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## CENSORSHIP OF THE INTERNET

Eldridge Bell

An Abstract Presented to the Faculty of  
the Graduate School of Lindenwood College in  
Partial Fulfillment of the Requirements for the  
Degree of Master of Arts

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## ABSTRACT

This project was produced in an attempt to discover the most effective way to censor the Internet. The project examines the Communications Decency Act, in order to determine if the bill is an effective way to keep harmful material off the Internet and out of the reach of children, or to decide if the Act is detrimental to society infringing on Americans' right of free speech. This project will discuss the varying opinions of individuals who want to protect the rights given to citizens by the First Amendment, and others who desire to protect the nation's children from potentially damaging material and predators made available by the Internet's global access.

Censorship of the Internet has become a noticeable concern of many people in the United States and around the world. As of yet, there has not been a strict set of guidelines drawn out to determine what can and cannot be cited on the Internet. The number of children becoming fascinated with Cyber-Space is on a steady increase. This fact is urging many of the world's governments to discover a way to protect

children while still allowing adults the freedom to choose their viewing material. As for now, the answer to this problem in many homes is Internet Filtering Software. This project will discuss various Filtering programs and decide if this is the best way to Censor the Internet.

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A Culminating Project Presented to the Faculty of  
the Graduate School of Lindenwood College in  
Partial Fulfillment of the Requirements for the  
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1997

COMMITTEE IN CHARGE OF CANDIDACY

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## Chapter I

### INTRODUCTION

The Internet was formed more than twenty years ago in an attempt to create a U.S. Defense Department communications network, called the ARPANET. During the 60's and 70's building effective computers was more important than paving the way for the Internet. In the developmental stage, the Internet was used mostly by students and faculty at universities. Internet services were hard to find, so the number of people on "the Net" increased slowly. It was not until the 1990's that people discovered the benefits of being connected to the Internet. In 1995, Netscape, a program which "browses" the World Wide Web became one of the top software products in the United States (Stumpf). Because of developments such as Netscape, the Internet can be accessed by people all over the world.

Bruce J. Ennis Jr., an active lawyer and writer for the Citizens Internet Empowerment Coalition believes,

almost ten million host computers are linked to the Internet (of which 40 percent or more



are located outside the United States), and the number of Internet users is predicted to grow from 40 million today to 200 million by 1999. (Ennis)

People are using the Internet to do everything from research to playing interactive video games. Most people begin using the Internet because of the convenience of electronic mail. E-mail allows a person to send mail to someone across the city or across the world in a matter of minutes. This allows for frequent and inexpensive communication between two people in distant areas. Not only can text be sent, but audio and video also. E-mail is mainly used for private communication; it functions more like private U.S. mail communications that are not subject to government interference (Smedinghoff 312).

A large number of people using the Net are passive, meaning they will "log on" and spend their "on-line" time searching for material to view. This is true for sports fans who log on to get updated on sporting events. Professional sports sites are often visited by Internet users. These sites are updated continuously, which proves to be the backbone of their existence. They can also give a more in-depth version of what happened in a particular sporting event than a radio or television sportscast. Many sports sites will also add audio and video clips to make it possible for

fans to hear or view the exciting plays that took place.

Passive users of the Internet also consist of students who use the Net to locate information for research papers, and others that are looking for information on a particular subject.

Some of these individuals use the Internet to look for information that might be very difficult to find in other places. For example, the Internet contains unpublished work by contemporary artists exhibiting in galleries of the SoHo district of New York. The Internet provides passive users the opportunity to encounter material that they normally would not have access to.

Electronic news groups are another reason people are hooked on the Internet. A Network News or Usenet contain some traits of radio and television, in that the information presented is available to anyone in the audience.

People who visit newsgroups are there to focus on a particular topic. When visiting news groups, 'netiquette' is very important. For example, anyone who broadcast irrelevant messages, known as "spawn" will be confronted very quickly by other individuals involved in the discussion. The range of these "news" discussion topics is quite wide.

Not all newsgroups contain material that is helpful to the advancement of society. Such Enews locations are usually clearly defined by their name. For example, it is very clear what "alt.binaries.pictures.fetish" represents.

The most important property of the Internet is its ability to give everyone the opportunity to be an author. Internet authors consist of individuals who post information for others to observe. Authors range from the governments of the world's most powerful countries, to school children.

The Net appears to be a place for everyone, but it also contains material that can be very harmful to society if not handled properly. Examples of such material include instructions on making bombs and pornographic pictures. Because of the potential for harm from this type of material, censorship of the Internet has become one of the hottest topics on the Internet itself, and in society generally. If the Net is to be censored, existing laws for other mediums may play a significant role in whatever limiting legislation results.

The First Amendment of the Constitution of the United States provides that,

Congress shall make no laws 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. (Holsinger and Dilts 37)

As we know, Congress has not interpreted this statement literally. All forms of the media have been under fire at some point in time with newspapers being the least limited by legislation. For example, federal law prohibits the advertisement of cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission (FCC), but permits such advertisement in the print media. The Supreme Court felt that since print media does not require government issued licenses to operate, they could not stop them from advertising cigarettes or little cigars (Smedinghoff 309). Because there are a limited number of frequencies, both television and radio stations are required to have government-issued licenses. The government argued that it is a privilege to be allowed to use one of these frequencies; therefore, a license holder must operate in the best interest of the public (Smedinghoff 309). The Supreme Court concurred with this view, justifying the restriction of some advertising in these media by saying that radio and television patrons become a

captive audience to whatever is broadcast before the channel can be changed (Holsinger and Dilts 436).

Although courts have shown a tendency to tolerate sexually explicit speech in print, as long as it is neither obscene nor exploits children, they have shown only limited tolerance for such speech in broadcast (Holsinger and Dilts 434).

Broadcasters can have their license taken away for airing language or sexual portrayals that would be protected by the First Amendment in print. The Federal Communication Commission showed its power to regulate radio when a disc jockey on the Pacifica Foundation's FM radio station in New York played all twelve minutes of "Filthy Words", by George Carlin (Holsinger and Dilts 435). The broadcast was aired in the middle of a weekday afternoon. A listener riding in his car with his son heard the broadcast and complained to the FCC. The FCC reprimanded Pacifica because Carlin's monologue violated the rules explicitly banning the use of obscene, indecent, and profane language. Justice John Paul Stevens, one of three judges that heard the case, offered two reasons for upholding the FCC's right to punish indecent broadcast:

1. Unlike other forms of communication, broadcast messages come directly and unannounced into the privacy of one's home where the individual's right to be

let alone plainly outweighs the First Amendment rights of an intruder.

2. Broadcasting is uniquely accessible to children, even those too young to read. (Holsinger and Dilts 436)

In the *Pacifica* case, the Supreme Court did not punish the radio station because it violated the First Amendment, but it did warn it that if it continued to broadcast obscene or sexually oriented material license renewal would not be pleasant.

Broadcasters interpreted the *Pacifica* decision as meaning that it is all right to broadcast indecent and sexually oriented material when children are in bed, between 10 P.M. and 6 A.M. This guideline was used for more than a decade before the FCC changed its position. In 1987, the FCC decided to forbid indecent or sexually oriented broadcasting during anytime of the day. In 1988, the FCC redefined and announced its definition on indecent speech. Such language was defined as "language or material that, in context depicts or describes, in terms patently offensive, as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs" (Holsinger and Dilts 437). The definition was based on language from *Miller v. California*, but with three differences.

1. The community is that of the broadcast medium, not the whole community.
2. There is no requirement that the broadcast be looked at as a whole.
3. The material need not appeal to a prurient interest in sex.

