campaign quickly gained momentum and soon was all over the Internet. Online chat groups were started, discussion groups throughout the Usenet and hundreds of web pages appeared that supported the defeat of the CDA.

Web pages such as Electronic Frontier Foundation Page (EFF) provided various articles, editorials, and laws pertaining to the CDA and communications law in general. This site also offers an excellent chronology of CDA events.85 The Center for Democracy and Technology Page (CDT) showed an ongoing compilation of the CDA debate, including the actual law and Congressional viewpoints.86 The Voters' Telecommunications Watch was a page dedicated to the issues, previous laws and how to register for Internet voter action.87


Computer Currents Interactive\textsuperscript{88} and HotWired provided a news pages of the ongoing debate on the CDA.\textsuperscript{89} Dave Winer wrote and maintained an editorial column on the pro's and con's of the CDA.\textsuperscript{90} Digital Shout was an awareness page of what rights and privileges would be lost if the CDA was adopted.\textsuperscript{91} Finally, the Digital Doomsday page provided a computerized clock showing when the CDA would go into effect.\textsuperscript{92}

Web pages that had no affiliation to the Blue Ribbon Campaign were able to download the 'blue ribbon gif' (a gif is a still picture that can be downloaded to web-sites) which demonstrated their opposition to the CDA. The blue ribbon was symbolic of the fight against the CDA, and quickly appeared throughout cyberspace.

The alert had been sounded. The goals were quickly set, and best summarized by a document issued by the EFF. In this pamphlet, the EFF quickly summarized the points of contention in the CDA. The EFF mentioned the problems with the term 'indecency' and noted it was ill-defined. The EFF argued


\textsuperscript{90} Opsit.

\textsuperscript{91} Ibid.

\textsuperscript{92} Ibid.
that Congress was wrong to equate the Internet to a broadcast or telephone medium. The CDA would weaken privacy for any users on the Internet regardless of intent or knowledge of wrongful doing. The CDA would even make classic works of art and literature illegal for anyone to distribute.93

The EFF quickly realized that the courts may just agree because of the argument along the First Amendment lines. The CDA would have given "unconstitutional expansion of federal authority... to the FCC" to regulate communication that the EFF believed was fully covered by the First Amendment.94 Another point of contention showed that the term 'indecency' was far too vague and had never been defined by the Courts or Congress. Another failure was the 'least restrictive means' which regulated speech was not adhered too. The quality of speech and the heavy punishments were questionable for the general public.

As the debate raged on several Congressional leaders became actively opposed to the CDA. The leading voice of dissent was the Speaker of the House Representative Newt Gingrich (R-GA). In the same MacNeil/Lehrer news show that Senator Exon voiced his support, Rep. Newt Gingrich raised crucial


94 Ibid.
concerns. This bill is “clearly a violation of free speech and it’s a violation of the right of adults to communicate with each other, but was I think seen as a good press release back home so people voted for it.”

Gingrich alluded that the Christian right wanted to flex their muscles and mobilize support and raise the awareness of the CDA issue.

Soon a list appeared of what would be banned by the advent of the CDA. Web pages that contained works of art, literature both informative and classic, support groups, as well as popular entertainment could have been a violation of the CDA (see Appendix I for complete list).

Opponents of the CDA gained steam with their initial principles and the laundry list of banned sites. The perceived threat to the First Amendment brought an outcry from virtually every point on the political spectrum. The Blue Ribbon Campaign was used as symbolic patriotism for all those not interested in the Internet itself but in free speech. This quickly drew the attention of the Press and the TV media. Even computer illiterate people who may not have been interested at first quickly hopped onboard when the media ‘red flag’ to impediment of free speech gained public attention. The argument for the CDA gained national scrutiny.

One of the interesting points brought up by the proponents of the CDA was the idea of a third party rating system. This met with quick scepticism by

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95 The MacNeil/Lehrer Newshour, 1.
the ACLU, which asserted that a "black cloud of private 'voluntary' censorship" would be as dangerous as government views of indecency. The ACLU White Paper document proposed six reasons why self-rating systems would be wrong for the Internet:

1) Self-Rating Schemes Will Cause Controversial Speech to be Censored.

One of the strongest arguments points out that whoever is running these third party rating systems would invariably bring their own subjective opinions into the equation to determine what was controversial and what speech was not.

2) Self-Rating is Burdensome, Unwieldy and Costly

These systems would require all American sites to be subjected to third party systems therefor unfairly subjecting shoe-string web operations of individuals to a cost that may well make it untenable for financially strapped people to even create web pages.

3) Conversation Can’t Be Rated

Chat room conversations become an interesting point of contention. How do you rate an ongoing conversation between two or more individuals? Answer,

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97 Ibid, 5.

98 Ibid.
it just can’t be done. You would need to subject every chat room to some sort of online speech referee who could call foul if someone crossed the line.99

4) Self-Rating Will Create “Fortress America” on the Internet

A self rating system that is strictly enforced here in this country doesn’t necessarily cross international borders. There would be a significant portion of the web that would go unaffected by U.S. legislation. These sites could regularly be accessed within the U.S. by U.S. citizens but carry on indecent speech through chat lines open to other countries.100

5) Self-Ratings, Will Only Encourage, Not Prevent, Government Regulation

The ACLU argues that any self-rating system by network users just encourages the ever intrusive government towards broad measures like the CDA. Legislation that Congress does not really have the knowledge to create, or time to truly investigate, the many facets of what the Internet really means to the American public.101

6) Self-Ratings Schemes Will Turn the Internet into a Homogenized Medium Dominated by Commercial Speakers 102

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99 Ibid, 6.

100 Ibid, 6-7.

101 Ibid.

102 Ibid, 8.
Big corporations like Disney would be the only operations able to afford the expensive, cumbersome rating system at all. The exchange of interesting concepts and ideas would be subject to the whim of decency. Fascinating discussions about AIDS, cults and sexually transmitted diseases would be wholly eliminated. There would be nine thousand channels of on-line communication going on and nothing to talk about except the weather.¹⁰³

The one category both sides partially agree with is that of parental screening with the use of software blocking programs. Teaching one's children family values and morals translates into reasonable Internet responsibility. Although, this, too, has a potentially dangerous check on free speech. Companies like Microsoft, who dominate a huge portion of the software industry, would probably set implied standards by their sheer dominance of the software market. People would be again subject to a third party, mega-computer conglomerate setting national and international standards of decency.

"Black Thursday, February 1, 1996, as it is known in cyberspace, was the day the Communications Decency Act, attached to the Telecommunications Act, was passed by Congress. President Clinton one week later signed the bill into law, February 8, 1996 became known as the Day of Protest, because thousands of Internet sites went black in a unified protest" against the CDA.¹⁰⁴

¹⁰³ Ibid.

The onset of the CDA spurred a series of state-like statutes that tried to imitate or expand the CDA. These pretenders tried a myriad of ways to try and improve the already existing obscenity laws and even tried to break new ground for state laws in the area of Internet communications (see Appendix II).

