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COMMENT

A PIG IN THE PARLOR:¹ AN EXAMINATION OF LEGISLATION DIRECTED AT OBSCENITY AND INDECENCY ON THE INTERNET

I. INTRODUCTION

Hailed as the modern Athenian forum of free discourse,² the Internet³ currently faces a crucial challenge to the very

1. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

2. See ED KROL, *THE WHOLE INTERNET - USER'S GUIDE & CATALOG*, O'Reilly & Assoc., Inc., 2d. Ed. 1994; EDWARD A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD* (1994).

3. *Id.* Technically, the Internet is the global network that connects many smaller, individual networks. A network is established by linking two or more computers to each other, enabling them to communicate. To establish a linkage with other computers and become part of a network, a user needs only a computer, access to standard telephone lines, and a modem through which his computer connects to others via the telephone lines. Once a connection is established, a user can communicate with as many other users as are part of that particular network. Generally, individual computers become members of a larger network community, interacting through a central nucleus. These central nuclei are either large commercial online providers (i.e., CompuServe, America Online, and Prodigy,) or smaller, individualized networks known as Bulletin Board Systems (hereinafter "BBS.") The operator of a BBS links individual users to one another through a "host" computer, establishing a community of like-minded users. This "host" computer stores the information transmitted by the individual in its memory banks, and provides access to other users attempting to obtain that information. Communication in the established online community occurs through one of the three following methods: (1) Internet Relay Chat, or "IRC," which allows users to communicate in "real-time" with other users logged on at the same time, taking on the characteristics of an actual conversation covering a specified topic or interest; (2) File Transfer Protocol, or "FTP," which enables transferring, or uploading and downloading, of files of information or software from one computer to another; and (3) Electronic Mail, or "E:mail," which allows users to send "letters" or postings to other users. *Id.*

premise on which it is based. For although the Internet arose from free speech ideals,⁴ members of the United States Congress have overwhelmingly supported legislation that restricts Internet users who transmit material Congress deems "obscene" or "indecent."⁵ While the stated goal of such legislation is to protect minors who use the Internet from exposure to obscene material,⁶ this legislation, as written, imposes a standard which is incongruous with the nature of the Internet as a communication system.⁷

The Internet, or ARPAnet,⁸ was originally developed by the U.S. Defense Department to support military research.⁹ As academics were invited to use the system, word of the system's research utility quickly spread.¹⁰ As the popularity of the computer increased, public consumer demand for access to the Internet increased.¹¹ Consequently, the Internet quickly became a household word, no longer confined to government or academic circles.¹² Currently, the Internet accommodates 20 million users, and the numbers increase daily.¹³

In light of the expanse and growing importance of the Internet, this Comment will discuss the history and application of obscenity laws.¹⁴ This Comment will then discuss how obscenity and indecency laws apply to content transmitted over various interactive mediums, particularly the Internet.¹⁵ Fi-

4. Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38, 45; *Regulation of On-line Services*, NEW YORK LAW JOURNAL, August 22, 1995, at 3.

5. Edmund L. Andrews, *Senate Supports Severe Penalties on Computer Smut*, N.Y. TIMES, June 15, 1995, at A1, D6.

6. 140 CONG. REC. S9745, S9746 (daily ed. July 20, 1994) (statement by Sen. Exon).

7. See *infra* notes 122-53 and accompanying text for further discussion.

8. ED KROL, *THE WHOLE INTERNET - USER'S GUIDE & CATALOG*, 15, O'Reilly & Assoc., Inc., 2d. Ed. 1994.

9. *Id.* at 13. (The United States Defense Department sought to establish a computer communications network which would have the ability to function in the aftermath of a large scale bomb attack.)

10. See *Id.* at 13-15.

11. David Wallechinsky, *Be At Home on the Internet*, SUNDAY EXAMINER & CHRONICLE PARADE, November 19, 1995, at 6.

12. See *Id.*

13. *Id.*

14. See *infra* notes 17-69 and accompanying text for further discussion.

15. See *infra* notes 112-60 and accompanying text for further discussion.

nally, this Comment will conclude with recommendations for fashioning legislation that limits access to undesirable material to minors, while maintaining the freedom for consenting adults to access such material.¹⁶

II. BACKGROUND

Material transmitted through interactive communication mediums is subject to regulation under case law interpreting the First Amendment¹⁷ and by statutes enacted under Congressional regulatory powers.¹⁸ Obscene material has historically been subjected to statutory prohibition and does not receive First Amendment protection.¹⁹ However, indecent material that does not rise to the level of obscenity is protected under the First Amendment, albeit to a limited degree.²⁰

A. OBSCENITY UNDER THE FIRST AMENDMENT

The guarantees of freedom of expression and freedom of the press are found in the First Amendment to the Constitution of the United States.²¹ The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press."²² The Framers of the Constitution fashioned the First Amendment's protection of free speech and press to ensure the continual exchange of political ideas and social sentiment.²³ The First Continental

16. See *infra* notes 161-91 and accompanying text for further discussion.

17. See U.S. CONST. amend. I, and *infra* pp. 22-68 and accompanying text for further discussion.

18. U.S. CONST. art.I.

19. See *infra* notes 21-69 and accompanying text for further discussion.

20. See *infra* notes 70-84 and accompanying text for further discussion.

21. U.S. CONST. amend. I.

22. *Id.* The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Id.

23. *Roth v. United States*, 354 U.S. 476, 484 (1957). (The Supreme Court affirmed the conviction of petitioner for mailing obscene material through the U.S. Postal Service, in violation of 18 U.S.C. § 1461.)

Congress stated that:

The importance of this [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.²⁴

Justice Holmes further defined the underlying rationale for protecting freedom of expression as ensuring “free trade in ideas,” stressing that society must have access to all opinions, favorable or unfavorable, thereby permitting individual choice.²⁵

However, as the Supreme Court often reiterates, the guarantee of freedom of expression is not absolute.²⁶ Historically, the Supreme Court has acknowledged Congress’ power to abridge certain “categories” of expression which it finds harmful, of no redeeming value, or which cannot be mitigated by further speech.²⁷ Such “categories” of expression do not de-

24. *Id.* at 484 (citing 1 Journals of the Continental Congress 108 (1774)).

25. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (majority of the Court upheld petitioners convictions under the 1917 espionage Act, which prohibited advocating anti-war sentiment with the intent to disrupt the United States’ involvement in World War I.)

