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## Censorship, Cyberspace, and Community Standards: American Responses to On-Line Obscenity

Laura Mame Spear  
*College of William & Mary - Arts & Sciences*

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**CENSORSHIP, CYBERSPACE, AND COMMUNITY STANDARDS:  
AMERICAN RESPONSES TO ON-LINE OBSCENITY**

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A Thesis

Presented to

The Faculty of the Department of American Studies  
The College of William and Mary in Virginia

In Partial Fulfillment  
Of the Requirements for the Degree of  
Master of Arts

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by

Laura M. Spear

1996

**APPROVAL SHEET**

This thesis is submitted in partial fulfillment of  
the requirements for the degree of

**Master of Arts**

  
\_\_\_\_\_  
Laura M. Spear

Approved, April 1996

  
\_\_\_\_\_  
Davison Douglas  
Marshall-Wythe School of Law

  
\_\_\_\_\_  
Robert Gross

  
\_\_\_\_\_  
Rodney Smolla  
Marshall-Wythe School of Law

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## **ABSTRACT**

The purpose of this paper is to examine the applicability of existing American obscenity law, based on local community standards, to the problem of policing obscenity in cyberspace.

Additionally, this paper critiques recent attempts to regulate obscenity in cyberspace and suggests alternatives which would allow constitutional and consistent regulation of obscenity on-line.

**CENSORSHIP, CYBERSPACE, AND COMMUNITY STANDARDS:  
AMERICAN RESPONSES TO ON-LINE OBSCENITY**

## Introduction

"[O]ne man's vulgarity is another's lyric"

- Justice John Harlan<sup>1</sup>

Rapidly changing technologies have required that American laws evolve and expand to include new areas of conflict within their scope.<sup>2</sup> Technology is like a frontier in that it is an area where old ideas, laws, and societal mores conflict with the realities of completely new

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<sup>1</sup>Cohen v. California, 403 U.S. 15, 25 (1971).

<sup>2</sup>For example, the expansive use of telephones, cable television, and both radio and television broadcasting have created unique challenges for lawmakers and legal commentators alike. See, e.g., Nicholas P. Miller & Joseph Van Eaton, A Review of Developments in Cases Defining the Scope of the First Amendment Rights of Cable Television Operators, 380 PLI/Pat 885 (March-April 1994); Steven Nudelman, A Chilly Wait in Radioland: The FCC Forces "Indecent" Radio Broadcasters to Censor Themselves of Face the Music, 2 J.L. & Pol'y 115 (1994); Jeffrey L. Reed, Recent Development: Constitutional Law - First Amendment Protected for Indecent Speech - Dial-A-Porn, 57 Tenn. L. Rev. 339, 363 (1989).

and different situations. Cyberspace<sup>3</sup> is such a technological frontier.<sup>4</sup> Accordingly, it has been hailed

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<sup>3</sup>"Cyberspace" is a term which recently entered popular use to refer to the spatially undefinable area where electronic communications take place. See generally Edward J. Naughton, Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action, 81 Geo. L.J. 409 (1992).

<sup>4</sup>The Internet, "a worldwide interlinked network of computers born in 1969 as ARPANET under the auspices of the U.S. Department of Defense," Kim Neely, Caught In The Net, Rolling Stone, December 1, 1994, at 63, was for nearly twenty years used primarily by military and university computer experts, as well as "a core group of computer elite - scientists, programmers, and hackers." Id. In recent years, the advent of commercial computer services like America Online, Prodigy, and Compuserve have opened the Internet to anyone with access to a computer and a modem.

For some commentary on the subject of other developing legal issues on the Internet, see I. Trotter Hardy, The Proper Legal Regime for "Cyberspace", 55 U. Pitt. L. Rev. 993 (1994) (discussing the appropriate legal regime for "cyberspace"; Rosalind Resnick, Cybertort: The New Era: The Rush to Use the Internet has Spawned a Host of Court Battles and a New Practice Area, The Nat'l L.J., A1, col. 2, July 18, 1994 (discussing on-line libel cases from 1991 to

as the only form of media where a truly free exchange of ideas and commentary can exist.<sup>5</sup> Such an exchange

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the present, summarizing on-line trademark and contract litigation); Daniel Waggoner, Potholes on the "Information Superhighway", Practicing Law Institute: Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order No. G4-3918, March-April 1994.

<sup>5</sup>See M. Ethan Katsh, The First Amendment and Technological Change: The New Media Have a Message, 57 Geo. Wash. L. Rev. 1459, 1481 (1989) (describes how electronic communication promotes self-fulfillment); Eric C. Jensen, An Electronic Soapbox: Computer Bulletin Boards and the First Amendment, 39 Fed. Comm. L.J. 217, 224 (1987); Gina M. Garramone et al., Uses of Political Bulletin Boards, 30 J. of Broadcasting & Electronic Media 325, 329 (1986); Robert O'Harrow, Jr., Computer-Friendly Homes Increasing: Electronic Bulletin Boards Provide Many Residents with Comfort, Communication, Wash. Post., Dec. 27, 1992, at B1; Jammy Scott, On-Line, and Maybe Out of Line, L.A. Times, Sept. 24, 1993, at A1 (discussing the blunt forms on-line communication can take because of the relative anonymity of its users). All of the above are cited in Eric Schlatchter, Cyberspace, The Free Market, and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions, 16 Hastings Comm. & Ent. L.J. 87 (1993). See also David Landis, Sex, laws & cyberspace/Regulating

includes, however, the exchange of thoughts and materials that many consider obscene.<sup>6</sup>

Many users of on-line systems argue that whether or not materials are obscene depends upon the perspective of the beholder. They agree with Justice Harlan's comment that, "it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."<sup>7</sup>

This paper will examine the applicability of existing American obscenity law, based on local community standards, to the problem of policing obscenity on the Internet, an international computer network which embraces people from innumerable communities. Part I of this paper gives a brief history of obscenity law in the United States. Part II discusses modern applications of community standards with regard to obscenity in different media. Part III explores the impact of the first on-line obscenity case and then investigates the debate on whether cyberspace should be treated as public or private space. Part IV discusses the inadequacy of recent on-line obscenity legislation, which is porn: Does it Compute?, USA Today, August 9, 1994 at p. 1D

<sup>6</sup>See, e.g., Playboy Enterprises, Inc. v. Frena, 839 F. Supp 1552 (M.D. Fla. 1993); Joel Garreau, Bawdy Bytes: The Growing World of Cybersex, Wash. Post, Nov. 29, 1993, at A1.

<sup>7</sup>Cohen v. California, 403 U.S. 15, 25 (1971).

almost certainly unconstitutional, and asks how we can both constitutionally and consistently limit the exchange of otherwise protected communications in cyberspace.

## A Brief History of Obscenity Laws in the United States

Obscenity is a concept that Americans have found "notoriously difficult to define,"<sup>8</sup> to the extent that even the Supreme Court has yet to arrive at a truly satisfactory description of what constitutes "obscenity."<sup>9</sup> This frustration is probably best embodied by Justice Potter Stewart's famous comment: "[I] know it [obscenity] when I

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<sup>8</sup>Donovan W. Gaede, Constitutional Law -- Policing the Obscene: Modern Obscenity Doctrine Re-evaluated, 18 S. Ill. U. L. J. 439. Justice Harlan wrote in Ginsberg v. New York, 390 U.S. 676, 704-5 (1968) (Harlan, J., concurring), that no other subject has produced a greater variety of views among members of the United States Supreme Court than obscenity. Ginsberg, 390 U.S. at 704-5; Joseph T. Clarke, The "Community Standard" in the Trail of Obscenity Cases - A Mandate for Empirical Evidence in Search of the Truth, 20 Ohio N.U.L. Rev. 13, at 13 and fns. 1 & 2. In thirteen 1960s cases, there were fifty-five separate opinions written by the nine Justices. Id.