A virtual Pandora's box was opened when state legislators began to imitate their national counterparts. Upon closer examination some state legislators had already copied existing laws that governed obscenity and just applied them to the Internet these included: California, Hawaii, Maryland, New York, North Carolina, Oklahoma, Virginia. The other states like Kansas and Montana tried to outlaw images generated by morph technology software. Yet, these indecent pictures were generated out of day to day pictures from things like people, animals, and scenery. Oklahoma tried to ban obscene material from its state databases altogether. Some states tried to enforce anti-harassment laws by attempting to ban electronic transmissions intended to offend whom ever was receiving the e-mails. Only Hawaii's Resolution 177 attempted a go-slow approach to try and do any systematic study of what exactly state CDA legislation would amount to.

The Congressional rush to pass the CDA, which was cloaked in the veil of pro-family, anti-obscenity, and anti-child pornography legislation, was infringing upon First Amendment rights. Politicians attempted to ingratiate themselves with their constituency by cashing in on the bandwagon effect that
led to the CDA. The rush to pass the CDA almost robbed the new arena of cyberspace crucial First Amendment protection. Most of the state laws that mimicked the CDA were well intentioned but like their national counterpart they were generally over broad.

Opponents of the CDA mentioned that upon closer examination these state laws shared the CDA's problems. Fortunately, some states weren't as impetuous as their neighbors; Massachusetts, Oregon, Pennsylvania, Washington considered bills but declined to pass them. This was a hopeful sign that legislators who considered the broad ramifications of mini-CDA bills knew they were unconstitutional. There were brighter signs ahead.

A STEP IN THE RIGHT DIRECTION

_ACLU & EFGA v. Georgia (1996),_ was the first attempt to prove that legislative regulation on the Internet was excessive. An association of plaintiffs, led by the "ACLU and a civil liberties organization called Electronic Frontiers Georgia (EFGA), filed suit on September 24, 1996 to have a Georgia law overturned. This lawsuit provided the first challenge to the new federal law regulating the Internet outside of the context of indecency issues."^105 This law prohibited distribution of information along two lines. First it "prohibited the

transmission of any information by anyone who does not fully identify
himself.\textsuperscript{106} Secondly, it "prohibits the 'use' of any trade name, registered
trademark, logo, legal or official seal or copyrighted symbol, without permission
from the owner, in a manner that would suggest that such permission has been
obtained."\textsuperscript{107} Although the first provision of this law tried to prevent fraud by
prohibiting false names and had good intentions it is fraught with First
Amendment conflicts. Prohibiting anonymity chafes against the very nature of
protection of the minority's opinion from the majority's wrath.

Unfortunately, there are also technological-legislative gap problems that
conflict with application of this law to the Internet. The various e-mail accounts,
chat groups and Usenets operate under the cloak of anonymity. Some of the
largest network servers such as America Online, CompuServe, Prodigy, and
Netcom use nicknames, numbers, pseudonyms or a combination of both when
using e-mail and online chat applications. Whether this is by choice or because
two users have a name conflict, it still was criminal under the Georgia law.
Criminalizing information that is obtained or transmitted under the guise of
these nicknames turns the entire communications process through the Internet
into a crime.

There may be legitimate reasons why the user wants to go unnoticed or

\textsuperscript{106} Ibid, 2.

\textsuperscript{107} Ibid.
remain anonymous. "The subject may be embarrassed or politically incorrect, other users in a discussion area might not speak freely if they had to identify themselves, or the user might be someone well known who desires anonymity in order to participate more freely."\textsuperscript{108}

The second part of this law which stipulates the use of trade names, and company logos is just a copy of current copyright laws. The legislature’s failure to comprehend the inner-workings of the Internet, and failed to conduct the fundamental research on the new interactive process it brings to communications were the reasons this bill was so fundamentally wrong in the two areas it criminalized. This case provided a pulse on how the Judicial system after closer research would not join the bandwagon euphoria and may view the CDA for what it truly represented a First Amendment issue.

Another case that showed the court’s leanings was \textit{American Library Association v. Pataki} (1997). "The U.S. District Court for the Southern District of New York analyzed the impact of Internet content regulations by asking whether they represent impermissible overreaching by one state into the regulatory affairs of other states, thus violating U.S. principles of federalism."\textsuperscript{109} \textit{ALA v. Pataki} consisted of 15 plaintiffs "suing the state of New York over its

\textsuperscript{108} Ibid.

recent legislation, which essentially, makes it a felony to knowingly make certain material which is harmful to minors available via ‘any computer communication system.’* This language was very similar to the CDA, although on a state level. As Reno v. ACLU (1997) was to point out, Internet users may not necessarily know the ages with all those they are communicating. The Court stated:

The unique nature of the Internet highlights that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states jurisdictional limits are related to geography; geography, however is virtually meaningless construct on the Internet. The menace of inconsistent state regulations invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers’ reaction to overreaching by the individual states that might jeopardize the growth of the nation— and in particular, the national infrastructure of communications and trade— as a whole.**

The court correctly assumed that due to the nature of the Internet, Internet traffic allowed for New York e-mail between one New Yorker and another might get routed through a series of states such as Massachusetts or Connecticut and that this conflicted with other states authority over their own citizens. Online chat rooms also proved to be a problem, because there was no way to assure that all participants are from one state, or even one country.

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110 Ibid.

111 Ibid.
The New York District Court acknowledged several factors that made the legislation concerning the Internet difficult. First was the question of jurisdiction, because the Internet knows no boundaries and no one state could legislate for the entire Internet or just that of their own geographic borders. Second, the court found the legislation violated the Commerce Clause because the Act attempts to regulate interstate commerce at "too great a burden to justify the minimal benefits it produces." Finally, the court argued that because of the commerce clause, the Internet, "can only reasonably be regulated at the national level." The court argued that some form of a national lowest-common-denominator standard of regulation had to be set and since only the Supreme Court had the authority to do this and had not shown any such signs, the New York District Court bowed out.

THE THREE PANEL APPELLATE COURT

Through a special provision within the CDA, it was able to get fast-tracked to any appellate court to determine any judicial impropriety that the bill may represent. The government did not have to wait long. The CDA was challenged almost immediately after its passage when in February 1996, "the ACLU, American Library Association, and such companies as America Online

\begin{footnotesize}
\begin{itemize}
\item[112] Ibid.
\item[113] Ibid.
\end{itemize}
\end{footnotesize}
and Microsoft joined together in attempt the to overturn the CDA.” The plaintiffs wanted to ensure the Internet would be a protected medium of speech. The only way they could do this was to apply protection given to the printed word and thereby remove the Internet from the area covered by the Communications Act of 1932. “The time is ripe for this court to select the correct analogy for cyberspace. Secondly, the proper analogy for cyberspace is print.”

There was no surprise why the ACLU chose the three-panel Philadelphia Appellate Court. All three judges had provided various broad First Amendment support throughout their individual histories. This time they would be ruling the application of the First Amendment to a whole new form of communication. The ACLU provided the three judges with every law student’s initial dream; the ability to create brand new jurisprudence on a Constitutional matter.

This time the three Federal judges took a month and a half to familiarize themselves with the Internet before taking action. “On Wednesday June 12, 1996, in a unanimous decision, the judges ruled that the CDA would unconstitutionally restrict speech on the Internet.”