The FCC felt if an individual was not part of a broadcasting area he or she had no right to set the indecent speech standard for that community. Under this new standard, works that contained social value could be considered indecent. It would not be long before the FCC would have a chance to test its new law. Immediately after the definition was released, the FCC asked three stations to respond to complaints about indecent programming (Holsinger and Dilts 437). The stations were accused of broadcasting sexually explicit talk during daytime hours. WFBQ-FM, Indianapolis, paid a \$10,000 fine. The station's general manager's defense was that the program he aired did not violate the city's community standards. Although some stations were prosecuted under Congress' around the clock ban of indecent speech, it was found unconstitutional by the District of Columbia Federal Appeals Court in 1991. Congress then passed a law that stated broadcasters who were on twenty-four hours a day could carry indecent material between midnight and 6 A.M., and public broadcasters who got off at midnight could air indecent material from 10 P.M. to midnight.

In 1995, the FCC settled a case with Infinity Broadcasting in the amount of \$1.7 million for the Howard Stern talk show. Howard Stern, one of America's most famous radio morning show personalities, found himself in trouble after a program about masturbation and lesbian dating. A woman in Los Angeles felt the program was indecent and reported it to the FCC. The fine was so big because the government felt that a broadcast station should have control of its on-air personnel. Who will be fined if the government uses this type of punishment to control the Internet, users or providers?

Because of the foundation that was laid down by radio, television has not been pulled into court as much as one might think. In the late 1980's *Action for Children's Television v. FCC* was settled, establishing a "safe harbor" for adult programming between 8 P.M. to 6 A.M. Television faces a different challenge than radio; it is not the language, it is the pictures. Violence and sex are becoming the norm; after all, they sell. In 1995, Reed Hundt, chairman of the FCC said that he believes "that violent content on television is more dangerous to children than indecency" (Holsinger and Dilts 438).

Lately Congress has been considering legislation that would prohibit violent programs during the time of



day when children are watching. Some people want violent programs to be treated as indecency is treated. If violent programs are based on community standards some cities in the United States will be allowed to show almost anything.

Since cable licensing is different from television and radio, cable operators are not required to follow the indecency laws for television and radio. For example, the words "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits" are not legal on television or radio, but can be broadcast on some cable channels. However, cable operators can be prosecuted for obscenity under state and local law.

Indecency is another matter. At the present time, there are few restrictions of indecency on cable systems. This situation has not gone without a challenge. In 1985, the Supreme Court affirmed a lower court decision striking down a Utah law that would have limited the sexual content on cable television (Holsinger and Dilts 439). Cable has been allowed some freedom because, unlike television and radio, the subscribers elect to have the service come into their homes. The courts also felt that parents have greater control over cable television than they have over regular television (Holsinger and Dilts 440). Parents also have the choice not to include channels such as

HBO, which airs what many would consider indecent programming in their subscription. Congress has encouraged cable operators to refuse to carry programming they believe to be indecent, according to contemporary community standards (Holsinger and Dilts 440).

There have been attempts to censor the media in the creative world. Movies, recorded music and concerts performances have been under enormous pressure because of explicit language. For example, the film, "Carnal Knowledge" was found obscene by a Georgia Jury, but the jury's decision was soon overruled by a unanimous Supreme Court decision (Holsinger and Dilts 443). Since then, no movies have even been tested in the courts. In their defense, executives in communication industries focus on sex and violence as selling points. The issues of sex and violence are discussed almost daily by advertising and public relations firms associated with movies and music (Holsinger and Dilts 444). In the music world, freedom of speech has endured tremendous pressure from groups such as 'Parents' Music Resource Center, headed by Tipper Gore. The group was designed to protest the use of explicit sexual language and hatefulness in rock music. The attention from the groups forced record companies to put warning labels on albums that

contained lyrics urging suicide, sexual violence, and antisocial attitudes. Some stores refuse to sell these albums to minors (Holsinger and Dilts 444). It has also forced some artists to pull certain works from the shelves. For example, Rapper Ice-T withdrew his song "Cop Killer" because of the lyrics that were in the song. Time Warner president, Gerald M. Levin, had refused to withdraw the record saying, "We believe that the worth of what an artist or journalist has to say does not depend on pre-approval from a government official or a corporate censor or a cultural elite" (Holsinger and Dilts 444).

In another attempt to censor music, a Florida sheriff warned record store owners in his area that they would be arrested for selling the album "As Nasty As They Wanna Be" by 2 Live Crew (Holsinger and Dilts 445). The sheriff felt the album was obscene, but the rappers won an injunction and a finding, on appeal. The courts felt the sheriff did not prove the album obscene under the Miller test.

The precedents applied to television and radio suggest that the government feels it is responsible when it comes to minors in the United States. The Internet is considered access to the future, and the government is attempting to make it safe for adults and children. Everyone agrees that children should not be

exposed to indecent and offensive material. Many adults feel, however, that they are the ones that will be controlled when it comes to censorship of the Internet. Under the CDA, an adult could become a felon if he or she posted indecent material on the Net where minors could access it (Ennis).

One way to censor the Internet is self regulation, which will require everyone who puts something on the Net to rate their material. Rating material will allow the public to have some control over what happens to the Internet, but people are apathetic and may not maintain the standards necessary to keep control of the Net where it belongs, in the hands of the public.

Another way for parents to control what their children see on the Net is to become part of their children's Internet experience. The foremost solution to the problem, of preventing children from being exposed to indecent material on the Net, is for parents to provide moral guidance (Godwin). Monitoring children would allow parents some control of what children are exposed to, but, the problem is, who has the time to watch a child constantly. Most parents are part of a household that requires both parents to work. When teenagers come home from school, there is often no one there to greet them. Parent monitoring is not the answer for these children.

Filtering software such as Surfwatch and Net Nanny, which contain the ability to block out some harmful material, might be the way to keep indecent material out of the hands of children whose parents are not always a part of their Internet experience. The price of this software is cheap enough for every computer owner (Lewis 11). The question is will it block out everything parents want it to? It contains the ability to block out material that is rated with a code that can be read by a computer. The software has become very effective, but it has not reached the standard some lawmakers want for the Internet.

Before congress can censor the Internet, there are a number of issues that must be addressed. The global nature of the Internet make terms such as "indecenty" and "patently offensive" even more vague than they already are. The issue of community standards must also be addressed before the Internet can be censored by a governmental body.

This project will explore the arguments for and against government censorship of the Internet. It will examine the Communications Decency Act to determine if it violates the First Amendment of the Constitution of the United States. It will also address the global nature of the Internet to determine if the CDA or

filtering software is the most effective means of eliminating children's access to indecent material.

The Commission on the Protection of Children from Sexually Explicit Material and Violence (the Commission) was established in 1994 by the President to study and report on the problem of children's access to sexually explicit material. The Commission's report, "Protecting Children from Sexually Explicit Material," was published in 1996. The Commission's report is available at <http://www.fcc.gov/ocom/children/children.htm>. The Commission's report is a comprehensive study of the problem of children's access to sexually explicit material. It includes a detailed description of the problem, a review of current law and policy, and a set of recommendations for action. The Commission's report is a valuable resource for anyone interested in this issue.

Although the Commission's report is a comprehensive study of the problem of children's access to sexually explicit material, it does not address the issue of filtering software. The Commission's report is a valuable resource for anyone interested in this issue.

One example of this would be the "fire" in a building that was caused by a person who started a fire in a building. The fire in the building was caused by a person who started a fire in a building. The fire in the building was caused by a person who started a fire in a building. The fire in the building was caused by a person who started a fire in a building.

## Chapter II

### REVIEW OF THE LITERATURE

The United States Constitution was designed to protect the American public and give them a voice in this country. The different forms of speech affected by the Constitution, written more than two hundred years ago, could not have been imagined by the parties that constructed it. It has affected everything from the right to express opinions on abortion, to offensive language broadcast on radio and television. There was also another reason the Constitution of the United States was written, to keep the government from becoming overly oppressive.