<sup>9</sup>See John E. Nowak & Ronald D. Rotunda, Constitutional Law, §16.59-61 (4th ed. 1991).

see it."<sup>10</sup>

The Comstock Acts

Obscenity laws first appeared in America in the 1870s when moral purity movements "link[ed] birth control to obscenity in the atmosphere surrounding the family in the Victorian United States."<sup>11</sup> A New Yorker named Anthony Comstock was behind the reform effort; with the assistance of Vice President Henry Wilson and Supreme Court Justice William Strong, he drafted the first national obscenity statute.<sup>12</sup> The Comstock Act became law on March 1, 1873.

The language of the Act makes it clear that Comstock had no qualms about legislating morality. The Act prohibited the "circulation and importation of obscene materials" through the U.S. mails, as well as banning all items designed "for preventing contraception or producing abortion."<sup>13</sup> Violators were to be punished severely -- with a \$5000 fine, a sentence of one to ten years hard labor, or both. Many states also passed their own versions, called "Little Comstock Acts."<sup>14</sup>

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<sup>10</sup>Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)  
(Stewart, J., concurring).

<sup>11</sup>Kermit L. Hall, *The Magic Mirror: Law and American History* (1989) at 161.

<sup>12</sup>Id.

<sup>13</sup>Id.

<sup>14</sup>Id.

### The Hicklin Test

Until 1957, the test for obscenity in other forms was taken from the 1868 British case of Regina v. Hicklin.<sup>15</sup> The Hicklin test for obscenity was based on the effects of certain paragraphs in a written pamphlet upon "particularly susceptible persons."<sup>16</sup> The test found materials obscene if "the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."<sup>17</sup> This test, based on the effects obscenity could have on its audience, remained the law in the United States for nearly one hundred years.<sup>18</sup>

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<sup>15</sup>L.R. 3 Q.B. 360 (1868), as discussed in P. Heath Brockwell, Grappling with Miller v. California: The Search for an Alternative Approach to Regulating Obscenity, 24 Cumb. L. Rev. 131 (1993-94). Brockwell suggests that Regina v. Hicklin finds its basis in Sydlies Case, 83 Eng. Rep. 1146 (1663), considered the first reported Western obscenity case. See also the discussion of the Hicklin test in Gaede, supra note 8.

<sup>16</sup>Gaede, supra note 8.

<sup>17</sup>Hicklin, L.R. 3 Q.B. 360 at 371 (1868).

<sup>18</sup>See, generally Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, et. al., 343 U.S. 495 (1952); Dennis et. al. v. United States, 341 U.S. 494 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Winters

The Hicklin Test Repudiated, and the Creation of "Community Standards"

The Hicklin test was explicitly repudiated in the 1957 Supreme Court decision Roth v. United States.<sup>19</sup> Roth involved the case of a bookseller convicted for mailing obscene materials in violation of an existing federal statute.<sup>20</sup> The Supreme Court upheld Roth's conviction and articulated, for the first time, a legal definition of obscenity<sup>21</sup> which clearly placed it outside of the First Amendment's free speech protections.<sup>22</sup>

The Roth opinion states that "obscene material is material which deals with sex in a manner appealing to prurient interest."<sup>23</sup> Roth went on to clarify how courts were to identify what was legally obscene by determining if "to the average person, applying contemporary community

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v. New York, 333 U.S. 507 (1948); Hannegan, Postmaster General v. Esquire, Inc., 327 U.S. 146 (1946); Martin v. City of Struthers, 319 U.S. 141 (1943); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Price v. United States, 165 U.S. 311 (1897); Rosen v. United States, 161 U.S. 29 (1896).

<sup>19</sup>354 U.S. 476, 489 (1957).

<sup>20</sup>Id. at 480.

<sup>21</sup>Roth, 354 U.S. 476 (1957).

<sup>22</sup>See U.S. Const., amend. I.

<sup>23</sup>Roth, 354 U.S. 476 at 487 (footnote omitted).

standards, the dominant theme of the material taken as a whole appeals to the prurient interest."<sup>24</sup> This test was based on the idea that individual geographic placement determined how Americans determined what constituted obscenity.<sup>25</sup>

The Justices, however, were not specific about what exactly the phrase "community standards" meant; consequently, the Supreme Court often found itself attempting to clarify its holding in the years immediately following Roth.<sup>26</sup> Some Justices maintained that "contemporary community standards" really referred to some sort of national American standard.<sup>27</sup> Others preferred use of a national standard only for federal prosecutions.<sup>28</sup>

*Miller v. California and the Modern Test for Obscenity*

The legal wrangling over the vagueness of Roth

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<sup>24</sup>Id. at 489.

<sup>25</sup>Id.

<sup>26</sup>Eg., Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 82 S.Ct. 1432, 1437-38, 8 L. Ed. 2d 639 (1962); Jacobellis v. Ohio, 378 U.S. 184, 192-95, 84 S. Ct. 1676, 1680-82, 12 L. Ed. 2d 793 (1964); Hoyt v. Minnesota, 399 U.S. 524, 90 S. Ct. 2241, 26 L. Ed. 782 (1970).

<sup>27</sup>Jacobellis, 378 U.S. 184, 192-95 (1964) (Brennan, J., joined by Goldberg, J.).

<sup>28</sup>Manual Enterprises, 370 U.S. 478, 488 (1962) (Harlan, J., joined by Stewart, J.).

convinced the Court that it must articulate a clearer test for use on potentially obscene materials.<sup>29</sup> A new three-part test for obscenity was promulgated in the 1973 case, Miller v. California.<sup>30</sup> In Miller, the Court stated that materials in question must be viewed according to whether:

- (a) "the average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"<sup>31</sup>;
- (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"<sup>32</sup>;
- and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."<sup>33</sup>

The Court stated that a national obscenity standard was unacceptable to the nation and would be impossible to administer:

[O]ur Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all fifty states in a single formulation<sup>34</sup> . . . [To] require a State to structure obscenity proceedings around evidence of a national "community standard" would be an exercise in futility<sup>35</sup> . . . [I]t is neither realistic nor constitutionally sound to

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<sup>29</sup>See Nowak and Rotunda, supra note 9 at §16.60, discussing Miller v. California, 413 U.S. 15 (1973).

<sup>30</sup>413 U.S. 15 (1973).

<sup>31</sup>Id. at 24.

<sup>32</sup>Id.

<sup>33</sup>Id..

<sup>34</sup>Miller, 413 U.S. 15 at 23 (1973).

<sup>35</sup>Id. at 24.

read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."<sup>36</sup>

Although Chief Justice Burger argued the practical difficulties of determining a single national standard, he ignored the even more immense logistical nightmare that the formulation and application of local obscenity standards created for the courts. What constitutes obscenity in one part of the country - or one part of the county - could be perfectly legal and acceptable in another.<sup>37</sup> But Burger, like Chief Justice Warren before him, clearly indicated in Miller that the "community standards" doctrine means that standards for acceptable levels of obscenity are to be set at the local level.<sup>38</sup> This remains the law of the land today.<sup>39</sup> Generally, legal definitions of "obscenity" are

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<sup>36</sup>Id. at 32.