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116 Faber, 7.
The three judges cited many problems with the CDA.

Judge Sloviter stated:

"Internet communication is more akin to telephone communication, at issue in Sable, as with a telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online. I believe that 'indecent' and 'patently offensive' are inherently vague, particularly in light of the government's inability to identify the relevant community by whose standards the material will be judged."\(^{117}\)

Interestingly Judge Buckwalter raised a new issue that the CDA brought into question:

All parties agree that this statute deals with protected speech. The CDA attempts to regulate protected speech through criminal sanctions, thus implicating not only the First Amendment but also the Fifth Amendment of our Constitution... The concept of due process is every bit as important to our form of government as is free speech.\(^{118}\)

Judge Dalzell went further than the other two by proclaiming:

"Internet is a far more speech-enhancing medium than print, the village green, or the mails, because it has characteristics of transcendent importance."\(^{119}\)

Furthermore the Internet "is the most participatory form of mass speech yet


\(^{118}\) Ibid, 2.

developed, the Internet deserves the highest protection from governmental intrusion."\textsuperscript{120}

**REACTIONS TO RENO v. ACLU**

Despite the fact that *Reno v. ACLU* struck down the CDA, the battle lines were redrawn for round two. President Clinton who lead the support for the CDA, stated, 

I remain convinced, as I was when I signed the bill, that our Constitution allows us to help parents by enforcing this Act to prevent children from being exposed to objectionable material transmitted through computer networks. I will continue to do everything I can in my Administration to give families every available tool to protect their children from these materials.\textsuperscript{121}

After the heated debate and research conducted by the Appellate Court, Senator Jim Exon denounced the three-judge panel by stating that, "the CDA made it illegal to transmit or make available indecent material to children. From the beginning, we felt that the best chance for a considered opinion would be in the US Supreme Court and that's where the final decision will be made.

\textsuperscript{120} Losey, 2.

Hopefully, reason and common sense will prevail in the Supreme Court.”¹²²

Exon argued two points with the courts ruling. First, “the Philadelphia court found that there were no effective measures to determine the age of computer users. The court overlooked the fact that a number of Internet sites already block child access by requiring credit card or adult PIN numbers to access certain sites.”¹²³ Exon stated that the indecency standard was defined by the long history of jurisprudence, and that the “indecency standard is sufficient and it has been repeatedly upheld in the Supreme Court.”¹²⁴

The evolution of the written word analogy becomes evident when looking at all the cases in their entirety. In Cubby v. CompuServe libel is addressed to mean which printed words were whose responsibility. US v. Baker & Gonda the judge referred to the students stories as fantasy writings not designed to threaten anyone. Furthermore in Religious Technology Center v. Arnaldo Pagliarini Lerma (1995), a judge ruled that confiscating a computer was similar to confiscating a printing press. Early in cyber-law cases throughout the 1980s provided sloppy handling by defense lawyers, and the failure to examine the First Amendment argument. By the 1990s lawyers were coming up to par with the technological


¹²³ Ibid, 2.

¹²⁴ Ibid.
lingo of the Internet and the tide slowly turned when *US v. Baker & Gonda* was recognized for what it was a First Amendment issue. Eventually the mini-CDA represented in *ACLU & EFGA v. Georgia* would not survive scrutiny under the anonymity argument of the First Amendment, paving the way for *Reno v. ACLU* when the written word analogy was fully employed.

The opposition to the CDA applauded unanimously when the decision hit the media. Senator Russ Feingold (D-WI) proclaimed, "this is welcome news for all of us who not only support free speech, but who also want to see this new, dynamic communications technology develop safe from the threat of censorship." Other leading voices included Rep. Christopher Cox (R-CA) who had tried to introduce the go-slow approach. "I hate to say I told you so. But I did. Today's ruling is no surprise—the CDA is fraught with constitutional problems." Senator Patrick Leahy (D-VT) said, "let no one be confused--this is NOT a victory for child pornography or indecent material—but instead a victory for the First Amendment." Rep. Rick White (R-WA) offered that, "The CDA

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debate sent a pretty clear signal that many members of Congress are lost in cyberspace. The bottom line is that we’re never going to get good laws until we get our legislators up to speed on Internet issues.”

The CDA represents a gross overreaction on the part of the government, and is not at all in tune with the “jurisprudence on the First Amendment that speech regulation laws must pass the ‘least restrictive means’ test” as noted in Sable Comm v. FCC (1989). What is worse, the CDA granted broad and sweeping powers to the FCC to determine what is ‘indecent’ material. Surely, our founders never sought to have one government institution regulate any sort of free speech, regardless of good intentions.

As previously discussed there are alternatives to the CDA without relying on government regulation. Private industry has created a myriad of watchdog programs that limit access to certain Web sites. “SurfWatch blocks access to well-known sites dedicated to sexual material.” However, programs like “Cybersitter provides the parents with the option of choosing block, block and


alert, or simply alert them when access to certain sites have been attempted."\textsuperscript{131} "NetNanny provides a list of obscene words and phrases, and forces the system to stop downloading material where these are found."\textsuperscript{132} All these options are far more acceptable than governmental intrusion, because these alternatives allow for the private individual to oversee the development of their children as they see fit without the government intrusion.

Proponents of a smaller bureaucracy also stand against the CDA. If the CDA were constitutional there would need to be a myriad of new agencies designed for the single purpose of scanning the Internet for these 'indecent' people lurking out there in cyberspace waiting to leap at the opportunity to grab cyber-smut. At what point would they stop looking? Personal e-mail? Accounts transactions were sent through? Where would the intrusion end?

The CDA also copied already existing laws that prevent pornography and have already been successful at regulating Internet pornography. Instead of creating legislation like the CDA, perhaps legislators should consider the laws already in place.

The concept of 'community standards' that were brought up in Miller needs to be redefined. As I have reviewed Robert & Colleen Thomas what was found descent in the community they lived (California) was found indecent in a

\textsuperscript{131} Ibid.

\textsuperscript{132} Ibid.
community (Tennessee) that ordered from them. This failure to recognize the Internet’s ability to create a new community without state lines or boundaries created double jeopardy for determining what is ‘indecent’ using differing community standards (in this case state). This allowed the government to go forum shopping for convictions through various communities where ‘indecent’ is more to their approval. This hardly seems just.

The Internet represents the future of communications because of its spontaneity and global applications. Legislators should be wary of regulating without researching the possible avenues that the Internet entails. In the case of the CDA, thankfully, the court system provided a bridge between the legislative-technological gap as was shown by Congress in formulating the CDA. By investigating exactly what the Internet has to offer, the three judge panel in Reno v. ACLU saved freedom of expression over the Internet. The Supreme Court would settle the future of Internet communication.
CHAPTER 3

BACK TO COURT AGAIN: ATTORNEY GENERAL

JANET RENO v. ACLU (1997) A CASE SUMMARY
AND CRITIQUE

The Communications Decency Act of 1996 (CDA) began as a governmental attempt to regulate various forms of indecent speech over the Internet. Unfortunately, what started off as a well-intentioned bill aimed at the Cyber-pornography industry quickly shifted into overly-broad legislative language that would have endangered select consensual individual communications. The CDA was immediately overturned by a three-judge federal appellate panel in Philadelphia, Pennsylvania, for being too broad and vague. There was a question as to the clarity with the 'indecent' and 'patently offensive' clauses that would criminalize consensual adult conversations held via the Internet.