Although the First Amendment of the Constitution states that Congress shall make no law that prohibits free speech, it has not been interpreted literally. There have been several different occasions where Congress has found it necessary to ban forms of speech.

One example of this would be falsely yelling "fire" in a crowded theater. This could panic people, start a stampede, and endanger the lives of the people in the theater. Because of a lie people could be killed. In a situation such as this, the courts have

felt that the government's interest in protecting the public outweighs the individual's right of free speech (Smedinghoff 306).

In order to make laws that censor speech, the government must balance the First Amendment against the interest of the government's regulation of speech. Because content-based regulation of speech prohibits communication of certain ideas, it must be held to a higher level of scrutiny. To be valid, content-based restriction on speech must pass the test of strict scrutiny, which states the restriction must:

1. be necessary to achieve a compelling (not just a significant) government interest; and
2. use the least restrictive means available that will still achieve the government's objective. (Smedinghoff 306)

It is also pointed out in a book entitled Online Law: written by Thomas J. Smedinghoff, that the regulation must not unnecessarily interfere with First Amendment Freedoms. As pointed out in Chapter 1, it is clear that the government has a major interest in protecting minors from indecent speech. Although completely banning all such speech would meet the government's objective of protecting minors, such a solution would be too broad and would place an undue burden on free speech (Smedinghoff 307). An



alternative to completely banning indecent speech would be making it a crime to distribute indecent material to minors. This would allow adults who want to be exposed to indecent material the opportunity to be exposed to it.

Would government censorship be the least restrictive way to censor the Internet? The Philadelphia Court felt a far less restrictive means of addressing the Government's concern would be to educate parents and school administrators about the Internet and the availability of blocking and filtering tools (Ennis).

Computer programs already exist which can block out information labeled as adult material, and more programs are being tested to offer an alternative to government censorship. Since protecting children is the reason the Communications Decency Act was constructed, computer programs such as Surf Watch and Net Nanny have been improved and tested so parents will have peace of mind about what their children see or hear while surfing the Internet.

Because the Internet contains so much information, it would be impossible for an organization to examine everything that is being put on the Net. Senator Jim Exon of Nebraska wants control of the Internet placed in the hands of the government. Senator Exon's reason

for his involvement with censorship of the Internet was based on the fear of the possibility that his granddaughters might be exposed to indecent material while surfing the Internet (Corn-Revere 24). He made it very clear that he introduced the bill to protect minors from being exposed to unsuitable material on the Net. Senator Exon had no problem getting support from his colleagues. The Telecommunications Bill of 1996 passed the senate by a vote of 91 to 5.

Senator Exon told the New York Times,

My amendment would simply apply the same laws that protect against obscene, indecent or harassing telephone calls to computers. I want to make the information superhighway safe to travel for children and families.  
(Allison and Baxter)

There is indecent material on the Net that children might come in contact with. All American parents and grandparents should be given a reason to feel confident that children will not be exposed to indecent material while surfing the Internet, but some people put things on the Net without thinking about who might visit their site. This has forced law enforcement to take a serious look at the information being put on the Internet. There is no doubt that the interpretation of existing laws associated with the

First Amendment will affect people who log-on in the future.

Senator Exon wants to make indecent materials illegal just as obscene material is illegal on the Internet. The U.S. Constitution does not protect obscene material regardless of whether it appears in a magazine mailed to a purchaser's home or is transmitted to a user's computer screen through the Internet or commercial bulletin board service (Smedinghoff 320). Some material contains so little social value that society's interest outweighs the work itself. Because of the fact that indecent speech is protected by the First Amendment and obscene speech is not, the Supreme Court released a three-part test in 1973 to introduce a legal definition of obscenity.

1. Would the "average person, applying contemporary community standards" find that the work, taken as a whole, appeals to "the prurient interest?"
2. Does the work depict or describe, in a "patently offensive" way sexual conduct that is specifically defined by the applicable state law?"
3. Does the work, taken as a whole, "lack serious literary, artistic, political, or scientific value?" (Smedinghoff 320)

If the answer to all three of the questions is yes, then the work is considered to be obscene, and is not protected by the First Amendment. If the answer to one of the questions is no, then the work is not consider

obscene and is protected by the First Amendment.

When determining if a work is obscene, the first thing that must be done is to interpret community standards and prurient interest. In formulating its test for obscenity, the Supreme Court rejected a national community standard, emphasizing that the people of Maine or Mississippi should not be forced to accept the public depiction of conduct tolerated in Las Vegas or New York (Smedinghoff 321). When information is put on the Internet, state and international boundaries can be thrown out the window. Whose community standards would an individual have to follow when putting information on the Net? If one has to follow the conservative community standards of Maine or Mississippi then the Supreme Court's rejection of a national community standard would be overturned, and the people of Las Vegas or New York would feel they were being punished.

There has already been one case where a bulletin board operator has been punished for violating the community standards of a more conservative community. In 1994, a San Francisco couple, Robert and Carlene Thomas, were prosecuted for violating the community standards of Memphis, Tennessee. The Thomas' owned a bulletin board that allowed paying customers to download sexually explicit material, they were

convicted of interstate transportation of obscene material (Smedinghoff 321). If this is the approach the courts take as the Internet knows no boundaries, the most conservative communities will control the information allowed on the Internet.

Another form of speech illegal under the Communications Decency Act and the First Amendment is child pornography. It is already a crime to possess child pornography in any form in the United States (Smedinghoff 325). The courts felt that child pornography contributes to the sexual abuse of children in two ways:

1. The material provide a permanent record of the child's participation that increases the harm to the child when circulated and
2. continued distribution (including advertising and selling) of such material, requires the sexual exploitation of children. (Smedinghoff 325)

At the federal level, child pornography is defined as any visual depiction involving the use of a minor engaging in sexually explicit conduct (Smedinghoff 325). Some state courts have ruled that minors do not even have to be naked for a work to be considered child pornography. A Missouri Court held that a 14 year old girl wearing a G-string was nude for purpose of statute (Smedinghoff 325). Although the laws against child

pornography are clearly laid out, it will be hard to locate the people who violate the laws in cyberspace.

The Communications Decency Act was Senator Exon's answer to indecent material on the Internet. The Act was designed to protect children from harmful material. A three judge panel in Manhattan, New York ruled unanimously on July 29, 1996 that the Communications Decency Act was unconstitutional. This followed a decision in Philadelphia that also found the Communications Decency Act unconstitutional on June 12, 1996. The judges who heard the case in Philadelphia said, "the Internet deserved as least as much protection under the First Amendment as printed material received, if not more" (Lewis 1).

The government argued that cyberspace should be held to the same strict standards of television and radio. The biggest difference between print and the electronic media of television and radio is that television and radio are required to have government license in order to broadcast. Will individuals who use the Internet be required to obtain a government license if the government is given control over the Internet? The precedent has already been set in China, whose citizens are required to be registered before they can legally use the Internet (Sorensen). China, it should be noted, does not have a long-standing

tradition of valuing free expression as does America.

The Communications Decency Act faced little resistance in Congress. It was passed overwhelmingly by Congress as part of the Telecommunications Act of 1996, and was signed by President Clinton. Congress felt it was necessary to halt the flow of pornography and other indecent material that is on the Net (Ennis). Congress stayed behind its reason for passing the bill in the first place, providing parents some assistance in protecting children from indecent and sexually explicit material on the Internet. With the bill having already lost two attempts to be found constitutional, the ground work is already laid for the Supreme Court. The Supreme Court can be unpredictable, so the war is not won, only a couple of battles.