<sup>37</sup>Id. at 24.

<sup>38</sup>The Miller test gives "community standards" a more literal meaning than in the Roth decision by explicitly delegating to the jury the determination of what constitutes obscenity: "[I]n resolving the inevitable sensitive questions of fact and law, we must continue to rely on the jury system . . . ." Miller, 413 U.S. at 26 (1973) (quoted in Nowak and Rotunda, supra note 9).

<sup>39</sup>See, e.g. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 470 (1994); Rhoden v. Morgan, 863 F. Supp.

narrow, describing what most Americans would consider "hard-core pornographic expression."<sup>40</sup>

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612, 617-18 (1994); *United States v. Caver*, 41 M.J. 556, 561 (1994) (all citing the Miller test the current standard for defining obscenity for First Amendment purposes).

<sup>40</sup>Rodney A. Smolla, *Free Speech In An Open Society* (1992) at 324-25.

### Modern Applications of Community Standards

While technology has changed the way we communicate,<sup>41</sup> it has not altered how we evaluate obscenity,<sup>42</sup> which receives no First Amendment protection because of its content, regardless of the medium by which it is communicated.<sup>43</sup> Eventually, any legal debate about regulating obscenity in cyberspace reaches the point where one must confront the stone wall of community standards. Although we live in an age where modernization arguably tends to destroy all that is purely local in any community, due to the dominance of influences that originate from outside the locality, the community standards doctrine

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<sup>41</sup>For example, within the past five years, the electronic bulletin boards of the Internet have "become a favorite stomping ground for millions of people." Neely, supra note 4 at 63. There are approximately 45,000 such bulletin boards, being used by "literally millions of people." Computer Porn A Prosecutorial challenge: Cyberspace Smut Easy to Distribute, Difficult to Track, Open to Legal Questions, ABA Journal, December 1994, at 40.

<sup>42</sup>See recent cases discussed supra note 39.

<sup>43</sup>See Laurence H. Tribe, American Constitutional Law 930 (2d ed. 1988).

applies to every mode of communication.<sup>44</sup> One legal scholar has concluded that the multimedia revolution which created "cyberspace" will likely stretch our "legal creativity" to the limit, but notes that the First Amendment has accommodated new technologies before and will likely be able to do so again.<sup>45</sup>

#### The Message in the Medium

The development of new technologies has resulted in a hierarchy of First Amendment applications to differentiate between electronic and print media.<sup>46</sup> The Supreme Court has stated that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."<sup>47</sup> This hierarchical approach has been explained by the intrusive nature of certain media like radio, telephone solicitation, and broadcast television.<sup>48</sup> Thus, the nature of the Internet's technological structure

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<sup>44</sup>See, e.g., Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) (dial-a-porn); FCC v. Pacifica Foundation, 438 U.S. 726 (1978), rehearing denied 439 U.S. 883 (1978) (radio broadcasting).

<sup>45</sup>Waggoner, supra note 4.

<sup>46</sup>The Message in the Medium, 107 Harvard L. Rev. 1062 (1994).

<sup>47</sup>Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

<sup>48</sup>See, e.g. FCC v. Pacifica, 438 U.S. 726, 748 (1978).

is likely to color any future determination by the Court of what constitutes obscenity in electronic media.<sup>49</sup> The question of what form, if any, censorship of cyberspace should take is complicated by the fact that it combines elements of print, broadcast, and telephone media. How obscenity has been dealt with in those contexts can illuminate how it should be regulated in cyberspace.

#### Print Media

The Court ruled in Kaplan v. California<sup>50</sup> that although "a book seems to have a different and preferred place in our hierarchy of values,"<sup>51</sup> books could be found obscene by the content of their words alone.<sup>52</sup> The Court also found that the contemporary community standards were the appropriate

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<sup>49</sup>The question of what form censorship, if it is to be applied to the Internet, should take is complicated by the fact that a fundamental question about the nature of interactive media has yet to be resolved: should it be regulated like other forms of mass communication? See John F. Dickerson & Douglas Root, Censoring Cyberspace: Carnegie Mellon's Attempt to Ban Sex From Its Campus Computer Network Sends A Chill Along the Info Highway, Newsweek, November 21, 1994, 102, 103.

<sup>50</sup>413 U.S. 115, 116 (1973), rehearing denied, 414 U.S. 883 (1973).

<sup>51</sup>Id. at 119.

<sup>52</sup>Id.

means by which to determine what constituted an obscene book.<sup>53</sup>

Courts have not, however, required bookstores, as "secondary distributors of information,"<sup>54</sup> to be familiar with the contents of every title they stock<sup>55</sup> in order to keep clear of local obscenity ordinances. Additionally, prior restraints on other forms of print media, generally disfavored by the Court,<sup>56</sup> are often upheld in obscenity cases, although censoring authorities must first meet stringent requirements and have the determination of obscenity made by a local court.<sup>57</sup>

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<sup>53</sup>Id. at 121. Kaplan, id. at 115, was decided after but during the same term as Miller. 413 U.S. 15 (1973).

<sup>54</sup>Message, supra note 46 at 1067. Computers also fit into this category if one considers their functions as "bulletin boards" and information services. The analogy is particularly apt when applied to information downloaded from databases: games, journals, images, etc. Id.

<sup>55</sup>In Smith v. California, 361 U.S. 147 (1959), the Court held that the First Amendment prohibits prosecution of a bookseller unless he or she has "knowledge of the contents of the book." Id. at 153.

<sup>56</sup>See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

<sup>57</sup>In Freedman v. Maryland, 380 U.S. 51 (1965), the Court required a local censorship board attempting to revoke

Broadcast Radio and Television

Broadcast radio and television stations are regulated by the Federal Communications Commission,<sup>58</sup> which controls<sup>59</sup>

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the license of a book and motion-picture distributor's to follow certain specific procedural safeguards before they could "engage in the prior restraint of allegedly obscene materials." Nowak and Rotunda, supra note 9, at §16.61 (c).

The Court required that the censoring body:

- (1) Afford the accused part a prompt hearing,
- (2) Has the burden of showing that the material is, in fact, obscene,
- (3) Must defer to a judicial proceeding for the imposition of a valid prior restraint on the material, and
- (4) Must either refrain from making a finding of obscenity, or, as a requirement of law under the board's enabling statute or clear judicial mandate, take action on its own behalf in a court of law to seek an affirmation of its initial finding of obscenity. Id.

Nowak and Rotunda note that it is unlikely that this rule on prior restraints would apply if only books were involved.

Id. at fn 27.

<sup>58</sup>See, e.g., 47 U.S.C. § 309 (a) (1988) (granting FCC the right to license radio and television operators due to the limited number of frequencies available on the electromagnetic spectrum used for broadcasting).

<sup>59</sup>The FCC cannot, however, engage in "censorship." 47 U.S.C.A. § 326. Another statutory provision, however, requires the Commission to prohibit "obscene, indecent, or

what can be broadcast over public airwaves. Most Supreme Court decisions in this area evince the Court's concern about broadcast's unique pervasiveness and its accessibility to children.<sup>60</sup> In FCC v. Pacifica Foundation,<sup>61</sup> the Court upheld the Commission's ban on obscene speech, while allowing the Commission only a limited right to regulate "indecent" speech.