In July, 1997, the Supreme Court struck down the CDA in a 9-0 vote in what national press hailed as a quintessential step paving the way for free speech laws into the 21st century. Justice Stevens delivered an insightful majority
opinion to the decision making of the Court's stand. Justice O'Connor wrote a
dissent in part for the 9-0 vote, she was joined by Chief Justice Rehnquist
providing fascinating remedies that may allow for the 'son' of CDA to become
constitutional where its predecessor failed.

This chapter will cover why the Court found the CDA unconstitutional
and what the arguments were leading to that decision. Since the Supreme
Court's landmark ruling further attempts to try new angles of Internet
censorship have occurred. There will be an overview of the continuing CDA-
type legislation and what their possible affects could impose.

**THE COURT'S OPINION**

"At issue is the constitutionality of two statutory provisions enacted to
protect minors from indecent and patently offensive communications on the
Internet," Justice Stevens stated in the opening of the majority opinion.\(^ {133}\) He
agreed with the District Court's description of the character and dimensions of
the Internet. Justice Stevens acknowledged the "availability of sexually explicit
material in that medium,"\(^ {134}\) and recognized that users require some

\(^ {133}\) *Citizens Internet Empowerment Coalition (CIEC).* "Attorney General Janet Reno

\(^ {134}\) Ibid.
responsibility when they are retrieving information from the Internet, but there are problems "confronting age verification for recipients of Internet communications." Justice Stevens recognized the District Court’s findings that "ten’s of thousands of users are engaging in conversations on a huge range of subjects," and that it is "no exaggeration to conclude that the content on the Internet is as diverse as human thought." "From a publisher’s point of view, it constitutes a vast platform from which to address and hear from a world wide audience of millions of readers, viewers, researchers and buyers. Any person or organization with a computer connected to the Internet can ‘publish’ information."

Justice Stevens realized the necessity for a decision about a medium that has "as many as 8,000 sexually explicit sites on the World Wide Web alone at the time of the hearing, and the number estimated to double every 9 months." Although this dilemma is troubling from the government’s perspective, more

135 Ibid.
136 Ibid, 3.
137 Ibid.
138 Ibid, 4.
problems arise when trying to censor the Internet with over broad language like 'indecent' and 'patently offensive'.

The government argued that current screening technology is inadequate because although it "enabled parents to acquire software that blocks out certain suggestive words and known sexually explicit sites," these programs can not currently "screen for sexually explicit images," increasing the need for government-based regulation like the CDA. However, Justice Stevens agreed with the District Court's finding that all evidence demonstrated that certain programs do screen suggestive words or known obscene sites, and furthermore, adequate software is being developed "by which parents can prevent their children from accessing sexually explicit and other material which parents believe is inappropriate for their children."

Justice Stevens admitted that the age verification requirement of the CDA, which criminalizes knowingly transmitting 'indecent' materials to a minor was woefully inadequate. "The government offered no evidence that there was a reliable way to screen recipients and participants" in arenas like e-mail, mail exploders, news groups and chat rooms. The only feasible way offered by either side was credit card verification. This method was ruled out for several

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140 "Justice Steven's Opinion", 5.

141 Ibid.

142 Ibid.
reasons. First, "using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down."\(^{143}\) Furthermore, "at the time of the trial credit card verification was effectively unavailable to a substantial number of Internet content providers."\(^{144}\) "Moreover, the imposition of such a requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material."\(^{145}\)

One suggestion offered by the government was the use of a password system which could be used to ensure individual age verification. The feasibility of this type of technology provides similar problems to the credit card verification system. The "District Court found that an adult password requirements would impose significant burdens" on the same non-commercial sites covered in credit card verification, and the costs of such systems would push maintaining sites out of the reach of the common user.\(^{146}\) "Even if credit card verification or adult password were implemented, the Government

\(^{143}\) Ibid.

\(^{144}\) Ibid.

\(^{145}\) Ibid.

\(^{146}\) Ibid, 6.
provided no testimony on how such systems" could in fact ensure the user was actually over eighteen.\textsuperscript{147}

Justice Stevens noted Judge Buckwalter of the District Court correctly concluded "the terms 'indecent' and 'patently offensive' were so vague that criminal enforcement of either section would violate fundamental constitutional principles."\textsuperscript{148} He "found no statutory basis for the government's argument that the challenged provisions would only be applied to pornographic materials, noting that obscenity, unlike indecency, has not been defined to exclude the works of serious literary, artistic, political or scientific value."\textsuperscript{149} Judge Dalzell, of the District Court, recognized that the "act would abridge significant protected speech, particularly by non-commercial speakers."\textsuperscript{150}

The government tried to argue that the CDA is constitutional under the precedent of three previous cases decided before the Supreme Court. These cases are \textit{Ginsberg v. New York} (1968), \textit{FCC v. Pacifica Foundation} (1978), and \textit{Renton v. Playtime Theaters, Inc.} (1986). However, upon closer examination Justice Stevens argued these "raise doubts—rather than relieves doubts—concerning

\begin{itemize}
  \item \textsuperscript{147} Ibid.
  \item \textsuperscript{148} Ibid, 8.
  \item \textsuperscript{149} Ibid, 8-9.
  \item \textsuperscript{150} Ibid, 9.
\end{itemize}
constitutionality of the CDA." In *Ginsberg*, the Court upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene to them even if not obscene as to adults. The Court decided that "constitutional freedom of expression is decided by the individual whether they are an adult or a minor. Furthermore the prohibition against sales to minors doesn't bar parents from buying it for their kids anyway." Justice Stevens stated that this is a significantly narrower aspect than portrayed in the CDA. He stated that the CDA does not adhere to this constricting category for three reasons. First, the CDA does not require the parent's consent or even their participation in engaging in dialogue that is criminal in the statute. Secondly, the New York statute in *Ginsberg* applied to commercial communications, but the CDA doesn't have any limitations. Third, Stevens argued the "utterly without redeeming social importance for minors" clause in *Ginsberg* clarifies what is considered indecent to children. The CDA doesn't provide any definition or any particularity of what is indecent.

In *Pacifica*, the "filthy words" dilemma arose when a monologue delivered in the afternoon was admittedly 'patently offensive'. It was noted that broadcast

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151 Ibid, 10.

152 Ibid.

153 Ibid.

154 Ibid.
mediums place particular programming at certain times of the day, which would then be "permissible to air such a program in that particular medium." Justice Stevens noted that in the *Pacifica* case, there had been a framework in use for decades which set precedent in regulating broadcast radio and television. However, under the present conditions of the CDA, it asked the "Court to define 'indecent' transmission that would justify criminal prosecution." Possibly the most important aspect that Justice Stevens raised in the *Pacifica* analogy is the question of history. Broadcast medium have historically been limited in the view of the First Amendment protection, but the Internet has no similar history.