Dolores Sloviter, Ronald Buckwalter, and Stewart Dalzell were the three judges who made the decision that the Communications Decency Act was unconstitutional in the Philadelphia case. The three judges who heard the case in Philadelphia were not experts on the Net going into the case. They had to be informed about many of the things addressed by the Communication Decency Act (Lewis 11). After the decision the three judges wrote "The Findings of Fact" which explains why the most effective way to block objectionable material on the Internet is for

individuals to use filtering software on their own personal computers, not for Congress or state legislatures to make broad decrees (Lewis 11).

The judges used voluntary ratings systems called PICS (Platform for Internet Content Selection), and filtering material as an alternative to government censorship. PICS only allow access to sites that carry a rating in areas such as sex and violence, sites that have not been rated will not be allowed. It will also block access to a regularly updated list of questionable sites.

After the Philadelphia Court's decision, Mike Russell, spokesman for the Christian Coalition, said he and other supporters of the law hoped to prevail at the Supreme Court (Lewis 1).

Before reaching the Supreme Court the Communications Decency Act suffered another defeat by a three-judge panel in Manhattan, New York. The decision was given by United States Circuit Judges Jose A. Cabranes and District Judges Leonard B. Sand and Denise Cote. The judges ruled that current technology provided Internet and on-line service operators with no practical way to try to comply with the law, exposing them to liability (Lewis 11).

With no clear way to punish people who violated the Communication Decency Act it is easy to understand



why L. Allison and R. Baxter, authors of "Protecting Our Innocents", refer to censorship of the Internet as a "knee-jerk" response (Allison and Baxter). They also have some support in their theory that government control of the Internet is not good for the expansion of the Net. The results from a poll performed by Electronic Telegraph indicated that voters were against government control of the Internet by a margin of nine to one (Allison and Baxter). As with every poll, the beliefs of a few does not represent the entire public. Allison and Baxter clearly believe that control of the Internet should be placed in the hands of the public, not in the hands of the government. It is very important that authors on the Net be responsible for the material that they put on the Net. It is in the best interest of an author to classify his or her material to ensure maximum readership by the target audience. Labeling material with a machine readable code would also allow filtering programs to block materials that might be offensive to children. There are authors who will not label their material because of the excitement they receive from being different. These people can be dealt with by the law in the normal way.

The strong sense of netiquette evident in the electronic newsgroups suggests that such individuals

might also be controlled by (cyber-) social pressure to some extent (Allison and Baxter).

The categories an author is allowed to use in order to label a work should be broad because of the differences in community standards across the world. The level of nudity tolerated in one community could be considered obscene in another. If works are labeled this way it makes it easy for Internet users to avoid works that fall outside their target range. It will also allow parents some flexibility. If a parent has a 17-year old and a 7-year old, different levels of information should be allowed.

One issue not addressed in the Communications Decency Act was the information that children could be exposed to that originates outside the United States. In the business world, material is labeled for two reasons,

1. to maintain a good public relationship and
2. ensure maximum exposure.

For example, it is to the advantage of magazines such as Playboy to be known as a provider of nude pictures. If this is what a surfer is looking for and it is rated "X", the surfer automatically knows what is about to be revealed if he or she visits the site. Labeling would also help political groups who want to reach a targeted

audience. Such labeling would prove to be the basis for a very effective form of control if the public was interested in making it work.

In order for this system to work, authors can not afford to be apathetic, they must take the time to honestly rate their material accordingly. With the type of system that Allison and Baxter feel will work, it will not be a small list of codes to choose from. This system would also require authors to be considerate as well as informed about the different communities around the world. Under this system authors will also be expected to rate their work as weak or strong. This would be very important when it comes to bulletin boards, where the Internet site owner and the author are different. For example, a university might consider a document insensitive, but a student could add something to the document itself or commentary about it making it sensitive or objectionable. This interactiveness makes it impossible for the Communications Decency Act to perform effectively. The amount of information being processed each day eliminates the effectiveness of a monitoring system that would identify authors putting illegal material on the Internet. The traditional control methods applied to radio and television are not

likely to be effective on the Internet because everyone is a broadcaster.

It is possible in principle to license Internet users, as ham radio operators are now licensed. But there are a number of problems with this approach.

First the number of people on the Internet is much larger than the number of people using ham radios. It would also be very difficult to license people in other countries, who do not have to follow American Laws. Ham radio licenses are coordinated through international agreement, thus leaving the door open for potential international laws on the Internet. Allison and Baxter feel that the Internet will be subject to social pressures just as television and radio (Allison and Baxter). Social pressure has forced television to rate everything that is broadcast. The V-chip is the censoring mechanism proposed for television that will be placed in the hands of parents if it is found to be effective (Allison and Baxter). It works almost like Internet-filtering programs by blocking out unwanted material. The only difference is that, unlike television, applying ratings to material on the Internet would be optional, but hopefully social pressure would force everyone to rate their material. Such a system, once effectively in place, could also drive publishers of illegal material underground, where

they do not pose a real threat to children. When deciding what type of method will be used to censor the Internet, the first step is to identify what is on the Net. There are servers that offer information requested through e-mail and mailing lists. The World Wide Web is where information is hunted for, making the hunter just as responsible as the prey for the information that is revealed. There is indecent material on the Net, but indecent speech is protected under the First Amendment of the Constitution. In a brief written by Bruce J. Ennis Jr., of the American Library Association, it is stated that,

if parents exercise parental responsibility, they can prevent their children from accessing indecent communications, including communications posted abroad. If they do not, no government regulation of speakers can prevent minors from gaining access to indecent communication. (Ennis)

The three judge panel in Philadelphia found the Communication Decency act so vague that even work with serious value could be found criminal if a jury was biased. Ennis argues that when control is in the hands of a few, history points to the suppression of some material because of the message being passed by a certain group, race, or organization. He made the case that if the Communications Decency Act was passed, then this basis would target the entire adult population of

the United States, because the CDA makes it illegal to use the Net for indecent material. In essence, the Internet would be controlled by children, because the adult community would only have access to what is suitable for children.

Karen Sorensen, a writer for Human Rights Watch and author of "Silencing the Net", believes that children and adults should be informed of the abuse that some humans have to endure. She felt that if the CDA passed the Supreme Court, some of Human Rights Watch postings would be consider indecent, which would hurt their ability to educate the public.

The material discussed in this chapter was compiled from the books: Online Law by Thomas J. Smedinghoff, Cyberspace and the Law by Edward A. Cavazos and Gavino Morin, The Emperor's Virtual Clothes by Dinty W. Moore, and Netlaw by Lance Rose. Internet sources "Protecting Our Innocents" by Allison and Baxter, "Statement" by Bruce J. Ennis Jr., "Rheingold's Tomorrow" by Rheingold Howard, and "Silencing the Net" by Karen Sorensen were also used in the discussion. Two magazine articles by Peter H. Lewis of the New York Times provided valuable information. They are "Judges Turn Back Law to Regulate Internet Decency" and "Opponents of Indecency Rules on Internet Win Another Case". The Communications Decency Act, which is part



### Chapter III

#### SELECTIVE EVALUATION AND REVIEW OF RESEARCH

This chapter takes an in-depth look at the Communications Decency Act, "Silencing the Net" by Karen Sorensen, and Cyberspace and the Law by Edward A. Cavazos. In this chapter, the CDA is examined to expose any possible weakness, and to determine if it infringes on the First Amendment. It also explains how the CDA would hurt the efforts of Human Rights Watch to expose the cruel punishment some humans are forced to endure. The steps the government and network providers can legally take in order to protect America's children will be explained.

As the United States attempts to find a way to keep indecent material out of the hands of children, numerous other countries observe. Many of these countries will follow the example set by the United States. Others have already decided what they will do about indecent material on the Internet. Some of these countries not only want to ban indecent material, they want to ban the right of citizens to express their political views on the Net also. Other countries are interested in controlling the Net because of financial



problems access might cause them down the road. The remaining countries have not even considered censoring the Net because they do not have access to it. While the world is watching, the United States Supreme Court must decide whether or not the Communication Decency Act is constitutional.