26. *See Breard v. Alexandria*, 341 U.S. 622 (1951) (Supreme Court upheld petitioner’s conviction under local ordinance prohibiting door-to-door commercial solicitations without prior homeowner approval;) *See Feiner v. New York*, 340 U.S. 315 (1951) (Supreme Court upheld petitioner’s conviction for disorderly conduct. Petitioner delivered an inflammatory street-corner speech. Certain members of the crowd warned the police of a violent reaction. Petitioner was arrested after refusing police requests to stop the speech due to concern of violence;) *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (Supreme Court upheld petitioner’s conviction under a statute which made it unlawful to address another in public with “fighting words,” words likely to cause the average person to fight;) *Schenck v. United States*, 249 U.S. 47 (1919) (defendants sent two draftees a document in opposition of the draft and urging that they not participate. Defendants were charged with conspiring to violate the 1917 Espionage Act, making it a crime to incite or attempt to incite insubordination in the U.S. military forces.)

27. *Chaplinsky*, 315 U.S. at 572. In *Chaplinsky*, the Court set forth the list of categories of expressions which traditionally have not received First Amendment protection. unprotected expressions include: advocacy of imminent lawless behavior

serve First Amendment protections and are considered to be of less social value because they infringe upon other rights.²⁸ Where expression falls within an unprotected category, the Supreme Court has interpreted the First Amendment as allowing for abridgement premised on the communicative impact of the expression.²⁹

1. Obscenity as Unprotected Expression

Since the holding in *Commonwealth v. Sharpless*³⁰ in 1815, the American judicial system has consistently held that obscenity falls outside the protection of the First Amendment³¹ because it lacks any social value or importance.³² Based on such characterization, obscenity has also been statutorily prohibited by federal and state legislatures since 1868.³³ In response to constitutional challenges against such statutes, the Supreme Court has proffered three reasons for upholding laws that prohibit obscenity:

- (1) "An arguable correlation between exposure to obscene material and crime;" (2) The power of

(*Schenck*, 249 U.S. 47); "fighting words" (*Chaplinsky*, 315 U.S. at 572); obscenity (*Roth*, 354 U.S. 476); and libelous utterances (*Beauharnais v. Illinois*, 343 U.S. 250 (1952)).

28. See *Roth*, 354 U.S. at 484, wherein Justice Brennan stated "[A]ll ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. *Id.*

29. See *supra* note 26 and accompanying text for further discussion.

30. 2 S.R. 91 (1815). (Conviction at common-law premised upon the exhibition, for profit, of a nude picture).

31. See *infra* notes 32-69 and accompanying text for further discussion.

32. *Miller v. California*, 413 U.S. 15 (1973) (vacating and remanding petitioner's conviction for utilizing the postal service for disseminating obscene material. Petitioner was convicted under California Penal Code § 311.2, for the mass mailing of "adult" material to people whom had not requested such material); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (reversing the adjudication of petitioner's book as obscene); *Roth*, 354 U.S. 476 (1957) (affirming the conviction of petitioner for utilizing the postal service for the dissemination of obscene literature and advertisements).

33. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 12-16, at 906 (2d ed. 1988). (Hereinafter "TRIBE") New York enacted the first statute criminalizing obscenity in 1868, as a result of intense lobbying efforts of Anthony Comstock and other protestant leaders. Congress eventually followed suit, enacting the first federal anti-obscenity law in 1873. *Id.*

the states "to make morally neutral judgments" that public exhibition of obscene material, or commerce in the obscene, tends to "injure the community as a whole" by polluting the "public environment"; and (3) The deleterious effect that obscene material has upon the public, because "what is commonly read and seen and heard and done intrudes upon us all, want it or not."³⁴

By articulating the purposes behind statutory prohibitions against obscenity, the Supreme Court has clearly held that the legislature's strong interest in protecting the morals of its citizens permits the suppression of obscene material.³⁵

One of the primary legislative motives for prohibiting obscene expression has been a concern for minors.³⁶ A state has a recognized compelling interest in ensuring the health, safety, welfare and moral development of the children within its jurisdiction.³⁷ Clearly, a state may control the conduct of children even if it cannot control the same type of behavior if engaged in by an adult.³⁸ Accordingly, the regulation of material made available to children constitutes a supervening state interest.³⁹

The Supreme Court has articulated two interests that justify the regulation of material accessible to children: (1) the basic societal interest⁴⁰ in aiding parents in the performance of their parental duties⁴¹ and (2) the independent state inter-

34. *Id.* at 917 (quoting from *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58-60 (1973)). In *Paris Adult Theatre*, the Court upheld a Georgia ban on exhibition of "adult films" for purpose of avoiding anticipated crime. Held that a legislature may determine, even in the absence of conclusive evidence, that antisocial conduct will be an inevitable result of exposure to obscenity. *Paris Adult Theatre*, 413 U.S. at 59-61.

35. *Id.*

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

37. *Id.* at 638.

38. *Id.* "[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . ." *Id.* (quoting from *Prince v. Massachusetts*, 321 U.S. 158, 170, (1944)).

39. *Id.* at note 6 (quoting from Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 938-939 (1963)).

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

41. *Id.*

est in the “well-being of its youth.”⁴² Therefore, states may regulate obscene material⁴³ to ensure the healthy intellectual and moral development of its youth.⁴⁴

Since 1815,⁴⁵ courts have struggled to apply obscenity statutes to the content of communication that legislatures seek to restrain.⁴⁶ The Supreme Court has devised numerous tests and standards to define that which constitutes obscene expression. The first standard for determining whether material is obscene was established in the English case of *Regina v. Hicklin*, which was subsequently adopted by American courts.⁴⁷ The *Regina* court defined obscene material as that which tends to “deprave and corrupt those whose minds are open to such immoral influences.”⁴⁸ However, later courts found that the *Regina* test reached further than desired after the United States Court of Appeals for the Second Circuit refused to apply it to the renowned novel, *Ulysses*.⁴⁹

The Supreme Court established the next obscenity test in *Roth v. United States*.⁵⁰ In *Roth*, the Court held that an expression was obscene if, as a whole, it appealed to prurient interests.⁵¹ The court defined “prurient” as “material having a tendency to excite lustful thoughts”⁵² or that which provokes an “itching, morbid, or lascivious longing.”⁵³ The *Roth* court

42. *Id.* at 640.

43. See *infra* notes 55-61 and accompanying text for further discussion.

44. See *Ginsberg*, 390 U.S. 629 (1968).

45. See *supra* note 30 and accompanying text for further discussion.

46. *Paris Adult Theatre*, 413 U.S. 49, 99 (1973) (Brennan, J., dissenting).

47. L.R. 3 Q.B. 360 (1868).

48. *Id.* at 368.

49. *United States v. One Book Called “Ulysses”*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff’d* 72 F.2d 705 (2d Cir. 1934) (District Court held that James Joyce’s novel, *Ulysses*, was not obscene. The novel is a day-in-the-life depiction of city dwellers in Dublin, in which Joyce explored the thoughts and mental imagery of his characters. The United States government charged that the novel was obscene due to the language and apparent pre-occupation of the characters with sexual matters.) *Id.*

50. 354 U.S. 476 (1957).