In *Renton*, the Supreme Court upheld zoning ordinances that kept adult movie theaters out of residential neighborhoods. The court was more concerned about subsequent effects of the movie theaters than the content of the movies, such as crime and property devaluation. The government argued that the CDA was constitutional because it established some sort of 'cyberzoning' on the Internet as it applies to 'indecent' and 'patently offensive' material. Nevertheless, the CDA applied to the entire universe of cyberspace. Justice Stevens indicated the purpose of the CDA was to protect children from the 'indecent' material, not control the secondary effects that *Renton* was conceived under. Under the current purview of the CDA, all questionable content is

155 Ibid, 11.

156 Ibid.
"subject to blanket restriction, and cannot be properly analyzed as for time, place, and manner regulation."\textsuperscript{157}

The government's quintessential argument for Internet regulation was the broadcast analogy. The government said sexually explicit material was widely available and should be subject to some governmental regulations. Likening the Internet to radio or television, the government could draw upon the history of regulation of broadcast media. The broadcast standards were set because of the 'invasive' nature of radio and television communications in \textit{Sable Communications of California, Inc. v. FCC} (1989). However, the Court found the "Internet is not as 'invasive' as radio or television."\textsuperscript{158} In fact the Internet "requires a series of affirmative steps more deliberate and directed than merely turning a dial,"\textsuperscript{159} or switching on your radio or TV. There must be some affirmative action on the part of the information seeker to get at the indecent material that resides on the Internet. Yet, unlike broadcast mediums the Internet "users seldom encounter such 'indecent material' accidentally. A document's title or a description of the document will usually appear before the document itself, and in many cases the user will receive detailed information about a site's

\textsuperscript{157} Ibid.

\textsuperscript{158} Ibid, 12.

\textsuperscript{159} Ibid, 13.
content before he need take the step to access the document. Almost all sexually explicit images are preceded by warning as the content.\footnote{Ibid, 12.}

When Congress first enacted laws regulating the radio and television spectrum it was viewed as a scarce commodity. Justice Stevens noted that the Internet provided "relatively unlimited, low cost capacity for communication of all kinds."\footnote{Ibid, 13.} As per testimony provided during the oral arguments of this case "as many as forty million people use the Internet today, and that figure is supposed to expand to two hundred million by 1999."\footnote{Ibid.} The Supreme Court agreed with the findings of the District Court that the "content on the Internet is as diverse as human thought."\footnote{Ibid.}

Justice Stevens noticed that the government thought \textit{Miller} (1973) was no more vague than the CDA. But Justice Stevens argued that the three pronged test that was established in \textit{Miller} can not hold up to the test. \textit{Miller} contained a critical element that the CDA lacks, a definition of what is 'indecent'. \textit{Miller} stated the material was "specifically defined by the applicable state law."\footnote{Ibid.} More importantly the \textit{Miller} case provided two other narrowing features to test

\footnote{Ibid, 15.}
the obscenity definition. When tested the material considered as a whole must appeal to the "prurient interest" and that if it "lacks of serious literary, artistic, political, or scientific value critically limits the uncertain sweep of the obscenity definition."\textsuperscript{165} Unlike the 'indecent' or 'patently offensive' clauses in the CDA, \textit{Miller} narrowed the definitional criteria by providing the three step test for any 'indecent' material that is questioned.

The 'community standards' question raised in \textit{Miller} as applied to the "Internet means that communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message."\textsuperscript{166} This is similar to the double jeopardy analogy in \textit{Thomas}.

The government's final argument was that if the CDA was not constitutional as is, then the Supreme Court could tailor the statute so as to make it constitutional as by honoring the statutes severability clause. The Court does have a history of this tailoring measures when deemed to "limit construction on a statute only if it is 'readily susceptible' to such a construction."\textsuperscript{167} However the "open ended character of the CDA provides no guidance whatsoever for limiting its coverage."\textsuperscript{168} Justice Stevens stated that it was not the Supreme Courts duty

\textsuperscript{165} Ibid.

\textsuperscript{166} Ibid, 17.

\textsuperscript{167} Ibid, 21.

\textsuperscript{168} Ibid.
to alter laws to make them constitutional, as that should be done during the statutes inception at the legislative level.

Justice Stevens concluded that the government may not "reduce the adult population to only what is fit for children."\textsuperscript{169} Stevens contended that the breadth of coverage attempted by the CDA is "wholly unprecedented."\textsuperscript{170} Furthermore, the CDA "lacks the precision that the First Amendment requires when a statute regulates the content of speech. The CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and address to one another, and the CDA would torch a large segment of the Internet community."\textsuperscript{171}

\textbf{DISSENT IN PART}

Justice O'Connor, joined by Chief Justice Rehnquist, wrote an interesting dissenting opinion. The basis behind Justice O'Connor's argument was that despite "the soundness of its purpose, the portions of the CDA are

\begin{footnotesize}
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\item[Ibid, 16.]
\item[Ibid, 17.]
\item[Ibid, 20.]
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unconstitutional because they stray from the blueprint of our prior cases have
developed for constructing a 'zoning law' that passes constitutional muster."\(^{172}\)

Justice O'Connor argued that if the CDA was redrafted to narrower
parameters and attempted to follow the Courts adherence to the 'adult zones'
doctrine that the statute could be constitutional. Justice O'Connor stated 'zoning
laws' are "valid if 1) It does not unduly restrict adult access to the material and
2) minors have no First Amendment right to read or view the banned
material."\(^{173}\)

Justice O'Connor conceded that as the Internet exists today in 1997, the
"display provision and some applications of the 'indecency transmission' and
'specific person' provisions" fall far short of what was intended.\(^{174}\) "Unlike the
Court, however" Justice O'Connor said it "would invalidate the provisions only
in these circumstances."\(^{175}\)

She admitted that the 'display provision' could not pass muster.\(^{176}\) That to

Dissent in of the Court." 29 June 1997. [article on-line]; available http://
www.abcnews.com/sections/scitech/cda_opinion/dissent/index.html.;
Internet; accessed 20 July 1997. 1.

\(^{173}\) Ibid, 2.

\(^{174}\) Ibid.

\(^{175}\) Ibid.

\(^{176}\) Ibid, 5.
do so under the auspices of the CDA, the speaker would simply have to refrain from using ‘indecent’ language, because there would be no guarantee that minors would not be listening. Justice O’Connor recognized that Ginsberg breaks down when adult conversation occurring in a chat room is intruded upon by a minor.\(^\text{177}\)

Justice O’Connor argued that ‘zoning laws’ are a feasible alternative which would bring new life to the CDA. The precedence of ‘zoning laws’ was currently “valid only if adults are still able to obtain the regulated speech.”\(^\text{178}\) In Ginsberg, the “New York law created a constitutionally adequate ‘adult zone’” that Justice O’Connor believed the Court did not question.\(^\text{179}\) Justice O’Connor mentioned that the Court had only considered laws that operate in the physical world, with two measurable characteristics that create ‘adult zones’: geography and identity.\(^\text{180}\) These characteristics allow for institutions to know where they can reside and who may enter them.