The CDA makes it a felony, punishable by up to two years in prison and a fine, to use an interactive computer service to display in a manner available to a person under 18 years of age any communication that in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs (Communications Decency Act, Title V, Sec 502).

Senator Exon's attitude about the Communications Decency Act has been consistent throughout the early stages of the war against the CDA. He has repeatedly said that his objective is to keep indecent material out of the hands of children. The government feels the CDA is the solution to the problem because it not only protects children from indecent and obscene material, it does not ban constitutionally protected material from adults (Ennis).

In Title V, Section 230 (PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL) of the Communications Decency Act it is explained why the

government must have some control over the Internet.

1. The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and information resources to our citizens.
2. These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
3. The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
4. The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
5. Increasingly, Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services. (47 U.S.C. 230(a))

In essence, Congress feels the educational opportunities and the rate of growth of the Internet are the two main reasons it must be controlled. But there were also other reasons Congress felt something must be done to make the Information Superhighway safe for everyone. The Communications Decency Acts states that it is the policy of the United States:

1. to promote the continued development of the Internet and other interactive computer services and other interactive media;
2. to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
3. to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services.
4. to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate on-line material; and
5. to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer. (447 U.S.C. 230 (b))

Because computer access is offered at universities and companies, Congress felt it was necessary to identify who will be held responsible for information put on the Internet (447 U.S.C. (e)(1)). Congress felt it would not be fair to punish a network provider, institution, or company for the actions of an individual not representing the organization.

Congress also included protection for 'Good Samaritans' who block or screen offensive material. The Communications Decency Act makes it clear that no provider or user of an interactive computer service shall be treated as the publisher of information that

was presented by another source. The Act also makes it all right for a provider or user of an interactive computer to restrict material they find objectionable whether it is constitutionally protected or not.

How will the Communications Decency Act affect existing laws? This question is answered in the section of the CDA labeled "Effect on Other Laws". The CDA states that it has no barring on intellectual property, it shall not prevent any State law from being enforced, and shall not limited the application of the Electronic Communication Privacy Act of 1986. The Communications Decency Act defines a list of terms used in the Act to clear up any questions that might occur in the future.

At a glance, the CDA appears to be a harmless Act with good intentions. It is not until it is thoroughly examined that the flaws of the Act are exposed. There are a number of organizations that realize the problems associated with the Communications Decency Act. Some of these organizations have a financial interest in the unconstitutionality of the Act, while others are concerned about the best interest of the public (Sorensen).

The Communication Decency Act has identified the people it intends to prosecute in the United States for not following the guidelines set by the CDA, but it has

to be remembered that a large percentage of information on the Net is placed on the Net outside the boundaries of the United States. While some of these countries have addressed the issue of censorship, others have not.

Karen Sorensen, an on-line research associate at Human Rights Watch, feels it is important for people to be informed about Internet Censorship around the world (Sorensen). America is not the only country that wants to censor the Internet in an attempt to protect children. Governments around the world are trying to shelter children, protect their way of life, and silence racist and hate mongers. The most noticeable efforts have occurred in the United States and Germany. The German phone company has already cut off access to American Internet service provider (ISP) to stop neo-Nazi propaganda from entering the country via the Internet. There are also countries such as China, Singapore, and Iran which not only want to censor sexually-explicit material, but also want to stop citizens from gaining access to pro-democracy discussions. Sorensen feels that censoring the Internet violates free speech guarantees enshrined in democratic constitutions and international law (Sorensen). No matter what country censorship occurs

in, the rights of people will be threatened in one way or another.

Not only does censorship limit the political power of some, it "threatens the chill expression globally and to impede the development of the Global Information Infrastructure (GII) before it becomes a truly global phenomenon" (Sorensen). The United States and Germany are two major players in the existence of the GII, but they are contradicting themselves by censoring the Internet. Sorensen contends, this does not look very good when they try to point fingers at countries such as China and Vietnam that prevent citizens in their country from having access to certain material. Both China and Vietnam feel the Internet should be controlled for political reasons (Sorensen).

To access the Internet, all that is needed is a computer and a telephone line. As we know in some third world countries there are so few telephone lines that the Internet is currently not a reality. There are forty-nine countries in the world that have fewer than one telephone per 100 people, of which thirty-five are in Africa (Sorensen). In about 80 percent of the world, the most basic equipment is not available for an individual who wants to get on the Internet. Because of the economic impact of the Internet, communications technology companies are providing developing countries

with the basics. Although some countries have the necessary equipment to become part of the Information Superhighway, they have decided to control the number of people that are on the Net for different reasons. Countries such as India and Saudi Arabia have chosen to censor the Net in an effort to control its potential liberalizing effect (Sorensen). They have accomplished this by charging extremely high fees for access, which simply denies entire segments of the population Internet access.

With political control being an important issue in some countries, it is to the benefit of those in charge to limit what the suppressed portion of the population may have access to. It has been proven throughout history that the way to ensure suppressed individuals remain in their place is by controlling the information that they come in contact with. This has proven to be true in the United States as well as other countries. The control of information will make it difficult for politically disadvantaged groups to make positive change; therefore, censorship has served its purpose. As young as the Internet is, many countries have already realized the impact it will have on the world in the future. Many of these countries have already tried to get a grip on the Internet. For example, China requires users and Internet Service Providers to

register with authorities. India charges extremely high fees for international access. New Zealand classifies computer disks as publication, disks have been seized and restricted accordingly (Sorensen). Privacy on the Internet is almost non-existent in some countries, so individuals do not have protection from the government.

Meetings took place as early as 1995, that included representatives from some of the world's most powerful countries, to discuss the free flow of information. For example, the "Ministerial Conference on the Information Society" that was held in Brussels in February of 1995 was set up to discuss the Internet. Sorensen reports that Vice President Gore stated, "Global communication is about protecting and enlarging freedom of expression for all of our citizens and giving individual citizens the power to create the information they need and want from the abundant flow of data they encounter moment to moment" (Sorensen).

When the issue of censoring the Internet comes up, the first thing that is mentioned is Usenet. Usenet is a system separate from the Internet, but can be accessed from it. It contains more than 40,000 newsgroups, which puts about 100 million characters a day into the system. Usenet contains and discusses everything from sex to politics, making Usenet the



target of censorship by countries all over the world. CompuServe has already felt the pressure of the German Government for Usenet links that they felt were not acceptable (Sorensen). Although CompuServe removed the newsgroups, smart computer users gained access to the newsgroups by connecting to computers that carried the newsgroups. Because of world wide access, the Internet is considered by some to be the first truly mass medium, and, as such, will face more legal problems than any other system. Its advocates feel it should be given the same protection as the press.

Human Rights Watch got involved in the fight against the Communications Decency Act because some of the material they put on the Net would fall in the category of indecent as described by the CDA. Human Rights Watch defends its position on censorship because it feels that it is necessary for pictures of execution, mass murder and rape to be seen for the impact of these inhumane gestures to sink in (Sorensen). The group is sure that some of its material will be found indecent or patently offensive. Human Rights Watch report on crimes committed by citizens, but they also report on crimes committed by government officials, hate groups, and soldiers. This type of reporting is not only unpopular with the United

States Government, but is not tolerated in more repressive countries.