51. *Id.* at 487.

52. *Id.* at 487 note 20.

53. *Id.*

did, however, emphasize that First Amendment protection extends to ideas having even the "slightest redeeming social value."⁵⁴

The Supreme Court later incorporated the "slightest redeeming social value" language into the obscenity test in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*.⁵⁵ In *Memoirs*, the Court held that the work must be shown to be utterly without redeeming social value" before it may be judged obscene.⁵⁶ However, due to the practically insurmountable burden such a formulation placed upon the prosecution, the Court found that the *Memoirs* criteria for judging obscenity was impractical in its application.⁵⁷

2. The *Miller* Test and the Notion of Community Standards

Presently, the Supreme Court follows the standard set forth in *Miller v. California*.⁵⁸ Under *Miller*, the Court weighs the following factors to determine whether an expression is obscene:

- (a) Whether the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest; (b) Whether the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁵⁹

In contrast to *Memoirs*,⁶⁰ therefore, the *Miller* test holds that

54. *Id.* at 484.

55. 383 U.S. 413, 418 (1966). In *Memoirs*, the Massachusetts Supreme Court upheld a lower court's adjudication of the book as obscene, holding that a patently offensive book which appeals to prurient interest need not be unqualifiedly worthless before it can be deemed obscene. The Supreme Court affirmed.

56. *Id.*

57. See *Miller v. California*, 413 U.S. 15, at 21-22 (1973).

58. 413 U.S. 15 (1973).

59. *Id.* at 24.

60. 383 U.S. 413, 418 (1966).

an expression may be obscene even if not utterly lacking in redeeming social value.⁶¹

The *Miller* court provided a detailed definition of what might constitute “patently offensive” material. The Court stated that material will be deemed patently offensive if it represents or depicts ultimate sexual acts, normal or perverted, actual or simulated; masturbation; excretory functions; or lewd exhibition of the genitals.⁶² Hence, for an obscenity statute to survive constitutional challenge, *Miller* held that a statute must clearly define that which is patently offensive.⁶³

However, the *Miller* court acknowledged that the concept of patently offensive material varies from community to community.⁶⁴ The Court rejected the notion of a uniform, national standard when applying the “contemporary community standards” facet of the *Miller* test.⁶⁵ The Supreme Court reasoned that an umbrella standard would: (1) subject some communities to expressions which they found entirely offensive; or (2) suppress that expression which might be acceptable in other communities.⁶⁶ However, when applying the community standard facet of the *Miller* test, The Supreme Court has held that jurors are to draw from their own knowledge of what is acceptable on either a local, statewide, or to a limited degree, a national level.⁶⁷

Since obscene material is often distributed from one community and received in another, the Supreme Court addressed the potential for conflicting community standards in *Hamling v. United States*.⁶⁸ In *Hamling*, the Court held that an obscen-

61. *TRIBE*, *supra* note 42, at 909.

62. *Miller*, 413 U.S. at 25.

63. *See Id.*

64. *Id.* at 30.

65. *Id.*

66. *Id.* at 32 note 13. “In terms of danger to free expression, the potential for suppression seems at least as great in application of a single nationwide standard as in allowing distribution in accordance with local tastes.” *Id.*

67. *Hamling v. United States*, 418 U.S. 87, 104-5 (1974). The Court held that it is not unconstitutional for a jury to draw on its beliefs as to how the nation, as an all-encompassing community, would view the expressions charged as obscene in making their determination on that question.

68. 418 U.S. 87 (1974). In *Hamling*, postal patrons received a sexually explicit

ity statute will not be struck down as unconstitutional merely because the expression may be subjected to differing community standards in determining whether it is obscene.⁶⁹ Therefore, the transmitter of obscene material may be subject to prosecution in a community that holds a more strict standard regarding obscene material. This is so even though the community from which a person transmits the material may *not* consider the material as "patently offensive" or as something *less* than obscene.

B. REGULATION OF INDECENT SPEECH UNDER THE FIRST AMENDMENT

Where material is *not* "patently offensive under the relevant contemporary community standards," such material "may be deemed indecent rather than obscene."⁷⁰ Indecent material, unlike obscene material, is a protected form of speech.⁷¹ The Supreme Court has defined indecent expressions as those which fail to conform with accepted standards of morality.⁷²

brochure at a post office box in San Diego, which falls within the federal jurisdiction of the Southern District of California. The brochures were deposited in the mail by petitioners in North Hollywood, California, a part of the federal jurisdiction of the Central District of California. Petitioners were tried and convicted in the United States District Court for the Southern District of California by a jury, composed of persons from within the federal jurisdiction of the Southern District of California, for the mailing of an obscene advertising brochure with sexually explicit material in violation of 18 U.S.C. § 1461.

69. *Id.* at 106. "The fact that distributors of allegedly obscene material may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." *Id.*

70. *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995). In *Action for Children's Television*, petitioners challenged section 16(a) of the Public Telecommunication Act of 1992 which would have restricted commercial broadcasting of indecent programming to the hours between midnight and 6:00 a.m. The Court of Appeals remanded the case to the FCC with instructions to more narrowly tailor its provision. *Id.* at 656.

71. *See Cohen v. California*, 403 U.S. 15 (1971). In *Cohen*, the Supreme Court reversed appellant's conviction for wearing a jacket bearing the pronouncement "Fuck the Draft" in a courthouse. *Id.*

72. *FCC v. Pacifica*, 438 U.S. 726, 746 (1978). In *FCC*, the Federal Communications Commission (hereinafter "FCC") sanctioned a radio station for broadcasting an indecent program at a time of day when children were particularly apt to be listening. The radio station had broadcast George Carlin's infamous "Seven Dirty Words" monologue. The Supreme Court upheld the FCC's power to regulate the

Although offensive in nature, such material posits ideas which have been held to contain political or social value, however slight.⁷³

1. Limitations on Freedom of Expression: The Captive Audience Doctrine

While certain types of expression are protected under the First Amendment, a counter-balance generally exists to the indiscriminate exercise of that right.⁷⁴ Despite falling within the protections afforded by the First Amendment, indecent material is subject to regulation due to its "slight social value."⁷⁵ Where exercise of one's freedom of expression unduly encroaches upon other rights, invariably one must be compromised.⁷⁶ If a member of the community is subjected to an expression which he would sooner avoid and is unable to avert his attention from its source, that person becomes a captive audience to such expression.⁷⁷ Therefore, based on the concept of captive audience, a statute may regulate the context within which an unavoidable expression is made.⁷⁸

Expression may be regulated under the captive audience doctrine "only when the speaker intrudes on the privacy of the home or the degree of captivity makes it *impractical* for the unwilling viewer or auditor to avoid exposure."⁷⁹ Therefore, if the viewer can avoid the disagreeable expression, the person exercising his or her First Amendment rights will prevail.⁸⁰

time during which such an indecent program may be aired. *Id.*

73. *Cohen*, 403 U.S. at 25 (wherein Justice Harlan declared that "[O]ne man's vulgarity is another's lyric.") *Id.*

74. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-303 (1974).