Obscene broadcasts are prohibited by the FCC's enabling act,<sup>62</sup> but it offers no definition of obscenity more specific than Miller for the purposes of broadcast regulation.<sup>63</sup> The FCC set a clearer standard for cable

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profane" broadcasts. 18 U.S.C.A. § 1464. Pacifica, 438 U.S. 726 (1978), resolved this apparent conflict. The Court declared that: "[S]ection 326 does not limit the FCC's authority to sanction licensees who engage in obscene, indecent, or profane broadcasting. Though the censorship ban precludes editing proposed broadcasts in advance, the ban does not deny the FCC the power to review the content of completed broadcasts." Id.

<sup>60</sup>438 U.S. at 749.

<sup>61</sup>438 U.S. 726 (1978), rehearing denied 439 U.S. 883 (1978).

<sup>62</sup>18 U.S.C.A. § 1464.

<sup>63</sup>Perhaps because the FCC is not supposed to engage in censorship. See supra note 59.

television in 1992,<sup>64</sup> specifically advising local cable operators to base their programming around the Miller standard."<sup>65</sup>

### Telephone

The emergence of the dial-a-porn industry resulted in litigation to clarify how obscenity law would apply to possibly obscene telephone transmissions. Telephones, like computer systems, are "designed for point-to-point, interactive communication," unlike cable television or broadcasting.<sup>66</sup> In fact, the computer systems which create cyberspace use telephone wires to make their transmissions through modems.

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<sup>64</sup>See Miller and Van Eaton, supra note 2 (discussion of the 1992 Cable Act and its amendments); Krattenmaker and Esterow, Censoring Indecent Cable Programs: The New Morality Meets the New Media, 51 Ford. L. Rev. 606 (1983) (discussion of pre-Cable Act attempts at regulation).

The appropriate obscenity standard for direct-broadcast satellite television is also problematic. See John V. Edwards, Obscenity in the Age of Direct Broadcast Satellite; A Final Burial For Stanley v. Georgia (?), A National Obscenity Standard, and Other Miscellany, 33 Wm. & Mary L. Rev. 949 (1992).

<sup>65</sup>58 Fed. Reg. 19623 (1993) at 19624.

<sup>66</sup>Message, supra note 46 at 1065.

The holding of Sable Communications v. FCC,<sup>67</sup> required the dial-a-porn industry to adhere to local community standards, tailoring its messages to meet a variety of local obscenity ordinances.<sup>68</sup> The Sable decision makes two points about the FCC's ability to regulate the dial-a-porn industry through Section 223 (b) of the Communications Act of 1934, which bans indecent, as well as obscene, interstate commercial messages.<sup>69</sup> First, § 223 (b) "does not unconstitutionally prohibit the interstate transmission of obscene commercial telephone message" because obscenity receives no First Amendment protection.<sup>70</sup> However, the FCC's "ban on indecent telephone messages violates the First Amendment since the statute's denial of adult access to such messages far exceeds that which is necessary to serve the compelling interests of preventing minors from being exposed to the messages."<sup>71</sup>

Justice White, writing for the Court, distinguished Pacifica's grant of power to regulate indecent radio broadcasts, noting that Pacifica did not involve a total ban

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<sup>67</sup>492 U.S. 115 (1989), (striking down congressional ban on obscene telephone messages).

<sup>68</sup>Sable, 492 U.S. 115 (1989). See also Jeffrey L. Reed, supra note 2 at 363.

<sup>69</sup>492 U.S. 115 (1989).

<sup>70</sup>Id.

<sup>71</sup>Id.

on indecent material and relied on the pervasiveness of broadcasting, "which can intrude on the privacy of the home without prior warning of content and which is uniquely accessible to children."<sup>72</sup> Moreover, the opinion contrasts radio with dial-a-porn, which requires the "listener to take affirmative steps to receive the communications."<sup>73</sup> The distinction drawn between the type of media involved in the two cases indicates that obscenity and indecency regulation in cyberspace could also be affected by the need of computer users to first take "affirmative steps" before they can act within cyberspace. The Sable court's position on obscenity and indecency suggests that in cyberspace, an Internet user's indecent speech should receive First Amendment protection. However, whether that speech is indecent or obscene will be determined by the community standards of the user's locality.

Also, as Sable dealt with the prosecution of the producer of the messages, the Court largely ignored the intriguing question of the appropriateness of regulating common carrier telephone companies, which are required to ignore the content of the private messages their wires transmit.<sup>74</sup> As communication in cyberspace ultimately

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<sup>72</sup>Id.

<sup>73</sup>Id.

<sup>74</sup>See 47 U.S.C. § 153(h) (1988) (Communications Act of 1934), and 47 C.F.R. § 21.2 (1992). See Message, supra

occurs through telephone wires, it would follow that private computer-generated communications should also be free of regulatory interference. Although computer networks have not been designated as such, they appear to meet the Supreme Court's definition of "common carriers":

A common-carrier service in the communications context is one that "makes a public offering to provide [communication facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing."<sup>75</sup>

Sable, however, implies that indecent transmissions over telephone wires for commercial gain can indeed be regulated at their source. In cyberspace, this could mean that electronic mail and chat rooms might be free from any regulation, whereas commercial enterprises based on electronic bulletin boards could be censored.

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note 46 at 1065.

<sup>75</sup>Message, supra note 46 at 1066, quoting FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (footnote omitted).

### Cyberspace: Public or Private?

In July 1994, the Miller test was applied in the very first case involving the transmission of obscene images via the Internet.<sup>76</sup> The outcome of that case reveals that community standards do little to clarify what is and what is not obscene for the purposes of interlinked computer networks, and raises a very important question: is cyberspace a public area or a private one?

#### The Case of United States v. Thomas<sup>77</sup>

In July 1994, a California couple engaged in a profitable home business was found guilty of violating Memphis, Tennessee's local obscenity standards by transmission of obscene images through interstate phone lines. Robert and Carleen Thomas were charged with violations of Memphis' community standards for obscenity when an undercover federal agent posed as a subscriber to their members-only<sup>78</sup> electronic bulletin board,<sup>79</sup> Amateur

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<sup>76</sup>United States v. Thomas, No. 94-20019 (W.D. TN) (July 28, 1994).

<sup>77</sup>Thomas, No. 94-20019 (W.D. TN July 28, 1994).

<sup>78</sup>Members could subscribe to the bulletin board for \$55 for six months, \$99 for a year. Associated Press, Computer Porn Trial Breaking New Ground '73 Community Standards

Action.<sup>80</sup> Subscribers could use credit cards to download scenes of sexual fetishes, including bestiality.<sup>81</sup>

The scenes the Thomases sent to Memphis were not considered obscene by their own local California standards.<sup>82</sup> Prosecutors, however, felt that the fact that the images were obscene by Memphis standards was enough of a violation to justify bringing federal charges<sup>83</sup> of

Ruling May Get Stern Test, Fla. Sun Sentinel, Palm Beach edition, July 21, 1994, at 4A.

<sup>79</sup>Electronic bulletin boards (or "newsgroups") are publicly accessible and their current numbers are estimated between 50,00-100,000 in the United States. They include an enormous array of subjects, and "most are established by hobbyists and consist of a single computer and phone line. Some are profitable businesses with hundreds of thousands of subscribers. Callers, dialing in via computer, can post and read messages and retrieve files consisting of text, images or computer software." Landis, supra note 5.