Because the United States has not proven the Communications Decency Act to be constitutional, it is necessary to take a look at some of the other countries to get an idea how the Supreme Court will rule, and why. The Canadian Government formed the Information Highway Advisory Council, which decided two areas needed to be addressed: obscenity and racist/hate material. In Canada, it is illegal to spread these two forms of speech, and the mere possession of child pornography is illegal. In Asia, countries such as Pakistan are controlling the Internet by limiting its availability. In China, Internet accounts are so expensive that only the wealthiest can afford them. Government officials in China have no intentions of providing all of its citizens Internet capability (Sorensen). They have also reportedly not allowed some newsgroups. Because of the high prices, black market permits have become available. In Singapore, the Internet is treated as a broadcast medium, but one for which the Minister of information and the arts has already told Parliament that censorship will not be 100 percent effective (Sorensen).

Because experts all over the world have discovered that censorship will not stop the transmission of the

material they want stopped, many people feel censorship is not the answer. Many countries have placed the responsibility of controlling information in the hands of the Network provider. Some countries have gone to the extent of threatening the network provider if something was not done about questionable sites or newsgroups. For example, in Germany pressure was put on by the government to remove about 200 suggested newsgroups (Sorensen). Apparently German authorities gave CompuServe a list of newsgroups they wanted removed. Their letter also stated that it is up to CompuServe to take the necessary steps to avoid possible liabilities to punishment. Because the pressure was so great, CompuServe did not even take the time to view the sites. Discussion groups for homosexuals and services such as Clarinet were removed. At the time, Clarinet was not even on CompuServe's servers. In another case, the German Internet provider Deutsche Telekom, blocked its T-Online computer network from accessing Internet sites used to spread anti-Semitic propaganda, which is a crime in Germany (Sorensen).

There have also been cases of an Internet provider censoring material in the United States. This material was not unconstitutional, but Internet providers have the right to censor material they feel is not worth

being transmitted. This is legal under the constitution of the United States and is also an act that is advised under the Communications Decency Act. The Constitution only provides protection where the government is the one infringing on your rights (Cavazos 69).

In Cyberspace, users constantly complain about how their First Amendment Rights are being violated by a system operator or moderator. It is the responsibility of everyone who goes on-line to understand that the First Amendment prohibits government officials or agents, and no one else from stopping the flow of information. It was because of this fact that Prodigy felt it had the right to censor certain news groups.

In 1990, Prodigy decided to change its rate structure because of the number of people participating in on-line activity. Prodigy felt it was necessary to raise rates in order to control the amount of time an individual would spend on-line. There was a large number of users with a very high level of e-mail activity. Because of the rate increase some subscribers began to protest by posting on-line messages. Prodigy felt the need to screen the angry messages. Many users felt that their First Amendment right had been violated because Prodigy had censored their messages. The outcry from some of Prodigy's

customers was so great that Geoffrey Moore, Prodigy's director of market and programs, felt the need to respond to the outcry. On the Op/Ed page of the New York Times, Moore responded by stating that Prodigy knew that it had not violated the First Amendment (Cavazos 69). He went on to say Prodigy's position as an Internet provider made it constitutional for them to block out anything they felt was questionable. Geoffrey clarified the fact that Prodigy does not have to publish whatever is submitted. He called Prodigy's decision not to publish certain material "editorial discretion".

Because Internet providers retain the right to censor any material they feel is objectionable, many people feel that, if the Communications Decency Act does not pass the Supreme Court, Internet providers will be the next target of the government. They are in the Internet business to make a profit, making them a vulnerable target for government officials. Such governmental pressure would put them in the category with movie companies that were forced into censorship years ago. The only question is, if total control is put in the hands of the network provider will they be more restrictive than the government? Internet providers are waiting for an answer from the Supreme

Court on the Communications Decency Act before making their next move.

The court's decision in the case of the Communications Decency Act is a landmark decision. It is a decision that will have a profound impact on the future of the Internet and the way we communicate.

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## Chapter IV

### RESULTS

Several issues need to be examined to determine why the Philadelphia Court ruled against the Communications Decency Act. The government's defense for the CDA will be looked at to find out why its sponsors in Congress felt it was the most effective way to keep indecent material out of the hands of children. The Philadelphia Court's reasons for ruling the CDA unconstitutional and why the court felt the CDA would not achieve its objective will be examined.

Because the judges in the Philadelphia case were not experts on the way the Internet worked they took five days to find out how the Internet worked (Ennis). Experts were also brought in to discuss and demonstrate how the Internet operated and how it would be effected by the CDA. Howard Schmidt was brought in as a government witness to discuss how some art works would be classified under the CDA. The government's witnesses admitted that works which contained social value could be considered indecent under the Communications Decency Act.

The CDA would also effect areas of society such as

sex education, medical information, music, and art. These are forms of speech that have been considered to be constitutional, but the CDA would make certain information in all of these areas a crime. Howard Schmidt stated that a picture of Demi Moore that was on the cover of Vanity Fair Magazine would be considered a crime under the Communications Decency Act if posted on the Net (Ennis). In the photograph, Demi Moore was shown nude while in the later stages of her pregnancy. The same exact picture was entirely legal in print publication. If a picture of this nature is considered a violation of the law, a large percentage of the art work presented in the United States would not stand a chance under the CDA. Even art works that have become legendary, such as Michelangelo's statue of David could be considered illegal on the Internet.

The Philadelphia Court also found that the CDA would put a complete ban on speech considered indecent, which is protected by the Constitution. Supporters of the CDA in Congress knew that under the First Amendment they could not put a complete ban on the dissemination of indecent material to adults. Because of this, the government used *Sable Communications of California v. FCC* to get the court to see things their way (Ennis). Under *Sable*, material can be banned when it reached the point where it becomes meaningless. The government



knew it could not constitutionally ban indecent speech from a medium of communication used by adults. Under the CDA, the Internet would become a medium that contained material only suitable for children. While the government argued that the Communications Decency Act does not act as a complete ban, the Philadelphia Court found that it does operate as a ban (Ennis). The CDA requires individuals to ensure the indecent material they put on Internet is not accessed by children (47 U.S.C. 223 (d) (1) (B)). The only way to ensure that children do not access indecent material put on the Internet is not to put indecent material on the Internet. The government has passed laws that permit store owners from selling nude magazines to children, but this has not stopped children from finding a way to get nude magazines. The only way to ensure children do not get nude magazines is to stop the publication of such material, and the only way to guarantee children are not exposed to indecent material on the Net is to not put it on the Net. This type of ban would effect newsgroups, chat rooms, and Web Sites that are open to everyone. None of these areas would be allowed to post indecent material.

One way to keep minors from entering areas that contain adult material would be to require the use of verified credit cards, access codes or debit accounts

(Ennis). This would at least guarantee that the people who apply for authorization to such sites are adults, but it does not guarantee that every individual who accesses these sites is an adult. Both the government experts and the Philadelphia Court found that this defense is technologically unavailable to authors who use most modes of communication on the Internet. Both sides also acknowledged that the technology does not exist that would allow all areas of the Internet to screen for age. Because it was not possible to screen for age in all areas of the Internet, the courts felt the only way to ensure children would not access indecent material was for it not to be posted on the Internet. This approach, however, would violate the First Amendment and be considered unconstitutional under the holding of *Sable Communications of California vs. FCC*.

The World Wide Web is the only place on the Internet that can screen for age, and even that alternative is not available to most people on the Internet. There are two reasons that this is not widely available to people on the Net.

1. Most people on the Net do not have Web Sites.
2. Only Web Sites that have the capacity to use a cgi script can screen for age.

None of the Web Sites available to most of the population by the major on-line providers have that capacity. Because of these two reasons, individuals who wish to screen for age would have to start their own Web Sites with cgi script capability (Ennis). This would take a large amount of time and a large amount of money, which most people are not willing to invest. This would also limit the right of free speech on the Internet to people who are financially advantaged.