Justice O’Connor stressed that similar zoning parameters could be successfully applied to the Internet. “Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed locations on

\(^\text{177}\) Ibid, 7.
\(^\text{178}\) Ibid, 2.
\(^\text{179}\) Ibid, 3.
\(^\text{180}\) Ibid.
She further emphasized that “cyberspace is malleable”, thus it would be possible to “construct barriers that screen for identity, making cyberspace more like the physical world and consequently more amenable to zoning laws.”

She based this zoning premise on the ongoing use of ‘gateway’ technology. Such technology requires the Internet users to enter information about themselves” such as ID numbers or credit card numbers. Nevertheless it has been stated that this current technology is far too expensive for ordinary noncommercial sites at present, the flux of the Internet generates new technology availability at a far more accelerated rate making this technology accessible in the not-to-distant future. However, this ‘gateway’ technology has not been adopted by most of the Net, and under current circumstances it is not economically feasible for most Web site supporters.

Justice O’Connor stipulated that “user based zoning is still in its infancy. For it to be effective it must: 1) have an agreed upon code or ‘tag’ would have to exist; 2) screening software or browsers with screening capabilities would have to be able to recognize the ‘tag’; and 3) those programs would have to be widely available.”

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181 Ibid, 4.
182 Ibid.
183 Ibid.
available—and widely used—by Internet users." At this time Justice O'Connor admitted this is a long way off.

Justice O'Connor rejected the argument about the CDA being "facially over broad." Justice O'Connor argued that the precedent of the Court has required real proof to "show some over breadth, such as in Broadrick v. Oklahoma (1973), and the appellees have not carried their burden in this case."

Justice O'Connor pointed out that the appellees in no fashion "cited examples of speech falling within the 'patently offensive' category." More importantly, the "CDA might deny minors the right to obtain material that has some 'value' is largely beside the point." Justice O'Connor believed that although "discussions about prison rape, and nude art have some redeeming educational value for adults, they do not necessarily have any such value for minors." Justice O'Connor concluded by stated the CDA in her opinion, "does not burden a substantial amount of minors' constitutionally protected speech."

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184 Ibid, 5.
185 Ibid, 9.
186 Ibid.
187 Ibid.
188 Ibid, 10.
189 Ibid.
190 Ibid.
Justice O'Connor's final disagreement about the Court's opinion depended upon the burden of proof that rested with the appellees to show some over breadth as to prove CDA's 'blanket effects'. In one aspect Justice O'Connor is right, when showing any amount of over breadth the appellees must be able to provide specific examples to draw upon. Fortunately, CDA was never actually enacted before appealed to the Federal Court. Therefore, there are no actual cases to cite where Web sites were deemed 'indecent' to show "see this is what we meant by the CDA being far too broad." Justice O'Connor failed to consider that the CDA is a punitive law thereby anyone accused under the CDA the burden of proof falls to the defense rather than the prosecution. This contradictory nature of the law falls short of the spirit in which any criminal statute is conceived.

In conclusion, the very name Communications Decency Act is a slap in the American public's face. This bill's title simply says we, the legislators, do not trust you the individual to regulate yourself and teach your children accordingly in regard to free expression with regards to the newest medium - the Internet.

The Supreme Court's refusal to define what indecency or patently offensive could have remedied some of the initial complaints with the CDA. Proponents of the CDA took advantage of the Court's ambiguity and pressed forward with possibly the most damaging bill to the First Amendment in American history. Even though the Court provided a myriad of tests (Chaplinsky
to *Miller*) which incrementally made it more difficult to challenge written material in the Courts the 5-4 ruling in *Miller* showed that even the Court itself wasn’t clear when it came to definitions like ‘patently offensive’ or ‘community standards’.

Chapter one discussed the competing theories on First Amendment over the obscenity issue. Chapter one also showed the inadequacies of the way in which the Supreme Court had addressed the issue of defining exactly what obscenity meant. In a slew of Supreme Court cases from *Chaplinsky* (1942) to *Miller* (1973) the Court has struggled to define obscenity and even created a series of tests in order to show what obscenity meant. Unfortunately, with every step to attempt to solve these problems the Court created new problems to consider, such as community standards and terms like patently offensive, and indecent. More importantly, chapter one developed a case framework for understanding the privileged speech debate over questionable speech such as obscenity.

The incremental effect of all these rulings produced more questions than answers and allowed legislation like the CDA in the first place. The Supreme Court itself realized that any all encompassing absolute standard is dangerous. Issues like obscenity subtly change with the generational standards adopted with the passing of time.

This definitional ambiguity allowed for various perspectives on what
should be and what ought to be considered questionable material. This haze surrounding obscenity allowed the CDA and similar state bills to be as over-broad as possible and still receive the support of the uneducated masses.

In the second chapter, the CDA proponents first noted that the Internet was more akin to broadcast analogy than to the written word. Therefore, the government argued it could provide broad regulation when it came to communication over the Internet. At the time before the CDA was challenged proponents of the CDA stated that self-imposed rating systems and private censoring software just was not sufficient to deal with the flood of obscenity and pornography that could be found at the quick click of a mouse button.

Several cases changed how the Internet was perceived by both the Courts and the public. Cubby, Inc. v. Compuserve, Inc. (1991), U.S. v. Robert & Colleen Thomas (1992), U.S. v. Jake Baker & Arthur Gonda (1995), ACLU & EFGA v. Georgia (1996) and ALA v. Pataki (1997). These cases provided an educational springboard for the Courts on the technological issues created by the Internet. This informed decision making showed promising results for Reno v. ACLU (1997). When it was realized that the Supreme Court relied heavily upon the Three Panel Appellate Court’s research, it was not surprising to find out how they ruled in July 1997.

Reno (1997) puts to rest a myriad of questions that started with the CDA’s inception. Justice Steven’s opinion correctly stated the problems with the
government’s sweeping attempt to deal with the ‘indecent’ material on the Internet. There were several points raised that should be covered for better comprehending the reasoning behind the Court’s decision.

The lynch-pin of the government’s argument rested on the broadcast analogy. If the Court found that Internet was similar to the broadcast medium then the CDA would have a sound historical framework for initiating the restrictions that the CDA envisioned. This argument was not new by any means. In *Cubby, Inc.*, and *Jake Baker & Arthur Gonda*, the Internet was first recognized as something very unique in realm of communications. In fact, Internet e-mail in this case was analogous to the printed word which has always received the highest form of protection from the Court. The Court realized that the very unique and unprecedented nature of the Internet does not include the ‘invasive’ nature that *Sable* recognized in radio or television. The user must have a computer and secondly be hooked into the Internet. The ‘affirmative action’ intent of the user thoroughly contradicts this ‘invasive’ nature. Furthermore, once dismissing the idea that the Internet is not considered a scarce resource, the government’s premise of treating the Internet something akin to the broadcast medium falls flat on its face. Therefore, the Court can consider the Internet in its true form without adhering to the past history of regulation.