<sup>80</sup>Thomas, No. 94-20019 (W.D. TN, July 28, 1994).

<sup>81</sup>Id.

<sup>82</sup>Robert Thomas has been quoted as saying: "Everything I have on my bulletin board can be purchased on the street in San Francisco." Computer Porn, supra note 41.

<sup>83</sup>See 18 U.S.C.S. § 1465, 1466 (1994). § 1466 (a) provides in part that: "[W]hoever is engaged in the business of selling or transferring obscene matter, . . . ,

transmitting obscenity through interstate telephone lines.<sup>84</sup> A Memphis jury convicted the Thomases on eleven counts of obscenity violations, and sentenced Robert and Carleen Thomas to 36 and 30 months in jail, respectively.<sup>85</sup> Their conviction was recently upheld by a federal appellate court.<sup>86</sup>

The appellate court's opinion is extremely limiting. Judge Nancy Edmunds, writing for the Sixth Circuit Court of Appeals, rejected the Thomases' argument that Congress did not intend for 18 U.S.C. § 1465 to regulate intangible objects like computer transmissions; the court also rejected their assertion that the Congressional intent *not* to regulate computer transmissions is evinced by the lack of an express prohibition of such conduct in the statute.<sup>87</sup> The opinion holds that the images were tangible at both their source and their destination, and are therefore

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which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both."  
Id.

<sup>84</sup>Thomas, No. 94-20019 (W.D. TN, July 28, 1994).

<sup>85</sup>Id.

<sup>86</sup>United States v. Thomas, 74 F. 3d 701, 1996 U.S. App. LEXIS 1069 (6th Cir. 1996).

<sup>87</sup>Id. at \*7.

tangible images for the purpose of federal regulation.<sup>88</sup> In addition, the court points out that their duty to interpret federal statutes is to "construe the language so as to give effect to the intent of Congress,"<sup>89</sup> which they found here to be the prevention of interstate transmission of obscene materials by any and all means.<sup>90</sup>

The Thomas ruling, which holds operators of electronic bulletin boards to the community standards of any locality, actually subverts completely the entire rationale of community standards, which was to allow communities to set their own levels of "acceptable" obscenity. The opposite occurred in the Thomas case: Californians, selling

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<sup>88</sup>Id. at \*11.

<sup>89</sup>Id. at \*12 (quoting United States v. Underhill, 813 F. 2d 105, 111 (6th Cir.), cert. denied, 482 U.S. 906 (1987) (quoting United States v. American Trucking Associations, Inc., 310 U.S. 534, 542-44 (1940)).

<sup>90</sup>Id. at \*14. To support this conclusion, the court cited a military case where it was held that § 1465's silence as to computer transmissions was irrelevant, because "it is clear Congress intended to stem the transportation of obscene material in interstate commerce regardless of the means used to effect that end." Id., quoting United States v. Maxwell, 42 M.J. 568, 1995 WL 259269 (A.F. Ct. Crim. App. 1995) at \*10.

pornography deemed not obscene by their own community,<sup>91</sup> were held to the dictates of communities in Tennessee, who did consider the pornography obscene.<sup>92</sup>

This is an especially worrisome development in the context of the Internet, because operators of bulletin boards usually cannot screen out calls from any one locality,<sup>93</sup> essentially leaving their operators subject to the obscenity laws of every community in America.<sup>94</sup> Even if operators could prevent callers from areas where the material sought would be obscene, they are still obligated

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<sup>91</sup>Much pornography is not legally obscene. Playboy and Penthouse, for example, display "soft-core" pornography which is rarely, if ever, found to be legally obscene. Mike Godwin, Problems Policing Porn On-Line: Community Standards Difficult to Apply in Cyberspace, The San Francisco Examiner, August 14, 1994.

<sup>92</sup>Thomas, No. 94-20019 (W.D. TN, July 28, 1994).

<sup>93</sup>Distributors of books, magazines, and videos which may be obscene can avoid shipping to areas where they could face prosecution. Operators of bulletin board systems, who use telephone lines, cannot control from whom who they receive calls. Landis, supra note 5.

<sup>94</sup>For a general discussion of legal issues affecting operators of computer information systems, see David Loundy, E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability, 12 Computer L.J. 101 (1993).

to know every local obscenity law in the country. Although it has been posited that in the future, operators of electronic networks will resemble telephone companies in that they will be considered "conduits more than editors,"<sup>95</sup> the Thomas case suggests that at present, operators of electronic bulletin boards will be held to the standards of editors who review and are responsible for every word or image in their form of media.<sup>96</sup>

Do Electronic Transmissions "Pollute" an Electronic Community?

The Thomas decision seems even more unfair when one considers that the Supreme Court has upheld the right to possess pornography in the privacy of one's home. Writing for the Court in Stanley v. Georgia,<sup>97</sup> Justice Thurgood

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<sup>95</sup>Message, supra note 46 at 1084. See also id. at 1088-98 for an in-depth discussion of the future of all First Amendment regulation on the information superhighway.

<sup>96</sup>Thomas, No. 94-20019 (W.D. TN, July 28, 1994).

<sup>97</sup>394 U.S. 557 (1969). Pornography depicting children, however, receives no First Amendment protection under any circumstances if states choose to criminalize even its private possession. Osborne, 495 U.S. 103 (1990). See David B. Johnson, Why the Possession of Computer-Generated Child Pornography Can be Constitutionally Prohibited, 4 Alb. L.J. Sci. & Tech. 311 (1994) for a discussion of the problematic nature of computer-generated obscene images, with particular

Marshall stated: "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."<sup>98</sup> However, the Court has construed that holding very narrowly. Although commentators have observed that "one may enjoy obscene material in one's own home, ... virtually any process that leads to such possession may be declared illegal,"<sup>99</sup> implying that the business of obscenity necessarily "pollutes" a community.<sup>100</sup>

However, in the context of cyberspace, purchasers of pornography have it transmitted directly to their home computers. As they must log on or subscribe to a service, potentially obscene materials do not interact with either the cyberspace community or the purchaser's physical

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emphasis on those involving the depiction of children.

<sup>98</sup>Id. at 565.

<sup>99</sup>Nowak and Rotunda, supra note 9 at § 16.61 (a).

<sup>100</sup>United States v. Orita, 413 U.S. 139 (1978) (transporting obscene material for eventual private use in the home); United States v. Reidel, 402 U.S. 351 (1971) (receipt of obscene materials through the mails); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), rehearing denied, 414 U.S. 881 (1973), on remand 231 Ga. 312, 201 S.E. 2d 456 (1973), certiorari denied, 418 U.S. 939 (1974), rehearing denied, 419 U.S. 887 (1974) (voluntarily seeking obscene materials).

surroundings. The transaction is completely private; only those persons who have sought out such materials receive exposure to them. The Thomases' ostensible "polluting" took place during the split-second transmission of their images to Tennessee -- a transmission initiated not by them, but by the undercover agent in Memphis.

As one First Amendment lawyer has pointed out, "electronic material travels invisibly from one computer to another,"<sup>101</sup> and "in electronic ether ... with the exception of electrons moving at the speed of light, there is no community interface."<sup>102</sup> Mike Godwin, attorney for the Electronic Freedom Foundation, has argued that "pornography inevitably finds its way into any new technology and that since computer networks come directly into the home, they may have a much less intrusive impact on communities than older methods of pornography distribution."<sup>103</sup>

#### On-Line Business On the Line

Although the debate about distribution highlights cyberspace as a private area, pornography is ultimately a

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<sup>101</sup>Landis, supra note 5.