75. *Pacifica*, 438 U.S. at 746 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

76. *Id.*

77. *Id.* at 302 (citing *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) Douglas, J., dissenting)).

78. *Id.* at 302.

79. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (emphasis added).

80. *Id.* at 210-211 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). "[T]he burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Id.*

2. Time, Place, or Manner Regulation of Indecent Speech

In *FCC v. Pacifica*, the Supreme Court held that regulation of indecent material is justified when it prevents children's exposure to offensive expressions.⁸¹ Analogizing indecent material to subjecting a captive audience to a nuisance, the Supreme Court held that communities may regulate indecent material with respect to the time, place, or manner of its transmission.⁸² However, in promulgating a time, place, or manner regulation affecting protected speech, legislatures must narrowly tailor the regulation to serve the government's legitimate, content-neutral interests.⁸³ For a statute to regulate indecent material, the regulation must be narrowly tailored to serve the government's purpose of preventing exposure to minors or unwilling recipients.⁸⁴

C. FEDERAL STATUTORY REGULATION OF EXPRESSION TRANSMITTED VIA COMMUNICATIVE MEDIUMS: THE COMMUNICATIONS ACT OF 1934

With the advent of new technologies, Congress continually confronts the issue of how to balance the right to freedom of expression with the right to enjoy the benefits of increasingly pervasive technological mediums.⁸⁵ As the opportunity to engage in free expression increases with the growth of telecommunication mediums, legislatures and courts must find a way to balance existing limitations on freedom of expression with new technology.

Congress recognized the need to regulate speech activity occurring through telecommunications mediums in passing the

81. *Pacifica*, 438 U.S. at 732.

82. *See Id.* at 750.

83. *Ward v. Rock*, 491 U.S. 781, 798 (1989). In *Ward*, New York City passed a sound-amplification guideline to regulate the volume of performances held in a public park. The Supreme Court upheld the city's guideline, holding that it was narrowly tailored to serve the city's legitimate interest in protecting the interests of other users of the park. *Id.*

84. *See Pacifica*, 438 U.S. 726 (1978).

85. *See Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, at 119-20 (1989).

Communications Act of 1934.⁸⁶ 47 U.S.C. § 151⁸⁷ Chapter 5 of the Communications Act covers the regulation of wire or radio communication.⁸⁸ The stated legislative purpose for enacting Chapter 5 of Title 47 is:

[T]o make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication . . .⁸⁹

In order to execute the provisions of Chapter 5 of Title 47 and “safeguard the public interest,” with respect to wire communications,⁹⁰ Congress established the Federal Communications Commission (hereinafter “FCC”).⁹¹ “[C]ommunications by wire” include, but are not limited to,:

[T]ransmission of writings, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.⁹²

Therefore, the FCC has a broad legislative mandate to institute and enforce rules and regulations affecting wire transmissions as it deems necessary.⁹³

86. 47 U.S.C. § 151 (1988).

Congress premised its authority to regulate the communications industry upon the Commerce Clause of the Constitution of the United States.

87. *Id.* See also U.S. CONST. art. I, sec. 8, cl. 3. The Commerce Clause provides that “Congress shall have the power to regulate commerce . . . among the several states.” *Id.*

88. 47 U.S.C. § 151 et seq. (1988).

89. 47 U.S.C. § 151 (1988).

90. *National Cable Television Assoc. v. United States*, 415 U.S. 336, 341 (1974); 47 U.S.C. § 151 (1988).

91. *Id.*

92. 47 U.S.C. § 153(a) (1988).

93. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

1. Regulation of Content in Telephone Communications Under Title 47

Given the strong Congressional position that obscenity is "injurious to public morals,"⁹⁴ Congress applied existing obscenity restrictions to telecommunication devices.⁹⁵ One such targeted medium was the telephone.⁹⁶ Because communication over the telephone constitutes a "communication by wire," Chapter 5 of Title 47 explicitly includes the telephone within the confines of the Communications Act.⁹⁷

Section 223(a) of Title 47 provides, in relevant part, that any statement made over the telephone that is "obscene, lewd, lascivious, filthy, or indecent" subjects the maker of such statement to criminal prosecution, which can result in a significant jail sentence, a costly fine, or both.⁹⁸ Additionally, Section 223(b)(2) subjects the owner of a telephone facility providing "indecent communications" to anyone under eighteen years of age, or to an unconsenting recipient, to a significant jail term, a costly fine, or both.⁹⁹

94. *Winters v. New York*, 333 U.S. 507, 515 (1948).

95. 47 U.S.C. § 223 (1988).

96. *Id.*

97. See *supra* note 92 and accompanying text for further discussion.

98. 47 U.S.C. § 223(a) (1988).

Whoever - (1) in the District of Columbia or in interstate or foreign communications by means of telephone - (A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent; . . . or (2) knowingly permits any telephone facility under his control to be used for any purpose prohibited by this section, shall be fined not more than \$50,000 or imprisoned not more than six months, or both.

Id.

99. 47 U.S.C. § 223(b)(2).

Whoever knowingly - (A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than \$50,000 or imprisoned not more than six months, or both.

Id.

2. Amendments to Title 47 U.S.C. 223

In response to vast changes within the telecommunications industry, Congress has recently focused on updating and amending The Communications Act of 1934.¹⁰⁰ In 1994, the Committee on Commerce drafted an amendment to the Act designed to restrict obscene and indecent expressions on the Internet.¹⁰¹ Specifically, Senator James Exon of Nebraska submitted an amendment to Section 223 of Title 47 which substituted the phrase “telecommunications device” for the word “telephone,” thereby expanding the language of the statute to encompass communication by computers.¹⁰²

Presenting his proposed amendment to the Commerce Committee, Senator Exon indicated that the purpose of his proposed “Communications Decency Act,” was to “assure that the information highway does not turn into a red light district.”¹⁰³ In addition, Senator Exon declared that his amendment would protect children from obscene, lewd, or indecent messages.¹⁰⁴ Senator Exon’s proposed Amendment, however, received no Congressional attention outside of the Commerce Committee during the 103rd Congressional Term.¹⁰⁵

In 1995, Senator Exon proposed a revised version of the “Communications Decency Act,”¹⁰⁶ reiterating that the fundamental purpose of the amendment was to provide much-needed protection for children.¹⁰⁷ On June 14, 1995, the Senate incorporated the Communications Decency Act into the larger Telecommunications Competition and Deregulation Act of 1995 by a vote of 84 to 16.¹⁰⁸

100. 140 CONG. REC. S9745, S9746 (daily ed. July 20, 1994) (statement of Sen. Exon).