Screening software used by individual families like ‘Netnanny’ and ‘Surfwatch’ offers a stop-gap answer to the ongoing cyber-porn issue. The best
answer for on-line 'indecency' regulation isn't government involvement but instruction and education at the family level. Screening programs offer families a choice. None of the programs are totally effective, but they're a start. Both sides admit that screening through software is a viable alternative, and far less imposing than the shotgun effects of the CDA statute.

Age verification techniques such as credit cards and passwords ensure that freedom of expression on the Internet comes to those who can afford it. First Amendment protection does not read 'for those wishing to state something questionable please insert your credit card and await verification.' This totally absurd system begs the question: "when is governmental regulation too much?"

The Internet allows people from all walks of life and parts of the globe to express their views. There is an ongoing historic movement for closing the gap on current borders and ancient cultural mistrust and the Internet is part of that movement. Our government should welcome rather than shun steps that ensure continued freedom of exchange of thoughts to promote this ongoing process.

The Court's opinion also addressed the Miller question. The confining parameters of the Miller test show why the Court was able to use Miller to disprove the government's argument. Once this final contention is ousted the government withdrawals to its fall back position.

The government's 'cut & paste' premise showed that even the lawyers arguing the case recognized problems with the CDA's language. The only
reason this card was played was an attempt to salvage some part of the statute they could, by severing the unconstitutional parts. This supposition was rejected by the Court stating that statutes be far more clearer when attempting to ban sections of First Amendment speech. In short “do your research before you write something that is so broad as to be questioned by everyone.”

Justice O’Connor’s opinion raised an interesting point about ‘adult zoning’. Her assumption was based on the two characteristics that make zoning possible; geography and identity. Yet these two characteristics demonstrated Justice O’Connor’s own unfamiliarity with the Internet. She argued that there are fixed points that reside on the Internet itself (IE. chat rooms, web sites etc..), however, this is not entirely true. Only some sites can consistently be found under the same name or subject. The very nature of the Internet was always changing certain aspects of where things are found and under what titles they will be found. For instance, if you go to a site for fishing advice, a month from now that same site may be under a different name, or doesn’t exist outright. Justice O’Connor was right in that the Internet is malleable, but she would try and create boundaries where none exist and none were meant to exist. The only viable alternative would be to zone areas of subject matter. This type zoning in itself would fit under the blanketing effects that found the CDA unconstitutional, and would not effect sites that remained outside of the physical boundaries of the US.
The second characteristic of zoning is identity. Throughout this case both sides conceded the difficulty in identifying just who is who on the web. The whole premise of age verification becomes muddled in the ambiguous arena of the Internet. It was impossible to ascertain ages of participants in chat rooms, and news groups that have a 'revolving door' procedure. The communications were always on-going and the entire group isn’t going to stop every time someone new comes in. One possible approach was to host your own chat rooms or post your own news groups: that way the individual becomes the filter for the type of conversations and information that is covered. Thus taking regulation out of governmental hands and placing them in the individuals making it far easier and less intrusive than what the CDA envisioned.

Another problem with identity is the questions raised in ACLU & EFGA v. Georgia (1996). There was the moral question that the individual does deserve some anonymity. This stems from individual concerns of privacy as people might not want their names associated with the material being discussed. celebrities, field experts, or politicians could post to the Internet and not worry about consequences of their stands. Information that was based on the education or the age of the participant may be assigned to an irrelevant status even though the information provides insight or is factually sound.

What does a peek into the looking glass reveal? Reno provided a promising start to a history of judicial protection that the new medium of the
Internet deserves. This precedent should set a theme to build upon for future cases regarding cyber communications. There was still a potential for future 'sons' of the CDA to come creeping through the legislative plain. Justice O'Connor pointed out, if future statutes are more precise in their wording coupled with better understanding of the Internet format, it would be possible to imagine that the a newer law would be far harder to kill than the current CDA. This time we were lucky. Unfortunately, the more familiarity legislators gain with the Internet the more particular their scope of 'indecent' and 'patently offensive' will become. The First Amendment was the most cherished of the Bill of Rights, it is the first ones our founding fathers considered and have continually provided unparalleled protection for. Technology is continually expanding communication applications. The First Amendment should be viewed through technologically transparent lenses.

**POST RENO v. ACLU STANCE**

In a post-CDA summit that was held on October 15 - 16, 1997 supporters of the CDA scrambled to find possible alternatives in light of the Supreme Courts finding in *Reno v ACLU*. Among the chief participants were leading advocates of “online privacy and security experts, as well as parent and library
This meeting was organized by the White House as an attempt to pick up the shattered pieces of the CDA changed their approach to favor supporting a possible rating system to the Internet. However, this would be strictly voluntary by the web operators and Internet service providers.

Proponents of this new wave of activism continued to believe that the Internet is a place where the enormous amounts of obscene material continue to be available to just about anyone logging on to the Internet. This time proponents of CDA-type legislation have retraced their steps and are proceeding on a more toned down strategy shown by the Netparents page. Answers that were once only considered stop-gaps and insufficient have now been embraced by the pro-CDA forces such as self-imposed ratings systems and software blocking programs have gone to the forefront of their campaign.

When Senator James Exon retired, new congressional members like Rep. Bob Goodlatte (R-VA) took up the pro-CDA campaign. He stated “the Supreme Court has now given Congress a very clear guide” on how to proceed with future CDA-like legislation. Others like Senator Charles Grassley (R-IO)


believed that "our objective hasn't changed. Some way, somehow, we will have to find a constitutional way of protecting kids from the porn the way we did for printed material."^{193}

The pro-CDA backers simply outlined their new plan of attack. They believed clearer language, better technological understanding of the Internet, and targeted enforcement on objectionable sites would play key roles in making a more workable CDA.

A new bill proposed by Senator Dan Coats (R-IN) is the 'son of the CDA'. This new bill would make it illegal "to display material 'harmful to minors' on Web sites potentially accessible to minors."^{194} Furthermore, the text was edited so that "pornographic images or text depicting 'patently offensive'" defined by "actual or simulated sex.. or lewd exhibition of the genitals" was considered unlawful.^{195} Anyone violating this law would be subject to stiff penalties of up to $50,000 fine and six months in jail. Unlike the previous legislation, the new Coats bill would exclude material which has literary, artistic, political or scientific value. The new bill would also exclude the previously contended chat rooms.

^{193} Ibid.


^{195} Ibid.
Coat's staffers argued that "compliance with the bill's requirements could be met with instituting credit card-based age verification." Nevertheless, the Supreme Court noted in *Reno* that age verification was an unnecessary burden to most Web site operators. Senator Dan Coats believes this bill has enough clarity to pass judicial muster. The ACLU contended that the 'harmful to minors' clause was about as muddled legalese has the previously defeated bill. ACLU lawyers argue that "harmful to minors- is a censorship standard half-way between 'obscenity' and 'indecency'" leaving the content of what the bill outlaws as much in dispute as the CDA did.  