<sup>102</sup>See Landis, supra note 5.

<sup>103</sup>All Things Considered: Couple Found Guilty of Selling Pornography on Internet (National Public Radio broadcast, July 29, 1994) (Transcript #1558-4).

money-making venture, especially in electronic media,<sup>104</sup> and such businesses are generally considered within the public realm. Many operators are choosing to limit business activities which are perfectly legal in their own communities, hoping that self-censorship will ward off obscenity prosecutions where their product is illegal. Community standards' potential chilling effect on business was a concern first expressed by Justice William Brennan thirty years prior to *U.S. v. Thomas*. In 1964, he wrote that applying local standards to obscene materials meant that dissemination of such materials might be curtailed because sellers would be unwilling to risk convictions under

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<sup>104</sup>Although exact estimates on the number of sexually explicit electronic bulletin boards vary, the July 1994 compilation of the most "trafficked" discussion groups listed three sexually-oriented ones in its top ten: alt.sex.stories., alt.binaries.pictures.erotica, and alt.sex. Landis, supra note 5. Each group had more than 200,000 readers in July 1994. Id.

Some have remarked on studies which identify 90% of on-line system users as unmarried white men between the ages of 21 and 30 and posited that the prominence of sex-oriented bulletin boards will continue until women users are a more palpable presence in cyberspace. See Fran Maier, Women.Not@CyberWorld, Wash. Post, April 16, 1995 at C1.

varying obscenity standards depending upon the locale.<sup>105</sup>

Additionally, Justice Brennan was concerned with arbitrary enforcement of community standards, given that some states zealously prosecute obscenity violations while others are far more lenient on possible offenders.<sup>106</sup> In

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<sup>105</sup>Jacobellis v. Ohio, 378 U.S. 184 193-195 (1964) (Brennan, J., concurring, joined by Goldberg, J.).

<sup>106</sup>Of particular relevance to the issue of possible vigorous prosecution of offenses is a state's initial definition of obscenity. Although most are based on the Miller standard, they vary widely from state to state. See, e.g., Cal. Penal Code § 311 (Deering 1995); Ill. Rev. Stat. ch. 38, para. 11-20 (1994); Ind. Code Ann. § 35-49-1-1 (Burns 1994); Kan. Stat. Ann. § 21-4301 (c) (1994); La. Rev. Stat. Ann. § 91.11 (A) (3) (West 1993); Mich. Stat. Ann. § 28.579 (365) (Callaghan 1993); Mont. Code Ann. § 45-8-201 (1994); N.D. Cent. Code § 12.1-27.1-01 (1993); Pa. Cons. Stat. § 5903 (B) (1994); Va. Code Ann. § 18.2-372 (Michie 1994).

Some states, however, have limited the rights of localities to further regulate obscenity. See, e.g., Mich. Stat. Ann. § 28.579 (370) (allows exemption for zoning laws); N.D. Cent. Code § 12.1-27.1-12 (1993). Other states have acted affirmatively to allow their municipalities to regulate obscenity further than the state itself. See, e.g., Kan. Stat. Ann. §21-4301 (f) (3) (1994); La. Rev.

fact, the Thomas' lawyer, unsuccessfully argued before the trial that federal prosecutors had shopped around for an area traditionally conservative on obscenity issues and generally "computer-illiterate,"<sup>107</sup> in order to make their case against the Thomases as strong as possible.<sup>108</sup>

#### The Problem of Juvenile Access

Although concern over children's potential exposure to obscenity has been a major factor in the efforts to regulate cyberspace, children are not exposed to on-line obscenity the moment they turn on the family computer. Like Playboy, computer-generated obscenity must be subscribed to, or purchased item by item. Cyberspace users with no wish to view obscene images simply do not subscribe to bulletin boards which specialize in them. Accordingly, the danger to children generally results from their own curiosity.

As such, the problem of juvenile access can be dealt with through the use of parental control, either by direct supervision of their children's computer time, or through use of software devices that would allow them to block out

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Stat. Ann. § 91.11 (C) (1993); Mont. Code Ann. § 45-8-201 (5) (1994).

<sup>107</sup>Associated Press, Computer Porn Trial Breaking New Ground '73 Community Standards Ruling May Get Stern Test, as reported in Sun Sentinel (FL), Palm Beach Edition, Thursday July 21, 1994, at 4A.

<sup>108</sup>Computer Porn, supra note 41.

"dirty" cybersites,<sup>109</sup> much like cable television allows the blocking out of adult channels. Several companies now offer software to enabling parents to exercise control over what on-line topics are accessible to their children.<sup>110</sup> In addition, nearly all of the major servers such as America On-Line have built-in parental control features.

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<sup>109</sup>See, e.g., Lawrence Magid, *Sen. Exon's Censors Are Set a Little High for the Internet*, Wash. Post, March 14, 1995, at F18. Magid argues that the preservation of free speech on the Internet is threatened by the Communications Decency Act in the name of protecting children. "I worry that some overzealous prosecutor, anywhere in the country, might use this law to go after a discussion of reproductive rights, birth control abortion, gay rights, or any other intensely debated subject." Id. Magid asserts that parents "have other ways to protect their children," Id., from obscenity on the Internet. He refers concerned parents to his booklet "Child Safety on the Information Superhighway," which is available through the National Center for Missing and Exploited Children. Id.

<sup>110</sup>Such programs include "Cybersitter," which screens words in context so that a question about the sex of an individual would not be blocked, while a "lurid question" would; in addition, programs like "Surfwatch" now offer parents the ability to block sites for violence. Parental Control Ware, Newsweek, February 12, 1996, at 12.

Another potential answer is to have electronic boards "rated" for obscene conduct as are video games, movies, and musical releases. This suggestion might be feasible for boards that download images, but likely would not work on discussion boards, which involve members from around the world sharing their thoughts via the computer screen. Operators of boards could caution users to keep their talk within certain obscenity limits, but could not guarantee their compliance.<sup>111</sup>

In sum, the question of juvenile access demonstrates the dual nature of cyberspace as both a public and private area. Even though the Supreme Court has acknowledged the legitimate interests of states in regulating the dissemination of obscene material when the method of distribution "carries with it a significant danger of offending the sensibilities of unwilling recipients or of

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<sup>111</sup>There are differing approaches to control of messages posted on electronic bulletin boards. See Schlachter, supra note 5 at § IV B 1. Prodigy considers itself responsible for its users' messages and thus has editorial discretion not to print all submitted messages. Id. (citing Marianne Taylor, Users Say Computer Network is Muzzling Their Give-and-Take, Chi. Trib., Jan. 7, 1991, at C1, quoting Martha Griffin, Prodigy spokesperson). CompuServe will remove obscene or offensive messages if users complain. Id.

exposure to juveniles,"<sup>112</sup> cyberspace exists outside the traditional public boundaries of local communities<sup>113</sup> and can be prevented from inadvertently affecting unwilling viewers through technological controls.<sup>114</sup> As the "public" aspects of cyberspace are easily circumvented, one would think that Americans would be willing to view it primarily as a private area. However, both the Thomas case and new legislation indicate that as yet, our society is unwilling to do so.