101. *Id.*

102. *Id.* The amendment also added the phrase “makes, transmits, or otherwise makes available” obscene or indecent communications. In addition, Senator Exon’s proposed amendment increased the fines from \$50,000 to \$100,000, and the length of imprisonment from six months to two years. *Id.*

103. *Id.* at S9746.

104. *Id.*

105. 141 CONG. REC. S8087 (daily ed. June 5, 1995) (statement of Sen. Exon).

106. 141 CONG. REC. S8120 (daily ed. June 5, 1995).

107. 141 CONG. REC. S8087 (daily ed. June 5, 1995) (statement of Sen. Exon).

108. 141 CONG. REC. S8310, S8329 (daily ed. June 14, 1995) (statement of Sen.

On June 15, 1995, the United States Senate overwhelmingly approved the Telecommunications Act, containing Senator Exon's amended provisions.¹⁰⁹ Following months of negotiations within the House of Representatives, the Telecommunications Act passed both houses of Congress on February 1, 1996.¹¹⁰ Finally, on February 8, 1996, President Bill Clinton signed the Telecommunications Competition and Deregulation Act into law, thereby fully incorporating the Communication Decency Act.¹¹¹

Exon); Edmund L. Andrews, *Senate Supports Severe Penalties on Computer Smut*, N.Y. TIMES, June 15, 1995, at A1, D6. The Communications Decency Act amended 47 U.S.C. § 223, in relevant part, to read as follows:

47 U.S.C. § 223(a) provides: (a) Whoever - (1) in the District of Columbia or 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, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person; . . . or (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity shall be fined not more than \$100,000 or imprisoned not more than two years, or both.

141 CONG. REC. S8386 (daily ed. June 14, 1995).

47 U.S.C. § 223(d) provides: Whoever - (1) knowingly within the United States or in foreign communications with the United States by means of telecommunications device makes or makes available any obscene communication in any form including any comment, request, suggestion, proposal, or image regardless of whether the maker of such communication placed the call or initiated the communications; or (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by subsection (d)(1) with the intent that it be used for such activity, shall be fined not more than \$100,000 or imprisoned not more than two years, or both.

141 CONG. REC. S8386 (daily ed. June 14, 1995).

109. Carolyn Lockhead, *Senators Approve Broad Telecom Bill*, S.F. CHRONICLE, June 16, 1995, at A1, A17. Final vote count was 81 yeas, 18 nays. *Id.*

110. Bryan Arules and Albert R. Karr, *Telecommunications: Telecom Vote Signals Competitive Free-for-All*, WALL ST. JOURNAL, Feb. 2, 1996, at B1.

111. Ramon G. McLeod and Reynolds Holding, *Clinton OKs Telecom Overhaul*, S.F. CHRONICLE, February 9, 1996, at A1, A19.

III. DISCUSSION

A. AMENDED 47 U.S.C. § 223 CREATES AN IMPERMISSIBLE NATIONAL STANDARD

Under the commerce clause, Congress has the constitutionally backed authority to regulate the dissemination of obscene material.¹¹² However, any federal statute regulating obscene material must comport fully with the community standards element as set forth in *Miller v. California*.¹¹³ In prohibiting the transmittal of obscene matter over the Internet, however, the amended 47 U.S.C. § 223¹¹⁴ fails to take into account the structure of that medium as it applies to the concept of community. Although the concept of community may be ascertainable in the context of the telephone,¹¹⁵ the same is not true of the Internet. Because the sweeping language set out in the amended 47 U.S.C. § 223 fails to take into account the nature of the Internet, the provisions contained therein impermissibly and unconstitutionally establish a national community standard in contravention of *Miller v. California*.¹¹⁶

1. The Telephone: Federal Obscenity Regulations Are Feasible Because Community Standards Are Discernible

Title 47 U.S.C. § 223 constitutes the federal obscenity statute regulating content over the telephones.¹¹⁷ Generally, a telephone service provider must take steps to ensure that expression that would be deemed obscene by a community does not reach such community.¹¹⁸ In *Sable Communications of*

112. U.S. CONST. art. I, § 8, cl. 3; *Sable Communications of California, Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 124-125 (1989).

113. *Sable* at 125 (citing *Miller v. California*, 413 U.S. 15 (1973)). The *Miller* standards, including the contemporary community standards formulation, apply to federal legislation. *Id.*

114. See *supra* note 108 and accompanying text for further discussion.

115. See *infra* notes 118-27 and accompanying text for further discussion.

116. See *supra* notes 64-69 and accompanying text for further discussion.

117. See *supra* notes 98-99 and accompanying text for further discussion.

118. *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 124 (1989). *Sable* operated a dial-a-porn service out of Los Angeles, CA., which could be accessed from anywhere in the country by means of dialing a long distance toll call to Los Angeles. *Sable* brought suit seeking equitable relief against enforcement of 47 U.S.C. § 223(b) on the basis that the statute created a

California, Inc. v. Federal Communications Commission, the Supreme Court held that 47 U.S.C. § 223(b), in its application to content transmitted over telephones, did not contravene the contemporary community standards requirement of *Miller*.¹¹⁹ In *Sable*, Sable Communications operated a dial-a-porn service out of Los Angeles, California that provided access to callers from anywhere in the country by means of a long distance toll call.¹²⁰ The Court determined that “[t]here is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others.”¹²¹

By being subject to the standards of each and every community from which calls originated, Sable was, in essence, left to tailor the content of their messages to the standards of the least-tolerant community in the nation in order to avoid prosecution.¹²² Sable argued that by subjecting the transmitter to the standards of the least-tolerant community, Congress had established a de facto national standard of obscenity.¹²³ The Supreme Court responded to this argument by stating:

Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages.¹²⁴

Therefore, the Court placed the burden upon Sable to develop a system to ensure that community standards were maintained.

national standard of obscenity. The Supreme Court determined that 47 U.S.C. § 223(b) did not unconstitutionally prohibit the interstate transmission of obscene material.

119. *Id.*

120. *Id.* at 117-118.

121. *Id.* at 125-26.

122. *Id.* at 124.

123. *Sable*, 492 U.S. at 124.

124. *Id.* at 125.