Coat's supporters believed that legislating independent blocking software and rating systems may be the way to go. One possible recipient of this legislation would be public libraries that have been a growing access point for the American public in the last seven years. In anticipation of any attempt to further the life of the CDA, the ALA issued a statement on their position:

Libraries are places of inclusion rather that exclusion. Current blocking/filtering software prevents not only access to what some may consider 'objectionable' material, but also blocks

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196 Ibid.

information protected by the First Amendment. The result is that legal and useful material will inevitably be blocked.¹⁹⁸

Since the Supreme Court’s ruling every possible advocate group has been reinvigorated to resist all new First Amendment legislation intrusions to the Internet. The Supreme Court’s ruling also affected all the state pretender bills that sprouted up because of the CDA.

However, this time pro-CDA advocates lacked their one time powerful ally. Ira Magaziner, a senior domestic policy advisor to the President has hinted that Clinton would veto CDA-like bills in the wake of the Supreme Court’s decision. The initial White House support was crucial for the original CDA to become law, and without further White House backing any like-minded legislation, will not even have a chance to succeed.

The Supreme Court has made its mark on applying the broadest protection of the First Amendment to the Internet in Reno. The Supreme Court ruling will stand well into the next century as the cardinal rule when applying First Amendment questions to the application of the Internet.

APPENDIX I

WEB SITES BANNED BY CDA

Art:

Venus de Milo:
http://www.paris.org/Musees/Louvre/Treasures/gifs/venusdemilo.gif.

The Sistine Chapel:

Michelangelo's David:
http://fileroom.aaup.uic.edu/FileRoom/images/image201.gif.

Madonna and Child with Saint John the Baptist:
http://cac.psu.edu/~mtd120/palmer/otherworks/tosini.madonna.html.

The Birth of Venus:
http://www.southern.com/wm/paint/auth/boticelli/venus/venus.jpg. ¹⁹⁹

Literature:

Mark Twain's The Adventures of Huckleberry Finn:
http://www.wonderland.org/Works/Mark-Twain/huckleberry/.

The Scarlet Letter:
http://www.w3.org/hypertext/DataSources/bySubject/Literature/Gutenberg /etext92/.

The Jungle: http
:\//www.w3.org/hypertext/DataSources/bySubject/Literature/Gutenberg/etext t94/.

¹⁹⁹ EFF. "Is This What They Mean by Indecent?", 2.

Support groups:

Lesbian.org. An online Usenet resource center for lesbians.

Christianity and Homosexuality Home Page: Ironically, a Christian Right page that explores cures for homosexuality. 201

Problems Faced by Homosexual Youth. Trials about growing up gay. To help minors come to terms with their sexual preference. 202

The Survivor's Homepage: http://www.nebula.net/~maeve/survs.html


Gay and Lesbian Alliance Against Defamation: http://www.glaad.org/.

Discussion on Prozac: now here is a pretty tame topic to be banning.

Popular Entertainment:

Alanis Morissette, Hole, Pearl Jam, Radiohead, Smashing Pumpkins and The Rocky Horror Picture Show: http://www.seas.upenn.edu/~averon/lyrics.

Movies written and directed by Quentin Tarantino:

200 Ibid.

201 Ibid, 7.

202 Ibid, 8.
Even a Homepage titled The Jihad to Destroy Barney: http://deeptht.armory.com/~deadslug/Jihad/jihad.html. 203

Miscellaneous sites:


Water Birth Information: http://www.well.com/user/karil/.


The Safer Sex Page. Includes Lesbian Safer Sex Guidelines. 205


How to Use a Condom. Meant for highschoolers. 207

203 Ibid, 4.


205 Ibid, 7.

206 Ibid, 8.

207 Ibid, 9.
APPENDIX II

NEW INTERNET STATE LAWS OF 1995 AND 1996

California
Assembly Bill 295, enacted Sept/96
Sponsor: Rep. Baldwin
"Expands obscenity and child pornography statutes to prohibit transmission of images by computer."

Connecticut
House Bill 6883, enacted June/95
Sponsor: House Committee on Judiciary
"Creates criminal liability for sending an online message 'with intent to harass, annoy or alarm another person.'"\(^{208}\)

Florida
Senate Bill 156, enacted May/96
Sponsor: Senator Burt
"Amends existing child pornography law to hold owners or operators of computer online services explicitly liable for permitting subscribers to violate the law."

Georgia
House Bill 163, enacted April/96
"Criminalizes the use of pseudonyms on the Net, and prohibits unauthorized links to web sites with trade names or logos."
House Bill 76, enacted July/95
Sponsor: Rep. Wall
"Prohibits online transmission of fighting words, obscene or vulgar speech to

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minors, and information related to terrorist acts and certain dangerous weapons.”

**Illinois**

Senate Bill 747, enacted July/95
Sponsor: Senator Dudley
“Prohibits sexual solicitation of a minor by computer.”

House Bill 3622
Sponsor: Rep. Winkel
“Amends Criminal Code to include threat by computer in the definition of intimidation.” Spurred by *Gonda* case.

**Hawaii**

House Bill 2665
Sponsor Rep. Aki
“Expands statute that prohibits ‘promoting pornography’ to include electronic transmission.”

House Concurring Resolution 177
Sponsor: Rep. Arakaki
“Requests that Attorney General study and recommend legislation to protect minors from online pornography.”

**Kansas**

House Bill 2223, enacted May/95
“Expands child pornography statute to include computer generated images.”

**Maryland**

House Bill 305 / Senate Bill 133, enacted May/96
Sponsor: Rep. Murphy
“Amends child porn law to include online communication.”

House Bill 619
Sponsor: Rep. Rosenberg
“Prohibits the use of e-mail to annoy, abuse, torment or embarrass other persons.”

Senate Bill 163

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209 Ibid, 2.

210 Ibid, 3.

211 Ibid, 2.
Sponsor: Senator Norman Stone
"Expands 'harmful to minors' law to prohibit exhibition of such material by computer transmission."

**Montana**
House Bill 0161, enacted March/95
"Expands child pornography statute to prohibit transmission by computer and possession of computer-generated child pornographic images."^212

**New York**
Senate Bill 210E, passed July/96
Sponsor: Senator Sears, Rep. DeSitto
"Criminalizes the transmission of 'indecent' materials to minors."^213
Assembly Bill 8509
Sponsor: Rep. Sanders
"Expands harassment law to include harassment over computer networks."

**North Carolina**
House Bill 207, enacted June/96
Sponsor: Rep. Bowie
"Expands existing law to prohibit sexual solicitation of a minor by a computer."

**Oklahoma**
House Bill 1048, enacted April/95
Sponsor: Rep. Barry
"Prohibits online transmission of material deemed 'harmful to minors'.'
House Concurrent Resolution 1097, enacted May/96
Sponsor: Rep. Paulk
"Directs all state agencies, including educational institutions" (universities as well), "to remove all illegal obscene material from their computer systems."

**Virginia**
Senate Bill 1067, enacted May/95
Sponsor: Senator Calhoun
"Expands existing statute to criminalize electronic transmissions of child

^212 Ibid, 3.

^213 Ibid, 2.
pornography.\textsuperscript{214} House Bill 9. Sponsor: Reps. Marshall and O'Brien "Requires online service providers to label 'sexually explicit content on their systems.'\textsuperscript{215}

\textsuperscript{214} Ibid, 3.

\textsuperscript{215} Ibid, 4.
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