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<sup>112</sup>Miller, 413 U.S. 15 at 18-19. See also Stanley v. Georgia, 394 U.S. 557, 567 (1969); Ginsberg v. New York, 390 U.S. 629, 637-643 (1968); Redrup v. New York, 386 U.S. 767, 769 (1967); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

<sup>113</sup>"[N]ew problems in cyberspace will arise from the fact that residents of cyberspace are also residents of "real" spaces; they will thus be members of two (or more) different communities." Hardy, supra note 4 at 1012.

<sup>114</sup>Although these arguments make it seem increasingly unreasonable to apply community standards on obscenity to a medium which does not actually affect its community, courts must keep in mind that the situation may have changed by the time new regulations could be implemented. Interactivity, in particular, is beginning to characterize all forms of electronic media, and the relative passivity of media subscribers may not exist in the future.

## **A Cyberspace Standard for Obscenity:**

### **The Communications Decency Act and Alternatives**

Legislators soon recognized that it would be easiest to regulate cyberspace through action at the federal level. The Communications Decency Act of 1995 was one of several proposals made in response to concerns over the de facto application of community standards in cyberspace. This "anything goes,"<sup>115</sup> standard, which resulted in very few prosecutions, was too expansive for the liking of Senators Jim Exon and Slade Gorton, backers of the Communications Decency Act of 1995,<sup>116</sup> signed into law on February 8, 1996 as a small part of an important telecommunications bill supported by the Clinton administration.

### **Criminalizing "Indecent" Speech in Cyberspace**

The Act modified the 1992 Communications Act<sup>117</sup> to allow criminal liability to be imposed on the transmitters of computer messages which are "obscene, lewd, lascivious, filthy, or indecent."<sup>118</sup> The primary objectives of the bill's sponsors are the protection of children from

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<sup>115</sup>Steven Levy, Indecent Proposal: Censor the Net, *Newsweek*, April 3, 1995, at 53.

<sup>116</sup>S. 314, 104th Cong., 1st Sess. (1995).

<sup>117</sup>47 USC § 223 (1992).

<sup>118</sup>S. 314 at Sec. 223.

"pornography and smut," "computer stalking and inappropriate contact with children."<sup>119</sup> In addition, Representative Henry Hyde, an opponent of abortion, added language which applies the Comstock Act of 1873 to cyberspace, resulting in a ban on discussions of abortion and birth control.<sup>120</sup>

The Act's passage touched off a storm of protest. Thousands of World Wide Web site operators turned their screen backgrounds black, the "cyberspace equivalent of book burning," according to Jerrold Nadler, cyberspace user and U.S. Representative.<sup>121</sup> Over twenty groups filed suit in federal court in Philadelphia, challenging the Act's constitutionality.<sup>122</sup> In New York, a district judge denied requests for an order restraining the government from enforcing the anti-abortion speech section of the Act after "receiving assurances from the U.S. attorney that the

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<sup>119</sup>See Jim Exon, We Can't Allow Smut on the Internet, Wash. Post, March 9, 1995, at A20.

<sup>120</sup>Peter H. Lewis, Protest, Cyber-style, for New Law, The New York Times, February 8, 1996, at A16.

<sup>121</sup>Id.

<sup>122</sup>Communications Decency Act 96: First Wave of Lashbacks, Online Libraries and Microcomputers, March 1, 1996. The coalition includes, among others, the ACLU, the Society of Professional Journalists, and the San Francisco Bay Guardian. Legal representation will be provided by the First Amendment Project.

government would not prosecute people who discuss abortion on-line." The judge pointed out that the Department of Justice considers the Comstock law unconstitutional and has not enforced it in twenty years.<sup>123</sup> Kate Michelman, president of the National Abortion rights Action League, expressed her dissatisfaction with the judge's decision by pointing out that such promises extend only through the end of the Clinton administration, and that Americans "cannot be subject to changing political winds on so critical a matter."<sup>124</sup>

In addition, Senators Leahy and Feingold immediately introduced a bill to repeal the Communications Decency Act. Senator Feingold stated that the Act, "while well-intentioned, is improperly targeted at so-called 'indecent' speech on the Internet which is protected by the First Amendment."<sup>125</sup> He pointed out that criminal statutes, like the ones used to prosecute the Thomases, already served to punish illegal distribution of obscenity. The Senator argued that the Act does nothing further "to protect children on-line," while "compromis[ing] the right of every

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<sup>123</sup>Telecommunications: Judge Rejects One Abortion-Specific Suit, Abortion Report, February 9, 1996.

<sup>124</sup>Id.

<sup>125</sup>Russell Feingold, Senator, Senate, Leahy-Feingold Bill Introduced to Repeal New Internet Censorship, Congressional Press release, February 9, 1996.

American to free speech."<sup>126</sup>

An Inappropriate Method

Further, critics charge that the Act fails to consider the unique nature of communication in cyberspace, which can:

resemble postal mail, coffee klatsches, public lectures, academic seminars, locker-room banter, and print periodicals . . . [I]n none of these venues would we welcome regulations where fines and prison sentences would be doled out for uttering certain expletives that, though once considered scandalous, are now fairly ubiquitous in our culture. . . if a magazine that commonly runs some of those nasty words in its pages - say, The New Yorker - decided to put its contents on-line, its leaders would be liable for a \$100,000 fine and two years in jail.<sup>127</sup>

The variegated nature of cyberspace communications emphasizes the unsuitability of the Communications Decency Act as a regulator of potentially obscene speech on the Internet. Many of its goals could be met in ways that would not so severely restrict freedom of speech in cyberspace.<sup>128</sup>

If cyberspace must be policed for obscenity, almost any other standard would be more appropriate than that provided by the Communications Decency Act. Another standard would also have a better chance of surviving a constitutional

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<sup>126</sup>Id.

<sup>127</sup>See Levy, supra note 115.

<sup>128</sup>See Ken E. Weine, The Communications Decency Act: Too Deep, Too Broad, Too Much, N.Y. L. J., March 15, 1995 at 2.

challenge; the Act's criminalization of indecent speech in cyberspace is prima facie unconstitutional as the Supreme Court has emphatically declared that indecent speech merits First Amendment protection.<sup>129</sup> Additionally, the technological feasibility and relative inexpensiveness of software blocking devices emphasize that the sweeping taboos of the Communications Decency Act are ridiculously broad. As the Act has already elicited a number of legal challenges, alternatives that can constitutionally regulate obscenity in cyberspace while protecting "indecent" speech merit discussion.

#### Legislative Options

Two existing bills may offer alternative legislative options to the Communications Decency Act. The "Protection of Children from Computer Pornography Act of 1995" would place criminal liability on any electronic bulletin board operator who knowingly transmits indecent material to anyone under the age of eighteen.<sup>130</sup> Penalties include both fines and prison terms. Although this bill also addresses indecent speech, it does so in a manner appropriate under the current constitutional regime; pornography is illegal

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<sup>129</sup>See, e.g., FCC v. Pacifica, 438 U.S. 726 (1978), rehearing denied, 439 U.S. 883 (1978); Sable Communications v. FCC, 492 U.S. 115 (1989).

<sup>130</sup>Richard Raysman and Peter Brown, Regulation of On-Line Services, N.Y.L.J., August 22, 1995, at 3.

for sale to minors regardless of whether it is obscene or indecent under local laws. This would eliminate the problem of determining what is obscene and what is indecent under local community standards; however, debate would be sure to ensue about the definition of "pornography."