The Court recommended methods by which Sable, and other message providers, could limit access to their services to those communities in which the messages would not be deemed obscene.¹²⁵ For example, message providers could hire operators to screen the locales of incoming calls, or they could arrange with telephone companies to automatically screen and block calls dialed from restricted communities.¹²⁶ Therefore, because the service provider has the means to determine the community from which telephone calls are received, the burden rests upon the service providers to prevent access to calls originating in less-tolerant communities.¹²⁷

2. The Internet: The Amended 47 U.S.C. § 223 Creates a National Standard and is Therefore Unconstitutional

Although the regulation of obscene expressions over the telephone survives a national standards challenge because of the provider's ability to discern the relevant community's standards,¹²⁸ regulation of obscenity on the Internet, as embodied in the amended 47 U.S.C. § 223,¹²⁹ will be unable to survive a similar challenge. Due to the inherent inability to predetermine the community's standards into which material is transmitted, a provider will have no other choice but to restrict his content to that which is acceptable only in the least-tolerant community in the nation.

The structure of the Internet¹³⁰ as a communication medium, while similar in utility to the telephone, is vastly different in operation.¹³¹ A user gains access to a vast network of

125. *Id.*

126. *Id.*

127. *Id.* at 126.

128. *See supra* notes 118-27 and accompanying text for further discussion.

129. *See supra* note 108 and accompanying text for further discussion.

130. *See supra* note 2 and accompanying text for further discussion.

131. ED KROL, *THE WHOLE INTERNET - USER'S GUIDE & CATALOG*, 24 (O'Reilly & Assoc., Inc., 2d ed. 1994).

"When you try to imagine what the Internet is and how it operates, it is natural to think of the telephone system. After all, they are both electronic, they both let you open a connection and transfer information, and the Internet is primarily composed of dedicated telephone lines. Unfortunately, this is the wrong picture, and causes many misun-

like-minded users at the press of a button,¹³² allowing him to communicate with as many, or as few, other users as are present.¹³³ The user merely needs to establish a modem connection with his selected host system to open the world of information available in the Internet.¹³⁴ The host system connects to an estimated 1,313,000 other host systems, permitting the user access to all information and interaction occurring within the vast Internet network.¹³⁵

Although some of the sexually-oriented material found online may constitute obscene matter in some communities, the same material may be characterized merely as *indecent* in another.¹³⁶ For example, a sysop¹³⁷ in San Francisco may establish a BBS providing global access to adult material readily available in any San Francisco adult bookstore.¹³⁸ By posting his BBS to general viewing in the Internet, the sysop has no involvement in who is seeking the content of his BBS, nor any knowledge of their locale.¹³⁹ Thousands of viewers located anywhere on earth may access a BBS in any twenty-four hour period.¹⁴⁰

derstandings about how the Internet operates. The telephone network is a *circuit switched* network. When you make a call, you get a piece of the network dedicated to you.

Id.

132. *Id.* at 342.

133. *Id.*

134. See *supra* note 2 and accompanying text for further discussion.

135. Ted Bunker, *Computers & Automation*, INVESTOR'S BUSINESS DAILY, February 10, 1993.

136. *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995)

137. System Operator.

138. See Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38, 40. "[R]esearchers found nothing that can't be found in specialty magazines or adult bookstores. Most of the material offered by the private BBS services, in fact, is simply scanned from existing print publications." *Id.*

139. J. David Loundy, *Would He Know IT When He Downloads IT?*, CHICAGO DAILY LAW BULLETIN, April 13, 1995, at 6.

[The] process of determining the appropriate community would serve to avoid cases . . . where someone calls up a system, applies for an account, seeks out, finds and requests transmission of adult material, and then has the operator hauled into court for distributing material that is obscene to a community thousands of miles away from where the defendant is running his business.

Id.

140. See Michael Meyer, *A Bad Dream Comes True in Cyberspace: The Germans*

The analogy between the telephone and the Internet loses its effect at this juncture. The rationale of *Sable Communications*¹⁴¹ in placing the burden of conforming dial-a-porn messages to each individual community's standards is simply not feasible on the Internet.¹⁴² Whereas a dial-a-porn provider has the technology available to ascertain the community from which incoming calls are made, no such technology is available to the sysop of a BBS. Since the accessibility to a BBS on the Internet is relatively unrestricted, the sysop has no awareness of the communities from which accessors of his service originate.¹⁴³ She cannot be expected to ascertain the obscenity standards of those communities, and tailor the content of his BBS accordingly.¹⁴⁴ Therefore, the *Sable* challenge applies with full force, as sysops will be forced to adopt a national standard dictated by the standards of the least-tolerant community in the nation.

B. 47 U.S.C. § 223, AS AMENDED, VIOLATES FIRST AMENDMENT PROTECTION OF INDECENT EXPRESSION

Amended 47 U.S.C. § 223 not only creates a national standard, but in doing so, sweeps within its language speech which enjoys First Amendment protection, such as indecent expressions. More importantly, the captive audience doctrine, which has been a major ground for the regulation of indecent expressions,¹⁴⁵ simply has no applicability within the context of the Internet.¹⁴⁶ Using a BBS is analogous to using bulletin

Censor an Online Service and the Rest of Us, Too, NEWSWEEK, January 8, 1996, at 65.

141. See *supra* notes 118-27 and accompanying text for further discussion.

142. Mike Godwin, *Virtual Community Standards - BBS Obscenity Case Raises New Legal Issues*, REASON MAGAZINE, November, 1994, at 48.

143. Pamela A. Huelster, *Note: Cybersex and Community Standards*, 75 B.U.L. REV. 865, 870 (1995).

144. *Id.*

145. See *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding that there is a compelling governmental interest in protecting high school students from an indecent speech at a high school assembly); See *FCC v. Pacifica*, 438 U.S. 726 (1978); See *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir., 1995).

146. *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 127 (1989). "Unlike an unexpected outburst on a radio broadcast, the message received . . . is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Id.*

boards found in grocery stores, post offices, schools, businesses, or other public places.¹⁴⁷ Just as a bulletin board permits members of the community to post information of interest for viewing by like-minded individuals, a BBS permits a community of like-minded users to view information posted therein, ignoring those BBS' which do not appeal to their particular interest.