The Philadelphia Court also found that it would be very expensive and burdensome for non-commercial organizations to operate systems of age verification. The Government's expert acknowledged, for example, that it would cost between \$1,000 and \$10,000 for a speaker to establish his own Web server, and would cost even more to maintain the data bases required for age verification" (Ennis). The expensive cost of age verification would prohibit some non-profit and commercial organizations from posting valuable information on the Internet.

The government felt that credit card companies could serve as age verifying agencies (Ennis). This would most likely add a charge to the credit card, and it would limit access to adult sites to only people who possess credit cards. It would also put a limit on the information casual browsers would be able to encounter

when they visit the Net.

There are some existing organizations that use age verification systems already. They consist mainly of commercial pornographic sites (Ennis). Most people would not want to register with these companies because it means registering their name onto a list with people who want to view pornographic material, when their intent might just be to research medical information or take part in an unpopular political discussion. Even the Government's expert acknowledged that he would not be willing to register his name with such a system, and admitted he did not know whether those systems protected the privacy of registrants or sold their lists to others (Ennis). This type of system is effective for people interested in obtaining a large amount of indecent material, but its broader application seems problematical.

In order for an age verifying system to work, organizations would have to label all their material decent or indecent. This would be very costly to major libraries and universities, some of which would not have the funds to get the job done properly. The alternative for organizations that do not have the money to label material would be to label all their material indecent. This would reduce the number of people who visit the site, and eliminate minors who

might find the sight useful.

The government attempted to give its argument some weight by providing the act of "good faith" as a possible defense for some individuals. The government said that speakers who tagged their material with an identifier would be acting in "good faith". The government then said that "good faith" would not be an overwhelming defense under the Communications Decency Act, but might become a defense in the future. The Act would make anyone putting allegedly indecent material on the Net, whether they are acting in "good faith" or not, a target for prosecution under the CDA. On the other hand, ironically, "the only speakers who would not be significantly affected are commercial pornographers, because they already require payment by credit card for access to their sites"(Ennis). All other forms of speech that were not considered decent by all American communities could be prosecuted.

Because the guidelines and parameters for defining objectionable material were not set, the Philadelphia Court felt the CDA was unconstitutionally vague. In effect, it asked, what do the terms "indecent" and "community standards" actually mean?

The Communications Decency Act does not state a clear definition for "indecent". The FCC defines "indecent" as more than a few dirty words and the kind

of adult fare that uses sexual vulgarity, references to body parts and excretory functions to shock, titillate, and amuse (Holsinger and Dilts 438). Although "indecent" is defined by the FCC it is left to be interpreted by the courts.

The global nature of the Internet creates a major problem when the term "community standard" is introduced. What is considered to be decent in one community might not be considered to be decent in another. The government stated that work with serious value might be found indecent in some conservative communities, but they also said it will rarely if ever violate the Communications Decency Act (Ennis).

These terms would cause individuals to stay clear of certain speech even if it was not a crime under the Communications Decency Act. If the terms were clearly labeled they might not limit as many people from speaking. Because the penalty for violating the CDA is so great it would create self censorship. Most of the American public does not have the time or money to retain lawyers to examine the material they wish to put on the Internet.

The government used the Miller v. California case to define the Communications Decency Act for those who tried to prove the CDA was unconstitutionally vague (Ennis). Under Miller, a speaker is safe if he knows

his speech is not prurient and has serious value. But under the Communications Decency Act, a speaker could be convicted even if his speech is not prurient and has serious value. If one is to be judged on a questionable topic or subject, there is no doubt that the biased opinion of those in charge will play a role in the outcome of the case. This is the very thing the constitution tries to prohibit. It would be discrimination.

Congress' effort to place the FCC-administered broadcast indecency standard to the Internet is truly out of place. First of all a broadcast usually has a clearly defined audience and area of influence. Second, the FCC is a clearly defined body that broadcasters are prosecuted by when they violate the law. The Communications Decency Act is left to be enforced by local communities which will interpret the law differently from one town to the next. If this is the case, then local governments have to be trusted to prosecute only when necessary. The Communications Decency Act was also presented with the challenge of passing the test of strict scrutiny, before it could be found constitutional. A statute has to substantially serve a compelling governmental interest in the least restrictive way possible. To provide a defense for the test of strict scrutiny, the government again went back

to the Pacifica case. The courts felt that the Internet was not at all like broadcast, because the Pacific case did not make it possible for all allegedly indecent material to be banned (Ennis). Broadcast can also enter the home without prior warning, where an individual's right to be left alone outweighs the right of free speech. The government argued that like broadcast, material posted on the Net confronts citizens in the privacy of their homes. The clear difference between broadcast and the Internet is that information on the Net has to be sought after, and information on a broadcast could come without warning. One of the government's witnesses stated that the chances are slim that one would come across a sexually explicit site by accident (Ennis). In the Pacifica case, the parent had no chance to screen the material that was broadcast, but the Internet is different. Parents can do a number of things to prevent their children from gaining access to indecent material.

Another thing the government overlooked about the Pacifica case was that indecent speech was not totally banned, but channeled to a different part of the day (Ennis). The thinking was that the chances for children being in the audience would be less late at night. The problem with the Communications Decency Act was that it banned allegedly indecent speech at all



times of the day, but there was no alternative whereby obscene language in a context with redeeming social value could be presented. On the Internet it does not matter what time something is posted. It stays there until it is removed. The courts also stressed that violations under *Pacifica* did not subject the speaker to criminal penalties (Ennis).

In writing the bill, its sponsors in Congress felt that the CDA would pass the test of strict scrutiny because of its ability to protect minors from indecent material. But the court noted that, at best, the CDA would have a chance to pass the test of intermediate scrutiny (Ennis). Under intermediate scrutiny, the government would have to prove the indecent harms are real and the Communications Decency Act would alleviate these harms in a direct and material way. The government presented no cases of children being exposed to indecent material while using the Internet. It merely showed that indecent material exists in certain parts of the Internet. The government also acknowledged that parents could control what their children viewed by locking the computer when they are not home or by obtaining software to screen targeted material.

The government argued that unless the Internet is cleansed of indecent material parents may refuse to use

this unparalleled educational resource. The Philadelphia Court saw that the Internet has continued to grow without government regulations, and felt it will continue to do so.

Because the Internet is a global medium, the courts felt the Communications Decency Act would not prevent minors from gaining access to indecent material posted in other countries. The court felt that the CDA would provide the most limited answer to the problem (Ennis). Countries which allow more freedom in the form of pornography will allow their citizens to post information on the Net which will be available to American citizens. Therefore, the Philadelphia Court reasoned, the CDA will without a doubt fail to serve its purpose, protecting children from indecent material on the Internet. The CDA would only force commercial purveyors to post their material from other countries. Since the CDA would only block out about half of the indecent material on the Internet, it is not the answer. Many families are already using filtering software in their homes. The government all but ignored the fact the major on-line service providers offer their subscribers filtering programs (Ennis). The government's argument was, parents may not use this option. Organizations testifying in opposition to the CDA felt that the government should be teaching parents

how to use filtering material instead of trying to pass a law that would not solve the problem. The CDA would offer parents a false sense of security, when the problem would continue to exist.

Under the CDA, it is a crime to post or send a patently offensive communication to a specific person or persons under 18. This would make it illegal to post a message in a chat room if it is known there is one minor in the audience, even if the remainder of the audience are adults. The government used Ginsberg to support its position on this issue (Ennis). In Ginsberg, it was established that it is a crime to sell adult books to minors (Ennis). The problem with this is that book sellers can request identification before selling adult material, and if anyone violates the law he can be prosecuted where the infraction took place. The courts felt that the CDA can not stop such actions because of the information that is posted from other countries and there was no way to verify age on the Internet.