By contrast, the "Internet Freedom and Family Empowerment Act" prohibits Internet regulation by the Federal Communications Commission. The bill creates a national policy on use and development of the Internet, which it praises as "an extraordinary advance in the availability of educational and informational resources" which "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."<sup>131</sup>

Moreover, the Internet Freedom and Family Empowerment Act fosters parental control over access to cyberspace and encourages the development of parental control devices. It includes a "Good Samaritan" provision designed to allow cyberspace users who already act to inhibit the distribution of "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable material"<sup>132</sup> to continue to do so. This clause allows continued use of obscenity control measures, such as those already in place at the larger on-line service companies. However, although

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<sup>131</sup>Id.

<sup>132</sup>Id.

this bill is friendly to Internet users and certainly encourages the expansion of cyberspace, its adoption would return us to basing on-line obscenity prosecutions on community standards alone, as in the Thomas case.

#### Cyberspace As A Community

As an alternative to the community standards doctrine has yet to be found, perhaps the simplest way to regulate obscenity in cyberspace is to declare it a community all its own. Under current law, this would require that Internet users determine a set of "community standards" which courts could then apply to obscenity cases within the cyberspace community as they would in any other locale.

Declaring cyberspace to be a community of its own is an attractive option; however, it is also a problematic one. It is highly unlikely that a uniform "community standard" could be agreed upon by users of the Internet, as there are "differing interest groups all across cyberspace."<sup>133</sup> One main attraction of the Internet, after all, is the incredible variety of its user pool. All sorts of people, from all over the world, log on to the Internet to chat, debate, and exchange ideas; it is hardly fair to request that such a diverse group make a decision which even the Supreme Court found itself unable to articulate on a

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<sup>133</sup>See Hardy, supra note 4 at 1013.

national scale.<sup>134</sup>

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<sup>134</sup>In addition, the question of to what degree Internet users reasonably are subject to a particular court's jurisdiction raises thorny problems. Subscribers to on-line systems are in effect possessed of "dual citizenship," in cyberspace and in "real space." Hardy, supra note 4. Although prior court holdings have subjected people to jurisdiction in areas to which they reached out, in those cases the parties knew to what locality their actions were directed. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). On-line subscribers do not necessarily know to what geographic area their communications are directed; accordingly, proprietors of bulletin board systems do not necessarily know the origins of its subscriber base.

If the Internet were declared a community of its own, the knotty issue of whether or not international users of the network who violated the "community standard" could be prosecuted under American obscenity laws is certain to arise. Fairness would seem to require a more direct attempt to reach American markets before foreign subscribers could be held liable for violations of American law. See, e.g., *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987), 702 P. 2d 543 (1986), 39 Cal. 3d 35 (1986). There is the additional question of how willing other nations would be to assist the United States in such adjudications against its citizens.

### Overturing Miller

The difficulties involved in applying existing obscenity law to cyberspace demonstrate the more general failings of the "community standards" doctrine as it applies to America as a whole. As one commentator has noted, the idea of "culturally distinct geographical locations may simply be obsolete in this age of cyberspace."<sup>135</sup> For that reason, overturning Miller and adopting a clearer definition of what is obscene for use in all media is an attractive option. Ideally, a new obscenity regime would accommodate the expansion and development of new technologies and would broadly define obscenity to allow room for speech that society values, such as political debate over abortion now technically illegal in cyberspace. A new national standard for obscenity and indecency could include reasonable controls on speech designed to limit access to children.

As the Supreme Court has long recognized, it seems unlikely that we will ever be willing to abandon regulation of obscene and indecent speech. In the companion case to Miller, Paris Adult Theater v. Slaton,<sup>136</sup> the Court

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For these reasons, some commentators have advocated the creation of "cybercourts," which could act as a "virtual forum" for the adjudication of disputes worldwide. See Resnick, supra note 4 at A1.

<sup>135</sup>All Things Considered, supra note 103.

<sup>136</sup>413 U.S. 49 (1973).

acknowledged that: "[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity ... [t]hese include the interests of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."<sup>137</sup> And in the years prior to Miller, Chief Justice Warren wrote that there is a "right of the Nation and of the States to maintain a decent society," which must be balanced against "the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." <sup>138</sup>

Efforts to balance concern over the quality of life and the right of individual expression have given rise to suggestions of obscenity regulation like the "Plain Brown Wrapper Principle."

The Plain Brown Wrapper Principle is this: The government may not prohibit the free trade of obscene or indecent speech in the general marketplace, but it may require that all obscene or indecent speech be packaged and disseminated in a manner that substantially diminishes exposure to such speech to children or involuntary exposure to such speech in genuine captive audience

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<sup>137</sup>Id. at 57-58.

<sup>138</sup> Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting). See also Memoirs v. Massachusetts, 383 U.S. 413, 457 (1966) (Harlan, J., dissenting); Beauharnais v. Illinois, 343 U.S. 250, 256-57 (1952); Kovacs v. Cooper, 336 U.S. 77, 86-88 (1949).

situations.<sup>139</sup>

Such theories seem far better equipped than the Miller standard to keep in equipoise both one's right of free expression and one's right to avoid the free expression of others. Use of a "Plain Brown Wrapper Principle" on-line would encourage the employment of cyberspace's own technology to weed out whatever users did not wish to see, while still permitting the open exchange the medium makes possible.<sup>140</sup>

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<sup>139</sup>Smolla, supra note 40 at 330.

<sup>140</sup>Smolla, supra note 40 at 330-334.

## Conclusion

One legal commentator of a historical bent has noted that "the Internet's Jeffersonian beginnings are already spawning a Hamiltonian backlash."<sup>141</sup> Many Americans consider the explosion of electronic communications a modern example of the truth of Jefferson's observation that "free communication among the people ... [is] the only effective guardian of every other right."<sup>142</sup> Others, however, consider cyberspace a hotbed of "public licentiousness," agreeing with Hamilton's view on the dangers of "danc[ing] to the tune of liberty without law."<sup>143</sup> As these factions struggle to decide how we will regulate obscenity in cyberspace, its new technologies are stretching our "legal creativity"<sup>144</sup> to the limit.

As a place with both public and private aspects, cyberspace is perhaps the ideal arena in which to experiment with new ideas about ways to control obscenity and indecency in media. Further, as it seems unlikely that the harsh strictures of the Communications Decency Act will survive judicial scrutiny, an alternative means of regulation will be needed to preserve free speech in cyberspace. It will be

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<sup>141</sup>David Post, New Rules for the 'Net?, The American Lawyer, July August 1995, at 112.

<sup>142</sup>Id.

<sup>143</sup>Id.

<sup>144</sup>Waggoner, supra note 4.

a challenging prospect, but the First Amendment has accommodated new technologies before, and there is every reason to believe that it will again.

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## VITA

### Laura Mame Spear

Born in Doylestown, Pennsylvania, April 21, 1971. Graduated from Central Bucks High School West in that city, June 1989. A.B., The College of William and Mary, May 1993, with concentrations in English and History. M.A. candidate, The College of William and Mary, 1993-96, with a concentration in American Studies. J.D. candidate, Marshall-Wythe School of Law, The College of William and Mary, 1993-96. After completion of the M.A. and J.D. degrees, the author will practice law in Philadelphia, Pennsylvania.