Yet, there is a significant difference between the grocery store "community bulletin board" and an Internet Bulletin Board System. In order to utilize the grocery store's bulletin board, an individual must be within the geographically defined community in which it exists. Therefore, that individual is on notice of the community's standards regarding obscene material by virtue of entering the community. A person may place a posting on the grocery store bulletin board which may be offensive and insulting to other community members. These unsuspecting viewers may be captive audiences to the content of such posting, at least until they recognize the offensive quality of the posting and avert their eyes.¹⁴⁸

However, the structure of the Internet's Bulletin Board System poses no such problems. Viewers of the "bulletin boards" on the Internet are not immediately subjected to the contents contained therein, as are those in the physical community when reading each individual posting.¹⁴⁹ To view the contents within a particular BBS, users must take the affirmative step of connecting their computer to the host computer via modems.¹⁵⁰ The viewer never becomes a captive audience because the viewer is never forced to view a potentially offensive item.¹⁵¹ Users of the Internet who may be offended by the material in a particular BBS can simply choose not to connect to such BBS, much as they do when walking past an adult bookstore or adult movie theatre, without a glance backward.¹⁵²

147. David Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability*, 12 *COMPUTER L.J.* 101, 103 (1993).

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

149. See David Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and System Operator Liability*, 12 *COMPUTER L.J.*, 101, 103 (1993).

150. *Id.*

151. Eugene Volokh, *Symposium: Emerging Media Technology and the First Amendment: Cheap Speech and What it Will Do*, 104 *YALE L.J.* 1805, 1847 (1995).

152. Charles Levendosky, *Parental Guidance Suggested; Congressional Efforts to*

A useful analogy can be drawn between the Internet's Bulletin Board System and Cable Television.¹⁵³ Just as a cable subscriber must make an "affirmative decision to bring Cablevision into his home,"¹⁵⁴ an Internet user seeking sexually-oriented material must make an affirmative decision and take affirmative steps to obtain such material through one of the BBS' providing adult-related material.¹⁵⁵ Furthermore, just as a cable subscriber may use monthly program guides to determine which programs he wishes to avoid,¹⁵⁶ an Internet user may use the title of a BBS to avoid the services containing material objectionable to that user.¹⁵⁷ Finally, Cable subscribers' concerns with preventing access to the "unpleasant" material available on certain cable stations were alleviated by providing a free "lockbox" or "parental key."¹⁵⁸ Most commercial online-providers¹⁵⁹ already provide "lockout" devices, which enable parents to restrict their children's access to undesirable material.¹⁶⁰

IV. PROPOSAL: PRIVATE ALTERNATIVES TO INTERNET REGULATION

The legislative purpose in amending 47 U.S.C. § 223 to prevent minors' exposure to obscene material on the Internet is

legislate Cyberspace will Create a Decency Monster - and it's Coming After You, SUN-SENTINEL, August 6, 1995, at 1G. "The audience is the seeker. What appears on your computer screen, you requested. You can only blame yourself. You control the information you receive." *Id.*

153. Cf. Jerry Berman and Daniel J. Weitzner, *Symposium: Emerging Media Technology and the First Amendment: Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 Yale L.J. 1619, 1624 (1995) (comparing and contrasting the access and information exchange capabilities of both communication devices.)

154. *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985). The Eleventh Circuit affirmed the granting of declaratory and injunctive relief against a Miami ordinance banning the distribution of obscene and indecent material by cable television providers.

155. Carol Innerst, *Anti-porn Bill Makes Waves in Cyberspace; Issue Centers on Internet's Status Under Law*, THE WASHINGTON TIMES, March 7, 1995, at A4.

156. *Cruz*, 755 F.2d at 1419.

157. Carol Innerst, *Anti-porn Bill Makes Waves in Cyberspace; Issue Centers on Internet's Status Under Law*, THE WASHINGTON TIMES, March 7, 1995, at A4.

158. *Cruz*, 755 F.2d at 1420-1421.

159. *See supra* note 2.

160. Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38, 45.

a worthy undertaking. However, because the amended statute implements a de facto national standard for obscenity,¹⁶¹ its application will have a chilling effect on the freedom to engage in expression which is protected in many communities throughout the United States.¹⁶² Furthermore, sysops of BBS' transmitting adult-material will be subject to selective enforcement of the statute as written.¹⁶³ The statute may be utilized by overzealous prosecutors in those communities where the standards for obscenity are the least tolerant, converting material which may demand First Amendment protection into that which possesses none at all.¹⁶⁴

Because the Internet spans a global market, permitting users from every continent to establish a connection at the touch of a button, it cannot be treated in the same manner as the telephone.¹⁶⁵ The users of the Internet establish their own quasi-communities within any one site.¹⁶⁶ Codes of conduct are typically enforced by community ridicule, acceptable topics for discussion are delineated by the particular online community,¹⁶⁷ and most commercial online providers post

161. See *supra* notes 128-44 and accompanying text for further discussion.

162. Jube Shiver Jr., *House Conferees Seek to Ban 'Indecent' Internet Material*, LOS ANGELES TIMES, December 7, 1995, at A1.

163. See *supra* notes 68-69 and accompanying text for further discussion.

164. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS - INSIDE THE SUPREME COURT*, p.253, Simon & Schuster, 1979.

A few weeks later [following the Court's decision in *Paris Adult Theatre*], an Albemarle County, Virginia, prosecutor announced that he would prosecute anyone selling *Playboy* magazine on local newsstands. The magazine violated community standards in Charlottesville, home of the University of Virginia . . . When the Chief [Burger, C.J.] read a news story on the prosecutor's action, he immediately jotted a memo to the conference. He had never intended to ban *Playboy*, he insisted. His opinion was clear on that point.

Id. See also ACLU, *Other Groups File Brief Appeal of BBS Operator*, THE ENTERTAINMENT LITIGATION REPORTER, August 15, 1995.

165. EDWARD A. CAVAZOS & GAVINO MORIN, *CYBERSPACE AND THE LAW: YOUR RIGHTS AND DUTIES IN THE ON-LINE WORLD*, 94 (1994). "Cyberspace is, after all, a global community that often pays little attention to the boundaries and borders of the physical world." *Id.*

166. Ramon G. Macleod, *The Rules of Netiquette: Minding Your Manners on the Net*, S.F. CHRONICLE, March 6, 1996, at A1, A10.

167. *Id.*

terms of service upon signing on with that provider.¹⁶⁸ Therefore, in satisfying the elements of the *Miller* test, the relevant community's standards must be those of the Internet community.¹⁶⁹

The protection of First Amendment rights demands that a legislature enact regulations that are narrowly tailored to achieve a substantial governmental interest.¹⁷⁰ With respect to the indecency provisions embodied within amended 47 U.S.C. § 223, several alternatives exist which, if adopted, would simultaneously accomplish the government's substantial interest in preventing exposure of offensive material to children, while maintaining First Amendment protections.¹⁷¹ These alternative measures include software with built-in "filter" products and a self-imposed BBS rating system.¹⁷²

The technology for software programs designed to "filter" out undesirable Internet sites already exists.¹⁷³ In fact, several types of software that filter undesirable Internet sites are currently available on the market. These software products preclude exposure to such Internet sites.¹⁷⁴ The products function in several ways to filter the undesired sites from a users' personal computer.¹⁷⁵ One product allows the user to customize the program to filter sites containing words or phrases that the user may find inappropriate for children.¹⁷⁶ Another software product automatically filters out approximately sixteen hundred sites deemed objectionable by the

168. *Id.*

169. J. David Loundy, *Would He Know IT When He Downloads IT?*, CHICAGO DAILY LAW BULLETIN, April 13, 1995, at 6, citing to Lance Rose, author of NETLAW. "[T]he first test a court should apply is to look and see if there is a relevant on-line community whose standards should be applied . . ." *Id.*

170. *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (discussing the requirement that a regulation be narrowly tailored to achieve a substantial, content-neutral governmental purpose).