The Communications Decency Act could be found unconstitutional by the Supreme Court for a number of reasons. The CDA poses terms that are not clearly defined. If a person is to be prosecuted he should be presented with the exact law broken, not the interpretation of an existing law. There should also

be some guidelines as to where he could be prosecuted, if information is posted on the Internet. Because the CDA does not pass the test of strict scrutiny, it could be found unconstitutional. The Philadelphia Court found that filtering software was the answer to the problem, at least for now.

## Chapter V

### DISCUSSION

This chapter will discuss the reactions to the Philadelphia Court's decision against the CDA. The chapter will examine the responses from supporters of the Communications Decency Act like Senator Exon and Mike Russel. It will also investigate the responses of groups against the Act, like supporters of the Blue Ribbon Campaign. The decision of the Philadelphia Court will be looked at to find out why the judges ruled the way they did and what solutions could be used instead of censorship.

After the three judges of the Philadelphia Court (Dolores Sloviter, Ronald Buckwalter, and Stewart Dalzell) ruled that the Communications Decency Act was unconstitutional on June 12, 1996, they felt it was necessary to explain why they decided on a verdict against the CDA. They wrote "The Findings of Fact", the document supported the idea that software is the best way to control the information children are exposed to while surfing the Net (Lewis 11). The judges felt that the CDA was not only unconstitutional, but also unworkable and impractical from a technical

standpoint. The judges felt that the technology already exist to block out objectionable material, and showed great confidence in Platform for Internet Content Selection (PICS).

PICS allows access to only those sites that carry a rating in areas such as violence, profanity, and nudity. All other sites are blocked out. PICS also exclude access to a list of questionable sites that are updated on a regular bases. The judges felt that because PICS block out sites that have not been rated it will act as a positive rating system (Lewis 11). The affordable price of this software was another reason the judges felt it was practical for all Internet families. The price of Internet filtering software ranges from about \$20 to about \$60, with options to upgrade. Surfwatch, for instance, which is one of the most popular Internet filtering software programs, has a suggested retail price of \$49.95. Surfwatch is an Internet filtering program that blocks out thousands of explicit sites without restricting the access rights of other Internet users. Surfwatch also gives an individual the capability to make a customized list of sites to block. Filters are updated often using a combination of pattern matching technologies and the tracking of known adult oriented sites. Surfwatch is also password protected, which allows

adults to turn the filter on or off. This gives them the opportunity to visit adults sites if they choose while continuing to keep indecent material away from children.

Programs such as Surfwatch made it easy for the Blue Ribbon Campaign, a group of concerned citizens organized against the CDA, to have an active voice against the Communications Decency Act. The Blue Ribbon Campaign was organized on the Internet and gained support from Internet users in favor of free speech. The blue ribbon was chosen as the symbol for the preservation of basic civil rights in the electronic world. Anyone who wanted to become active in the fight for free speech on the Internet was asked to display a blue ribbons on their homepage. The Blue Ribbon Campaign took a stand against the CDA because of the belief that government censorship would control the expression of ideas on the Internet (Blue Ribbon Campaign). Supporters of the Campaign felt it was not necessary to damage the atmosphere of freely expressing ideas, for the safety of children. They also expressed the concern that the small percentage of information that the government targeted in the beginning, would increase in the future. Blocking out information because of the nature of the medium it was delivered on, was not accepted by those who wanted to express

themselves freely on the Internet. Under the CDA, allegedly indecent material that can be found in some stores would have been illegal on the Internet. Not only is software available to block out objectionable sites, but some Internet providers allow parents to control what Internet relay chat sessions are available to their children. Supporters of the Blue Ribbon Campaign felt that parents could have a separate "proxy server" for their children's web browser. The Campaign began to get support from authors who turned their pages black, in an attempt to show their feelings about government censorship and the Communications Decency Act.

Along with the Blue Ribbon Campaign, and the act of turning homepages black, the Green Ribbon Campaign for Responsibility in Free Speech was launched. Using the Internet as a vehicle to transport their messages, members of the Green Ribbon Campaign encouraged authors to act responsible while exercising the right of free speech. Some supporters of the Green Ribbon Campaign felt authors should act responsibly by attempting to keep indecent material out of the hands of children without the government forcing them to do so. Failure to act responsibly by a small percentage of the Internet population was the main reason Exon and Coats constructed the Communications Decency Act.



After the Philadelphia Court ruled the Communications Decency Act unconstitutional, Senator Exon issued a statement on the court's ruling. Senator Exon felt that two of the reasons the judges gave for finding the CDA unconstitutional, were wrong. The courts stated that there were no effective measures to screen for the age of Internet users, but Exon felt that the technology was already available to screen for the age of individuals that were using the Internet. Exon also felt that the ruling on indecency being too vague was not true, because the term is clear when applied to radio, television, telephone, and cable (Senator Exon). President Clinton, a supporter of the CDA, released a statement on June 12, 1996, after the Philadelphia Court's ruling on the Communications Decency Act. The President stated that the Constitution allows Congress to help parents prevent children from being exposed to objectionable material transmitted through computer networks. President Clinton also said that he supported software products that screened material on the Net (President Clinton).

Rich Reighard, a Communications Professor and Internet Instructor at Lindenwood College, feels that Internet Filtering software is very effective, but the government should have some control over the information being transmitted on the Net. Reighard

contends that filtering programs are great, but they do not stop malicious individuals who purposely send indecent material around. "These people rate their pages wrong on purpose, and a law would provide the legal infrastructure to go after these individuals" (Reighard). He also believes that child pornography and dangerous information, such as bomb making instructions, should be controlled by the government. If given control over the Internet, however, government officials must not misuse the system. Reighard believes "we have no choice but to trust them, after all we elect them. If they do not do their jobs properly then we must elect new government officials" (Reighard).

Reighard believes "the vagueness of the Communications Decency Act allows community standards to be set, and allows for constitutional interpretation. Which is a problem, but is the price we have to pay" (Reighard). He also contends that the interpretation of the vague terms in the CDA will not stop individuals from expressing themselves on the Internet, because people usually act first then wait to see what will happen. Reighard feels that the government has the right to censor the Internet just as it has censored television, radio, print, and cable.

Since the Internet knows no bounds, Reighard would

like to see some international control of the Internet. "Like the Chemical Weapons treaty, there will be some countries that will not abide by the treaty, but if most of the major countries follow it, the amount of indecent material will be decreased greatly"

(Reighard). Reighard feels that if the CDA does not pass the Supreme Court, Internet Providers will be the next target of the government in its attempt to control indecent and sexually explicit material on the Internet.

I feel that children should not be exposed to indecent, sexually explicit, or dangerous information while surfing the Internet. The software available today is capable of blocking out objectionable material and should be used by parents. I also feel that the Communications Decency Act is not the answer to the problem. It contains terms that are very vague, such as "indecent" and "community standards", that will cause the court systems of America to interpret these terms. Since a person can be penalized heavily for violating the CDA, what constitutes a violation should be easier to understand. The CDA does not pass the test of strict scrutiny, which states any law that restricts the right of free speech must be of compelling interest by the government and use the least restrictive way to reach its objective. I feel that

the CDA passes the first part of strict scrutiny, because the government's compelling interest is attempting to protect America's children; however, it does not meet the second standard of strict scrutiny because Internet filtering software would be the less restrictive way to censor the Internet. Further it would not reach its objective of banning indecent material because it does not solve the problem of indecent material entering the United States from other countries.

In the near future, the Supreme Court will be presented with the challenge of making a decision on the constitutionality of the Communications Decency Act. I feel that the Supreme Court will find the CDA unconstitutional, which will force Senator Exon and other supporters of the CDA to reconstruct the bill. I also feel that if the CDA does not pass, government officials will put pressure on Internet providers to control the information being transmitted. Some Internet providers have already excluded newsgroups that discuss child pornography from their service. I feel that there will be a law passed in the future to censor the Internet, but it will not be the CDA as we know it today.

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