171. *Industry Task Force to Study Ways to Control Obscenity on Computer Systems*, DAILY REPORT FOR EXECUTIVES, June 29, 1995, Sec. A, p.125.

172. *Id.*

173. See Doug Abrahms, *Exon Move on Internet Porn Grabs Lawmakers*, THE WASHINGTON TIMES, July 19, 1995, at B7.

174. Joe Abernathy, *Net Censorship: Alternatives Gain Momentum*, PC WORLD, September, 1995, at 54.

175. *Id.*

176. *Id.*

developers,¹⁷⁷ while providing a password device enabling an adult to access such material.¹⁷⁸ Parents who are concerned about the potential for their children to stumble upon adult-content material can easily purchase, install, and in some cases customize these preventive products.¹⁷⁹ Similarly, most major online providers¹⁸⁰ already include parental control devices which permit parents to block those areas which they do not want their children to access.¹⁸¹ In fact, major online providers are currently expanding the range of options available to parents to block their children's access to undesired material.¹⁸²

Another less restrictive alternative to the amended 47 U.S.C. § 223 is a self-imposed rating system.¹⁸³ Similar to the rating system utilized by the motion picture industry,¹⁸⁴ an Internet rating system delineates the content of Internet sites based upon their theme and language.¹⁸⁵ Under this system, every content provider on the Internet would adhere to a pre-arranged rating guideline and rate the content of his or her site accordingly.¹⁸⁶ Parents and schools would be immediately advised as to the character of the content of a particular Internet site¹⁸⁷ and could respond accordingly with their filter software.¹⁸⁸

177. *Id.*

178. Charles Levendosky, *Parental Guidance Suggested; Congressional Efforts to Legislate Cyberspace will Create a Decency Monster - and it's Coming After You*, SUN-SENTINEL, August 6, 1995, at 1G.

179. Ellis Booker, *What a Tangled Web We Weave*, COMPUTERWORLD, July 31, 1995, at 54.

180. See *supra* note 2 and accompanying text for further discussion.

181. Doug Abrahms, *Exon Move on Internet Porn Grabs Lawmakers*, THE WASHINGTON TIMES, July 19, 1995, at B7.

182. Ellis Booker, *What a Tangled Web We Weave*, COMPUTERWORLD, July 31, 1995, at 54.

183. Joe Abernathy, *Net Censorship: Alternatives Gain Momentum*, PC WORLD, September, 1995, at 54.

184. *Swope v. Lubbers*, 560 F.Supp. 1328, app.I (W.D. Mich., 1983). Appendix I to *Swope* sets forth the reasons and purposes behind the Movie Picture Association of America's ("MPAA") adaptation of a self-imposed rating system for all movies.

185. See Joe Abernathy, *Net Censorship: Alternatives Gain Momentum*, PC WORLD, September, 1995, at 54.

186. *Id.*

187. See *Swope v. Lubbers*, 560 F.Supp. 1328, app.I (W.D. Mich., 1983). "The only objective of the ratings is to advise the parent in advance so he or she may determine the possible suitability or unsuitability of viewing by children." *Id.* at 1337.

188. Joe Abernathy, *Net Censorship: Alternatives Gain Momentum*, PC WORLD,

The essence of each of the above-proposed alternatives is the notion that responsibility and control over one's children must reside with parents.¹⁸⁹ The legislature must resist assuming a parental role, thereby impinging upon First Amendment rights.¹⁹⁰ The role of the parent must not be usurped by the government, especially when the teachings of morality are involved.¹⁹¹

V. CONCLUSION

This comment has argued that the amended Title 47 U.S.C. § 223, regulating the transmission of obscene material over the Internet, is unconstitutional because application of the *Miller* test requires that a community standard dictate what constitutes obscene material.¹⁹² Because the Internet, by its very nature, blurs traditional concepts of community, the *Miller* test proves to be inapplicable with respect to a community standard. Sweeping language that binds the entire country to

September, 1995, at 54.

189. *Id.* at 54; Doug Abrahms, *Exon Move on Internet Porn Grabs Lawmakers*, THE WASHINGTON TIMES, July 19, 1995, at B7; Elizabeth Corcoran, *Researchers Try to Set Standards; Technology Tackles Ways to Block Out Information*, THE WASHINGTON POST, October 30, 1995, at F15; Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38; J. David Loundy, *Would He Know IT When He Downloads IT?*, CHICAGO DAILY LAW BULLETIN, April 13, 1995, at 6.

190. Nat Hentoff, *Can Gingrich Rescue Cyberspace?*, SACRAMENTO BEE, July 1, 1995, at B6, quoting Senator Leahy (D-Vt.):

Empowering parents to manage - with technology under their control - what the kids access over the Internet is far preferable to bills . . . government regulation of the content of all computer and telephone communications, even private communications, in violation of the First Amendment is not the answer - it is merely a knee-jerk response.

Id.

191. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 72 (1973) (Douglas, J., dissenting).

As a parent or a priest or as a teacher I would have no compunction in edging my children or wards away from the books and movies that did no more than excite man's base instincts. But I never supposed that government was permitted to sit in judgment on one's tastes or beliefs - save as they involved action within the reach of the police power of government.

Id.

192. See *supra* notes 58-69 and accompanying text for further discussion.

the standards of the least-tolerant community must be avoided.¹⁹³ Rather than enlarging existing telecommunications statutes regulating the transmission of obscene material, Congress should concentrate its efforts at devising a statute which reflects the nature of the medium being regulated.

This comment has also argued that Title 47 U.S.C. § 223, as amended, sweeps within its language a non-captive audience, and therefore fails to narrowly achieve the substantial governmental interest of protecting children from indecent material. Congress must consider the alternative means available to accomplishing the desired result of preventing dissemination of adult-material to children, while securing the right for adults to have access to material that is protected within their communities.

*Andrew Spett**

193. See Robert F. Goldman, *Note: Put Another Log on the Fire, There's a Chill on the Internet: the Effect of Applying Current Anti-obscenity Laws to Online Communications*, 9 GA. L. REV. 1075, 1119 (1995).

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